

Signature Bank v Box Fresh Pictures Inc.

2010 NY Slip Op 30465(U)

March 5, 2010

Supreme Court, New York County

Docket Number: 101082/2009

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 101082/2009
SIGNATURE BANK
vs.
BOX FRESH PICTURES INC
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

FILED
MAR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MAR 05 2010

Dated: 3/5/10

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: IAS PART 10**

-----X
Signature Bank,

Plaintiff (s),

-against-

Box Fresh Pictures, Inc. a/k/a
Fresh Box Pictures, Inc. and
Ludwig Miguel, individually,

Defendant (s).

DECISION/ ORDER
Index No.:
Seq. No.:

PRESENT:
Hon. Judith J. Gische
J.S.C.

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

Papers

Pltf n/m (3215) w/AET affirm, exn

FILED
MAR 09 2010

Numbered

1

**NEW YORK
COUNTY CLERK'S OFFICE**

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

GISCHE J.:

This is an action to recover monies due pursuant to a Business Revolving Credit Account Agreement dated between plaintiff Signature Bank and defendant Box Fresh Pictures, Inc. a/k/a Fresh Box Pictures, Inc. ("corporate defendant"), the borrower dated December 14, 2006 ("revolving credit agreement"). Defendant Ludwig Miguel ("guarantor"), is the corporate defendant's president; he personally guaranteed all obligations of the corporate defendant under the agreement, including repayment of any sums borrowed. The personal guaranty is also dated December 14, 2006 ("personal guaranty")

Plaintiff has attempted to have the clerk enter a money judgment against defendants on default. According to the clerk's memorandum to plaintiff's counsel dated August 21, 2009, the proposed judgment was rejected because plaintiff did not explain how the amount sought in the complaint was calculated or the source for the prime rate used to calculate interest. Also, the clerk required proof of compliance with the additional notice requirements of CPLR 3215 and a non-military affidavit.

The court has reviewed the documents previously submitted to the clerk and those submitted now. It appears that the deficiencies have been addressed and corrected:

Plaintiff has provided proof of service of the summons and complaint on each defendant. The (domestic) corporate defendant was served through the Secretary of State on February 3, 2009 (BCL 306). Diligent attempts (three) were made to serve the guarantor personally. On the third attempt (February 9, 2009), plaintiff's process server affixed the summon and complaint to the door of the guarantor's residence; another copy of the summons and complaint was mailed to the guarantor on February 10, 2009.

Plaintiff also served additional copies of the summon and complaint to the corporate defendant on February 17, 2009 and to the guarantor on February 24, 2009. Such service complies with the additional notice requirements of CPLR 3215 *et al.* There is also proof of service of this motion at least 20 days prior to entry of judgment which is additional notice of this action.

Although plaintiff already provided a non-military affidavit in the affidavit of service it previously filed, plaintiff has now prepared a more complete affidavit indicating

it searched government records to determine whether the guarantor is on active military service; he is not.

Despite such service and additional service, neither defendant has answered the complaint, appeared in this action or obtained an extension of its time to do so. Where a defendant has defaulted in answering the complaint that defendant is deemed to have admitted all the factual allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). The plaintiff, however, must demonstrate it has a *prima facie* cause of action (Gagen v. Kipany Productions Ltd., 289 AD2d 844 [3rd Dept 2001]).

The following facts are alleged by plaintiff in its verified complaint (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]):

The corporate defendant entered into revolving credit agreement with a credit line of \$50,000. The guarantor signed the personal guaranty to induce the plaintiff to lend the money to his company. The corporate defendant drew money from the account and made (more or less) timely payments for some time until November 20, 2008 when it stopped making any of the monthly payments. At that time the principal balance due was \$35,151.12. No payments have been made since then and interest has continued to accrue.

Paragraph 3[c] sets forth the interest rate on any unpaid balance. It is The Wall Street Journal Prime Rate plus a Spread of 1%. Prime rate was 4.00% on the date of default. It was lowered thereafter on December 16, 2008 to 3.25% (<http://www.wsjprimerate.us>)

Pursuant to paragraph 9 of the guaranty, the guarantor is also responsible for plaintiff's legal fees but apparently plaintiff has waived those fees since they are neither demanded in the "wherefore" clause of its motion or otherwise addressed in its motion. They were waived in the proposed judgment that the clerk previously rejected.

Based upon the foregoing, plaintiff has established defendants' indebtedness in the principal amount of \$35,151.12 with interest in the amount of \$1,162.67 through and including December 15, 2009 plus interest from December 16, 2009 at the rate of 4.25%.

To the extent that plaintiff seeks interest from December 16, 2009 at the rate of 1.5% above prime, that motion is denied. Plaintiff has failed to identify any provision which allows for that rate.

Conclusion

In accordance with the foregoing,

IT IS HEREBY ,

ORDERED that plaintiff's motion for entry of a money judgment against the defendants jointly and severally on plaintiff's 1st and 4th causes of action for breach of contract and 5th cause of action for breach of continuing guaranty is hereby granted; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff Signature Bank against defendants Box Fresh Pictures, Inc. a/k/a Fresh Box Pictures, Inc. and Ludwig Miguel, individually, in the principal amount of Thirty Five Thousand and One Hundred Fifty One and 12/100 Dollars (\$35,151.12) with interest in the amount of \$1,162.67

through and including December 15, 2009, plus interest from December 16, 2009 at the rate of 4.25% to the date of entry, with costs and disbursements; and it is further

ORDERED that plaintiff's motion for interest from December 16, 2009 at the rate of 1.5% above prime (instead of prime plus 1% which has been granted) is denied as plaintiff has failed to identify any provision which allows for that rate; and it is further

ORDERED that plaintiff's 2nd and 3rd causes of action for quasi contract are hereby severed and dismissed; and it is further

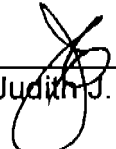
ORDERED that plaintiff's claims for legal fees are hereby severed and dismissed without prejudice; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 5, 2010

So Ordered:



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

FILED
MAR 09 2010
NEW YORK
COUNTY CLERKS OFFICE