

HSBC Bank USA, N.A. v Bridge Ave Cleaners, Inc.

2009 NY Slip Op 31470(U)

July 1, 2009

Supreme Court, New York County

Docket Number: 106994/08

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHÉ

PART 10

Index Number : 106994/2008

HSBC BANK USA, NATIONAL ASSOCIATION

VS.

BRIDGE AVE. CLEANERS, INC.,

SEQUENCE NUMBER : # 001

DEFAULT JUDGMENT

Justice

INDEX NO. 106994-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The motion is decided in
accordance with the annexed
decision & order.

FILED

JUL 07 2009

COUNTY CLERKS OFFICE
NEW YORK

Dated: 7/1/09

J. Gisché
HON. JUDITH J. GISCHÉ ^{ESQ.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

HSBC BANK USA, NATIONAL ASSOCIATION,

Plaintiff,

-against-

BRIDGE AVE. CLEANERS, INC.,
AND SUK JO, INDIVIDUALLY

Defendants.
-----X

DECISION/ORDER

Index No.: 106994/08

Seq. No.: 001

Present:

Hon. Judith J. C. J.
J.S.C.

FILED
JUL 07 2009
COUNTY CLERK'S OFFICE
NEW YORK
NUMBERS

Recitation, as required by CPLR 2219[a], of the papers considered in the preparation of this (these) motion(s):

Papers	NUMBERS
Pltfs. not. motion [d j/mt], affirm (BEW), affd (EP) exhs.	1

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff seeks a motion for a default judgment on its first, third and fourth causes of action against Defendants. Plaintiff waives the second cause of action. This action is twofold: 1) for a default under a Business Loan Note ("the Note") between Plaintiff and Corporate Defendant, Bridge Ave. Cleaners ("Bridge Ave."); and 2) a default under an unlimited, continuing, absolute, unconditional guaranty of payment contract (the "Guaranty") between Plaintiff and Suk Jo, (the "Guarantor"). Presently before the Court is Plaintiff's motion for entry of a default judgment against Defendants for their failure to appear and answer the Summons and Complaint. Despite service of the motion, there is no opposition to it.

Background

Plaintiff filed the Summons and Complaint on April 23, 2008. On May 29, 2008, Plaintiff personally delivered the Summons and Complaint to Suk Jo, an authorized representative and president of Bridge Ave., at the business location. CPLR 311. Plaintiff also personally delivered the Summons and Complaint to the Guarantor at his place of employment. CPLR 306. Defendants did not appear, or answer the complaint within the time provided under the CPLR, nor did they obtain an order from the Court extending their time to do so.

On November 13, 2008, Plaintiff mailed an additional copy of the Summons and Complaint to Bridge Ave., thereby complying with the additional requirements of CPLR 3215(g)(4)(i). Plaintiff also mailed a copy of the Summons and Complaint to the Guarantor, attempting to comply with the additional requirements of CPLR 3215(g)(3)(i).

On January 13, 2009, Plaintiff attempted to obtain a default judgment with the Clerk of the Court ("Clerk"). However, in a Memoranda dated, January 30, 2009, the Clerk denied the submitted default judgment because Plaintiff needed to: 1) clarify the default date in paragraph "10" and "11" of the complaint; 2) explain the calculation for accrued interest; 3) explain the calculation of the principal amount owed; 4) waive the second cause of action; and 5) execute another affidavit of mailing to the Guarantor to comply with CPLR 3215(g)(3)(i). In this motion, Plaintiff has addressed each of the Clerk's concerns.

On March 20, 2009, Plaintiff mailed a second copy of the Summons and Complaint to the Guarantor, thereby complying with CPLR 3215(g)(3)(i). Such

additional notice was served at least twenty days prior to moving before this Court for entry of a default judgment.

The Court recognizes that Plaintiff previously attempted to enter default judgment within one year of Defendants' default in answering, but the Clerk declined to enter judgment for reasons previously indicated. Although this motion for default judgment was not made within one year of Defendants' default in answering, the Court finds there is sufficient cause for the lateness given due diligence with which Plaintiff pursued the matter. The complaint, therefore, will not be dismissed and the application for judgment will be considered on the merits. CPLR 3215(c).

Based on the Affirmation of Jaclyn E. Thomas and the verified complaint, as well as a copy of the Note and Guaranty, Plaintiff has established the following: on May 21, 2004, Bridge Ave. executed and delivered to Plaintiff the Note, evidencing a loan in the principal amount of \$50,000; and on May 21, 2004, the Guarantor executed and delivered to Plaintiff the Guaranty.

Plaintiff's first cause of action is for a breach of contract. Plaintiff contends that Bridge Ave. ceased making payments and breached paragraph 5(a) of the Note on January 21, 2008 ("Default Date"). Plaintiff states that Bridge Ave. is liable for the outstanding principal amount of \$28,580.38, plus accrued interest of \$680.23 and late charges of \$120.66 through March 24, 2008. The Note also provides that Bridge Ave. will pay late charges and interest continuing to accrue at the Default Rate from March 25, 2008 to the date of entry of judgment. Lastly, under the contract, Bridge Ave. is responsible for any attorneys' fees, costs and expenses incurred by Plaintiff in pursuing the debt.

