

Bazan v Best Thai on Grammercy Inc.

2019 NY Slip Op 30047(U)

January 3, 2019

Supreme Court, New York County

Docket Number: 652915/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 652915/2017

URIEL BAZAN, SERGIO CALLE, CRISOFORO PINEDA, DOMINGO CALEL CHICOJ, REYNALDO VILLALBA MARTINEZ, FRANCISCO QUINO, URBANO REYES, RODOLFO VILLANO, EDGAR ZEPEDA,

MOTION SEQ. NO. 001

Plaintiffs,

- v -

BEST THAI ON GRAMMERCY INC. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), 31 EAST 21 EXPRESS INC. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), BEST THAI ON 8 CORP. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), RTC 18 CORP. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), 331 LEXINGTON RESTAURANT CORP. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), RACHAPAS YANGEKSAKUL, KARNCHARNART LOO,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, the within motion is denied with leave to renew upon proper papers.

In this action, inter alia, for breach of contract, or more accurately, breach of a Settlement Agreement, plaintiffs URIEL BAZAN, SERGIO CALLE, CRISOFORO PINEDA, DOMINGO CALEL CHICOJ, REYNALDO VILLALBA MARTINEZ, FRANCISCO QUINO, URBANO REYES, RODOLFO VILLANO, and EDGAR ZEPEDA ("plaintiffs") move, pursuant to CPLR 3215, for a default judgment against defendants BEST THAI ON GRAMMERCY INC. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), 31 EAST 21 EXPRESS INC. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), BEST THAI ON 8 CORP. (D/B/A RHONG-

TIAM EXPRESS OR RHONG-TIAM), RTC 18 CORP. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), 331 LEXINGTON RESTAURANT CORP. (D/B/A RHONG-TIAM EXPRESS OR RHONG-TIAM), RACHAPAS YANGEKSAKUL, and KARNCHARNART LOO (“defendants”). The motion is unopposed. After a review of the motion papers, as well as the relevant statutes and case law, the motion is **denied with leave to renew upon proper papers.**

The underlying action was commenced on or about May 30, 2017, by filing the Summons and Verified Complaint on the Court, (Doc. No.1) plaintiff effectuated service of the Summons and Verified Complaint on corporate defendants, 331 Lexington Restaurant Corp. d/b/a Rhong-Tiam Express or Rhong-Tiam (Doc. No. 2)¹ and Best Thai on Grammercy Inc. d/b/a Rhong-Tiam Express or Rhong-Tiam (Doc. No. 3) on June 13, 2017 with service at their addresses, and upon individual defendant Rachapas Andy Yangeksakul a.k.a Andy Yang (Doc. No. 4) on August 21, 2017 by service on a person of suitable age at his dwelling house/usual place of abode, and additional mailing to that address, on August 22, 2017.

Plaintiffs allege that, on or about July 6th and 7th of 2016, in order to settle a federal class action suit, Index No. 15 Civ. 04830, brought by plaintiffs in the Southern District of New York (SDNY), the parties herein executed a Settlement Agreement (Doc. No. 10) wherein, in exchange for plaintiffs dropping said class action suit, the defendants, Best Thai on Grammercy, Inc, 31 East 21 Express, Inc. Best Thai on 8 Corp., RTC 18 Corp, 331 Lexington Restaurant Corp. and Rachapas Andy Yangeksakul a.k.a Andy Yang, agreed to pay plaintiffs a total settlement amount of \$180,000.00.

¹ All references are to the documents filed with NYSCEF in connection with this action.

Plaintiffs now move, pursuant to CPLR 3215, for an order granting them a default judgment against defendants. Plaintiffs, by affirmation of Rai Julien, Esq., a partner of the law firm Mizer Mazzocchi Julien & Chickedantz, PLLC (Doc. 9), affirms that the Settlement Agreement was approved by the SDNY on July 13, 2016. Julien further affirms that defendants made a payment of \$18,000.00 by certified check on or about September 14, 2016. Defendants were to have made 20 consecutive monthly payments of \$8,100.00 until the Agreement was paid. The first of such payments was to have been made on or before October 1, 2016. However, defendants failed to make that or any further payments to plaintiffs, thereby breaching the Agreement. Julien avers that that the time for defendants to answer has expired without defendant answering or appearing in this action.

Plaintiffs additionally annex an Affidavit in Support of Motion for Default Judgment, sworn to by plaintiff Francisco Salvador Quinto, who attests to the truth of the within motion papers, avers that the defendants owe the plaintiffs a total of \$162,000.00, and requests that the Court grant the default judgment as requested by plaintiffs.

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that “[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

This Court notes that, although plaintiffs submit an “Affidavit of Due Diligence” relating to the service of the summons and verified complaint, they fail to submit any proof of service, or attempted service of the instant motion. Every affidavit of service submitted by plaintiffs

references service of the summons and verified complaint and, thus, plaintiff has failed to establish that the motion was properly served. Additionally, plaintiffs fail to submit sufficient "proof of the facts constituting the claim." CPLR 3215(f); see *Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 (2013). The Court further notes the discrepancies between the named plaintiffs and defendants in the captioned action as compared to those in the SDNY action. Such inconsistencies will need to be explained or corrected before a default judgment is granted.

In light of the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied, with leave to renew upon proper papers; and it is further,

ORDERED that this constitutes the decision and order of the court.

1/3/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: