NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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FISH & CO HOLDINGS LLC, individually and derivatively on behalf of FINDLAY ESTATES LLC,

Index No. **816224/2021E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**
Justice

- against -

JACOB GRUNHUT; FINDLAY ESTATES LLC; AND SHEINDY GRUNHUT,

Defendants.

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The following papers numbered 1, read on this motion, noticed on 4/12/2022, and duly submitted as no. 1 on the Motion Calendar of 7/25/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Plaintiff's motion for default judgment is decided in accordance with the Decision and Order annexed hereto.

Dated: 10/5/22

Hon. _____
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
X NEXT APPEARANCE DATE: **January 9, 2023, at 11:30 a.m.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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FISH & CO HOLDINGS LLC, individually and derivatively on behalf of FINDLAY ESTATES LLC,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **816224/2021E**

JACOB GRUNHUT; FINDLAY ESTATES LLC; AND SHEINDY GRUNHUT,

Defendants.

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Plaintiff Fish & Co Holdings, LLC, individually and derivatively on behalf of Findlay Estates, LLC ("Plaintiff") moves for default judgment against Defendants Jacob Grunhut and Sheindy Grunhut ("Defendants")[1] pursuant to CPLR § 3215 in the amount of $550,000.00, plus interest at the rate of 1.5% per month from the date that each portion of the Capital Contribution was paid.

For the reasons which follow, Plaintiff's motion is granted, on default and without opposition.

BACKGROUND:

On November 29, 2021, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint, which alleges causes of action for breach of contract, breach of fiduciary duties, unjust enrichment, conversion, and constructive trust. The complaint is verified by Joel Fish, an authorized member for Plaintiff.

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[1] The notice of motion and supporting papers indicate that Plaintiff is moving for default judgment against all defendants named in this action. However, in a letter dated May 23, 2022, Plaintiff indicated to the Court that it would withdraw the portion of its motion seeking a default judgment against Defendant Findlay Estates LLC if the bankruptcy filed by said defendant was still pending on the return date of the motion. On September 28, 2022, counsel represented to the Court by email that the bankruptcy is still pending. As such, the portion of Plaintiff's motion seeking a default judgment against Defendant Findlay Estates LLC is withdrawn, and the Court has considered the motion only as against Defendants Jacob Grunhut and Sheindy Grunhut (*See Maynard v Fuller Co.*, 236 AD2d 300, 300 [1st Dept 1997] ["The automatic stay provisions of the Federal bankruptcy laws apply only to the parties in the adversary proceeding in Bankruptcy Court and do not extend to nonbankrupt codefendants"]).

The complaint alleges that Defendant Findlay Estates LLC (the "Company") owns the properties located at 1056, 1060, and 1064 Findlay Avenue, Bronx, NY (the "Property") (Compl. ¶ 4). Plaintiff alleges that on or around January 10, 2020, Defendant Jacob Grunhut ("Mr. Grunhut") and Plaintiff entered into an amended and restated operating agreement for the Company (the "Agreement") (Compl. ¶ 8). Plaintiff alleges that according to the Agreement, Mr. Grunhut and Plaintiff were each 50% members of the Company, with Mr. Grunhut acting as managing member (Compl. ¶ 9-10). Plaintiff alleges that between December 9, 2019, through March 31, 2020, it contributed $550,000.00 to the Company to cover the initial costs for the drawing and approval of plans, appraisals, deposits and other expenses relating to the Property (the "Capital Contribution") (Compl. ¶ 11-12). Plaintiff alleges that pursuant to the Agreement, Grunhut, as the managing member, promised to use the Capital Contribution towards the improvement of the Property (Compl. ¶ 13). Plaintiff also alleges that pursuant to the Agreement, defendants were required to repay Plaintiff the Capital Contribution plus a preferred return in the amount of 1.5% per month (the "Preferred Return") (Compl. ¶ 14, 26). Plaintiff alleges that Mr. Grunhut, together with Ms. Grunhut, breached the Agreement by failing to use the Capital Contribution towards the drawings and improvement of the Property, by allowing the Property to be encumbered with UCC liens without Plaintiff's consent, and by using additional loans and debt secured by mortgages and liens recorded against the Property for personal benefit, not for the benefit of the Property or the Company, as required under the Agreement (Compl. ¶ 15-20). Plaintiff alleges that on December 7, 2020, it sent a demand letter to Mr. Grunhut and the Company demanding repayment of the Capital Contribution plus the preferred return. Plaintiff alleges that they have not responded to the demand (Compl. ¶ 21). Plaintiff alleges that it would be futile to make any further demand (Compl. ¶ 22).

On its first cause of action, Plaintiff alleges that as a result of Defendants' breach of the Agreement, Plaintiff has been damaged in the amount of $550,000.00, plus interest at the rate of 1.5% per month from the date that each portion of the Capital Contribution was paid (Compl. ¶ 29). On its fourth cause of action, Plaintiff alleges that as a result of Mr. Grunhut's breach of fiduciary duties, Plaintiff has been damaged in an amount to be determined at trial, but estimated to exceed $550,000.00, plus interest at the rate of 1.5% per month from the date that each portion of the Capital Contribution was paid (Compl. ¶ 47). Plaintiff also alleges that Mr. Grunhut should be liable for punitive damages in the sum of at least $3,000,000.00 (Compl. ¶ 48). On its fifth

cause of action, Plaintiff alleges that Defendants have been unjustly enriched, and Plaintiff has been damaged (Compl. ¶ 49-54).

On March 7, 2022, Plaintiff filed the instant motion. On July 25, 2022, the motion was marked fully submitted.

DISCUSSION:

CPLR § 3215(a) provides in relevant part that: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against him."

CPLR § 3215(f) provides in relevant part that:

> On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. . . Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

(*See also Zelnik v Biedermann Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; *Stevens v Law Office of Blank & Star, PLLC*, 155 AD3d 917 [2d Dept 2017]). Thus, "[o]n a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default" (*Deutsche Bank National Trust Company v Hall*, 185 AD3d 1006, 1008 [2d Dept 2020]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2d Dept 2013]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005]). "To demonstrate 'the facts constituting the claim' the movant need only submit sufficient proof to enable a court to determine that 'a viable cause of action exists'. CPLR 3215(f) expressly provides that a plaintiff may satisfy this requirement by submitting the verified complaint" (*Fried*, 110 AD3d 56 at 59-60).

In support of its motion, Plaintiff submitted, *inter alia*, the affirmation of Plaintiff's counsel; the Affidavit of Joel Fish, Plaintiff's Managing Member; the summons and verified complaint; the Agreement; and affidavits of service of the summons and verified complaint upon Defendants.

Plaintiff asserts that Defendants were properly served with the summons and complaint. Plaintiff asserts that Defendants have not appeared or answered. Plaintiff also asserts that it

complied with the additional mailings required by CPLR § 3215(g).

Default:

Jacob Grunhut:

Here, the affidavit of service dated December 17, 2021, states that Mr. Grunhut was served with process pursuant to CPLR § 308(4) at 72 Horton Drive, Monsey, NY ("72 Horton Drive") by affixing a copy of the summons and verified complaint to the door at 72 Horton Drive on December 15, 2021, and by mailing a copy of the summons and verified complaint to 72 Horton Drive on December 17, 2021. The affidavit of service was filed with the Court on December 22, 2021. As such, service was complete on January 1, 2022 (CPLR § 308[4] ["proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing"]). Mr. Grunhut had until January 31, 2022, to answer (CPLR 320[a] ["if the summons was served on the defendant . . . pursuant to section 303, subdivision two, three, four or five of section 308 . . . the appearance shall be made within thirty days after service is complete"]). He did not serve an answer by that date and is thus in default.

Sheindy Grunhut:

Here, the affidavit of service dated December 17, 2021, states that Ms. Grunhut was served with process pursuant to CPLR § 308(4) at 72 Horton Drive by affixing a copy of the summons and verified complaint to the door at 72 Horton Drive on December 15, 2021, and by mailing a copy of the summons and verified complaint to 72 Horton Drive on December 17, 2021. The affidavit of service was filed with the Court on December 22, 2021. As such, service was complete on January 1, 2022 (CPLR § 308[4] ["proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing"]). Ms. Grunhut had until January 31, 2022, to answer (CPLR 320[a] ["if the summons was served on the defendant . . . pursuant to section 303, subdivision two, three, four or five of section 308 . . . the appearance shall be made within thirty days after service is complete"]). She did not serve an answer by that date and is thus in default.

CPLR 3215(g):

Plaintiff has demonstrated compliance with the additional mailings required by CPLR § 3215(g) by submitting an affirmation of service by counsel dated February 10, 2022 (Plaintiff's Exhibit 3).

Breach of Contract (Against Mr. Grunhut):

Plaintiff seeks a judgment against Mr. Grunhut in the amount of $550,000.00, plus interest at the rate of 1.5% per month from the date that each portion of the Capital Contribution was paid, plus attorney's fees and costs.

The elements of a cause of action for breach of contract are: (1) the existence of a contract, (2) the plaintiff's performance thereunder, (3) the defendant's breach thereof, and (4) resulting damages from the breach (*Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019]; *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Fuentes v LOMTO Federal Credit Union*, 200 AD3d 1032, 1033 [2d Dept 2021]; *East Ramapo Central School District v New York Schools Insurance Reciprocal*, 199 AD3d 881, 886 [2d Dept 2021]; *Plainview Properties SPE, LLC v County of Nassau*, 181 AD3d 731, 733 [2d Dept 2020]).

Here, Plaintiff has demonstrated that it entered into the Agreement with Mr. Grunhut (Affidavit of Joel Fish, ¶ 9; Compl. ¶ 24), that it performed under the Agreement by making the Capital Contribution (Affidavit of Joel Fish, ¶ 12-13; Compl. ¶ 24), that Mr. Grunhut breached the Agreement by, *inter alia*, failing to use the Capital Contribution towards the drawings and improvement of the Property (Affidavit of Joel Fish, ¶ 17-21; Compl. ¶ 27), and that Plaintiff has been damaged as a result (Affidavit of Joel Fish, ¶ 25; Compl. ¶ 29).

Accordingly, Plaintiff's motion for default judgment on its first cause of action for breach of contract is granted as against Mr. Grunhut. Ms. Grunhut is not a party to the Agreement, and as such, cannot be held liable for breach of the Agreement.

Breach of Fiduciary Duty (Against Mr. Grunhut):

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner, LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity" (*Board*

of Managers of Brightwater Towers Condominium v FirstService Residential New York, Inc., 193 AD3d 672, 673 [2d Dept 2021]; *Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017]).

"A fiduciary relationship may exist when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. An arm's-length business relationship does not give rise to a fiduciary obligation, as the core of a fiduciary relationship is a higher level of trust than normally present in the marketplace between those involved in arm's-length business transactions" (*Board of Managers of Brightwater Towers Condominium*, 193 AD3d 672 at 673). "A 'defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations'" (*Id.* at 674). "While courts generally look to the parties' contractual agreement to discover the nature of their relationship, the existence of a fiduciary relationship is not dependent solely upon an agreement or contractual relation. Rather, the actual relationship between the parties determines the existence of a fiduciary duty" (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]).

Here, Plaintiff has demonstrated that Mr. Grunhut is the managing member of the Company and therefore owed a fiduciary duty to Plaintiff (Affidavit of Joel Fish, ¶ 11; Compl. ¶ 44), that he breached his fiduciary duty by, *inter alia*, refusing to use the Capital Contribution for construction of the Property, failing to make distributions and payments to Plaintiff, and in refusing to comply with the Company's legal obligations (Affidavit of Joel Fish, ¶ 17-19; Compl. ¶ 45), and that Plaintiff has been damaged as a result (Compl. ¶ 47).

Accordingly, Plaintiff's motion for default judgment on its fourth cause of action for breach of fiduciary duty is granted as against Mr. Grunhut. Plaintiff has not alleged that Ms. Grunhut is a fiduciary owing any duties to Plaintiff.

Unjust Enrichment (Against Ms. Grunhut):

"The theory of unjust enrichment is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" (*Mannino v Wells Fargo Home Mortg., Inc.*, 155 AD3d 860, 862 [2d Dept 2017] [internal quotation marks omitted]). "The essential inquiry in any action for unjust enrichment … is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

To plead a cause of action for unjust enrichment, "a plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Mannino* at 862; *Mandarin* at 182; *McMurray v Hye Won Jun*, 168 AD3d 435, *1 [1st Dept 2019]).

Here, Plaintiff has demonstrated that Ms. Grunhut was enriched at Plaintiff's expense, as she retained the Capital Contribution and further encumbered the Property without increasing the value of the Property, and that it is against equity and good conscience to permit her to retain the value of this money (Affidavit of Joel Fish, ¶ 19-21; Compl. ¶ 49-54).

Accordingly, Plaintiff's motion for default judgment on its fifth cause of action for unjust enrichment is granted as against Ms. Grunhut. The Court need not discuss this cause of action as against Mr. Grunhut, as it is alleged only in the alternative to the breach of contract cause of action.

In light of the fact that Plaintiff seeks a default judgment against Defendants Jacob Grunhut and Sheindy Grunhut on its cause of action for conversion only in the alternative to the breach of contract causes of action, the Court need not address the cause of action for conversion.

It is hereby

ORDERED that the Clerk enter judgment in favor of Plaintiff and against Defendants Jacob Grunhut and Sheindy Grunhut in the amount of $550,000.00, plus interest at the rate of 1.5% per month from the date that each portion of the Capital Contribution was made.[2] It is further

ORDERED that this matter is scheduled for a **status conference** on **Monday, January 9, 2023, at 11:30 a.m.** It is further

ORDERED that Plaintiff serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 10/5/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**

[2] To the extent that Plaintiff seeks attorney's fees and costs of this action, the request is denied, as Plaintiff did not demonstrate that it is entitled to such sums pursuant to the Agreement or that it is otherwise entitled to such sums.