

**New York Community Bank v Ari Chitrik**

2011 NY Slip Op 33642(U)

July 11, 2011

Supreme Court, Nassau County

Docket Number: 18180-10

Judge: Timothy S. Driscoll

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.

Scan

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

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**NEW YORK COMMUNITY BANK,**

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

**Plaintiff,**

**-against-**

**Index No: 18180-10  
Motion Seq. No: 2  
Submission Date: 5/20/11**

**ARI CHITRIK A/K/A AARON CHITRIK  
PUREC AND SHAYA BOYMELGREEN A/K/A  
JESHAYAHU BOYMELGREEN,**

**Defendants.**

-----x

**Papers Read on this Motion:**

**Notice of Motion, Attorney's Statement, Affidavit in Support and Exhibits...x**

This matter is before the court on the motion by Plaintiff New York Community Bank ("Plaintiff" or "NYCB"), filed May 4, 2011 and submitted May 20, 2010. For the reasons set forth below, the Court denies the motion and directs counsel for Plaintiff and counsel for Defendant Ari Chitrik a/k/a Aaron Chitrik Purec ("Chitrik"), or Chitrik himself if he is unrepresented by counsel, to appear before the Court for a Preliminary Conference on September 7, 2011 at 9:30 a.m. Should Chitrik fail to appear as directed, the Court will entertain an immediate application by Plaintiff for renewal or reargument of its motion.

**BACKGROUND**

**A. Relief Sought**

Plaintiff moves for an Order, pursuant to CPLR § 3215, granting Plaintiff a default judgment against Defendant Chitrik.

Chitrik has not appeared at conferences as directed by the Court but, as outlined *infra*,

[\* 2]  
submitted a response to the Complaint.

B. The Parties' History

This is an action by NYCB 1) against Defendant Chitrik seeking payment on a revolving business line of credit note dated November 13, 2006 in the maximum principal sum of \$6,500,000 ("Note"), as amended, plus interest, late fees and costs and fees incurred in collection of the Note, and 2) against Defendant Shaya Boymelgreen a/k/a Jeshayahu Boymelgreen ("Shaya") who guaranteed payment of the Note up to the amount of \$2,000,000 ("Guaranty"). Shaya previously filed a motion to dismiss the Complaint on personal jurisdiction grounds ("Prior Motion"). By decision dated March 10, 2011 ("Prior Decision"), the Court directed that the Prior Motion would be the subject of oral argument. Shaya has now filed a motion to transfer venue of the action against him to Queens County, pursuant to the terms of the Guaranty. At a conference on June 16, 2011, the Court conducted a conference regarding this action, at which Chitrik did not appear. At that conference, the Court directed counsel for Plaintiff and counsel for Shaya to appear before the Court on September 7, 2011 at 10:30 a.m. for a Preliminary Conference, unless the Court granted Shaya's motion to transfer venue prior to that date.

The Complaint (Ex. 1 to Krause Aff.) outlines the relevant allegations including 1) NYCB's loan to Chitrik of the maximum principal sum of \$6,500,000, to finance a real estate project ("Loan") pursuant to the terms of the Note, 2) the modifications of the terms of the Note by the First and Second Modification Agreements dated May 25, 2008 and August 4, 2008, respectively, 3) relevant provisions in the Note, including those relating to advances, interest rate terms, timing of payments, late charges, the maturity date, events of default, NYCB's rights upon default, and miscellaneous provisions including Chitrik's obligation to reimburse NYCB in connection with the collection and enforcement of the Note, and 4) Chitrik's default on the Note by failing to pay the amounts due, including principal of \$6,114,930, plus unpaid interest and late charges.

The Complaint contains three causes of action against Chitrik. The first cause of action, sounding in breach of contract, alleges that, as of September 9, 2010, Chitrik owed a total sum of \$6,680,690.04 in principal, unpaid interest at the Contract Rate and Default Rate, and late charges on the Note. Plaintiff seeks damages against Chitrik consisting of principal in the sum of \$6,114,930, plus interest at the Contract Rate and Default Rate, late fees and the cost of

collection including reasonable attorney's fees. The second and third causes of action seek similar relief against Chitrik under the theories of money lent and unjust enrichment. The Complaint, which includes copies of the Note, modification agreements and Guaranty, is verified by Douglas H. Orth, a Vice President of NYCB.

