

**Boswell's of Mitchell Field, Inc. v Oak St.  
Boswell's Mitchell Field, Inc.**

2009 NY Slip Op 30252(U)

January 27, 2009

Supreme Court, Nassau County

Docket Number: 12975-08

Judge: Leonard B. Austin

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INDEX  
No. 12975-08

SUPREME COURT - STATE OF NEW YORK  
IAS TERM PART 11 NASSAU COUNTY

PRESENT:  
HONORABLE LEONARD B. AUSTIN  
Justice

Motion R/D: 11-28-08  
Submission Date: 12-1-08  
Motion Sequence No.: 001/MOT D

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BOSWELL'S OF MITCHELL FIELD, INC.  
and DOUGLAS GERBER,

COUNSEL FOR PLAINTIFF  
Joseph K. Garneau, Esq.  
431 Hempstead Avenue  
West Hempstead, New York 11552

Plaintiffs,

- against -

OAK STREET BOSWELL'S MITCHELL  
FIELD, INC. GORDON S. YEO and  
SUSAN J. YEO,

COUNSEL FOR DEFENDANT  
*NO APPEARANCE*

Defendants.

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ORDER

The following papers were read on Plaintiff's motion for a default judgment:

Notice of Motion dated November 11, 2008;  
Affidavit of Douglas Gerber sworn to on November 11, 2008.

Plaintiffs, Boswell's of Mitchell Field, Inc. ("Boswell's") and Douglas Gerber ("Gerber"), move for a default judgment against Defendants, Oak Street Boswell's Mitchell Field, Inc. ("Oak Street"), Gordon S. Yeo ("Gordon") and Susan J. Yeo ("Susan").

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BACKGROUND

Gerber sold his delicatessen business, Boswell's, to Oak Street on January 4, 2006. As consideration for the transfer, all three Defendants executed a promissory note ("Note"), dated January 4, 2006, in the sum of \$200,000, plus five per cent interest per annum, as partial consideration for the aforementioned transfer. The Note was to be subordinate to any notes and/or mortgages made by Broadway National Bank or any other institution in connection with Oak Street's purchase of the business. At the same time that the Note was executed, all three Defendants executed a purchase money security agreement.

Monthly payments of \$1,319.91 were due under the Note on the first of each month commencing February 1, 2006. There was a ten-day grace period for payments. In the event of continued nonpayment after the grace period, written notice could be sent requiring the repayment of the remaining unpaid balance within ten days. In addition, Plaintiffs could accelerate payment under the Note after giving ten days notice if Oak Street sold or transferred, without the consent of the Plaintiffs, its interest in the business or if Oak Street violated any provision of the purchase money security agreement.

Both the purchase money security agreement and the promissory note provide for the acceleration of the principal in the event the collateral should be leased or transferred without the prior written consent of Plaintiffs.

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By letter, dated April 4, 2008, Plaintiffs sent a notice to cure/notice of default to Oak Street, Gordon, Susan and Miae Park, Esq.<sup>1</sup> The notice states that the Defendants breached the Note and purchase money security agreement when Gordon, on behalf of Oak Street leased the premises where the delicatessen is located to Chestnut and Oak Street, Corp. on December 18, 2007 and by failing to make the March 2008 payment. Defendants never cured their default.

Plaintiffs commenced this lawsuit alleging that (1) the Defendants defaulted on paying monthly payments pursuant to the Note; and (2) the Defendants breached the purchase money security agreement by leasing the property in violation of the terms of the Note and the purchase money security agreement.

Plaintiffs now seek \$187,667.50 together with interest and late fees.

On July 29, 2008, Plaintiffs served Oak Street pursuant to Business Corporation Law §306 by delivering two copies of the summons and complaint with the Secretary of State. Gordon was served personally on July 23, 2008. Susan was served on July 23<sup>rd</sup> when a copy of the summons and complaint was left at her house with Gordon and a copy was then mailed to her on July 25, 2008. Copies of the affidavits of service pertaining to Gordon and Susan were filed with the Nassau County Clerk's Office on July 29, 2008.

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<sup>1</sup> According to the Note, any notice to Oak Street was to be sent to Gordon and Susan as well as their attorney, Miae Park, Esq.

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On November 11, 2008, Plaintiffs' counsel mailed copies of the notice of this motion and supporting papers to each of the three Defendants.

None of the Defendants have appeared or answered in this action or submitted opposition to the motion.

