

Wells Fargo Bank, N.A. v Everest Communications, Inc.
2011 NY Slip Op 30886(U)
April 6, 2011
Supreme Court, New York County
Docket Number: 113468/10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Wells Fargo Bank N.A.

Plaintiff (s).

INDEX NO.

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MOTION DATE

- v -

MOTION SEQ. NO.

001

Everest Communications
Defendant(s). *et al*

The following papers, numbered 1 to _____ were read on this motion to/for § 3215 on default

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

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

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

APR 06 2011
Dated: April 6, 2011

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

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

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 A.D.2d 844 (3d 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 N.Y.2d 728 (1984).

The relevant facts are based upon documentary evidence and are set forth in the affidavit of Gabrielle Sudo, a Recovery Officer for plaintiff. On March 26, 2009, Everest executed a promissory note (the "Note") for a line of credit in the amount of \$87,545.15. This Note renewed a promissory note dated March 22, 2007, in the original amount of \$100,000.00. On March 26, 2009, Tshering executed a personal guaranty (the "Guaranty"), wherein Tshering personally guaranteed the obligations of Everest in the event that Everest defaulted under the Note.

Plaintiff claims that defendants defaulted under the Note by failing to make payments, despite due demand thereof. Plaintiff states that as of August 30, 2010, defendants owed the principal amount of \$85,949.32 and late charges in the amount of \$4,806.26. Plaintiff also seeks interest, attorney's fees, costs and disbursements.

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. Furla v. Furla, 116 A.D.2d 694 (2d Dept. 1986). Plaintiff's claims and the proof submitted on this motion establish the elements of a *prima facie* cause of action against the defendants.

Accordingly, plaintiff is entitled to a default judgment against the defendants, jointly and severally, in the principal amount of \$85,949.32, plus late charges in the

amount of \$4,806.26, plus interest. The applicable interest rate on the date of the defendants' default, according to the Note, was 7.0% plus 3.0% (default rate), totaling 10.0%. Plaintiff is therefore entitled to interest from the date of default, August 30, 2010, at the rate of 10.0%.

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 Note expressly provides that defendant is liable for plaintiff's reasonable attorney's fees. Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of what plaintiff may recover from defendant for its reasonable attorney's fees 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 plaintiff's motion for entry of a default judgment against defendants EVEREST COMMUNICATIONS, INC. and LOTAY TSHERING is GRANTED; and it is further

ORDERED that the clerk shall enter a money judgment in favor of plaintiff WELLS FARGO BANK, N.A. and against defendants, EVEREST COMMUNICATIONS,

INC. and LOTAY TSHERING, jointly and severally, in the principal amount of Eighty Five Thousand Nine Hundred Forty Nine and 32/100 Dollars (\$85,949.32), plus late charges in the amount of Four Thousand Eight Hundred and Six and 26/100 Dollars (\$4,806.26), plus interest from August 30, 2010 at a rate of ten percent (10.0%); and it is further

ORDERED that the issue of what plaintiff may recover from defendants for its reasonable attorney's fees is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied; and it is further

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

Dated: New York, New York
April 6, 2011

So Ordered:



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

FILED
APR 12 2011
NEW YORK
COUNTY CLERK'S OFFICE