

TD Bank, N.A. v YTF Hair Extensions, Inc.
2020 NY Slip Op 34219(U)
December 17, 2020
Supreme Court, New York County
Docket Number: 657091/2019
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

TD BANK, N.A.

Plaintiff,

- v -

YTF HAIR EXTENSIONS, INC.,

Defendant.

-----X

INDEX NO. 657091/2019

MOTION DATE 11/20/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for

JUDGMENT - DEFAULT

In this action, *inter alia*, to recover damages for breach of a loan agreement and injunctive relief related to collateral secured by a commercial security agreement, the plaintiff, TD Bank, N.A., moves pursuant to CPLR 3215 for leave to enter a default judgment against the defendant. No opposition is submitted. The motion is granted in part and denied in part without prejudice to renewal upon proper papers.

“On 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 (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720).” Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). As proof of the facts, the plaintiff submits the affidavit of its assistant vice president, Vicki Ketikidis, two promissory notes signed by Satia Ricketts as president of the defendant, a commercial security agreement also signed by Satia Ricketts as president of the defendant, a UCC-1 Financing Statement filed against the defendant, a demand letter, a copy of the summons and complaint, and detailed time and billing records of its attorneys.

The plaintiff's submissions establish, *prima facie*, the facts underpinning the breach of contract cause of action by showing that there was "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009). The proof submitted demonstrates that the defendant is indebted to the plaintiff with respect to the two promissory notes executed on December 18, 2017 (the Loan Agreements). Under the first note, the defendant owes principal in the sum of \$9,182.46, accrued interest of \$1,015.93, plus late fees of \$48.61, and interest on the principal at the rate of 11.38% per annum from June 3, 2020. Under the second note, the defendant owes principal in the sum of \$56,069.01, accrued interest of \$4,489.76, plus late fees of \$319.16, and interest on the principal at the rate of 8.38% as of June 3, 2020.

The plaintiff's submissions also demonstrate proof of a blanket security interest given to it by the defendant in all of the defendant's assets, including its accounts, general intangibles, products, instruments, tools, supplies, records and all other property wherever located, described in greater detail in the commercial security agreement (the Security Agreement) executed on December, 18, 2017. The security interest was perfected by a UCC-1 Financing Statement bearing file number 201801055022937, filed against the defendant in the New York State Department of State on January 5, 2018. After the defendant defaulted on the Loan Agreement, the plaintiff issued a written notice and demand for payment. On October 4, 2019, the plaintiff sent the defendant a letter demanding assembly and turnover of collateral and, pursuant to the provisions of the Security Agreement, access to the defendant's business premises for an evaluation of collateral, all to be provided within 15 days. The defendant did not pay the balance due or turn over the collateral.

The plaintiff's security interest in the collateral pledged in the Security Agreement (the collateral) became enforceable by reason of the defendant's execution of a security agreement describing the collateral, its receipt of value in consideration of receipt of the collateral, and its clearly identifiable rights in the collateral. See UCC 9-203(1), 9-310(a). When a debtor whose obligation is so secured defaults, the secured party has the right to "reduce [its] claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure." UCC 9-501(1).

Here, however, the plaintiff does not separately state and number the forms of judicial relief it seeks as required by CPLR 3014. Rather, the plaintiff brings a single cause of action not specifically labeled, demanding injunctive relief that appears to include, but is not limited to, a restraining order against the removal of collateral, turnover of collateral, appointment of a receiver, seizure of collateral, etc. The plaintiff states only that the Security Agreement permits it to pursue such remedies but does not provide a basis for its entitlement to each of them in an organized manner. Nevertheless, construing the pleadings liberally, as the court is required to do under CPLR 3026, the court finds that the plaintiff has proven entitlement to an order declaring that the defendant's right or title to, or interest in, the collateral is permanently foreclosed, and that the plaintiff is entitled to possession of the collateral, and directing the defendant to assemble and make the collateral available to the plaintiff for inspection, appraisal and sale or other disposition pursuant to the Uniform Commercial Code. The plaintiff's remaining requests for, among other things, appointment of a receiver, are denied without prejudice to renewal upon proper papers. The defendant is reminded that its continued violation of its agreements with the plaintiff may result in the court's granting additional future remedies to the plaintiff, should the plaintiff so move.

As to the plaintiff's claim for attorneys' fees, such fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). The parties' Loan Agreement contains such a provision. It requires the defendant shall pay the plaintiff's reasonable attorney's fees and collection costs in enforcing its rights against the defendant under the Loan Agreement. The factors used to determine the reasonableness of legal fees "include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (citations omitted)." Matter of Barich, 91 AD3d 769, 770 (2nd Dept 2012); see Matter of Freeman, 34 NY2d 1, 9 (1974). An award of reasonable attorney's fees is within the sound discretion of the court. See Diakrousis v Maganga, 61 AD3d 469 (1st Dept. 2009). Here, the detailed time and billing records supplied and affirmed by the plaintiff's attorneys show that, the law firm expended 16.2 hours of work in this action and incurred \$2,682.50 in legal fees. The attorneys also incurred \$525.00 in costs and disbursements. The court finds that, applying the analysis above, the amount requested is reasonable.

Accordingly, and upon the foregoing papers, it is,

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment is granted in part, without opposition, to the extent that the plaintiff may enter a default judgment on the first cause of action and for the injunctive relief described below, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of the plaintiff, TD Bank, N.A., and against the defendant, YTF Hair Extensions, Inc., on the first cause of action in the sum of \$9,182.46, plus accrued interest of \$1,015.93, late fees of \$48.61, and interest on the \$9,182.46 at the rate of 11.38% per annum from June 3, 2020 with regard to the first note, and \$56,069.01, plus accrued interest of \$4,489.76, late fees of \$319.16, and interest on the \$56,069.01 at the rate of 8.38% per annum as of June 3, 2020 with regard to the second note, along with an award of attorneys' fees and costs in the sum of \$3,157.50; and it is further,

ADJUDGED that the defendant's right or title to, or interest in, the collateral that is the subject of the security agreement dated December, 18, 2017, is permanently foreclosed, and the plaintiff is entitled to possession of that collateral; and it is further,

ORDERED and ADJUDGED that judgment is hereby entered in favor of the plaintiff compelling the defendant, its agents, employees, accountants, attorneys and such other persons acting at the direction of or on behalf of the defendant to assemble and make the collateral available or deliver the collateral to the plaintiff for inspection, appraisal and sale or other disposition pursuant to the Uniform Commercial Code in order to satisfy the amounts due to the plaintiff; and it is further,

ORDERED and ADJUDGED that if the possession of the aforesaid collateral is not assembled and made available or delivered to the plaintiff within 30 days of service of a copy of this order with notice of its entry upon defendant, the sheriff of the City or County in which the collateral is located is directed to seize that collateral and deliver it to the plaintiff; and it is further,

ORDERED that the plaintiff shall serve a copy of this order and judgment upon the defendants at their last known addresses by regular and certified mail, return receipt requested, within 20 days of this order.

This constitutes the Decision, Order, and Judgment of the court.

12/17/2020
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☐

DENIED

☐

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE