

Newbank v 532 Madison Ave. Gourmet Foods, Inc.

2020 NY Slip Op 30081(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 651254/2017

Judge: Robert R. Reed

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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. ROBERT R. REED PART 43

Justice

-----X

NEWBANK,

Plaintiff,

- v -

532 MADISON AVENUE GOURMET FOODS, INC.,60
EAST FOOD CORP., MICHAEL PARK, RYUNG CHO

Defendant.

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INDEX NO. 651254/2017
MOTION DATE 01/29/2018
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that this motion is granted in part and denied in part.

Plaintiff commenced this action alleging that defendants breached a contract when defendant borrower and its guarantors failed to pay all amounts due and owing under a promissory note and loan agreement. Plaintiff now moves, pursuant to CPLR 3212, (1) for summary judgment in the amount of \$412,231.59 against defendants, (2) for an award of costs, expenses, and disbursements, including reasonable attorney’s fees, (3) to sever the portion of this action concerning costs, expenses, and disbursements, and to direct an inquest, and (4) to enter judgment against defendants as to the remainder of this action jointly and severally with pre- and post-judgment interest. In opposition, defendants cross-move, pursuant to CPLR 3211 (a) (4), for a comity stay or dismissal based upon pending earlier-filed motion for consolidation with a related action.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Hospital*, 68 NY2d 320). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact (*id.*). CPLR 3211 (a) (4) provides that dismissal of an action is appropriate where there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires. Additionally, comity cases require (a) a substantial identity of parties and (b) substantial identity of issues (*see Walsh v. Goldman Sachs & Co.*, 185 AD2d 748.)

In the instant motion, plaintiff provides, as proof, a copy of a promissory note signed by Ryung Hee Cho (president of 532 Madison Avenue Gourmet Foods, Inc.), a copy of a business loan agreement signed by Ryung Hee Cho, and a copy of an unconditional guarantee that lists -- among others -- Michael Park, Ryung Cho and 60 East Food Corp. as guarantors for borrower 532 Madison Avenue Gourmet Foods, Inc. Defendants have failed to proffer any proof in admissible form to establish that there is a triable issue of fact.

Defendant submits two bankruptcy petitions, the first filed by defendant Ryung Hee Cho in the United States Bankruptcy Court for the District of New Jersey on April 2, 2018, and the second filed by defendant Madison Avenue Gourmet Foods, Inc. in United States Bankruptcy Court for the Southern District of New York. Having been apprised of said filings, the court has determined that the action as against defendants Ryung Hee Cho and 532 Madison Avenue Gourmet Foods, Inc. should be stayed.

Defendant's cross-motion is denied as moot pursuant to the decision of Justice Charles Ramos in *Michael Park v. Newbank*, Index No. 651048/2017, filed October 20, 2017.

Accordingly, it is hereby

ORDERED that the portion of the motion seeking summary judgment on the complaint is granted in favor of plaintiff and against defendants 60 East Food Corp. and Michael Park in the sum of \$412,231.59, plus interest at the statutory rate from February 1, 2017, together with costs and disbursements as taxed by the Clerk, and the Clerk is respectfully directed to enter judgment accordingly; and it is further

ORDERED that, pursuant to Section 6, subsection (B) of the promissory note, attorney's fees, costs, expenses and disbursements are hereby awarded to plaintiff, payable jointly and severally from defendants 60 East Food Corp. and Michael Park; and it is further

ORDERED that counsel for plaintiff shall submit an affidavit in support of the claim for attorney's fees, costs, expenses and disbursements, with appropriate documentary evidence in support of said claim, not later than January 31, 2020; and it is further

ORDERED that counsel for defendants 60 East Food Corp. and Michael Park shall submit any specific written objections to the calculations of plaintiff's counsel's claimed attorney's fees, costs, expenses and disbursements by not later than February 14, 2020; and it is further

ORDERED that so much of the action as is directed to defendants 532 Madison Avenue Gourmet Foods Inc. and Ryung Cho is hereby stayed, including, but not limited to, motion sequence no. 001; and it is further

ORDERED that, upon the conclusion of the bankruptcy proceeding of 532 Madison Avenue Gourmet Foods, Inc. and Michael Park and/or other lifting of the automatic bankruptcy


stay, plaintiff may re-calendar this motion as to defendants 532 Madison Avenue Gourmet Foods, Inc. and Michael Park by letter application to the court and upon five (5) days' notice to all appearing parties; and it is further

ORDERED that the portion of plaintiff's motion seeking to sever the portion of this action concerning costs, expenses, and disbursements and direct an inquest is denied; and it is further

ORDERED that defendant's cross-motion for a comity stay or for dismissal is denied as moot, pursuant to the decision of Justice Charles Ramos' in *Michael Park v. New Bank*, Index No. 651048/2017, filed October 20, 2017.

This constitutes the Decision and Order of the court.

1/6/2020
DATE


ROBERT R. REED, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE