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INDEX
NO. 07885-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: February 19, 2008
Submission Date: February 11, 2008
Motion Sequence No. 002/MOT D

x

MARKET SERVICE, INC. d/b/a ACCOUNTS RECEIVABLE MANAGEMENT SOLUTIONS,

Plaintiffs,

COUNSEL FOR PLAINTIFF
Anthony K. Dilimetin, Esq.
1979 Marcus Ave., Suite 210
Lake Success, NY 11042

- against -

COUNSEL FOR DEFENDANT

S.P. DISCOUNT INC., RAND WHOLESALE INC., VAL VOLKOVAS a/k/a VITALIJUS VOLKOVAS, VLADIMIR A. POLSKI and YURIY SHVARTS,

NO APPEARANCE

Defendants.

x

ORDER

The following papers were read on Plaintiff's motion for a default judgment:

Notice of motion dated February 11, 2008
Affirmation of Anthony K. Dilimetin, Esq. dated February 11, 2008;
Affidavit of Larry Sarf dated February 11, 2008

BACKGROUND

Plaintiff, Market Service, Inc. ("Market Service"), alleges that it is entitled to damages as a result of Defendants' failure to make a payment for

the outstanding invoices, asserting that Defendants, Val Volkovas ("Volkovas"), president of Defendant, S.P. Discount ("Discount") and Vladimir Polski ("Polski"), are personally liable for the debts.

Market Service alleges that it is the assignee and authorized agent for BIC USA, Inc. ("BIC USA").

On May 25, 2005, Discount entered into an agreement, "Terms of Credit", with BIC USA, under which BIC USA, as seller, agreed to make a credit advance and Discount promised to make payment for the goods delivered and recieved after examining the invoices issued by the Seller.

Volkovas executed the agreement as president of Discount. He also personally guaranteed all debts owed to BIC USA by Discount.

Market Service alleges that goods and merchandise were delivered and received without objection by Defendants upon their request. The agreed upon value of the goods delivered is $385,993. Defendants have not paid any part of said sum despite Plaintiff's numerous demands for payment. As a result, Market Service seeks to recover $385,993 plus interest from April 1, 2007.

Defendants were served with a copy of summons and complaint. Polski and Volkovas were each served on May 9, 2007 pursuant to CPLR 308(2). Additional service of the summons and complaint were made by mail to each Defendant's last known residence pursuant to CPLR 3215 (g). Service was complete on May 26, 2007. To date, Defendants have not appeared, answered or moved in this case. Accordingly, Market Service now moves for leave to enter a default judgment against Volkovas and Polski.

DISCUSSION

CPLR 3215 permits a party to obtain a default judgment against a defendant who defaults in appearing and answering. An application for leave to enter a default judgment must be supported by proof of service of summons and complaint, and affidavit of merit sworn by a person with actual legal knowledge of the facts surrounding the claim and proof of default. Siegel, *New York Practice 4th* § 295; and CPLR 3215(f). Further, the party seeking a default judgment must establish the existence of a *prima facie* cause of action against the defaulting party. Joosten v. Gale, 129 A.D.2d 531 (1st Dept. 1987).

When a defendant has failed to appear, the plaintiff does not have the benefit of discovery. Thus, "the affidavit (of merit) or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70 (2003). Moreover, "defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inference that flow from them." *Id.* See also, Rokina Optical Co. v. Camera King, 63 N.Y.2d 728, 730 (1984).

Market Service has established this Court's jurisdiction over the Defendants. The affidavits of service establish personal service upon Polski and Volkovas pursuant to CPLR 308(2). Market Service's motion for default judgment is supported by an affidavit of merit made by Larry Sarf, president of Market Service, who has first hand knowledge of the facts constituting the cause of action as well as the verified complaint. See, Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1987); and Adkins v.

Lipner, Gordon & Co., 10 Misc.3d 1062(A) (Sup. Ct. Nassau. Co. 2005).

Market Service has established its *prima facie* claim for breach of contract against Volkovas, but not against Polski. The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and the defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986). Market Service failed to demonstrate Polski's relation to the agreement and to BIC USA, Inc. or Discount. Therefore, Market Service has failed to establish that Polski is a party to the agreement and is liable for breach thereof.

Plaintiff alleges that Volkovas personally guaranteed the payment due. A guaranty must be in writing executed by the person to be charged. Schulman v.Westchester Mechanical Contractors, Inc., 56 A.D.2d 625 (2nd Dept. 1977); and General Obligations Law § 5-701(a)(2). The intent to guarantee payment of the obligation must be clear and explicit. PNC Capital Recovery v. Mechanical Parking Systems, Inc., 283 A.D.2d 268 (1st Dept. 2001), *app. dism.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guarantee the obligation is established by having the guarantor sign in that capacity and by the language of the guaranty. Slazman Sign Co. v. Beck,10 N.Y.2d 63 (1961); and Harrison Court Assocs. v. 220 Westchester Ave. Assocs., 203 A.D.2d 244 (2nd Dept. 1994).

A guaranty is a contract that is to be construed so as to give effect to the intent of the parties as reflected by the language of the agreement. Fehr Bros. Inc. v. Scheiman, 212 A.D.2d 13 (1st Dept. 1986). The liability of a guarantor is narrowly construed and cannot be extended beyond the clear and explicit language of the guaranty. Key Bank of

Long Island v. Burns, 162 A.D.2d 501 (2nd Dept. 1990).

Volkovas signed the guaranty but Polski did not. The language of the guaranty indicates that the payment of debt was guaranteed. Although the language of the guaranty suggests that there was to be joint and several liability for Discount's obligations, Volkovas was the only signatory.

It is clear that Volkovas is in default for failing to appear in this matter. Having failed to properly deny his liability herein, the motion must be granted.

Accordingly, it is

ORDERED, that Plaintiff's motion for leave to enter a default judgment against Polski is **denied**; and it is further,

ORDERED, that Plaintiff's motion for leave to enter a default judgment against Volkovas is **granted;** and it is further,

ORDERED, that the County Clerk of Nassau County is directed to enter judgment in favor of the Plaintiff and against the Defendant, Val Volkovas, a/k/a Vitalijus Volkovas, in the amount of $385,993 together with interest from April 1, 2007, costs and disbursements as taxed by the Clerk.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
June 23, 2008

HON. LEONARD B. AUSTIN, J.S.C.
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ENTERED
JUN 25 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE