

NewBank v BuLee Cafe, Ltd.
2017 NY Slip Op 31800(U)
August 25, 2017
Supreme Court, New York County
Docket Number: 655138/2016
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54-----X
NEWBANK,

Index No.: 655138/2016

Plaintiff,

DECISION & ORDER

-against-

BULEE CAFE, LTD. d/b/a SARAH'S ARTISANAL
KITCHEN, YONG WON BU, KYU TAIK LEE, TONG
H. YANG, and SU NAM BU,Defendants.
-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff moves, pursuant to CPLR 3215, for a default judgment against defendants BuLee Cafe Ltd. (BuLee), Yong Won Bu, Kyu Taik Lee, Tong H. Yang, Su Nam Bu. Plaintiff's motion is granted, on default, for the reasons that follow.

Plaintiff seeks to collect on a \$1.6 million promissory note that was executed by BuLee on September 24, 2013. *See* Dkt. 43 (the Note).¹ The Note requires BuLee to make monthly payments of \$17,764. *See id.* at 2. The Note's interest rate is the monthly Wall Street Journal Prime rate plus 2.75%. *See id.* Upon a payment default, plaintiff is entitled to collect the full amount due under the Note, plus its attorneys' fees in a collection action. *See id.* at 3. The Note also requires BuLee to comply with a Business Loan Agreement. *See* Dkt. 44. Pursuant to a Commercial Security Agreement, the Note is secured by two parcels of real property (40-04 Westmoreland Street in Little Neck, New York and 53 Delmar Avenue in Cresskill, New Jersey)

¹ All of the related contracts discussed herein are dated September 24, 2013. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system (NYSCEF).

and BuLee's "Business Assets" (collectively, the Collateral). *See* Dkt. 47 (the Security Agreement).

Yong Won Bu and Kyu Taik Lee executed an "Unconditional Guarantee" in which they personally and unconditionally guaranteed all amounts due under the Note. *See* Dkt. 48. Tong H. Yang and Su Nam Bu executed an "Unconditional Limited Guarantee" in which they also personally guaranteed the Note, but only up to "their community property or spousal interest" in the Collateral. *See* Dkt. 49. Like the Note, both guarantees provide for plaintiff to recover its attorneys' fees in an enforcement action

On September 28, 2016, plaintiff commenced this action to collect on the Note and the guarantees. *See* Dkt. 1. On October 20, 2016, defendants, through counsel, filed an answer to plaintiff's complaint. *See* Dkt. 11. A preliminary conference was held on February 22, 2017. *See* Dkt. 22. By order to show cause filed on March 20, 2017, defendants' counsel moved for leave to withdraw. The court granted that motion by order dated March 30, 2017. *See* Dkt. 28. Defendants were ordered to retain new counsel within 60 days and appear for a discovery conference. They never did so. In the interim, BuLee filed a bankruptcy petition, which was dismissed on June 21, 2017. By order dated June 28, 2017, the court noted that the individual defendants were in default for failure to appear (either pro se or by counsel) at an ordered June 5, 2017 conference [*see* Dkt. 31], and that BuLee would be held in default if it did not retain new counsel within 30 days. *See* Dkt. 34. BuLee did not do so. *See* Dkt. 75.

On July 31, 2017, plaintiff filed the instant motion for a default judgment against defendants, which was fully submitted without opposition. In support of its motion, plaintiff submitted the affidavit of one of its loan officers, who averred:

By letter dated July 27, 2016, NewBank notified BuLee of its default under the Note; declared all amounts owing under the Note immediately due and payable pursuant to the Note and the Business Loan Agreement; and demanded that BuLee pay to NewBank, by no later than July 31, 2016, \$1,293,941.83, which consisted of the principal balance of the loan remaining as of July 25, 2016 (\$1,275,307.14) plus all accrued but unpaid interest and late fees, which, as of July 25, 2016, were \$16,826.97 and \$1,807.72, respectively.

Dkt. 42 at 3. Plaintiff, however, concedes that Tong H. Yang's and Su Nam Bu's liability is capped at "the value of [their] community property or spousal interest in the Collateral." *See id.* at 5. There is nothing in the record that indicates such value. Presumably, that would have been the subject of discovery had defendants not defaulted.

Plaintiff's counsel also submitted an affirmation in support of its application to recover its reasonable attorneys' fees and disbursements of \$23,556.27. *See* Dkt. 60. He submits his qualifications and billing records. The bills are itemized and sufficiently detail the work performed (i.e., no block billing reduction is warranted). *See* Dkt. 71. The amounts appear reasonable given the work performed and amount in controversy.

It is well settled that "a defaulting defendant is deemed to have admitted all the allegations in the complaint." *McGee v Dunn*, 75 AD3d 624 (2d Dept 2010). Pursuant to CPLR 3215 and 22 NYCRR 202.27, where, as here, a party fails to appear at a conference directed in connection with an order relieving their counsel, they should be held in default, their pleadings should be stricken, and an inquest may be ordered to determine damages. *See 60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511 (1st Dept 2013).

An inquest is not needed to determine the amounts owed by all of the defendants other than Tong H. Yang and Su Nam Bu – \$1,317,498.10 (the amount due on the Note plus attorneys' fees). The only question of fact not resolved by the record is "the value of [their] community

property or spousal interest in the Collateral.” Absent their participation in this action, plaintiff has been denied the opportunity to take discovery on that amount. Since their liability under the Unconditional Limited Guarantee is the same as the other defendants unless their interest in the Collateral is less than the amount due on the Note, the court severs the claims asserted against them, and affords them the opportunity to attend an inquest before a Special Referee, where they may seek to prove their interest in the Collateral. They shall be given notice of that hearing. If they do not attend, judgment in the full amount of \$1,317,498.10 will be entered against them. Accordingly, it is

ORDERED that the motion by plaintiff Newbank for a default judgment against defendants BuLee Cafe Ltd., Yong Won Bu, Kyu Taik Lee, Tong H. Yang, Su Nam Bu is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor plaintiff and against defendants BuLee Cafe Ltd., Yong Won Bu, Kyu Taik Lee, jointly and severally, in the amount of \$1,317,498.10, plus 9% pre-judgment interest from July 31, 2017 to the date judgment is entered; and it is further

ORDERED that within 3 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order on defendants BuLee Cafe Ltd., Yong Won Bu, Kyu Taik Lee along with notice of entry by overnight mail; and it is further

ORDERED that the claims against defendants Tong H. Yang and Su Nam Bu are hereby severed and shall continue; and it is further

ORDERED that within 3 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order on defendants Tong H. Yang and Su Nam Bu, along with notice

of entry by overnight mail, which shall include a cover letter that conspicuously informs them that, in accordance with this decision, if they fail to attend the hearing before the Special Referee, they will forfeit their right to prove that their interest in the Collateral is less than the amount due on the Note, and judgment in the amount of \$1,317,498.10 will be entered against them; and it is further

ORDERED that an inquest on Tong H. Yang's and Su Nam Bu's interest in the Collateral is referred to a Special Referee to hear and determine; and it is further

ORDERED that within one week of the entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is respectfully directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that if Tong H. Yang and Su Nam Bu do not appear at the hearing, the Referee shall promptly direct the Clerk to enter judgment against them jointly and severally, in the amount of \$1,317,498.10, plus 9% pre-judgment interest from July 31, 2017, but if they attend the hearing and prove their interest in the Collateral is less than the amount owed on the Note, the Referee shall direct the Clerk to judgment against each of them only in such amount, plus 9% pre-judgment interest from July 31, 2017.

Dated: August 25, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.