

BNB Bank Natl. Assoc. v Eastern Is. Food Inc.

2011 NY Slip Op 32718(U)

October 11, 2011

Supreme Court, Nassau County

Docket Number: 025271-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
BNB BANK NATIONAL ASSOCIATION,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

Index No: 025271-09

Motion Seq. No: 3

-against-

Submission Date: 9/7/11

**EASTERN ISLAND FOOD INC., KI HUN KWON,
DONNA M. KWON, MILLER REALTY ASSOCIATES,
and "JOHN DOE # 1-5" AND "JANE DOE # 1-5",**

Defendants.

-----X

The following papers having been read on this motion:

**Notice of Motion, Affirmation in Support, Affidavit in Support,
Affidavit of Mailing Pursuant to CPLR § 3215(g),
Affidavit of Mailing and Exhibits.....X**

This matter is before the Court for decision on the motion filed by Plaintiff BNB Bank National Association ("Bank") on August 22, 2011 and submitted on September 7, 2011. For the reasons set forth below, the Court grants Plaintiff's motion to the extent that the Court awards Plaintiff judgment against Defendants Eastern Island Food, Inc., Ki Hun Kwon and Donna M. Kwon on the first cause of action in the Amended Verified Complaint and refers the matter to an inquest for the determination of principal, interest, late fees, attorney's fees and costs to be awarded to Plaintiff.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR §§ 603 and 3215(a), for an Order directing the entry of judgment in favor of Plaintiff as against Defendants Eastern Island Food, Inc. ("Eastern Island"),

Ki Hun Kwon ("Ki Hun") and Donna M. Kwon ("Donna") (collectively "Defendants") for the relief demanded in the Amended Verified Complaint ("Amended Complaint").¹

B. The Parties' History

The Amended Complaint (Ex. A to Donato Aff. in Supp.), dated April 16, 2010, alleges as follows:

Defendants executed a Security Agreement in favor of Plaintiff, as collateral for a Note dated December 13, 2007, payable to Plaintiff in the original amount of \$280,000. The Security Agreement (Ex. A to Am. Compl.) is executed by Ki Hun as President of Eastern Island, and by Ki Hun and Donna in their personal capacities. The Security Agreement secures all of the personal property, assets and fixtures of Eastern Island, as well as the personal assets of Ki Hun and Donna. A Uniform Commercial Code ("UCC")-1 Financing Statement (*id.* at Ex. B) was filed on November 16, 2007 naming Eastern Island as Debtor and Plaintiff as Secured Party. The Note (*id.* at Ex. C) was executed by Eastern Island, by Ki Hun as President. Section 3 of the Note, titled "Payment Terms," provides, *inter alia*, that the Note was to be repaid in one hundred nineteen (119) consecutive monthly installments of principal and interest, each in the amount of \$3,661.57 commencing on February 1, 2008. As further collateral for the Note, Defendants Ki Hun and Donna executed guarantees (*id.* at Exs. D and E), pursuant to which they unconditionally guaranteed payment of the Note.

The Amended Complaint contains two (2) causes of action against the Defendants. In the first, sounding in breach of contract, Plaintiff alleges that the Defendants breached the Security Agreement by failing to make required payments as set forth in the Security Agreement, and in accordance with the Note. Plaintiff alleges that the loan is delinquent in payments due February 1, 2009. Plaintiff alleges that the unpaid principal balance due under the Note is \$196,873.84, and that Defendants also owe interest from January 1, 2009 in the amount of \$10,046.03 as well as late charges in the amount of \$1,720.14. Plaintiff seeks damages in the sum of \$208,640.01, plus accrued interest, penalties and late charges. In the second cause of action, sounding in unjust enrichment, Plaintiff alleges that Defendants' continued use and

¹ Plaintiff's counsel affirms that this matter has been discontinued against Defendant Miller Realty Associates, and provides a copy of a Stipulation Discontinuing Action as to that Defendant (Ex. L to Donato Aff. in Supp.).

operation of their business, despite their failure to make required payments pursuant to the Note and Security Agreement, has resulted in their unjust enrichment, for which Plaintiff seeks the same damages requested in the first cause of action, as well as an award of immediate possession of all of the collateral set forth in the Security Agreement and Financing Statement, "wherever located."

In his Affidavit in Support, Ted Morgan ("Morgan"), an officer of Plaintiff, affirms the truth of the allegations in the Amended Complaint regarding Defendants' execution of the Note, Security Agreement and Guarantees. He affirms that the Note was given to Defendants to facilitate their start-up and purchase of inventory and other equipment for the business known as Fireside Caterers located in Levittown, New York. Morgan affirms that Defendants have defaulted on the Note and Security Agreement by failing to make monthly payments due from February 17, 2009 and there is now due the sum of \$308,735.55 with interest, late fees and inspection/auction fees. Morgan provides a document titled "Plaintiff's Report of Amount Due" (Ex. M to Morgan Aff. in Supp.) which reflects an unpaid principal balance of \$262,497.84 as of February 17, 2010, as well as sums due for 1) interest from February 17, 2010 to August 9, 2011, 2) inspections/appraisal/auction fees, and 3) late charges. Plaintiff also seeks counsel fees and disbursements pursuant to Section 20 of the Security Agreement, which reflects the Defendants' agreement to pay expenses, including reasonable attorney's fees and disbursements, incurred by Plaintiff in enforcing its rights under the Security Agreement, Note and Guarantees.

In her Affirmation in Support, Plaintiff's counsel ("Counsel") affirms that the Amended Complaint was served on the Defendant, and provides copies of the affidavits of service in support (Exs. G, H and I to Donato Aff. in Supp.). Counsel also provides proof of Plaintiff's compliance with the mailing notice requirements pursuant to CPLR §§ 3215(g)(3) and (4). Counsel affirms, further, that Defendants have failed to appear in this action or respond to Plaintiff's application.

Counsel also affirms that there are no other Defendants required to be served in this action and asks that the Court amend the caption to delete the references to the "John Doe" and "Jane Doe" Defendants. Finally, counsel affirms that Plaintiff has incurred legal fees, costs, disbursements and expenses in the sum of \$5,372.03 in connection with enforcing its rights under the instruments at issue, and provides an "Affirmed Bill of Costs" (Ex. N to Donato Aff. in

Supp.) in support.

C. The Parties' Positions

Plaintiff seeks 1) judgment against Eastern Island in the amount of \$308,735.55 with interest from August 9, 2011, plus the legal fees, costs and disbursements of this action in the amount of \$5,372.03, 2) judgment against Ki Hun in the amount of \$308,735.55 with interest from August 9, 2011, plus the legal fees, costs and disbursements of this action in the amount of \$5,372.03, as well as judgment awarding Plaintiff the right to levy on all personal property and assets owned by Ki Hun to satisfy the judgment, and 3) judgment against Donna in the amount of \$308,735.55 with interest from August 9, 2011, plus the legal fees, costs and disbursements of this action in the amount of \$5,372.03, as well as judgment awarding Plaintiff the right to levy on all personal property and assets owned by Donna to satisfy the judgment. Plaintiff submits that it has demonstrated its right to judgment by providing proof of service of the Amended Complaint on Defendants and establishing their default pursuant to the relevant instruments.

Defendants have not appeared or responded to Plaintiff's motion.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Promissory Note

To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002). Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008).

[* 5]

C. Guaranty

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dismiss.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

D. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

E. Unjust Enrichment

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289

A.D.2d. 58 (1st Dept. 2001).

F. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See *Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

G. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion to the extent that the Court grants Plaintiff judgment on the first cause of action in the Amended Complaint against Defendants Eastern Island Food, Inc., Ki Hun Kwon and Donna M. Kwon. Plaintiff has established its right to a default judgment against these Defendants by presenting proof of service of the summons and the complaint, and establishing that Defendants breached the Security Agreement by failing to make the required payments as set forth in the Security Agreement, and in accordance with the Note. The Court refers the issue of the attorney's fee award to an inquest, based on the Court's conclusion that it has an insufficient record on which to base that award.

The Court denies Plaintiff's motion for "inspections/appraisal/auction" fees based on the Court's conclusion that the record does not warrant such an award. The only references to those fees are the affirmation of counsel that Plaintiff's claims are for a sum certain, which includes "expenses paid in connection with the auction of the equipment remaining at the business

address” and the inclusion of those expenses on the documentation provided by Morgan (Donato Aff. in Supp. at ¶ 13 and Ex. M to Morgan Aff. in Supp.).

Accordingly, the Court grants Plaintiff’s motion and awards Plaintiff judgment against Defendants Eastern Island Food, Inc., Ki Hun Kwon and Donna M. Kwon on the first cause of action in the Amended Complaint and refers the matter to an inquest for the determination of principal, interest, late fees, attorney’s fees and costs to be awarded to Plaintiff.

The Court denies Plaintiff’s motion for judgment on the second cause of action, alleging unjust enrichment, in light of the existence of the written agreements between the parties. The Court also denies Plaintiff’s application to amend the caption, based on the Court’s conclusion that Plaintiff has not established the necessity for the proposed amendment. The Court also denies that branch of Plaintiff’s motion that seeks an Order for a judgment awarding Plaintiff the right to levy “any and all personal assets owned” by Defendants Ki Hun Kwon and Donna M. Kwon to satisfy the judgment (Donato Aff. in Supp.) based on the Court’s conclusion that the record lacks specificity regarding the assets that Plaintiff wishes to seize. *Cf.* CPLR § 7102 (c) which provides that the application for an order of seizure shall be supported by an affidavit clearly identifying the chattel to be seized.

Accordingly, it is hereby

ORDERED, that the motion of Plaintiff BNB Bank National Association is granted to the extent that the Court awards Plaintiff judgment against Defendants Eastern Island Food, Inc., Ki Hun Kwon and Donna M. Kwon on the first cause of action in the Amended Complaint and refers the matter to an inquest for the determination of principal, interest, late fees, attorney’s fees and costs to be awarded to Plaintiff; and it is further.

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of principal, interest, late fees, attorney’s fees and costs to be awarded to Plaintiff on November 15, 2011 at 9:30 a.m.; and it is further

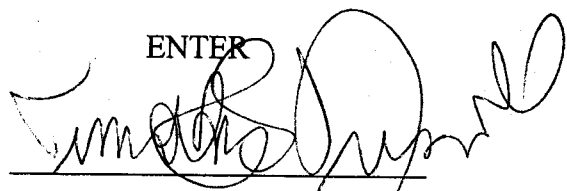
ORDERED, that Plaintiff shall serve upon Defendants Eastern Island Food, Inc., Ki Hun Kwon and Donna M. Kwon, by regular mail, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before November 4, 2011; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of Plaintiff BNB Bank National Association and against Defendants Eastern Island Food, Inc., Ki Hun Kwon and Donna M. Kwon in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
October 11, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
OCT 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE