

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

SCAN

Present:

**HON. LAWRENCE J. BRENNAN
Acting Justice Supreme Court**

-----x **TRIAL PART: 52**

ZAZEN RESTAURANT CORP.

NASSAU COUNTY

INDEX NO.: 018022/04

Plaintiffs,

-against-

MOTION DATE: 5-5-06

SUBMIT DATE: 5-17-06

SEQ. NUMBER - 003

**TURMERIC, INC. and DIWALKER MOSES
and UJWALA MOSES,**

Defendants.

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The following papers have been read on this motion:

Order to Show Cause dated April 12, 2006

Affidavit in Opposition dated 4/27/06

Reply Affidavit dated 5/2/06

Motion for an Order vacating the Orders of this Court dated May 25, 2005 and February 24, 2006, and the defaults of the defendants; allowing the defendants to serve the answer annexed to the moving papers as Exhibit B, to implead and counterclaim against Danny Chong, on the grounds of the defendants' excusable default and meritorious defense; and pursuant to CPLR 3212, granting Defendant, Ujwala Moses, summary judgment dismissing the claim of the plaintiff on the grounds that Defendant, Ujwala Moses, is not a signatory to any writing guaranteeing any obligation to the plaintiff, and has no independent obligation to the plaintiff, is determined as hereinafter set forth.

In the underlying action, the plaintiff seeks to collect on a promissory note.

On or about October 14, 2003, the Plaintiff, Zazen Restaurant Corp., and Defendant, Turmeric, Inc., entered into an Agreement of Sale whereby Turmeric, Inc. acquired the assets of the restaurant business operated by the plaintiff at 29 West 21st Street, New York, N.Y. Turmeric, Inc., as maker, executed a promissory note dated December 17, 2003, to Zazen, in the principal sum of \$120,000.00. The note was signed by Ujwala Moses, President. Diwaker Moses executed a Guaranty dated December 17, 2003. Defendant, Ujwala Moses, is the president and the owner of 50% of the outstanding shares of Turmeric, Inc. Defendant, Diwaker Moses, is also a shareholder and officer of Turmeric, Inc. (Diwaker Moses affidavit sworn to April 10, 2006). Defendant, Turmeric, Inc., is in default on its payments pursuant to the promissory note.

Plaintiff commenced the within action by motion for summary judgment in lieu of a complaint (CPLR 3213).

By Short Form Order dated May 25, 2005, this Court granted plaintiff's unopposed motion for an Order directing judgment against Defendant, Diwaker Moses and Ujwala Moses, as guarantors of Turmeric, Inc., in the sum of \$118,609.67. The Order (SFO 5/25/05) also provided "this action be stayed against Defendant, Turmeric Inc., upon receipt of Proof of Bankruptcy Chapter 11 filing and inclusion of this debt therein within 10 days of service of this order"

(Exhibit C to moving papers).

Defendant, Ujwala Moses, by her former attorney who is now disbarred, brought a motion to vacate the default judgment.

By Short Form Order dated January 6, 2006, this Court vacated the default judgment as to Defendant, Ujwala Moses. However, the judgment is to remain in full force and effect as security pending the final disposition of the within action.

On July 12, 2005, the Bankruptcy proceeding against Turmeric, Inc. was dismissed without the debt being discharged.

All defendants, to wit: Turmeric, Inc., Diwaker Moses and Ujwala Moses now appear by their new attorneys, Newman & Cahn, LLP. The within application seeks an order to vacate the default as against Defendant, Diwaker Moses, interpose an answer, affirmative defenses and an impleader on behalf of all defendants, and grant summary judgment dismissing the complaint against Defendant, Ujwala Moses, on the ground that she did not personally sign the note as a guarantor.

The reasons for vacating the default against Defendant, Ujwala Moses as set forth in this Court's Order dated January 6, 2006, also apply to defendants Turmeric, Inc. and Diwaker Moses. Further, the bankruptcy stay as to Defendant, Turmeric was in place up to July 12, 2005. The defaults of Defendant, Turmeric, and Defendant, Diwaker Moses, are vacated. The answer and first impleader claim

against third-party defendant Danny Chong, a copy of which is annexed to the motion papers as Exhibit B, is deemed served (Danny Chong being the principal of plaintiff Zazen Restaurant Corp., affidavit sworn to April 27, 2006). Attorney for defendants shall correct the caption to reflect the correct spelling of Danny Chong. The attorney for plaintiff shall have twenty (20) days from service of a copy of this Order, with Notice of Entry, to interpose a response to the first impleader claim on behalf of all defendants against Third-party Defendant, Danny Chong.

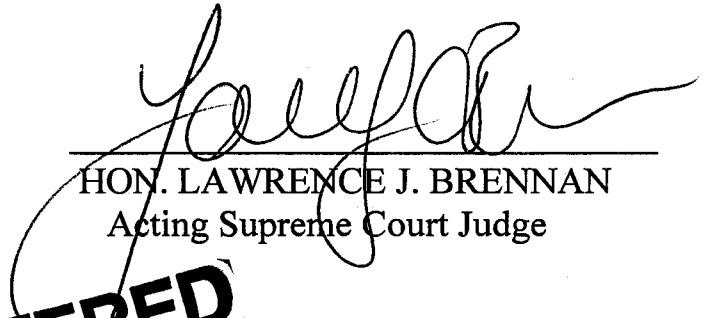
Based on the documentary evidence before this Court, Defendant, Ujwala Moses, did not sign a personal guarantee (Exhibit M to moving papers). There is no writing under which Ujwala Moses has guaranteed any obligation. A guarantee to promise the debt or default of another is unenforceable under the Statute of Frauds unless it is set forth in a written note or memorandum subscribed by the party to be charged. *See* General Obligations Law § 5-701a(2); *see also Walker v Roth*, 90 AD2d 847. Further, there can be no personal liability against Ujwama Moses since she signed the Bill of Sale only in her capacity as president of Turmeric, Inc. *See Steinberg v Universal Maschinenfabrik GmbH*, 18 Ny2d 943; *Cavalla v Ernest F. Elliot, Inc.*, 86 AD2d 884. The action is dismissed against Ujwala Moses as to any allegations based on her signing a personal guarantee and executing the bill of sale in her personal capacity.

Notwithstanding anything to the contrary, the judgment shall remain in full force and effect against Defendant, Turmeric, Inc. and Diwaker Moses, pending the final disposition of the within litigation.

Only counsel familiar with the outstanding issues shall appear for a Conference in the Chambers of the Honorable Lawrence J. Brennan on August 17, 2006. No adjournments may be granted without prior approval of the Court.

This shall constitute the Decision and Order of this Court.

Dated: July 18, 2006



HON. LAWRENCE J. BRENNAN
Acting Supreme Court Judge

ENTERED

JUL 24 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE