

**HSBC Bank USA, N.A. v Martinez**

2010 NY Slip Op 32041(U)

July 27, 2010

Sup Ct, NY County

Docket Number: 112262/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Index Number : 112262/2009

HSBC BANK USA, N.A.

vs.

MARTINEZ, RAYMOND EUSEDIO

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

in 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 date.

**FILED**

AUG 03 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/27/10 JUL 27 2010

HON. JUDITH J. GISCHE J.S.C.  
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  
HSBC BANK USA, NATIONAL ASSOCIATION,

Plaintiff,

-against-

RAYMOND EUSEDIO MARTINEZ A/K/A  
EUSEDIO MARTINEZ,

Defendant.  
-----x

**Decision/Order**

Index No.: 112262/09  
Seq. No. : 001

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

**FILED**  
AUG 23 2010  
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 [default] w/SRR affirm, KH affid., exhs

**Numbered**

..... 1

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

This is an action to recover amounts charged on a business line of credit. Plaintiff moves, pursuant to CPLR § 3215, for entry of a default judgment against the defendant. Although there is due proof of service of the underlying summons and verified complaint, as well as the instant motion, the defendant has not opposed this motion or otherwise appeared in this action within the time provided for in the CPLR. Defendant's time to do so has not been extended by the court. Plaintiff has also filed proof of additional service in compliance with CPLR § 3215 [g]. Therefore, the defendant has defaulted in this action and the motion will be considered without opposition.

Plaintiff is entitled to a default judgment against the defendant, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). The defendant's 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 N.Y.2d 728 (1st Dept. 1984).

Plaintiff claims that it extended a business line of credit to defendant's business on April 5, 2006 (the "Agreement"). The Agreement is signed by defendant, as president of the business and as guarantor. Plaintiff states that defendant used the line of credit and that as of August 25, 2008, \$76,676.64 was due and owing. Plaintiff mailed a monthly billing statement for this amount with a payment due date of September 19, 2008. However, plaintiff only seeks interest from March 26, 2009, for a reason unexplained to the court.

Plaintiff previously sought to enter a default judgment against defendant and the clerk did not enter the judgment at that time because, *inter alia*, plaintiff failed to: submit a copy of the Agreement; verify the complaint or provide an affidavit of facts; explain why interest is sought from March 26, 2009; demand the correct amount of damages; establish liability against the correct defendant; and modify the bill of costs.

## **Discussion**

The complaint contains two causes of action, to wit: [1] breach of contract; and [2] account stated.

Plaintiff has provided the affidavit of Kathleen Herod, an officer of the plaintiff. Ms. Herod states that as of August 25, 2008, \$76,676.64 is due and owing from defendant on the Account. Plaintiff has provided statements of defendant's account reflecting defendant's indebtedness.

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. Furja v. Furia, 166 A.D.2d 694 (2d Dept. 1990).

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 (3d Dept. 2005).

Plaintiff has corrected many of the defects cited in the judgment clerk's memorandum. Plaintiff has provided the court with a copy of the Agreement and an affidavit of facts. Plaintiff has also corrected the amount of damages to reflect the last monthly statement it mailed to defendant. Plaintiff has established liability against defendant as guarantor of the Agreement. However, plaintiff has not explained why it is seeking interest from March 26, 2009, and not from September 19, 2008, the date of the last statement. Since plaintiff is asking for less than it appears he is entitled to, the court will grant it interest from the later date (March 26, 2009).

Based on the foregoing, plaintiff has established a *prima facie* cause of action for breach of contract and account stated against the defendant. Accordingly, plaintiff is entitled to entry of default judgment against the defendant on its first and second causes of action. Plaintiff is entitled to a money judgment in the amount of \$76,676.64 with interest from March 26, 2009.

### Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (2d Dept. 1986). Here, the Agreement expressly provides that defendant is liable to pay plaintiff's "court costs . . . lawyer's actual fees and . . . out-of-pocket expenses." Plaintiff has provided an affirmation attesting to the fees incurred and the reasonableness thereof. Scott Reel, Esq., attorney for plaintiff, states that its reasonable attorneys fees, costs, and disbursements total the sum of \$15,335.33. Although the motion is unopposed, the court has reviewed the record and deems the attorneys fees, costs and disbursements incurred by plaintiff as unreasonable and incommensurate with the motion practice. The court, therefore, refers the issue of what plaintiff may recover from defendant for its reasonable attorneys fees, costs, and disbursements to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

### Conclusion

*In accordance herewith, it is hereby:*

**ORDERED** that the motion by plaintiff, HSBC Bank USA, National Association, for a default judgment in its favor and against defendant, Raymond Eusedio Martinez a/k/a Eusedio Martinez, is hereby granted; and it is further

**ORDERED** that the Clerk shall enter a money judgment in favor of plaintiff HSBC Bank USA, National Association, and against defendant, Raymond Eusedio Martinez a/k/a

Eusedio Martinez for \$76,676.64 with interest from March 26, 2009, at the statutory rate;  
and it is further

**ORDERED** that the issue of what plaintiff may recover from defendant for its  
reasonable attorneys fees, costs, and disbursements is hereby referred to a Special  
Referee to hear and determine; and it is further

**ORDERED** that any requested relief not expressly addressed has nonetheless  
been considered and is hereby denied.

**ORDERED** that this shall constitute the decision and order of the Court.

Dated: New York, New York  
July 27, 2010

So Ordered:

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

**FILED**  
AUG 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE