

<b>Freedom Baking Co. v Homemade Kosher Prod. LLC</b>
2013 NY Slip Op 31611(U)
July 15, 2013
Sup Ct, New York County
Docket Number: 106132/2009
Judge: Charles E. Ramos
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Ramos

PART 53

Index Number : 106132/2009  
FREEDOM BAKING COMPANY  
vs  
HANDMADE KOSHER PRODUCTS LLC  
Sequence Number : 007  
DEFAULT JUDGEMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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 is decided in accordance with  
accompanying Memorandum Decision.

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

Dated: \_\_\_\_\_

  
\_\_\_\_\_, J.S.C.  
**CHARLES E. RAMOS**

- 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: COMMERCIAL DIVISION  
-----X  
FREEDOM BAKING COMPANY,

Plaintiffs,

-against-

Index No.  
106132/2009

HOMEMADE KOSHER PRODUCTS LLC and SHMUEL  
ZITRONENBAUM,

Defendants.

-----X  
HANDMADE KOSHER PRODUCTS LLC and SHMUEL  
ZITRONENBAUM,

Defendants/Cross-claimants

-against-

HANDMADE PRODUCTS, INC., HANDMADE PRODUCTS II  
CORP., KAREN ARABACHYAN, MARINA AYRIYAN,  
KHACHATUR ARABACHIAN, JOSEPH ASVYANSKY,  
KAREN GEVORKYAN a/k/a JOHN GEVORKIAN,

Cross-claim Defendants.

-----X

**Charles E. Ramos, J.S.C.:**

Defendant/Cross-claim plaintiff Shmuel Zitronenbaum moves for an order of default judgment as against Freedom Baking Company, Mediterranean Best Foods Inc., and Karen Gevorkian a/k/a John Kumro.

**Background**

This action arises out of an asset purchase agreement (Agreement) that defendant Shmuel Zitronenbaum executed on behalf of a New York entity to be subsequently formed, to purchase a

bakery located in New York and owned by Handmade Products II, Corp. (Seller), on April 10, 2008. The New York entity that Zitronenbaum formed which eventually purchased the bakery is the defendant Handmade Kosher Products LLC (Handmade Kosher). Zitronenbaum is the sole member and manager of Handmade Kosher.

On the date of closing, Zitronenbaum tendered to the Seller \$36,500 and an official bank check for \$300,000. Handmade Kosher and Zitronenbaum, jointly and severally, executed a note (the Note) for the balance of the purchase price, to be paid over the next thirty-six months.

Concurrently, at closing the Seller assigned its rights under the Note to the plaintiff, Freedom Baking Company (Freedom Baking, or plaintiff), which constituted partial payment of debts purportedly owed by the Seller to plaintiff.

Freedom Baking, as assignee of the Note and a purported holder in due course, commenced this action after Handmade Kosher defaulted under the Agreement by failing to make installment payments. The remaining principal due and owing under the Note is \$24,624.19.

In the answer, Zitronenbaum interposed affirmative defenses, counterclaims, and cross-claims against the Seller, Handmade Products, Inc. (Handmade I), Karen Arabchyan, Marina Ayriyan, Khachatur Arabachian, Joseph Asvyansky, Karen Gevorkyan a/k/a John Gevorkian, and the plaintiff, Freedom Baking.

Zitronenbaum alleges that the Seller made numerous misrepresentations pertaining to the assets in order to induce defendants to enter into the Agreement. In addition, Zitronenbaum alleges that Freedom Baking, the assignee of the Note, had actual knowledge of the factual misrepresentations contained within the due diligence materials, and acted in concert with the Seller to induce Zitronenbaum to execute the Agreement and the Note. The driving force behind this fraudulent scheme was one man with three alleged identities: Karen Gevorkyan a/k/a John Gevorkian a/k/a John Kumro (Gevorkian), who is both the principal and/or owner of Handmade Products II and Freedom Baking.

Zitronenbaum alleges numerous instances of breach of the Agreement, including that both the Seller and Freedom Baking improperly solicited Kosher Products' customers, interfered with its distributor relationship, and trademark infringement, amongst other wrongful conduct. Zitronenbaum seeks to have the Note rescinded and the Agreement declared void, in addition to compensatory damages. He represents that Handmade Kosher has since gone out of business.

#### **Procedural Background**

In February 2010, the third party defendants moved to dismiss the claims against Joseph Asvyansky, and to compel arbitration of the counterclaims and cross-claims pursuant to a

written agreement to arbitrate contained in the Agreement.

