

Signature Bank v Chow Baby, LLC

2010 NY Slip Op 33808(U)

February 5, 2010

Sup Ct, NY County

Docket Number: 107722/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

SIGNATURE BANK,

Plaintiff,

-against-

CHOW BABY, LLC and MICHELLE
CHRISTMAN, Individually

Defendants.

INDEX NO. 107722/09

MOTION DATE Dec. 22, 2009

MOTION SEQ. NO. 001

MOTION CAL. NO. 10

The following papers, numbered 1 to 2 were read on this motion for a default judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED


1-2

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

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion for an order pursuant to CPLR § 3215 granting a default judgment against defendant Chow Baby, LLC is decided in accordance with the accompanying decision and order.

Dated: 2/5/10


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

-----X
SIGNATURE BANK,

**DECISION AND
ORDER**

Plaintiff,

-against-

Index No. 107722/2009

**CHOW BABY, LLC and MICHELLE CHRISTMAN,
Individually,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

In this action to recover a balance due on a business revolving line of credit, plaintiff Signature Bank ("Signature Bank" or "plaintiff") moves for a default judgment as against defendant Chow Baby, LLC ("Chow Baby"). Defendant Michelle Christman ("Christman") is the guarantor of Chow Baby's payment to Signature Bank under the line of credit agreement. The action as against Christman is presently stayed pursuant to the Bankruptcy Code § 362 (a) due her filing of a petition for bankruptcy protection. The motion has been submitted without opposition.

On June 1, 2009, Signature Bank commenced the instant action by filing the summons and verified complaint by which it sought to recover the sum of \$93,359.48 alleged to be due on a revolving business line of credit, plus interest from April 20, 2009, costs and disbursements upon theories of breach of contract, unjust enrichment and an account stated.

The affidavit of service, annexed to the moving papers, indicates that service was effectuated upon Chow Baby on July 8, 2009, at 6:48 p.m., pursuant to CPLR § 311-a by delivering a copy of the summons and verified complaint to Michelle Christman, alleged to be Baby Chow's managing agent, at 204 Huntington Street, Apt. 3B, Brooklyn, New York 11231.

Defendant Baby Chow has neither appeared, nor answered the complaint within the time provided under the CPLR, nor has it obtained an order from the Court extending its time to do so.

In support of its motion for a default judgment, plaintiff submits an affirmation of counsel, Janelle B. Rosenbaum, Esq., an associate of Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, establishing the default, together with Exhibits consisting, *inter alia*, of the summons and verified complaint to which the business line of credit agreement and the guaranty, dated April 11,

2008, are annexed, the affidavit of service, and the statements of account from April 11, 2008 through September 30, 2009.

It is well settled that a party may obtain a default judgment against a defendant who fails to appear or answer (CPLR § 3215 [a]). On an application for a default judgment, the moving party must present proof of service of the summons and complaint, proof of the claim by a person with personal knowledge of the facts and proof of the default (*see*, CPLR § 3215 [f]; *Woodsen v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]).

Plaintiff has established that it properly effectuated service upon Chow Baby pursuant to CPLR § 311 (a) (1) by serving its authorized agent.

Having failed to answer the allegations of the complaint, the defendant is deemed to have admitted “all traversable allegations in the complaint, including the basic allegation of liability” (*Curiale v Andra Ins. Co.*, 88 NY2d 268, 279 [1996]). Nevertheless, in order to be entitled to a default judgment, plaintiff must allege enough facts to enable a court to determine whether the plaintiff has established, prima facie, entitlement to judgment (*see*, *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept. 2007]; *Dyno v Rose*, 260 AD2d 694 [3d Dept. 1999]). If upon review of the facts proffered to establish the merits of a claim the court concludes that plaintiff has failed to establish a prima facie case, plaintiff is not entitled to a default judgment (*see*, *Dyno v Rose*, *supra*).

An account stated is predicated upon some indebtedness between the parties resulting from previous transactions with respect to the account items and the balance due or an express agreement between the parties to treat the statement as an account stated (*see*, *Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, 996 [1979]; *Ryan Graphics v Bailin*, 39 AD3d 249, 250 [1st Dept. 2007]).

The allegations of the verified complaint which “may be used as the affidavit of the facts constituting the claim” (CPLR § 3215 [f]) are sufficient to make out the requisite elements of a cause of action for an account stated for purposes of entering a default against Chow Baby on the third cause of action alleged in the verified complaint. The receipt and retention of itemized bills for a sum certain without objection within a reasonable time gives rise to an actionable account stated (*see*, *Zanani v Schwimmer*, 50 AD3d 445, 446 [1st Dept. 2008]; *Morrison Cohen Singer & Weinstein*,

LLP v Ackerman, 280 AD2d 355 [1st Dept.2001]; *Shea & Gould v Burr*, 194 AD2d 369 [1st Dept. 1993]). By failing to object, the recipient of the bill signifies that it agrees with the sender concerning the amount owed (*id.*). Here, plaintiff alleges that it sent regular monthly statements to Chow Baby as well as a final formal demand letter dated May 12, 2009, and that defendants made no objections to such statements and failed to pay the amount due.

Accordingly, it is

ORDERED, that plaintiff's motion for a default judgment as against defendant Chow Baby, LLC, is granted on default and the action is severed; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment on the third cause of action alleged in the verified complaint in favor of plaintiff SIGNATURE BANK and against defendant CHOW BABY LLC, in the sum of \$93,359.48, plus interest at the contract rate of 3.25% from April 20, 2009 through entry of judgment, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk upon submission of an appropriate bill of costs, making in all a sum total of \$ _____ and that plaintiff have execution therefor; and it is further

ORDERED, that the action shall continue as against defendant Michelle Christman; and it is further

ORDERED, that within 30 days of entry, plaintiff shall serve a copy of this order with notice of entry upon defendants.

This constitutes the decision and order of the court.

DATED: 2/5/10

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