

**Suifehne Yongtai Economic & Trade Co., Ltd. v
Unicos Enters., Inc.**

2012 NY Slip Op 32133(U)

February 21, 2012

Supreme Court, New York County

Docket Number: 600677/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

SUI FEHNE YONGTAI ECONOMIC AND TRADE CO., LTD.

INDEX NO. 600677/2010

MOTION DATE _____

- v -
UNICOS ENTERPRISE, INC., PHANNY SILK GROUP,
HUN C. PARK, and FRANKIE HEDVAT

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion *for* a default judgment

PAPERS NUMBERED

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

1-7

Answering Affidavits — Exhibits _____

8-9

Replying Affidavits _____

10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court denies plaintiff's motion for a default judgment, pursuant to the accompanying decision. C.P.L.R. § 3215(f).

FILED

AUG 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/21/12

Lucy Billings

LUCY BILLINGS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 46

SUIFEHNE YONGTAI ECONOMIC AND TRADE
CO., LTD.,

Index No. 600677/2010

Plaintiff

- against -

DECISION AND ORDER

UNICOS ENTERPRISE, INC., PHANNY SILK
GROUP, HUN C. PARK, and FRANKIE HEDVAT,

Defendants

FILED

AUG 10 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

LUCY BILLINGS, J.S.C.:

I. PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT

Plaintiff's witness in the People's Republic of China does not attest that he observed defendants or their representatives sign the Consignment Agreement or guarantees plaintiff seeks to enforce or that he is familiar with the signatures. Matter of Press, 30 A.D.3d 154, 156-57 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); People v. Bryant, 12 A.D.3d 1077, 1079 (4th Dep't 2004). See Peyton v. State of Newburgh, 14 A.D.3d 51, 53-54 (1st Dep't 2004). Nor does plaintiff present any circumstantial evidence authenticating defendants' signatures, such as personal knowledge of the transmission to defendants of an unsigned contract and their return of a signed contract. People v. Pierre, 41 A.D.3d 289, 291 (1st Dep't 2007); People v. Bryant, 12 A.D.3d at 1079; People v. Thomas, 272 A.D.2d 892, 893 (4th Dep't 2000); People v. Jean-Louis, 272 A.D.2d 626, 627 (2d Dep't 2000). Therefore the court

denies plaintiff's motion for a default judgment against defendants. C.P.L.R. § 3215(f); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 82 A.D.3d 674 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010); Beltre v. Babu, 32 A.D.3d 722, 723 (1st Dep't 2006). See Wilson v. Galicia Contr. & Restoration Corp., 10 N.Y.3d 827, 830 (2008); Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70-71 (2003); Al Fayed v. Barak, 39 A.D.3d 371, 372 (1st Dep't 2007).

II. DEFENDANT HEDVAT'S EXCUSE FOR DEFAULTING

In opposing plaintiff's motion for a default judgment, defendant Hedvat explains the reason for his default in answering. He consulted an attorney regarding plaintiff's claims against him and believed that she was handling his defense. When, upon his receipt of plaintiff's motion, he realized he no longer was being represented, he promptly retained another attorney, who promptly responded to the motion. Defendant Hedvat's misplaced reliance on his former attorney thus furnishes a reasonable excuse for his failure to answer. Cirillo v. Macy's, Inc., 61 A.D.3d 538, 540 (1st Dep't 2009); Jones v. 414 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008); Obermaier v. Fix, 25 A.D.3d 327 (1st Dep't 2006); Wilson v. Sherman Terrace Coop., Inc., 14 A.D.3d 367 (1st Dep't 2005). See Roussodimou v. Zafiriadis, 238 A.D.2d 568, 569 (2d Dep't 1997).