The Court granted the motion on default (NYSCEF No. 18), and in May 2010 entered an order dismissing all claims against Asvyansky, directing defendants to commence an arbitration to adjudicate the claims against Handmade I, the Seller, and Gevorkian within 90 days from the date of entry of the order, or the claims would be dismissed with prejudice (NYSCEF No. 21). Marina Ayriyan, Khachatur Arabachian and Karen Arabachian did not appear or answer.

On February 16, 2011, upon submission of an affirmation of counsel for the third party defendants, the Court entered an order dismissing the claims against the third party defendants for failure to commence an arbitration proceeding within 90 days of the original order (Arbitration Order) (NYSCEF Doc. No. 29, 54).

Simultaneously, Freedom Baking moved for summary judgment as to the principal amount due under the Note and sought attorney's fees. Zitronenbaum cross-moved, pro se, for summary judgment against Freedom Baking and Gevorkian. In his cross-motion, Zitronenbaum asserts that his individual claims against Gevorkian are not subject to the Arbitration Order.<sup>1</sup> According to

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<sup>1</sup> Freedom Baking and Kosher Products contracted directly for the supply of bread from California to Kosher Products' New York bakery. At some point in the relationship, Freedom Baking commenced an action for breach of contract in California and

Zitronenbaum, Gevorkian concealed that he had three separate identities, as the Seller of the bakery and the principal/owner of the assignee of the Note, Freedom Baking, which was part of the scheme to induce Zitronenbaum to purchase the bakery.

Freedom Baking denies any relationship between Gevorkian and the Seller, although Zitronenbaum submitted written evidence to the contrary.

The Court denied Freedom Baking's motion for summary judgment due to issues of fact with respect to Zitronenbaum's defenses that Freedom Baking was not a holder in due course (4/11/11 Tr 40:1-11). The Court also denied Zitronenbaum's cross-motion to invalidate the Note on the basis of fraudulent inducement also due to issues of fact (4/11/11 Tr 49:3-7, 54: 21-25, 55:1-3, 57:4-6).

Thereafter, Freedom Baking moved for an order declaring that all of defendants' counterclaims could only be raised by Handmade Kosher and not by Zitronenbaum individually, to strike and dismiss Handmade Kosher's answer and counterclaims for failure to appear by counsel, and for entry of a default judgment against Handmade Kosher for the principal amount due under the Note. Before the motion was fully briefed, counsel for Freedom Baking withdrew from the action, and the motion was deemed abandoned

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obtained a judgment against Kosher Products (4/11/11 Tr 21:10-14).

(NYSCEF Doc. No. 122, 129).

Zitronenbaum, individually, now moves for a default judgment against Freedom Baking, Gevorkian and Mediterranean Best Foods Inc.

To the extent that Freedom Baking did not oppose the motion and has failed to appear by counsel since its counsel withdrew on May 2, 2012 (NYSCEF Doc. No. 121), the motion is granted on default permitting the entry of judgment against Freedom Baking on the counterclaims, and the dismissal of its claim for the balance due under the Note and attorneys' fees (see CPLR 321 [a]; *Jiminez v Brenillee Corp.*, 48 AD3d 351, 352 [1<sup>st</sup> Dept 2008]). Zitronenbaum is directed to settle a judgment on notice, as against Freedom Baking Company.

As for the remainder of the motion, Gevorkian submitted an affidavit in opposition, and arguing that all claims against him personally were dismissed by this Court in the Arbitration Order (NYSCEF Doc. No. 29, 54). Nonetheless, Zitronenbaum has alleged that Gevorkian fraudulently induced him to purchase the bakery which, if proven, would invalidate the asset sale agreement containing the agreement to arbitrate. Zitronenbaum raises numerous issues of fact that cannot be resolved on the basis of the limited evidentiary record before the Court. In its discretion, the Court denies the motion for default judgment as against Gevorkian without prejudice. The Court directs an

evidentiary hearing on the claims against Gevorkian, who will be permitted to argue, if so advised, that all of the counterclaims against him were, in fact, dismissed. The parties are directed to contact the Part Clerk in order to schedule the hearing.

The motion for default judgment as against Mediterranean Best Foods Inc. (MBFI) is denied without prejudice. MBFI was not named in the original answer as a cross-claim defendant, and it is unclear as to whether the answer was amended to name this entity, or whether it was ever served.

This shall constitute the decision and order of the Court.

Dated: July 15, 2013

ENTER:

A handwritten signature in black ink, appearing to be 'C. Ramos', is written over a horizontal line.

J.S.C.

**CHARLES E. RAMOS**