Plaintiff waives its second cause of action for unjust enrichment.

Plaintiff's third cause of action is for an account stated. Plaintiff contends that Bridge Ave. accepted and retained statements of account pertaining to the Note without dispute. Therefore, Plaintiff states that pursuant to the Note, Bridge Ave. is liable for the outstanding balance, plus interest, late charges, attorneys' fees, costs and expenses.

Lastly, Plaintiff's fourth cause of action is for a breach in contract. Plaintiff contends that Guarantor defaulted on January 21, 2008, under the Guaranty for failure to fulfill payment of the obligations of Bridge Ave. Therefore, Plaintiff states that Guarantor owes to Plaintiff the total amount due under the Note.

Discussion

The service of the underlying Summons and Complaint on each of the Defendants was consistent with law and conferred personal jurisdiction over them. CPLR 302; 306; 311. Thus, the Court will consider whether Plaintiff is entitled to the default judgment it seeks. Each Defendant's default in answering the complaint constituted an admission of factual allegations therein [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)]. Thus, Plaintiff is entitled to a default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Feffer v. Malpeso,, 210 AD2d 60 (1 Dept 1994)].

Plaintiff's first cause of action is for a breach of contract. The elements of a cause of action for a breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. [Furia v. Furia, 116 AD2d 694 (1986)].

The note is a contract. Plaintiff performed according to the Note by providing \$50,000 to Bridge Ave. Bridge Ave. failed to perform obligations in accordance to the Note by failing to make payments due thereunder, on January 21, 2008. The resulting damage is the outstanding balance, plus interest, late charges, attorneys' fees, cost and expenses due under the Note, which Plaintiff has established is \$25,580.38 in principal, \$680.23 in interest, and \$120.60 in late charges through March 24, 2008. The above claims establish the elements of a *prima facie* cause of action for a breach of contract. Therefore, Plaintiff is entitled to an entry of default judgment with respect to the first cause of action.

Plaintiff's third cause of action is for account stated. "If party receives statement of balance owed and does not object within reasonable time, then that party is bound by that account unless fraud, mistake or other equitable considerations are shown."

[Rosenman Colin Freund Lewis & Cohen v. Neuman, 461 NY2d 297 (1 Dept 1983)].

Here, Plaintiff rendered statements of account to Bridge Ave. on a regular basis. Bridge Ave., who had a right to object to the account statements, accepted and retained said statements of account without dispute. Thus, Plaintiff established the elements of a *prima facie* cause of action for account stated.

Plaintiff's fourth cause of action is for a breach of contract between Plaintiff and Guarantor. The Guarantor failed to perform according the Guaranty by failing to make payment on behalf of Bridge Ave. Plaintiff established the elements of a *prima facie* cause of action for a breach of contract. Therefore, Guarantor is responsible to perform the obligations stated within the Note.

Plaintiff seeks its reasonable attorneys' fees. The Note provides that legal fees may be recovered in the event of a default. The motion, however, is devoid of any information regarding the legal fees incurred. The claim for legal fees is hereby referred to a Special Referee to hear and determine the issue of reasonable attorneys' fees. The Plaintiff is directed to file this decision with the clerk for the Office of the Special Referee within 30 days to have the issue placed on the calendar. If Plaintiff fails to place the matter on the calendar within the time provided, the issue of legal fees will be deemed waived.

Accordingly, Plaintiff's motion for entry of a default judgment on the first, third and fourth causes of action is hereby granted and the second cause of action is hereby severed and dismissed per Plaintiff's waiver.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that the motion by Plaintiff in this action, for an entry of default judgment, against Defendants, Bridge Ave. Cleaners and Suk Jo, is hereby granted; and it is further

ORDERED that the Clerk shall enter a money judgment in the amount of \$29,381.21 representing \$28,580.38 in principal, plus interest of \$680.23 and late charges of \$120.60 through March 24, 2008 in favor of Plaintiff in this action joint and severally against Bridge Ave. Cleaners and Suk Jo on the first, third and fourth causes of action; and it is further

ORDERED that the second cause of action is hereby severed and dismissed; and it is further

ORDERED that Plaintiff shall be entitled to pre-judgment interest in the amount provided in the Note of 9% per annum from April 1, 2008 to the date of judgment, as well as, the statutory costs and disbursements of this action; and it is further

ORDERED that the issue of reasonable legal fees shall be referred to a Special Referee for hearing and determination. Plaintiff shall serve a copy of this decision on the Office of Special Referee (Room 119 at 60 Centre Street) with the next 30 days so that the matter may be placed on Special Referee's calendar. Failure to so calendar the issue will be deemed a waiver of legal fees; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 1, 2009

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

FILED
JUL 07 2009
COUNTY CLERK'S OFFICE
NEW YORK