III. EXTENDING DEFENDANT HEDVAT'S TIME TO ANSWER

A. Applicable Standards

Although defendant Hedvat does not expressly move to extend his time to answer, C.P.L.R. § 3012(d), his opposition to plaintiff's motion does request that the court vacate his default in answering. Particularly in the context of a motion for a default judgment, the court may extend the time to answer absent a cross-motion for that relief. Id.; Higgins v. Bellet Constr. Co., 287 A.D.2d 377 (1st Dep't 2001); Vines v. Manhattan & Bronx Surface Tr. Operating Auth., 162 A.D.2d 229 (1st Dep't 1990); Willis v. City of New York, 154 A.D.2d 289, 290 (1st Dep't 1989); Shure v. Village of Westhampton Beach, 121 A.D.2d 887, 888 (1st Dep't 1986). See Spira v. New York City Tr. Auth., 49 A.D.3d 478 (1st Dep't 2008); Tulley v. Straus, 265 A.D.2d 399, 401 (2d Dep't 1999).

C.P.L.R. § 3012(d) allows a late answer upon a "reasonable excuse for delay or default" and "such terms as may be just." Although the latter provision may include a showing of a meritorious defense, § 3012(d) does not specifically require a meritorious defense against plaintiff's claims, and such a showing is unnecessary to support acceptance of a late answer. Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521 (1st Dep't 2009); Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 414 Equities LLC, 57 A.D.3d at 81; Spira v. New York City Tr. Auth., 49 A.D.3d 478.

B. Allowing Defendant Hedvat's Late Answer

Defendant Hedvat's explanation for failing to answer timely, absent any discernible prejudice to plaintiff, satisfactorily excuses his late answer. Gazes v. Bennett, 70 A.D.3d 579 (1st Dep't 2010); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521; Cirillo v. Macy's, Inc., 61 A.D.3d at 540; Jones v. 414 Equities LLC, 57 A.D.3d at 81. In opposing a default judgment, Hedvat also presents several defenses. First, plaintiff, a foreign corporation, is unauthorized to conduct business in New York, but is conducting business in New York, and therefore may not maintain this action until authorized. N.Y. Bus. Corp. Law § 1312(a). E.g., Barklee Realty Co. v. Pataki, 309 A.D.2d 310, 315-16 (1st Dep't 2003); Highfill, Inc. v. Bruce & Iris, Inc., 50 A.D.3d 742, 744 (2d Dep't 2008).

Second, Hedvat had no financial interest in defendant Phanny Silk Group or defendant Unicos Enterprise, Inc., against which plaintiff agreed to forbear commencing an action upon a letter of credit and bill of lading, in exchange for personal guarantees of defendant entities' obligations as consignees under a Consignment Agreement with plaintiff consignor. Therefore he received no consideration for signing what plaintiff claims is his personal guarantee of Phanny Silk's obligations under that agreement. Parkchester S. Condominium Inc. v. Hernandez, 71 A.D.3d 503, 504 (1st Dep't 2010); American Express Bank v. Spire Puerto Rico, 226 A.D.2d 158, 159 (1st Dep't 1996). See Bronx Store Equip. Co., Inc. v. Westbury Brooklyn Assoc., L.P., 16 A.D.3d 119, 120 (1st

Dep't 2005); PC Ware Intl. v. Jinma Computer Co., 299 A.D.2d 271, 272 (1st Dep't 2002); Atlantic Bank of N.Y. v. Bertolini Indus., 183 A.D.2d 591, 592 (1st Dep't 1992). He had neither any purpose in guaranteeing repayment to induce plaintiff's forbearance against Phanny Silk, see Caruso v. Northeast Emergency Med. Assoc., P.C., 54 A.D.3d 524, 526-27 (3d Dep't 2008), nor the requisite intent to be bound to plaintiff "as creditor to pay a debt contracted by a third party," here Phanny Silk, "either immediately upon default of the third party or after attempts to effect collection from the third party have failed." Chemical Bank v. Meltzer, 93 N.Y.2d 296, 302-303 (1999). Based on "the respective roles of the parties and the nature of the underlying transaction," id. at 303, the transaction "as an integrated whole," id. at 304, and the context of any such guarantee, Hedvat maintains he did not take on the status of a personal guarantor. Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324 (2007); Bronx Store Equip. Co., Inc. v. Westbury Brooklyn Assoc., L.P., 16 A.D.3d at 120; 150 Broadway Assoc. N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d 1, 7 (1st Dep't 2004); Caruso v. Northeast Emergency Med. Assoc., P.C., 54 A.D.3d at 527.

