

New York Community Bank v Ari Chitrik

2011 NY Slip Op 33522(U)

December 16, 2011

Supreme Court, Nassau County

Docket Number: 18180-10

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
NEW YORK COMMUNITY BANK,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

-against-

**Index No: 18180-10
Motion Seq. No: 4
Submission Date: 11/7/11**

**ARI CHITRIK A/K/A AARON CHITRIK
PUREC AND SHAYA BOYMELGREEN A/K/A
JESHAYAHU BOYMELGREEN,**

Defendants.

-----x

Papers Read on this Motion:

Notice of Motion, Attorney's Statement, Affidavit in Support and Exhibits...x

This matter is before the court on the motion by Plaintiff New York Community Bank ("Plaintiff" or "NYCB"), filed November 1, 2011 and submitted November 7, 2011. For the reasons set forth below, the Court grants Plaintiff's motion to the extent that the Court grants Plaintiff judgment against Defendant Ari Chitrik a/k/a Aaron Chitrik on the first cause of action in the Verified Complaint in the principal sum of \$6,114,930, plus interest at the Contract Rate and Default Rate, late fees and the cost of collection including reasonable attorney's fees to be determined at an inquest.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3215, granting Plaintiff a default judgment against Defendant Ari Chitrik a/k/a Aaron Chitrik ("Chitrik").

Chitrik has not appeared, and has not submitted an opposition or other response to

Plaintiff's motion.

B. The Parties' History

This action was the subject of a prior decision of the Court dated July 11, 2011 ("Prior Decision"). In the Prior Decision, the Court denied Plaintiff's motion for a default judgment, and directed counsel for Plaintiff and counsel for Chitrik, or Chitrik himself if he was unrepresented by counsel, to appear before the Court for a Preliminary Conference on September 7, 2011 at 10:30 a.m. The Court held further that, should Chitrik fail to appear as directed, the Court would entertain an immediate application by Plaintiff for renewal or reargument of its motion.

In the Prior Decision, the Court outlined in detail the allegations and affidavit in support, and the Court incorporates the Prior Decision herein by reference. As noted in the Prior Decision, Plaintiff seeks judgment against Defendant Chitrik pursuant to a revolving business line of credit note dated November 13, 2006 in the maximum principal sum of \$6,500,000 ("Note"), as amended, plus interest, late fees and costs and fees incurred in collection of the Note. The Complaint contains three causes of action against Chitrik. The first cause of action, sounding in breach of contract, alleges that, as of September 9, 2010, Chitrik owed a total sum of \$6,680,690.04 in principal, unpaid interest at the Contract Rate and Default Rate, and late charges on the Note. Plaintiff seeks damages against Chitrik consisting of principal in the sum of \$6,114,930, plus interest at the Contract Rate and Default Rate, late fees and the cost of collection including reasonable attorney's fees. The second and third causes of action seek similar relief against Chitrik under the theories of money lent and unjust enrichment. The Complaint, which includes copies of the Note, modification agreements and Guaranty, is verified by Douglas H. Orth, a Vice President of NYCB. In addition, Anthony E. Guinyard ("Guinyard"), a vice president of New York Community Bancorp, Inc., the parent company of NYCB, provided an Affidavit in Support in which he affirmed the truth of the allegations in the Complaint regarding the Note and Chitrik's failure to make required payments under the Note. Plaintiff has submitted Guinyard's affidavit in support of the instant motion. The Prior Decision also outlined Plaintiff's service of the Complaint on Chitrik and his failure to serve an answer to the Complaint.

In support of the instant motion, Plaintiff's counsel affirms that he served a copy of the Prior Decision on July 19, 2011, as reflected by the affidavit of service provided (Ex. 8 to Krause

Aff. in Supp.). Plaintiff's counsel affirms, further, that Chitrik failed to appear at the Preliminary Conference as directed by the Court, has failed to answer or make any motion with respect to the Complaint, and has not requested any extension of his time to answer or respond to the Complaint.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a default judgment by establishing its service of the Complaint on Chitrik and his failure to answer in a timely manner, and demonstrating Chitrik's failure to make required payments under the Note. Moreover, Chitrik failed to appear as directed by the Court in the Prior Decision, has persisted in his failure to answer or make any motion with respect to the Complaint, has not requested any extension of his time to answer or respond to the Complaint and has submitted no response to Plaintiff's motion.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Promissory Note

To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002). Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008).

C. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v.*

Furia, 116 A.D.2d 694 (2d Dept. 1986). See also *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia*, *supra*.

D. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See *Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

E. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion to the extent that the Court grants Plaintiff judgment against Defendant Ari Chitrik a/k/a Aaron Chitrik on the first cause of action in the Verified Complaint in the principal sum of \$6,114,930, plus interest at the Contract Rate and Default Rate, late fees and the cost of collection including reasonable attorney's fees to be determined at an inquest. Plaintiff has demonstrated its right to judgment by providing proof of service of the Complaint on Defendant Chitrik, and providing an affidavit and supporting documentation establishing Chitrik's failure to make required payments under the Note. In addition, Plaintiff is entitled to collection costs, including reasonable attorney's fees, incurred in enforcing its rights under the Note. The Court declines to award Plaintiff judgment on the second and third causes of action in the Complaint which seek identical relief, under different theories, as is sought in the

first cause of action. In light of the foregoing, it is hereby:

ORDERED, that the motion of Plaintiff New York Community Bank for a default judgment against Defendant Ari Chitrik a/k/a Aaron Chitrik is granted to the extent that Plaintiff is awarded judgment against Defendant Ari Chitrik a/k/a Aaron Chitrik on the first cause of action in the Verified Complaint in the principal sum of \$6,114,930, plus interest at the Contract Rate and Default Rate, late fees and the cost of collection including reasonable attorney's fees to be determined at an inquest.; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of interest, late fees and collection costs, including attorney's fees, to be awarded to Plaintiff on January 25, 2012 at 9:30 a.m.; and it is further.

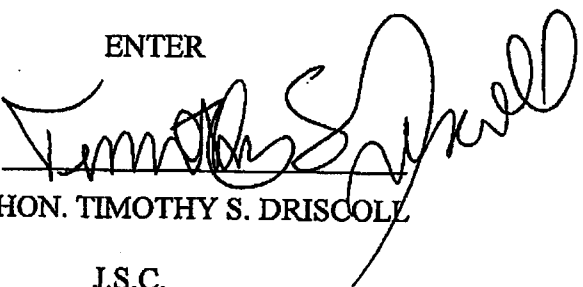
ORDERED, that Plaintiff shall serve upon Defendant Ari Chitrik A/K/A Aaron Chitrik, by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before January 11, 2012; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of Plaintiff New York Community Bank and against Defendant Ari Chitrik a/k/a Aaron Chitrik in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
December 16, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
DEC 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE