SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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LIVING ARTS, INC.,

Plaintiff,

-against-

PAB THEATRE, INC.,

Defendants.

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DECISION AND ORDER
Index No. 652892/15
Mot. Seq. No. 002

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-3 (Exs. A-E)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action to recover on a promissory note, plaintiff Living Arts, Inc. moves, pursuant to CPLR 3215(a), for a default judgment against defendant PAB Theatre, Inc. in the amount of $1.3 million, plus interest. Defendant does not oppose the motion. After a review of plaintiff's papers, and after a review of the relevant statutes and case law, the motion is **granted.**

FACTUAL AND PROCEDURAL BACKGROUND:

On November 3, 2009, plaintiff Living Arts, Inc. extended a secured promissory note ("the note") to defendant PAB Theatre, Inc. in the amount of $1,325,000. Ex. A. The maturity date of the note was November 2, 2016. Id. Paragraph 2(g)(iv) of the note obligated defendant to make certain payments to plaintiff. Id. Paragraph 7(a) of the note defined circumstances under which an "Event of Note Default" would occur. Id. This included a failure to "observe or perform in any material

respect any of the . . . covenants, agreements, terms or provisions of this [n]ote . . ." Id. Paragraph 7(b) of the note provided that, upon the occurrence of an event of note default, plaintiff could, inter alia, "by written notice to [defendant], declare the unpaid principal amount of this [n]ote and all other amounts payable hereunder to be immediately due and payable, whereupon the unpaid principal amount of this [n]ote and all such other amounts shall become immediately due and payable . . . Id.

Paragraph 3 of the note provided that, "[u]pon the occurrence of an [e]vent of [n]ote [d]efault", if any amount of principal was not paid when due, interest would be charged "at a per annum rate equal to ten percent (12.5%) [sic]." Ex. A. Additionally, a security agreement dated November 3, 2009 provided that, if defendant defaulted on its payment obligation, it would owe plaintiff $4,000 in attorneys' fees. Ex. C, at par. 7(f).

By correspondence dated May 21, 2015, Peter Klein, President of plaintiff, wrote to defendant to advise that an event of note default had occurred. Ex. B. Specifically, Klein wrote that defendant "ha[d] failed to make full payment to [plaintiff] [pursuant to the terms of paragraph 2(g)(iv)] [of the note] . . ." Id. Plaintiff advised defendant that it had 30 days to cure the default. Id.

On August 20, 2015, plaintiff commenced the captioned action seeking to recover $1.3 million on the note, plus interest and attorneys' fees. Ex. D.[1] According to the affidavit of service, the secretary of state was served with "a true copy" of the summons and complaint pursuant to Business Corporation Law ("BCL") 306(b) on September 17, 2015 (NYSCEF Doc. No. 2). When defendant failed to answer, plaintiff moved for a default judgment against it in the amount of $1.3

[1]Although plaintiff initially sought $1,325,000, it concedes that defendant made one payment of $25,000. Klein Aff., at par. 3.

million. NYSCEF Doc. No. 8.

By order dated July 29, 2016, the motion was denied on the ground that defendant had not been properly served with two copies of the summons and complaint pursuant to BCL 306(b)(1). NYSCEF Doc. No. 17. The denial was, however, with leave to renew upon proper papers. Id. Plaintiff now moves for the same relief, this time including an affidavit from its process server establishing that the initial affidavit of service contained an error and that the Secretary of State was indeed served with two copies of the summons and complaint in compliance with BCL 306(b)(1).

POSITION OF THE PLAINTIFF:

Plaintiff argues that it is entitled to a default judgment in the amount of $1.3 million, plus interest because defendant failed to answer, move for an extension of time to answer, or otherwise appear. It maintains that it properly served defendant via the secretary of state pursuant to BCL 306(b)(1) and that it has set forth all of the necessary elements for establishing its entitlement to a default judgment.

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against [it]." It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing." *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011). Proof of the facts constituting the claim may be

provided by plaintiff's affidavit or a verified complaint. *See* CPLR 3215(f). A default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, plaintiff has submitted proof of the facts constituting the claim in the form of the verified complaint (Ex. D) and the affidavit of Peter Klein. The affidavit of Elliott M. Portman, Esq. in support of the motion establishes defendant's default in answering or otherwise appearing. Moreover, plaintiff has submitted the affidavit of its process server establishing proper proof of service of the summons and complaint pursuant to BCL 306(b)(1). Thus, this Court finds that plaintiff is entitled to judgment against defendant in the amount of $1.3 million plus interest. However, since paragraph 3 of the note is contradictory regarding the rate of interest, i.e., 10% percent versus 12.5%, this Court construes the discrepancy against the plaintiff drafter (*see Jacobson v Sassower*, 66 NY2d 991, 993 [1985]), and awards interest at the lower rate of 10% from May 21, 2015.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Living Arts, Inc., a Delaware Corporation, having an address in care of Shelowitz & Associates, PLLC, 11 Penn Plaza, 16th Floor, New York, New York 10001 have judgment against defendant PAB Theatre, Inc., having its address at One Lincoln Plaza, 23H, New York, New York 10023, in the amount of $1,300,000, plus interest at the rate of 10% per annum from May 21, 2015; and it is further,

ORDERED that this constitutes the decision and order of the Court.

Dated: December 22, 2016

ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT