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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**COHEN FASHION OPTICAL, LLC,
COHEN FASHION OPTICAL OF COMPO, INC.
AND COHEN'S FASHION OPTICAL OF
FAIRFIELD, INC.,**
Plaintiffs,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

**Index No: 022109-08
Motion Seq. No: 2
Submission Date: 8/17/09**

-against-

SUSAN WESTRUP AND COMPO OPTICAL, INC.,
Defendants.
-----x

Papers Read on this Motion:

Notice of Motion, Affidavit in Support, Affirmation of Services and Exhibits....x

This matter is before the court on the motion by Plaintiffs Cohen Fashion Optical, LLC, Cohen Fashion Optical of Compo, Inc. and Cohen's Fashion Optical of Fairfield, Inc. (collectively "Plaintiffs"), for an Order, pursuant to CPLR § 3215, directing the entry of a default judgment in favor of Plaintiffs and against Defendants, Dr. Susan Westrup and Compto Optical, Inc. (collectively "Defendants") for the relief demanded in the Verified Complaint ("Complaint"). The Court grants Plaintiffs' motion in part and denies it in part. For the reasons set forth below, the Court 1) grants Plaintiffs' application for a default judgment against Defendants and directs an inquest on the issue of damages and counsel fees; and 2) grants Plaintiffs' application for a permanent injunction.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3215(b), granting them a default judgment against Defendants for the relief demanded in the Complaint, in light of Defendants' failure to answer, move or otherwise respond to the Complaint. Plaintiffs' motion includes an application for certain permanent injunctive relief.

Defendants have submitted no opposition or other response to Plaintiffs' motion..

B. The Parties' History

In support of their motion, Plaintiffs have provided an Affidavit in Support, dated July 22, 2009, of Richard Winter ("Winter"), the Chief Financial Officer of Plaintiff Cohen Fashion Optical, LLC ("CFO"). Winter affirms the following:

CFO franchises a nationwide chain of retail optical stores under the trade name "Cohen's Fashion Optical." These stores provide eye care services and products, including eye examinations by licensed optometrists, eyeglasses and contact lenses. The following is a list of relevant agreements pertaining to the two stores at issue.

1. Cohen Fashion Optical Store No. 158

On or about July 20, 1998, Defendant Compo Optical, Inc. ("Compo") and CFO entered into a franchise agreement, pursuant to which CFO granted Compo the right to operate a Cohen Fashion Optical Center, designated as Store No. 158, located at 431 Post Road East, Westport, Connecticut ("Store 158 Premises") for a term of ten (10) years. Winter provides a copy of that franchise agreement ("Store 158 Agreement"), which contains the signature of Susan Westrup ("Westrup") on behalf of Compo, the franchisee. On or about July 20, 2008, the Store 158 Agreement expired, pursuant to its terms.

Winter affirms that, following the expiration of the Store 158 Agreement, Compo continued to operate Store 158 under the same terms and conditions as those set forth in the Store 158 Agreement, which included Compo 1) using the Cohen Fashion Optical trademarks and signs; 2) reporting gross sales to CFO; and 3) paying a portion of the royalty fees and advertising fund contributions to CFO.

On or about November 25, 2008, allegedly as a result of Compo's material defaults, CFO terminated the Store 158 Agreement. Winter provides a copy of a letter from CFO's counsel to

Defendants dated November 25, 2008. In that letter, counsel advised Defendants, *inter alia*, that 1) in light of Defendants' failure to notify CFO whether Defendants intended to renew the Store 158 Agreement, and Defendants' vacating of the premises, CFO was terminating the Store 158 Agreement immediately; 2) Defendants remained liable for payments due to CFO totaling \$108,084.67; 3) CFO was demanding immediate payment of that sum; 4) CFO maintained a lien and security interest as to the assets, improvements and patient records in Store 158; and 5) pursuant to the restrictive covenant in the Store 158 Agreement, Defendants were precluded from engaging in certain business and activities.

2. Cohen Fashion Optical Store No. 243

On or about September 7, 2007, Westrup and CFO entered into a similar franchise agreement with respect to an optical center located at 1876 Black Rock Turnpike, Fairfield, Connecticut, designated Store No. 243. That agreement ("Store 243 Agreement") was also for a term of ten (10) years. Winter provides a copy of the Store 243 Agreement, which contains the signature of Westrup.

3. Sublease for Store No. 158

On or about January 27, 1993, Plaintiff Cohen Fashion Optical of Compo, Inc. ("Cohen of Compo") entered into a lease agreement with Westfair, Inc. ("Westfair"), pursuant to which Westfair leased the Store 158 premises to Cohen of Compo ("Store 158 Base Lease").¹ The Store 158 Base Lease was subsequently amended and extended by letter agreement dated June 12, 2002 ("Extension Agreement") which extended the term of the Store 158 Base Lease to December 31, 2007. By a second letter agreement, dated August 13, 2007, the term of the Store 158 Base Lease was extended to December 31, 2012 ("Second Extension Agreement").

On or about July 20, 1998, Cohen of Compo entered into a sublease with Compo, pursuant to which Compo leased the Store 158 Premises for a term which "shall commence as of July 20, 1998 and shall expire at midnight on the date being seven (7) days preceding the expiration of the Master Lease referred to in Article 3 below, unless sooner terminated as herein provided" (Plaintiffs' Ex. G). Pursuant to this sublease ("Store 158 Sublease"), Compo agreed to perform every obligation of Cohen of Compo under the Store 158 Base Lease including, but

¹ The Store 158 Base Lease, Exhibit D to the motion papers, pertains to a store located at 431 Post Road East, Westport, Connecticut, but designates that premises as "Store # 12," not Store 158. The corresponding franchise agreement, however, contains the words "Store No. 158" on the cover sheet.

not limited to, paying all rent due under the Store 158 Base Lease. On or about September 4, 2007, Compo and Cohen of Compo entered into a Sublease Modification Agreement, pursuant to which, *inter alia*, the Sublease was extended in accordance with the terms of the Second Extension Agreement (“Sublease Modification Agreement”).

4. Sublease for Store No. 243

On or about September 7, 2007, Cohen’s Fashion Optical of Fairfield, Inc. (“Cohen’s of Fairfield”) entered into a lease agreement with Miro 1876 Associates, LLC (“Miro”), pursuant to which Miro leased the Store 243 Premises to Cohen’s of Fairfield (“Store 243 Base Lease”). On or about September 7, 2007, Cohen’s of Fairfield entered into a sublease with Westrup, pursuant to which Westrup subleased the Store 243 Premises for a term that expired “at midnight on the date immediately preceding the date of the expiration of the Base Lease referred to in Article 3 below, unless sooner terminated as herein provided” (Plaintiffs’ Ex. J). The sublease (“Store 243 Sublease”) was solely for the operation of a Cohen Fashion Optical franchise center at the Store 243 Premises. Pursuant to the terms of the Store 243 Sublease, Westrup agreed to perform all obligations of Cohen’s of Fairfield under the Store 243 Base Lease including, but not limited to, payment of all rent due under the Store 243 Base Lease.

5. Store 158 Guaranty

On or about July 20, 1998, in connection with, and as a condition of, CFO entering into the Store 158 Agreement with Compo, Westrup executed a Guaranty to CFO, pursuant to which she guaranteed the timely payment of Compo’s obligations to CFO under the Store 158 Agreement. Westrup also guaranteed the payment of all rent under the Store 158 Sublease (“Store 158 Guaranty”). Pursuant to the terms of the Store 158 Guaranty, Westrup agreed to be bound by certain provisions in the Store 158 Agreement, including the covenants not to compete. Those covenants are set forth in Section XVI of the Store 158 Agreement.

6. Promissory Notes

On or about September 7, 2007, in connection with the Store 243 Agreement, Westrup executed and delivered to CFO a promissory note in the principal amount of \$10,000. This promissory note (“Franchise Fee Note”) provided that Westrup would pay to CFO a franchise fee in the sum of \$10,000, without interest, in twelve (12) monthly installments of \$833.33, commencing on October 7, 2007 and continuing for the next eleven (11) months until fully paid.

On or about September 7, 2007, also in connection with the Store 243 Agreement, Westrup executed and delivered to CFO, as successor-in-interest to Optical Business Solutions, Inc., a second negotiable promissory note in the sum of \$1,800, without interest, to be paid in eighteen (18) consecutive monthly installments of \$100.00, commencing on October 7, 2007 and continuing until paid in full ("POS Note").

7. Covenants Not to Compete

Section XVI of the Store 158 and 243 Agreements is titled "Covenant not to Compete." That Section, in both Agreements, contains restrictions on Defendants' ownership or other interest in a competing optical business both during the terms of the Franchise Agreements, and after their expiration. These covenants include a two (2) year restriction, from the date of termination or expiration of the Agreements, on Defendants' involvement in any competing optical business within a five (5) mile radius from the premises at which the Licensed Premises is located.

8. Allegations in and Service of the Verified Complaint

The verified complaint ("Complaint") contains fourteen (14) counts, which allege as follows:

First Count - seeks injunctive relief against Defendants for their alleged violations of the covenants not to compete in the Store 243 Agreements.

Second Count - seeks injunctive relief against Defendants for their alleged violations of the covenants not to compete in the Store 158 Agreements.

Third Count - seeks damages of at least \$100,000 against both Defendants for Defendants' alleged violations of the Store 158 covenants not to compete.

Fourth Count - seeks damages of at least \$90,000 against Compo for its alleged breach of the Store 158 Agreement provisions regarding payment of royalty fees, advertising fund contributions and other charges and fees.

Fifth Count - seeks damages of at least \$25,000 against Compo for its alleged breach of the Store 158 Sublease provisions regarding payment of rent and other charges.

Sixth Count - seeks damages of at least \$90,000 against Westrup for her alleged breach of the Store 158 Guaranty by failing to make payments pursuant to the Store 158 Agreement provisions regarding payment of royalty fees, advertising fund contributions and other charges

and fees.

Seventh Count - seeks damages of at least \$25,000 against Westrup for her alleged breach of the Store 158 Guaranty by failing to make payments pursuant to the Store 158 Sublease provisions regarding payment of rent and other charges.

Eighth Count - seeks damages of at least \$100,000 against Westrup for her alleged breach of the Store 243 Agreement provisions regarding payment of royalty fees, advertising fund contributions and other charges and fees.

Ninth Count - seeks damages of at least \$25,000 against Westrup for her alleged breach of the Store 243 Sublease provisions regarding payment of rent and other charges.

Tenth Count - seeks damages of at least \$40,000 against Westrup for her breach of the Letter Agreement and Security Agreement by failing to repay a loan for, and improperly diverting, certain equipment.

Eleventh Count - seeks damages of at least \$40,000 against Westrup for unjust enrichment for improperly converting funds lent to her for the purchase of certain equipment.

Twelfth Count - seeks damages against Westrup in the sum of \$3,333.36 for her alleged breach of the Franchise Fee Note by failing to pay monies to CFO due thereunder.

Thirteenth Count - seeks damages against Westrup in the sum of \$1,000 for alleged breach of the POS Note by failing to pay monies to CFO due thereunder.

Fourteenth Count - seeks a permanent injunction against Defendants for their alleged violation of the covenants not to compete in the Franchise Agreements.

Plaintiffs also seek interest, counsel fees and costs and disbursements.

In the Complaint, Plaintiffs outline in detail the facts supporting the allegations in the Complaint. Those allegations include: 1) on or about November 24, 2008, Defendants abandoned Stores 158 and 243 and have been engaged in selling optical products from Westrup's home located at 26 Little Fox Lane, Westport, Connecticut ("Westrup Residence"), in violation of the covenants not to compete; 2) Defendants, through an employee, have informed customers of Store 158 that Defendants will be opening a competing store near the Store 158 premises, also in violation of the covenants not to compete; 3) at or about the time that Westrup abandoned the Store 243 premises, she removed all furniture, fixtures and equipment and secreted those items with the intent to avoid her obligations to CFO and interfere with CFO's

security interest; and 4) in breach of the Letter and Security Agreements, Westrup leased the equipment, for which CFO had lent her money, and gave the leasing company a first priority security interest on that equipment, thereby compromising CFO's security position.

Plaintiffs filed the summons and verified complaint ("Complaint") on December 11, 2008. They served the Complaint on Westrup and Compo on December 15, 2008, by personal delivery on Westrup, an officer of Compo. They served an additional copy of the Complaint on Westrup, pursuant to CPLR § 3215(g)(3), on or about February 2, 2009. The time for Defendants to answer the Complaint, or otherwise respond, has passed and Defendants have not filed a verified answer, or otherwise responded to the Complaint.

9. Counsel Fees

Section XX of the Store 158 and 243 Franchise Agreements, titled "Indemnification," includes a provision that Franchisee agrees to indemnify and hold CFO harmless from any costs or expenses that it may incur, including counsel fees, in enforcing the terms of the Franchise Agreements and CFO's rights thereunder. Pursuant to the Agreements, this obligation survives any termination of the Agreements.

In support of Plaintiffs' motion, Plaintiffs' counsel provides an Affirmation of Services dated July 22, 2009 in which he outlines his firm's hourly fees and the work the firm has completed in this matter to date. Plaintiffs' counsel affirms that the value of its legal services to date totals \$29,460, plus costs and disbursements of \$758.04, and asks the Court to award Plaintiffs reasonable counsel fees, together with costs and disbursements.

10. Prior Orders Granting Injunctive Relief

On or about December 11, 2008, CFO moved for a preliminary injunction, *inter alia*, to enforce the restrictive covenants in the Franchise Agreements. On that date, Judge Austin issued several restraining orders, one of which restrained, enjoined and/or prohibited Defendants from "selling contact lenses, prescription and/or non-prescription eyewear and/or related eye care products at 26 Little Fox Lane, Westport, Connecticut 06880, or at any location in violation of Section XVI(A) of the Store 243 Agreement and/or Section XVI(B) of the Store 158 Agreement as more fully set forth in the Cohen Affidavit" (Plaintiffs' Ex. S).

On February 2, 2009, Judge Austin issued an Order granting Plaintiffs a preliminary injunction. That Order directed that, during the pendency of the action, or until further Court

Order, Defendants are enjoined from 1) selling contact lenses, prescription and/or non-prescription eyewear and/or related eye care products at any location in violation of Sections XVI(A) and (B) of the Franchise Agreements; 2) having any direct or indirect interest as an owner, or in any other capacity, in any non-Cohen Fashion Optical retail optical store, or any other entity which owns, develops, operates or franchises or licenses others to operate, retail optical stores, centers or businesses in violation of Section XVI(A) and XVI(B) of the parties' Franchise Agreements; and 3) using the Cohen Fashion Optical Operating Manual, vendor discounts, marketing materials, and any other confidential materials that Defendants previously used. The Court also directed Defendants to deliver forthwith to CFO all records relating to customers of the Cohen Fashion Optical retail optical stores that Defendants previously operated.

C. The Parties' Positions

Plaintiffs submit that 1) they have demonstrated their right to a permanent injunction enforcing the covenants not to compete; 2) they have established their right to money damages for Defendants' breach of the Franchise Agreements, Subleases, Notes and the Guaranty; and 3) they have established their right to counsel fees, pursuant to the terms of the Franchise Agreements.

Defendants have not answered, or otherwise responded to the Complaint, and have submitted no response to Plaintiffs' motion.

RULING OF THE COURT

A. Plaintiffs have Established Their Right to a Default Judgment against Defendants

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).

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept. 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The

intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept. 2001), *app. dismissed*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

To establish a *prima facie* case of entitlement to judgment on a guaranty, movant must establish the following: (1) the underlying obligation, (2) the guaranty executed by the defendant, and (3) a failure to make payment according to the terms of the underlying obligation and the guaranty. *Provident Bank v. Giannasca*, 55 A.D.3d 812 (2d Dept. 2008); *Verela v. Citrus Lake Development, Inc.*, 53 A.D.3d 574 (2d Dept. 2008); *Northport Car Wash Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008); *JP Morgan Chase Bank v. Gamut-Mitchell, Inc.*, 27 AD3d 622 (2d Dept. 2006).

The Court concludes that Plaintiff has demonstrated its entitlement to the entry of a default judgment against the Defendants on counts three, four, five, six, seven, eight, nine, ten, eleven, twelve and thirteen, based on the Plaintiff's submission of proof of 1) the service of the summons and verified complaint on Defendants, 2) the facts constituting its claim for breach of the relevant Agreements, Promissory Notes and Guaranty, and 3) the default in answering or appearing by the Defendants. CPLR § 3215(f); *see generally Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978 (2d Dept. 2008), *lv. app. den.* 11 N.Y.3d 715 (2009); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008); *Grinage v. City of New York*, 45 A.D.3d 729 (2d Dept. 2007).

B. Plaintiffs Have Demonstrated their Right to a Permanent Injunction

A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction. It is to be invoked only to give protection for the future, and prevent repeated violations of the plaintiff's property rights. *Merkos L'Inyonei v. Sharf*, 59 A.D.3d 403 (2d Dept. 2009).

Negative covenants restricting competition are enforceable to the extent that they are reasonable in scope, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee. *Weintraub v. Schwartz*, 131 A.D.2d 663 (2d Dept. 1987).

The Court shares Judge Austin's view that Plaintiffs have met their burden of establishing the appropriateness of injunctive relief, and notes Defendants' failure to respond to the Complaint or take any position with respect to the instant motion. Nevertheless, the Plaintiffs are not entitled to the full measure of injunctive relief that they seek, particularly with respect to Store No. 243, as they have not shown that Defendants have sought to operate a business that would violate the restrictive covenant regarding that store. Accordingly, the Court 1) denies Plaintiffs' motion for injunctive relief in the first cause of action in the Complaint, on the basis that it is unduly broad; 2) grants Plaintiffs' motion for injunctive relief in the second cause of action in the Complaint and enjoins Defendants from engaging in the sale of contact lenses, prescription and/or non-prescription eyewear and/or related eye care products and/or operating, or being involved in the operation of, any non-Cohen Fashion Optical retail store at the Westrup Residence, or at any location within five (5) miles of the Store 158 Premises, or within five (5) miles of the location of any other Cohen Fashion Optical Center for a period of two (2) years until November 25, 2010; and 3) grants Plaintiffs' motion for injunctive relief in the fourteenth cause of action in the Complaint and a) enjoins Defendants from using the confidential information, marketing materials, vendor discounts and customer records of Plaintiffs; and b) orders Defendants, within ten (10) days of service of this Order upon them, to deliver the Operating Manual, confidential information, marketing materials and customer records. Confidential information, marketing materials and customer records are enjoined from disclosure with respect to counts one, two and fourteen of the Complaint.

C. 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 Court concludes that Plaintiffs have demonstrated their right to counsel fees, and refers that issue to an inquest as well.

In light of the foregoing, it is hereby:

ORDERED, that Plaintiffs have judgment by default against Defendants Susan Westrup and Compo Optical, Inc. for the relief demanded in counts three, four, five, six, seven, eight, nine, ten, eleven, twelve and thirteen of the Complaint, as well as their demand for counsel fees; and it is further

ORDERED, that Plaintiffs' application for permanent injunctive relief, pursuant to counts one, two and fourteen of the Complaint, is denied; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank Schellace to hear and determine all issues relating to the determination of damages, interest, counsel fees and other costs, if appropriate, pursuant to CPLR § 3215, on November 18, 2009 at 10:00 a.m.; and it is further

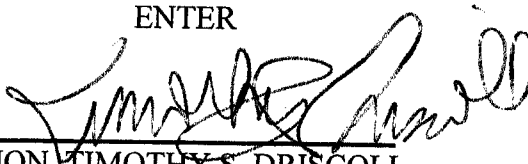
ORDERED, that counsel for Plaintiffs shall serve upon the Defendants by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before November 6, 2009; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiffs and against the Defendants 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
October 16, 2009

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

OCT 21 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**