Third, Hedvat signed the consignment Agreement at the end, on page 8, which included a Personal Guarantee provision, "on behalf of PHANNY SILK GROUP." Aff. in Supp. of Default J. of Chun Ji Jin Ex. A, at 8. Page 9, which shows Hedvat's signature "as individual," contains no text. Id. at 9. Thus, consistent with Hedvat's lack of intent to be bound as the guarantor of

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Phanny Silk's contracted debt to plaintiff upon Phanny Silk's default, articulated above, his signature is not identified as connected to any personal guarantee. Absent any text, the signature page that includes the provision "as individual" does not plainly and unambiguously relate to a promise that Hedvat individually will pay Phanny Silk's debt under the Consignment Agreement. On the signature page that does express a promise to pay Phanny Silk's debt, Hedvat signed only "on behalf of PHANNY SILK GROUP." If explicit terms that he promised to pay its debt are lacking, the ambiguity raises a serious question regarding the guarantee's enforceability against him. Mathias & Carr, Inc. v. Mangini, 13 A.D.3d 148 (1st Dep't 2004); Lowinger v. Lowinger, 287 A.D.2d 39, 45 (1st Dep't 2001); Ian Woodner Family Collection v. Abaris Books, 284 A.D.2d 163, 164 (1st Dep't 2001); Sound Distrib. Corp. v. Richmond, 213 A.D.2d 178, 179 (1st Dep't 1995).

Finally, plaintiff does not articulate how defendant Hedvat's delay in answering has caused plaintiff to change its position to its prejudice. E.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d 581, 582 (1st Dep't 2011). Absent discernible prejudice from Hedvat's delay, id.; Mut. Mar. Off., Inc. v. Joy Constr. Corp., 39 A.D.3d 417, 419 (1st Dep't 2007); Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d 306, 307-308 (1st Dep't 2005); Forastieri v. Hasset, 167 A.D.2d 125, 126 (1st Dep't 1990), his excuse for his delay and his articulated defenses provide just terms on which to allow his answer, as long as he serves it promptly. C.P.L.R. § 3012(d); Forastieri v.

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Hasset, 167 A.D.2d at 126. See Aloizos v. Trinity Realty Corp.,
171 A.D.2d 426, 427 (1st Dep't 1991).

IV. CONCLUSION

The deficiencies in admissible evidence supporting plaintiff's claim constitute grounds to deny its motion for a default judgment against all defendants. Defendant Hedvat's excuse for failing to respond to the complaint until after he received plaintiff's motion also constitutes grounds to deny a default judgment against him, as well as to allow his late answer. Spira v. New York City Tr. Auth., 49 A.D.3d 478; Guzetti v. City of New York, 32 A.D.3d 234 (1st Dep't 2006); Rodriguez v. Dixie N.Y.C., Inc., 26 A.D.3d 199, 200 (1st Dep't 2006); Terrones v. Morera, 295 A.D.2d 254, 255 (1st Dep't 2003). See Mayerson Stutman, LLP v. Most, 30 A.D.3d 261 (1st Dep't 2006); Tulley v. Straus, 265 A.D.2d at 401. Therefore the court denies plaintiff's motion for a default judgment and, on the grounds set forth above, extends defendant Hedvat's time to serve and file an answer to 20 days after entry of this order. C.P.L.R. §§ 3012(d), 3215(f). This decision constitutes the court's order.

DATED: February 21, 2012

FILED

AUG 10 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Lucy Billings

LUCY BILLINGS, J.S.C.

**LUCY BILLINGS
J.S.C.**