Anthony E. Guinyard ("Guinyard"), a vice president of New York Community Bancorp, Inc., the parent company of NYCB, provides an Affidavit in Support in which he affirms the truth of the allegations in the Complaint regarding the Note and Chitrik's failure to make required payments under the Note.<sup>1</sup> Guinyard affirms that, as of September 9, 2010, Chitrik owes NYCB a total sum of \$6,680,690.04 in principal, unpaid interest (which continues to accrue) and late charges. He avers, further, that pursuant to the Note, Chitrik is liable to NYCB for the costs and expenses it incurs in enforcing its rights under the Note.

Counsel for Plaintiff ("Counsel") affirms that on October 7, 2010, Plaintiff effected service of the Complaint on Chitrik pursuant to CPLR § 308(2), as reflected by the affidavit of service provided (Ex. 2 to Krause Aff.), which was filed with the Clerk of the Court on October 21, 2010. Counsel affirms that Chitrik failed to answer the Complaint within the prescribed time. Chitrik did, however, serve on NYCB a Notice of Limited Appearance and Demands dated October 18, 2010 ("Late Notice") (*id.* at Ex. 3), which NYCB's counsel received in an envelope postmarked December 14, 2010 (*id.*). NYCB rejected the Late Notice by sending to Chitrik a Notice of Rejection of Limited Appearance with Demands on December 22, 2010 ("Rejection Notice") (*id.* at Ex. 4). Counsel submits that Chitrik has failed to answer or make any motion with respect to the Complaint, and has not requested any extension of the time to answer.

In the Late Notice, which Chitrik served *pro se*, Chitrik stated, *inter alia*, that he 1) was hereby appearing "in-person" in this action and demanded that copies of all papers be served on him at a designated address, specifically 730 Eastern Parkway, Brooklyn, New York 11213; 2) reserved the right to answer the Complaint without waiving any available jurisdictional and other defenses; and 3) reserved the right to move, pursuant to CPLR § 3211, in lieu of an answer.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a default judgment by establishing

---

<sup>1</sup> Guinyard affirms that there is a typographical error in paragraph 21 of the Complaint regarding the timing of an interest payment, which brought interest current through January 1, 2010.

[\* 4]  
its service of the Complaint on Chitrik and his failure to answer in a timely manner, and demonstrating Chitrik's failure to make required payments under the Note.

Chitrik has submitted no opposition or other response to the instant motion but submitted the Late Notice in response to the Complaint.

RULING OF THE COURT

Public policy favors a determination of controversies on the merits. *Scarlett v. McCarthy*, 2 A.D.3d 623 (2d Dept. 2003). Although it was apparently untimely, the Late Notice represented an effort by Chitrik to answer the Complaint, and the Court concludes that the entry of a default judgment under these circumstances would be inappropriate. Accordingly, the Court denies Plaintiff's motion for a default judgment, and directs counsel for Plaintiff and counsel for Chitrik, or Chitrik himself if he is unrepresented by counsel, to appear before the Court for a Preliminary Conference on September 7, 2011 at 10:30 a.m. Should Chitrik fail to appear as directed, the Court will entertain an immediate application by Plaintiff for renewal or reargument of its motion.

All matters not decided herein are hereby denied.

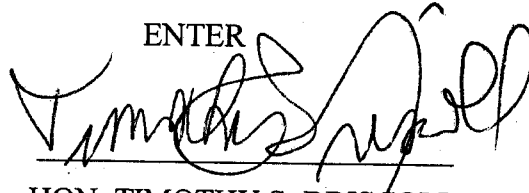
This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiff and counsel for Chitrik, or Chitrik himself if he is unrepresented by counsel, of their required appearance before the Court for a Preliminary Conference on September 7, 2011 at 10:30 a.m.

DATED: Mineola, NY

July 11, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
JUL 18 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE