

BNB Bank N.A. v Sherwood Asian Inc.

2012 NY Slip Op 30159(U)

January 12, 2012

Sup Ct, Nassau County

Docket Number: 14530-2010

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.

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
BNB BANK NATIONAL ASSOCIATION,

Plaintiff,

-against-

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Index No: 14530-2010

**Motion Seq. No: 1
Submission Date: 11/16/11**

**SHERWOOD ASIAN INC., CHIEN CHANG,
MILLER REALTY ASSOCIATES, and
"JOHN DOE #1-5" and "JANE DOE #1-5", said
names being fictitious and unknown to the Plaintiff,
the persons or parties intended being the occupants,
tenants, persons or entities, if any, having or claiming
an interest in the action herein,**

Defendants.

-----x

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits.....x

This matter is before the Court for decision on the motion filed by Plaintiff BNB Bank National Association ("Plaintiff") on October 28, 2011 and submitted on November 16, 2011. For the reasons set forth below, the Court grants Plaintiff's motion, awards Plaintiff judgment against Defendant Defendants Sherwood Asian Inc. and Chien Chang in the sum of \$143,456.92, plus attorney's fees, costs and disbursements to be determined at an inquest, and directs that the caption shall be amended as set forth herein.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR §§ 603 and 3215(a), granting Plaintiff judgment in favor of Plaintiff as against Defendants Sherwood Asian Inc. (“Sherwood Inc.”) and Chien Chang (“Chang”) (“Defendants”), for the relief demanded in the Complaint.

Defendants have not appeared in this action, and have submitted no response to Plaintiff’s motion.

B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. A to Donato Aff. in Supp.) alleges as follows:

Sherwood Inc. and Chang conduct business under the name Sherwood Asian located at 187 Glen Street, Glen Cove, New York (“Business”). Sherwood Inc., by Chang, as President, executed a Security Agreement dated April 13, 2007 in favor of Plaintiff (Ex. A to Compl.). The Security Agreement secures all of the personal property, assets and fixtures of the Business. A UCC-1 Financing Statement (*id.* at Ex. B) was filed on April 18, 2007 naming Sherwood Inc. as Debtor and Plaintiff as the Secured Party. The Security Agreement was provided as collateral for a Note executed on April 13, 2007 (*id.* at Ex. C), payable to Plaintiff in the original amount of \$150,000.00 and executed by Sherwood Inc. by Chang as President. As further collateral for the Note, Chang executed an Unconditional Guarantee (“Guarantee”) on April 13, 2007 (*id.* at Ex. D) that unconditionally guaranteed the payment of the Note.

In the First Cause of Action in the Complaint, Plaintiffs allege breach of contract by Defendants Sherwood Inc. and Chang based on their failure to comply with the terms of the Security Agreement by failing to pay portions of principal, interest or taxes, assessments, water rates, insurance premiums, escrow and/or other charges set forth in the Security Agreement, and in accordance with the Note and Guarantee. In the Second Cause of Action in the Complaint, Plaintiff alleges that Defendants Sherwood Inc. and Chang have been unjustly enriched based on their continued operation of the Business without making the required payments under the terms

of the Note and Security Agreement, or surrendering the collateral.¹

In his Affidavit in Support, Ted Morgan (“Morgan”), an officer of Plaintiff, affirms the truth of the allegations in the Complaint regarding the execution of the Security Agreement, Note, and Guarantee. The Note was given to Defendants to start up, and purchase inventory, fixtures and supplies for, the Business. Morgan affirms that Sherwood Inc. has defaulted on the Note and Security Agreement by failing to make the monthly payments due thereunder from December 1, 2009, and there is now due the sum of \$143,456.92, consisting of unpaid principal as of October 19, 2011, interest from November 22, 2009 to October 19, 2011, inspections/appraisal/auction fees and late charges (*see* Ex. I to Donato Aff. in Supp.).

In addition, Pursuant to Section 20 of the Security Agreement, Sherwood Inc. agreed to pay all expenses, including reasonable attorney’s fees and disbursements, incurred by Plaintiff in enforcing its rights under the Security Agreement. Pursuant to Section 9(A) of the Guarantee, Chang agreed to pay all expenses incurred by Plaintiff in enforcing the Guarantee, including but not limited to attorney’s fees and costs.

