

Gamma Lending Holdco LLC v Big Boots, Inc.

2020 NY Slip Op 31543(U)

April 6, 2020

Supreme Court, New York County

Docket Number: 655537/2019

Judge: O. Peter Sherwood

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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. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice
-----X

GAMMA LENDING HOLDCO LLC,

INDEX No.: 655537/2019

Plaintiff,

MOT. DATE: 001

-against-

MOT. SEQ. No.: 1/28/2020

BIG BOOTS, INC., ROGER MINCHEFF,

**DECISION + ORDER ON
MOTION**

Defendants.
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22 were read on this motion to/for DEFAULT JUDGMENT

Plaintiff Gamma Lending Holdco LLC (“Gamma”) moves for default judgment against defendant Big Boots, Inc. (“Big Boots”) pursuant to CPLR § 3215.

On January 8, 2016, Big Boots and Gamma Funding, LP (“GFLP”) entered into a Credit Agreement whereby GFLP extended a revolving credit facility to Big Boots for up to \$500,000 with a maturity date of January 8, 2018 (the “Loan”) (Pl. Aff. ¶ 4–5; Ex. A §§ 1.1, 2.1(c), 2.1(d)(i)). Big Boots’s President, defendant Roger Mincheff (“Mincheff”), personally guaranteed the loan (Pl. Aff. ¶ 5). On January 14, 2016, GFLP assigned the Credit Agreement, the Guaranty, and related loan documents to Gamma (*id.* ¶ 5–7). In February 2017, Big Boots requested an additional \$500,000 in working capital and an approximately one-year extension of the maturity date (Pl. Aff. ¶ 16). On or about August 14, 2017, the parties entered into the Omnibus Agreement for First Amendment to the Credit Agreement and Other Loan Documents which includes amendments to the Credit Agreement such as: (i) increasing the Loan from \$500,000 to \$1 million, (ii) extension of the maturity date to January 8, 2019, and (iii) requiring Big Boots to issue to Gamma additional shares of Big Boots’ common stock equal to 5% ownership on a fully diluted basis (Pl. Aff. ¶ 17; Ex. B, First Amendment §§ 1.1(a), (b), and (e)).

On October 30, 2018, Big Boots, Mincheff, and Gamma entered into the Omnibus Agreement for Second Amendment to the Credit Agreement and Other Loan Documents,

wherein Gamma agreed to lower the interest rate from 12% to 10% per annum and extend the maturity date to December 31, 2019 in exchange for additional conditions, including (*id.* ¶¶ 21–22; Ex. C, Second Amendment §§ 1.2 (a)–(b), (e)–(f), (j)). Mincheff executed the Second Amendment with himself as Guarantor and on behalf of Big Boots (Pl. Aff. ¶ 25; Ex. C). In connection with the Second Amendment, Big Boots also executed the Second Amended and Restated Promissory Note, dated October 30, 2018, confirming Big Boots’ promise to pay Gamma the original \$872,722.50 principal plus interest pursuant to the Credit Agreement (Pl. Aff. ¶ 26).

Big Boots made payments on May 1, 2019 and June 1, 2019, but failed to make any additional payments (Pl. Aff. ¶ 29). Plaintiff gave Big Boots and Mincheff notices of the defaults, including in a letter dated September 16, 2019, where plaintiff declared its commitments to Big Boots as terminated, accelerated the Loan’s maturity, and declared all amounts due under the Credit Agreements and other loan documents to be immediately due (*id.* ¶ 31). Plaintiff further advised that a five percent default charge would apply if the outstanding amount was not paid by September 23, 2019 (*id.*; Ex. F). Defendants have failed to pay the outstanding amount (Pl. Aff. ¶ 32).

Plaintiff argues it is entitled to judgment on its breach of the Credit Agreements claim against Big Boots for: (i) the outstanding \$812,722.50 principal, (ii) the outstanding \$60,225.50 accrued interest which continues to accrue at a daily rate of \$225.76, (iii) a 5% default charge on all outstanding amounts which continues to accrue, (iv) plaintiff’s costs and fees, including attorneys’ fees and costs, and (v) further relief the court deems just and proper (*id.* ¶ 33).

CPLR 3215 (a) provides that “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, . . . the plaintiff may seek a default judgment against him” (CPLR 3215 [a]). A judgment by default requires “proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party,” or a verified complaint (CPLR 3215 [f]; *Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997]). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). An application for default judgment must be denied when supported only by a complaint verified by an attorney, rather than by someone with personal knowledge of the facts (*see Drake v Drake*, 296 AD2d 566, 566 [2d Dept 2002]). “[A] complaint

verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215" (*Mullins v DiLorenzo*, 199 AD2d 218, 219 [1st Dept 1993]).

Here, plaintiff has provided proof of service of the summons and the complaint as against both defendants (NYSCEF Doc. Nos. 12, 23), confirmation of facts constituting the claim, the default, and the amount due (NYSCEF Doc. Nos. 20, 21), and additional service to the defendants as required by CPLR § 3215 (g)(4)(i) (NYSCEF Doc. No. 19, Ex. C). Consequently, it is hereby

ORDERED that the motion for default is **GRANTED**; and it is further

ORDERED that judgment shall enter in favor of plaintiff Gamma Lending Holdco LLC and against defendant Big Boots, Inc. in the amount of \$812,722.50 plus interest through September 23, 2019 in the amount of \$60,225.50, plus interest thereafter at a daily rate of \$225.76 until judgment is entered and thereafter at the statutory rate of 9% as calculated by the Clerk of the court together with costs in an amount to be fixed by the Clerk on presentation of a proper bill of costs; and it is further

ORDERED that the issues of the amount of the of the amount of reasonable attorney's fees that plaintiff may recover against the defendant is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This shall constitute the decision and order of the Court.

4/6/2020
DATE

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

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