

Valley Natl. Bank v Tristate Gas Inc.

2009 NY Slip Op 33274(U)

May 29, 2009

Supreme Court, New York County

Docket Number: 114480/2008

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: J. GISCHE

PART 0

Index Number : 114480/2008
VALLEY NATIONAL BANK
vs.
TRISTATE GAS
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*Motion decided in accordance
w/ annexed memorandum
decision.*

FILED
JUN 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/29/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

VALLEY NATIONAL BANK,

Plaintiff,

-against-

TRISTATE GAS INC.,

Defendant.
-----X

Decision/Order

Index No.: 114480/08

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's motion w/RFS affirm in support, exhs	1

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to recover on monies extended to the defendant pursuant to credit line extended to defendant, Tristate Gas Inc. ("Tristate"). Plaintiff moves, pursuant to CPLR § 3215, for entry of a default judgment. This motion has been submitted to the court without opposition.

Although there is due proof of service of the underlying summons and verified complaint, Tristate has not answered the complaint or otherwise appeared in this action within the time provided for in the CPLR, nor has its time to do so been extended by the court. Plaintiff has also filed proof of additional service in compliance with CPLR § 3215 [g]. Therefore, Tristate has defaulted in this action.

Plaintiff is entitled to a default judgment against defendants and in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v.

Kipany Productions Ltd., 289 AD2d 844 (3d Dept 2001). While Tristate's default in answering the complaint constitutes an admission of the relevant factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984).

The relevant facts are based upon documentary evidence and/or are stated in the affidavit of Robert F. Sierchio, vice president of plaintiff. On or about December 7, 2005, plaintiff loaned certain sums of money to Tristate under a Commercial Revolving Credit Line Note (the "Note") dated December 7, 2005. The Note is governed by and incorporates a Commercial Revolving Credit Line Agreement (the "Agreement"), which is undated. Plaintiff has provided the Note, the Agreement, and a copy of defendant's statement of account reflecting a currently unpaid principal balance of \$47,246.84.

Tristate failed to make payments of principal and interest from May 31, 2008. On August 5, 2008, Tristate made a payment of \$1,270, of which \$315.24 was applied to interest and \$854.76 was applied to principal. The Note provides that in the event a payment is more than five days late, Tristate must pay a late charge of 5% of the unpaid portion for the regularly scheduled payment. Therefore, plaintiff claims that \$650.64 is due on the Note for late charges.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990). Plaintiff's claims and the proof submitted on this motion establish the elements of a *prima facie* cause of action for breach of contract against Tristate. Therefore, plaintiff is entitled to a default judgment against Tristate and a money judgment representing the

unpaid principal in the sum of \$47,246.84, together with interest thereon from May 31, 2007 through April 9, 2009 in the sum of \$2,584.85, and late charges of \$650.64.

Plaintiff also seeks to recover its reasonable attorneys' fees, costs and expenses incurred in prosecuting this action. The Agreement provides as follows:

Collection Costs. If [plaintiff] institutes collection proceedings under this Agreement, [plaintiff] may add to the balance of the Line all of [plaintiff's] court costs plus attorney's fees at the rate of 20% of the unpaid balance (collectively, "Collection Costs"). [Defendant] agrees to pay all Collection Costs and also agrees that all of hte Collection Costs are reasonable in amount.

Plaintiff's attorney, Tae Hyun Whang, Esq., claims in his affirmation of services that as of April 1, 2009, his firm has spent a total of 9.4 hours on this matter and has billed plaintiff \$2,499.47 in legal fees and disbursements. Attorney Whang further estimates that "at least an additional \$7,000.00 will be required to successfully complete this matter, including the preparation of this motion, appearance for any referee proceedings, and entry of judgment and recording of judgment in appropriate jurisdictions." .

.Despite plaintiff's claim that under the Agreement, it is entitled to collect 20% of the unpaid balance due and owing from defendant for is attorneys' fees and costs, such claims are still subject to a reasonableness standard reviewable by the court. The court has reviewed the record and finds that only the attorneys fees, costs and disbursements incurred by plaintiff to date, \$2,499,47, is reasonable and commensurate with the motion practice. A mere statement that Attorney Whang anticipates billing almost three times that which he has already billed, without any calculations to establish the reasonableness of such costs, is insufficient to warrant an

award thereon. The court notes that Attorney Whang's concern about future costs for preparation of motions and appearances before a referee is moot since by this decision and order, the court will have fully resolved this action. Accordingly, that branch of the motion seeking attorneys fees, costs and disbursements from defendant Arrow is hereby granted only to the extent that plaintiff is entitled to a money judgment in the total amount of \$2,499.47.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendant Tristate Gas Inc is granted; and it is further

ORDERED that the clerk shall enter a money judgment in favor of plaintiff Valley National Bank and against defendant Tristate Gas Inc., in the sum of \$47,246.84, together with interest thereon from May 31, 2008 through April 9, 2009, in the sum of \$2,584.85, late charges of \$650.64, and \$2,499.47 for plaintiff's attorneys' fees, costs and disbursements incurred in this action.


Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 29, 2009

So Ordered:

FILED
JUN 03 2009
COUNTY CLERK'S OFFICE
NEW YORK


HON. JUDITH J. GISCHE, J.S.C.