

Signature Bank v JML Capital Inc.

2009 NY Slip Op 32702(U)

November 13, 2009

Supreme Court, New York County

Docket Number: 107720/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Signature Bank

Plaintiff (s),

INDEX NO.

107720/09

MOTION DATE

- v -

MOTION SEQ. NO.

001

JMC Capital et al.

Defendant(s)

MOTION CAL. NO.

The following papers, numbered 1 to _____ 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

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even time.*

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/13/09

J. Gische
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SIGNATURE BANK,

Plaintiff,

-against-

JML CAPITAL INC., and JOHN M. LEE,
Individually,

Defendants.

-----X

Decision/Order

Index No.: 107720/09

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Papers

Pltf's motion w/JET affirm in support, exhs 1

-----X

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

This is an action to recover monies extended to the defendant JML Capital Inc. ("JML") pursuant to a business revolving credit account agreement. Plaintiff now moves, pursuant to CPLR § 3215, for entry of a default judgment against the defendants. This motion has been submitted to the court without opposition.

Although there is due proof of service of the underlying summons and verified complaint, neither JML nor John M. Lee ("Lee") have answered the complaint or otherwise appeared in this action within the time provided for in the CPLR, nor has their time to do so been extended by the court. Plaintiff has also filed proof of additional service in compliance with CPLR § 3215 [g]. Therefore, both JML and Lee have defaulted in this action.

* 3]

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd Dept 2001). A default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)].

The relevant facts are based upon documentary evidence and/or are set forth in the verified complaint. In or about March 11, 2007, in connection with the extension of credit by the plaintiff, the defendant executed and delivered to plaintiff a Signature Bank Business Credit Application (the "Application"), requesting a line increase in the sum of \$50,000 and a Continuing General Security Agreement (the "Security Agreement") whereby the defendant borrowed the sum of \$100,000, pursuant to the terms of a Signature Bank Business Revolving Credit Account Agreement (the "Agreement") dated March 14, 2007. Copies of the Application, the Security Agreement and the Agreement have been provided to the court.

JML defaulted under the terms of the Agreement by failing to make payment when due on or about April 20, 2009. As of this date, no part of the Agreement's outstanding principal balance of \$98,062.18 has been paid.

Also, on or about March 11, 2007, the Agreement contained a personal guaranty whereby Lee personally guaranteed JML's indebtedness to plaintiff. Also, on August 16, 2006, Lee executed a Continuing Guarantee in his individual capacity whereby he absolutely and unconditionally guaranteed JML's indebtedness to plaintiff, personally.

Plaintiff has asserted the following claims against JML: [1] breach of contract (first cause of action); [2] unjust enrichment (second cause of action); [3] account stated

[* 4] (third cause of action); [4] failure to provide access to its books and records (fourth cause of action); and [5] replevin (fifth cause of action). Plaintiff has also asserted claims against Lee for breach of the guaranty (sixth cause of action) and breach of continuing guaranty (seventh cause of action).

Discussion

The breach of contract claims

The elements of a cause of action for 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, 166 A.D.2d 694 (2nd Dept. 1990). The foregoing claims establish that JML breached the Agreement, and that Lee breached both the Personal Guaranty and the Continuing Guaranty. Therefore, plaintiff is entitled to a default judgment on the first, sixth and seventh causes of action and a money judgment against the defendants, joint and severally, for the principal amount of \$98,062.18 at the applicable interest rate, 3.25% per annum from April 20, 2009.

Unjust enrichment

Plaintiff has demonstrated that a valid contract exists, the unjust enrichment claim fails. Clark-Fitzpatrick v. L.I.R.R., 70 NY2d 382 (1987). Accordingly, plaintiff's motion for default judgment on the second cause of action is denied and the second cause of action is hereby severed and dismissed.

Account stated

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 A.D.2d 868 (3d Dept. 1993), *lv. denied* 82 N.Y.2d 660 (1993). Where either no account has been

presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 A.D.3d 610 (3rd Dept. 2005). Based upon the foregoing, plaintiff has demonstrated a *prima facie* claim for account stated and is entitled to a default judgment on the third cause of action.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendants JML Capital Inc. and John M. Lee; and it is further

ORDERED that the clerk shall enter a money judgment in favor of plaintiff Signature Bank and against defendants JML Capital Inc. and John M. Lee, joint and severally, in the total amount of \$98,062.18 plus interest thereon at the rate of 3.25% from April 20, 2009.

Any requested 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
November 13, 2009

So Ordered: 

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

FILED
NOV 18 2009
NEW YORK
COUNTY CLERK'S OFFICE