In her Affirmation in Support, Plaintiff’s counsel affirms that, prior to service of the Summons and Complaint, Plaintiff advised Defendants of their default by a demand letter dated July 9, 2010 (Ex. C to Donato Aff. in Supp.), which was sent by certified mail, return receipt requested and by regular mail. Plaintiff served Defendants with the Summons and Complaint by 1) serving Sherwood Inc., pursuant to CPLR § 308, by serving the New York Secretary of State on October 6, 2010, and 2) serving Chang, pursuant to CPLR § 308(2), by serving a person of suitable age and discretion on August 18, 2010 at Chang’s home and mailing a copy of the Summons and Complaint to Chang’s home. Plaintiff provides Affidavits of Service in support (*id.* at Exs. D and E). In addition, Plaintiff has complied with the mailing notice requirement pursuant to CPLR §§ 3215(g)(3) and (4) by mailing copies of the Summons and Complaint to the Defendants, as reflected by the Affidavit of Mailing provided.

Plaintiff’s counsel affirms, further, that there are no other Defendants required to be served in this action, and no other Defendants were served or are necessary party defendants. Accordingly, Plaintiff request that the caption be amended to read as follows:

¹ The third cause of action is asserted against Defendant Miller Realty Associates (“Miller Realty”). Plaintiff’s counsel affirms that Plaintiff and Defendant Miller Realty have settled their claims against each other and filed a stipulation of discontinuance (Ex. H to Donato Aff. in Supp.) that discontinued Plaintiff’s claims against Miller and provided that Miller Realty withdrew its counterclaim against Plaintiff.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

BNB BANK NATIONAL ASSOCIATION,

Plaintiff,

Index No. 14530/10

-against-

SHERWOOD ASIAN INC. and CHIEN CHANG,

Defendants.

Plaintiff's Counsel also affirms that, as a result of Defendants' default, Plaintiff has incurred legal fees, costs, disbursements and expenses in the amount of \$3,709.87. Plaintiff's Counsel provides an Affirmed Bill of Costs (Ex. J to Donato Aff. in Supp.) that outlines the legal work performed by Plaintiff's Counsel, as well as the disbursements incurred by Plaintiff in connection with this action.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by presenting proof of service of the summons and complaint, and proof of the claim through the Complaint and Morgan Affidavit which establish the parties' agreements, Plaintiff's performance, Defendants' default and the amount due.

Defendants have not appeared in this action, and have submitted no response 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. 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, 695 (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*.

C. 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).

D. 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).

E. 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). See also, *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).

F. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion based on the Court's determination that Plaintiff has presented proof of service of the Summons and Complaint on Defendants, and provided the Complaint and Morgan Affidavit which set forth the facts constituting the claim, the default, and the amount due. Specifically, Plaintiff has established Defendants' execution of the Note, Security Agreement and Guarantee, and Defendants' failure to make payment pursuant to those instruments. Moreover, Defendants have failed to appear, answer or respond to Plaintiff's motion.

The Court also grants Plaintiff's application for counsel fees, but concludes that it has an insufficient basis on which to base that award and, accordingly, refers the determination of that issue to an inquest. Finally, the Court grants Plaintiff's application to amend the caption, and directs the Clerk of Nassau County, upon receipt of a copy of this Order, to amend the caption in the manner set forth herein.

Accordingly, it is

ORDERED, that Plaintiff's Motion for a Default Judgment is granted, and Plaintiff is awarded judgment against Defendants Sherwood Asian, Inc. and Chien Chang in the sum of \$143,456.92, plus attorney's fees, costs and disbursements; and it is further

ORDERED, that the action is respectfully referred to Special Referee Frank N. Schellace on February 9, 2012 at 9:30 a.m. to hear and determine all issues regarding attorney's fees, costs and disbursements; and it is further

ORDERED, that Plaintiff's counsel shall serve upon Defendants by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Note of Issue or Notice of Inquest and shall pay the appropriate filing fees on or before January 30, 2012; and it is further

ORDERED, that the County Clerk is directed to enter a judgment in favor of Plaintiff and against Defendants Sherwood Asian, Inc. and Chien Chang in accordance with the decision of the Special Referee; and it is further

ORDERED, that Plaintiff's motion to amend the caption is granted, and the County Clerk shall amend the caption so that it reads as follows:.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

BNB BANK NATIONAL ASSOCIATION,

Plaintiff,

Index No. 14530/10

-against-

SHERWOOD ASIAN INC. and CHIEN CHANG,

Defendants.

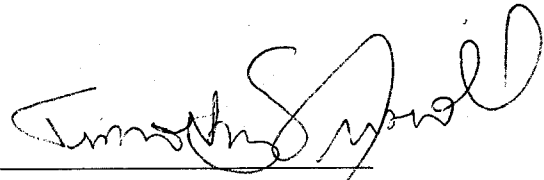
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

January 12, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

✓ X X

ENTERED

JAN 17 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**