

**Shinhan Bank Am. v Evergreen Gourmet Deli, Inc.**

2011 NY Slip Op 32905(U)

October 31, 2011

Supreme Court, New York County

Docket Number: 108126/10

Judge: Judith J. Gische

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SCANNED ON 11/2/2011  
SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

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

PART 10

Index Number : 108126/2010  
SHINHAN BANK AMERICA  
vs.  
EVERGREEN GOURMET DELI  
SEQUENCE NUMBER : 002  
DEFAULT JUDGMENT

INDEX NO. 108126/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_  No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

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

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

**FILED**

NOV 02 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/31/11

[Signature], J.S.C.  
**HON. JUDITH J. GISCHE**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION  
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER  
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10

-----X  
SHINHAN BANK AMERICA,

Plaintiff (s),

*-against-*

EVERGREEN GOURMET DELI, INC.,

Defendant (s).  
-----X

**DECISION/ ORDER**

Index No.: 108126/10

Seq. No.: 002

**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):

**FILED**

**Papers**

**Numbered**

Pltf n/m (3215) w/HW affirm, MFK affid, exhs ..... **NOV 02 2011** ..... 1

-----X  
*GISCHE J.:*

NEW YORK  
COUNTY CLERK'S OFFICE

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

This is an action to enforce the terms of a Note, a Business Loan Agreement and a Guarantee executed by defendant Evergreen Gourmet Deli, Inc. ("Evergreen" or "defendant"). Plaintiff Shinhan Bank America ("Shinhan" or "plaintiff") now moves, pursuant to CPLR § 3215, for an order directing the Clerk of the Court to enter a default judgment in its favor and against defendant, on the first (breach of contract), third (breach of guaranty) and fourth (attorneys' fees) causes of action. Evergreen has not submitted any opposition, despite due proof of service of the instant motion. Therefore, this motion is considered and decided on default against Evergreen.

This action was commenced by the filing of a summons and complaint on June 21, 2010. The summons and complaint were served upon Evergreen, in accordance with CPLR §311, by serving Tommy "Doe", the managing agent of Evergreen, on June 25,

2010, at 11:23 a.m., and thereafter by mailing an additional copy on June 25, 2010. Plaintiff complied with the additional notice requirements of CPLR §3215(g)(4) by mailing another copy of the summons and complaint with the present motion. Such additional notice was made upon the defendants by Plaintiff's Counsel, via first class mail, on August 18, 2011.

At no time prior to this decision has the defendant interposed an answer to the complaint, nor has the defendant requested that its time to answer be extended by the court.<sup>1</sup> Plaintiff has shown that the defendant has defaulted in this matter and that it is entitled to a judgment if it can otherwise establish a *prima facie* case. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd Dept. 2001); Zelnik v. Bidermann Industries U.S.A., Inc., 242 A.D.2d 227 (1997). Evergreen's default in answering the complaint constitutes an admission of the relevant 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).

### Discussion

The present action was commenced to enforce the terms of a Note, a Business Loan Agreement and a Guaranty executed by defendant Evergreen. Plaintiff relies on the Affidavit of Homin Wang, as well as numerous exhibits.<sup>2</sup>

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<sup>1</sup> Concurrent to Shinhan's commencement of this action on June 21, 2010, Plaintiff filed an Order to Show Cause, seeking an Order of Seizure ("OSC"). On the return date of the OSC, defendant Evergreen appeared by its attorney Nakyung Kang. The parties negotiated a Stipulation Resolving Order to Show Cause. The Stipulation specifically provided that it pertained only to the OSC and not the underlying action. Despite appearing and negotiating the Stipulation and Order, the Defendant has not filed an answer to the Complaint.

<sup>2</sup> The exhibits contain: (1) the summons and complaint with the attached (a) 6/27/08 Note signed by Evergreen, (b) 6/27/08 Business Loan Agreement, (c) 6/27/08

[\* 4]

Evergreen's Note & Business Loan Agreement

On June 27, 2008, Evergreen executed a Note (" Evergreen Note"), in which it agreed to repay Shinhan the sum of \$600,000, with interest. Pursuant to the terms of the Note, Evergreen was to make monthly payments of \$6,967.00, commencing on September 1, 2008 and continuing monthly thereafter, through and including August 1, 2018, at which time all remaining principal and interest was to come due. The Note provided, *inter alia*, that Evergreen would be in default if it did not make a payment when due. Evergreen failed to make the payment due on March 1, 2010, or any full monthly payment due thereafter. As a result of the default, Shinhan accelerated the amount due and owing under the Note and commenced the instant action. Plaintiff claims that due to Evergreen's default under the Note and the Loan Agreement, Evergreen now owes \$533,307.84, with interest, set at the *Wall Street Journal* prime rate plus 2%, from August 15, 2011, as well as the costs and disbursements incurred by Shinhan in this action.

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, 116 AD2d 694 (2d Dept. 1986). A Note is a form of contract, as is a Business Loan Agreement. Here, the Wang affidavit establishes the facts constituting the claims, particularly that defendant Evergreen entered into the Note, Agreement and a Guaranty of debt with Shinhan; that Evergreen defaulted by failing to make payments as they came due under the Note and that there is now due

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Commercial Security Agreement, (d) 6/27/08 UCC-1 Financing Statement, (e) 5/25/10 Default letter, (f) 5/25/10 Demand Letter, (g) 6/27/08 Note signed by TGC, (h) 6/27/08 Unconditional Guaranty, (2) 7/2/08 letter of settlement of the OSC, (3) 7/21/08 Stipulation Resolving OSC, (4) Final Judgment against TGC and Evergreen, New Jersey Superior Court, (5) Attorney billing sheets.

and owing \$534,754.78 with interest from May 26, 2010, until the date of determination. Accordingly, pursuant to the terms of the Note and Loan Agreement, Evergreen is liable for such sums.