DISCUSSION

A. *CPLR 3215—Legal Standard*

CPLR 3215(a) permits a plaintiff to seek and obtain a default judgment against a defendant who has failed to move or answer in an action. Plaintiff's application for a default judgment must be supported by proof of service of the summons and complaint, an affidavit of merit made by a person with actual knowledge of the facts constituting the claim, proof of default and the amount due by affidavit made by the party. CPLR 3215(f). Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due. CPLR 105(u); 3215(f); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70 (2003).

A plaintiff seeking a default judgment pursuant to CPLR 3215(e) must present some proof of liability to satisfy the court as to the *prima facie* validity of the cause of action. CPLR 3215(f); Silberstein v. Presbyterian Hosp. in City of New York, 95 A.D.2d 773, 774 (2<sup>nd</sup> Dept. 1983). In determining whether a party has a viable cause of action, such that the party has a right to recover upon a defendant's failure to appear or

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answer, the court may consider the pleadings in the action, and any other proof submitted by the plaintiff. Beaton v. Transit Facility Corp., 14 A.D.3d 637, 637 (2<sup>nd</sup> Dept. 2005). A plaintiff who submits proof of service of summons and complaint and a factually detailed verified complaint is entitled to a default judgment against a defendant on the issue of liability, where the defendant has failed to appear or answer. Zino v. Joab Taxi, Inc., 20 A.D.3d 521, 522 (2<sup>nd</sup> Dept. 2005); CPLR 105(u).

In support of this motion, Plaintiffs submit the verified complaint and an affidavit from Gerber. In addition, they have submitted affidavits from process servers detailing how service of the summons and complaint was made upon the Defendants and an affidavit of service evidencing service of the motion papers by mail.

1. Promissory Note

To establish *prima facie* entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show: (1) the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and (2) the failure by defendant to pay in accordance with the note's terms. Constructamax, Inc. v. CBA Assocs., Inc., 294 A.D.2d 460 (2<sup>nd</sup> Dept. 2002); Colonial Commercial Corp. v. Breskel Assocs., 238 A.D.2d 539 (2<sup>nd</sup> Dept. 1997); and Davis v. Lanteri, 307 A.D.2d 947 (2<sup>nd</sup> Dept. 2003).

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Plaintiffs have provided the Court with a copy of the Note and a copy of the notice to cure/notice of default. According to Gerber's affidavit, Defendants have failed to respond or cure their default. Thus, Plaintiffs have established a *prima facie* cause of action with respect to entitlement to judgment as a matter of law with respect to a promissory note

2. Breach of Contract

The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2<sup>nd</sup> Dept. 1986). Plaintiff must establish the provisions of the contract the defendant is alleged to have breached. Sud v. Sud, 211 A.D.2d 423 (2<sup>nd</sup> Dept. 1995); and Atkinson v. Mobil Oil Corp., 205 A.D.2d 719 (2<sup>nd</sup> Dept. 1994).

Plaintiffs and Defendants entered into a purchase money security agreement in connection with execution of the Note. Plaintiffs allege that Defendants breached §5(A) of the purchase money security agreement by leasing the premises in December 2007 to another entity. Therefore, Plaintiffs have established a *prima facie* cause of action for breach of contract.

Accordingly, it is,

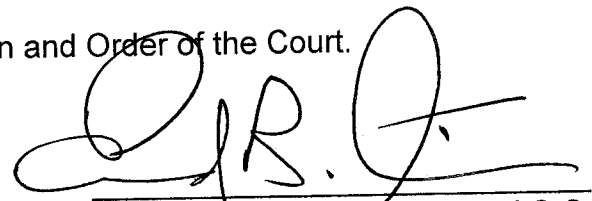
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**ORDERED**, that Plaintiffs' motion for a leave to enter a default judgment is  
**granted**; and it is further,

**ORDERED**, that the County Clerk is directed to enter a judgment in favor of the  
Plaintiffs, Boswell's of Mitchell Field, Inc. and Douglas Gerber, and against Defendants,  
Oak Street Boswell's Mitchell Field, Inc., Gordon S. Yeo and Susan J. Yeo, in the sum  
of \$186,667.50 together with interest calculated from April 1, 2008 and costs and  
disbursements as taxed by the Clerk.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY  
January 27, 2009

  
Hon. LEONARD B. AUSTIN, J.S.C.

**XXX**

**ENTERED**  
JAN 30 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE