

CIT Bank, N.A. v Tri-Elite Group Corp.

2019 NY Slip Op 30403(U)

February 19, 2019

Supreme Court, New York County

Docket Number: 157131/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 157131/2018
CIT BANK, N.A.,
MOTION DATE 11/05/2018
Plaintiff,
MOTION SEQ. NO. 001
- v -

TRI-ELITE GROUP CORP., d/b/a EL LUCHADOR, and TONY FOK
Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for JUDGMENT - DEFAULT

In this action to recover damages for breach of contract and breach of a personal guaranty, and for unjust enrichment, the plaintiff CIT Bank, N.A., moves for leave to enter a default judgment on its first four causes of action against the defendants. The plaintiff waives its fifth cause of action, sounding in unjust enrichment. The plaintiff also seeks attorney's fees. No opposition is submitted. The motion is granted in part inasmuch as the plaintiff has submitted proof of proper service of the summons and complaint on the defendants, proof of the facts constituting the claims, and proof of the defendants' failure to answer or appear. See CPLR 3215(f); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011).

While the "quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, *supra*; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). The plaintiff's submissions include, among other items, the complaint, an affidavit of Amy LaVoie, Legal Collections Manager for the plaintiff, a master equipment financing agreement and personal guaranty signed by Tony Fok, two equipment financing schedules signed by Tony Fok, and statements showing the defendants' payment history and outstanding balances due to the plaintiff pursuant to the master equipment financing agreement and financing schedules.

The plaintiff's proof establishes the necessary elements of a breach of contract claim: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Further, "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National

Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991). The terms of the subject guaranty agreement are clear, unambiguous, absolute and unconditional and, having defaulted in this action, the defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiff with regard to the agreement. Moreover, having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

The plaintiff seeks reimbursement for the attorneys' fees expended in the prosecution of this action. Such fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). Here, the plaintiff points to paragraph fifteen of the master equipment financing agreement, which provides that in the event of a default in payment by the defendants, the defendants are obligated to pay "all costs and expenses related to collection . . . including fees." The personal guaranty agreement further states that the guarantor shall "pay all costs, including attorneys fees incurred in enforcement of this guaranty." The plaintiff's counsel avers in an affidavit that the plaintiff is entitled to \$2,100.00 for work he performed in this matter. He also states that he took the matter on a 25% contingency fee basis. The plaintiff's counsel provides no records to support his testimony concerning the work he performed.

The terms "costs" and "expenses" "do not include attorney fees in the absence of express language to that effect in the contract or a statute." Golub v Board of Managers of Greentree at Murray Hill, 73 AD3d 570, 571 (1st Dept. 2010); see Royal Discount Corp. v Luxor Motor Sales Corp., 170 NYS 2d 382 (App Term, 1st Dept. 1957). The master contract refers to costs and expenses "including fees." However, attorneys' fees, or any fees specifically incident to litigation, are not mentioned. In the absence of clear contractual intent to waive the default rule that parties are responsible for their own attorney's fees, the plaintiff is not entitled to an award of attorneys' fees from the defendant Tri-Elite Group Corp. under these circumstances. See Community Counseling & Mediation Services v Chera, 115 AD3d 589 (1st Dept. 2014); Matza v Oshman, Helfenstein & Matza, 33 AD3d 493 (1st Dept. 2006); Iskalo 5000 Main LLC v Town of Amherst Indus. Development Agency, 147 AD3d 1414 (4th Dept. 2017).

However, the guaranty agreement signed by the defendant Tony Fok is sufficiently clear to warrant an award of attorneys' fees as against Fok upon the plaintiff's submission of adequate proof of the fees it seeks. Since the plaintiff's submissions are insufficient to establish the amount of attorneys' fees to which the plaintiff is entitled at this juncture, the court refers the issue of the amount due to the plaintiff for attorneys' fees under the subject guaranty agreement to a Judicial Hearing Officer or Special Referee.

In light of the foregoing, it is

ORDERED the branch of the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment as to its first four causes of action, sounding in breach of contract and breach of a guaranty agreement, is granted, without opposition, the plaintiff's fifth cause of action, sounding in unjust enrichment, is deemed waived, the branch of the motion seeking attorneys' fees is granted as against the defendant Tony Fok, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sums of: (a) \$43,644.73, with interest at a rate of 24.99% per annum from July 8, 2018, plus fees and late payment charges in the sum of \$1,044.16, less a credit of \$991.96; and (b) \$12,172.68, with interest at a rate of 24.99% per annum from February 12, 2018, plus fees and late payment charges in the sum of \$484.00; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the plaintiff from the defendant Tony Fok for attorneys' fees and costs under the subject guaranty agreement; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel for the plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiff shall serve a proposed accounting of attorneys' fees within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of the plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the plaintiff may enter an amended judgment adding the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

ORDERED that the plaintiff shall serve a copy of this order upon the defendants within 15 days of this order.

This constitutes the Decision and Order of the court.

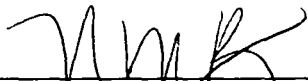
2/19/2019
DATE

CHECK ONE: CASE DISPOSED DENIED

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE



 NANCY M. BANNON, J.S.C.
 HON. NANCY M. BANNON