#### The Evergreen Guaranty

On June 27, 2008, non-party Green Café, Inc. ("TGC"), executed and delivered to Shinhan a Note ("TGC Note"), in which TGC agreed to repay Shinhan the sum of \$1,000,000, with interest, which was to be set at the *Wall Street Journal* prime rate plus 2%. Pursuant to the terms of the TGC Note, TGC agreed to make monthly payments of \$11,611.00, commencing on September 1, 2008 and continuing monthly thereafter, through and including August 1, 2018, at which time all remaining principal and interest was to come due.

As additional consideration, defendant Evergreen agreed to unconditionally guaranty the payment to Shinhan of all amounts owing under the TGC Note. TGC defaulted, by failing to make the payment, on March 1, 2010. On May 25, 2010, demand for payment of the TGC Note was made upon Evergreen. Plaintiff claims that Evergreen has failed to remit the payment due under the TGC Note.

On June 3, 2010, Shinhan commenced an action against TGC in the Superior Court of the State of New Jersey, Morris County bearing Docket No. L-1795-10 and a judgment was duly entered against TGC for the sum of \$898,684.94. As of the date of the motion, TGC has not made any payments toward the New Jersey judgment. Plaintiff claims that because Evergreen guaranteed the TGC Note, Evergreen is responsible for and owes a total of \$898,684.94, which includes a principle balance of \$506,502.62, accrued interest of \$23,607.04 (thru August 15, 2011), discharge of mortgage fee of \$100.00, UCC termination fee of \$200.00, and a late fee of \$2,898.18, and additional interest from

February 4, 2011.

A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation. The principal debtor is not a party to the guarantee and the guarantor is not a party to the principal obligation (Midland Steel Warehouse Corp. v. Godinger Silver Art, 276 A.D.2d 341, 343 [1st Dept. 2000], *quoting* Shire Realty Corp. v. Schorr, 55 A.D.2d 356, 359-360 [2d Dept. 1977]). Thus, the guarantor will be required to make payment only when the primary obligor has first defaulted (Weissman v. Sinorm Delj, 88 N.Y.2d 437, 446 [1996]).

Since Evergreen guaranteed TGC's note, and TGC has defaulted Evergreen, by operation of the executed guaranty to Shinhan, is contractually responsible for the outstanding payments that TGC failed to make but Evergreen guaranteed. Therefore, plaintiff has established that it is entitled to entry of a money judgment in the principal sum of total of \$898,684.94, which includes a principle balance of \$506,502.62, accrued interest of \$23,607.04 (thru August 15, 2011), discharge of mortgage fee of \$100.00, UCC termination fee of \$200.00, and a late fee of \$2898.18, and additional interest from February 4, 2011.

#### Attorney's Fees

Article 6 (B) of the Notes and Loan Agreement (Miscellaneous Provisions, Attorneys' Fees; Expenses) provide that in the event of a default by Evergreen, and failure to cure, Evergreen would pay plaintiff's reasonable attorneys' fees and costs. With respect to plaintiff's claim for attorneys fees, plaintiff states that, to date, it has incurred legal fees in the amount of Eight Thousand Two Hundred Fifty Dollars (\$8,250.00). (Attorney Kye states that the total time spent from inception [June 25, 2010] through and including July 29, 2011 has been 30 hours at an hourly billing rate of \$275.00 per hour.) The motion is

[\* 7]

unopposed. The court has reviewed the record, and considering the results achieved, and deems the fees incurred by plaintiff reasonable. Therefore, plaintiff is entitled to a money judgment against defendant in the amount of \$8,250.00 for the fees it has incurred, in prosecuting its claims.

**Conclusion**

*In accordance herewith, it is hereby:*

**ORDERED** that the motion by plaintiff Shinhan Bank America for entry of a default judgment on the first, third and fourth causes of action against defendant Evergreen Gourmet Deli, Inc. is hereby granted; and it is further

**ORDERED** that the Clerk of the Court shall enter a money judgment in favor of plaintiff Shinhan Bank America, on the First Cause of Action, against defendant Evergreen Gourmet Deli, Inc. in the principal amount of FIVE HUNDRED THIRTY THREE THOUSAND THREE HUNDRED SEVEN DOLLARS AND EIGHTY FOUR CENTS (\$533,307.84), plus interest, set at 5.25 %, from August 15, 2011, until the date judgment is entered, plus the costs and disbursements of this action, as taxed by the court and plaintiff shall have execution thereof; and it is further; and it is further

**ORDERED** that the Clerk of the Court shall enter a money judgment in favor of plaintiff Shinhan Bank America, on the Third Cause of Action, against defendant Evergreen Gourmet Deli, Inc. in the principal amount of EIGHT HUNDRED NINETY EIGHT THOUSAND SIX HUNDRED EIGHTY FOUR DOLLARS AND NINETY FOUR CENTS (\$898,684.94), plus interest, set at 5.25 %, from May 26, 2010, until the date judgment is entered, plus the costs and disbursements of this action, as taxed by the court and plaintiff shall have execution thereof; and it is further; and it is further

**ORDERED** that the Clerk of the Court shall enter a money judgment in favor of


8] plaintiff Shinhan Bank America, on the Fourth Cause of Action, against defendant Evergreen Gourmet Deli, Inc. in the principal amount of EIGHT THOUSAND TWO HUNDRED FIFTY DOLLARS (\$8,250.00), plus the costs and disbursements of this action, as taxed by the court and plaintiff shall have execution thereof; and it is further; and it is further

**ORDERED** that any 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  
October 31, 2011

So Ordered:

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

**FILED**

**NOV 02 2011**

NEW YORK  
COUNTY CLERK'S OFFICE