

Scheck v Barbarian Films, LLC
2011 NY Slip Op 31809(U)
July 1, 2011
Supreme Court, New York County
Docket Number: 103918/2010
Judge: Debra A. James
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

STEVEN SCHECK, INFINITE MEDIA CONCEPTS,
INC. PENSION PLAN and RICHARD JOHNSON,

Index No.: 103918/2010

Motion Date: 06/28/11

Plaintiffs,

Motion Seq. No.: 01

- v -

Motion Cal. No.: _____

BARBARIAN FILMS, LLC, PARTISAN MEDIA GROUP
LLC, DOUGLAS KUBER, RONALD HARTENBAUM and
AARON KAUFMAN,

FILED

JUL 06 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion for summary judgment in lieu of complaint and for a default judgment and cross motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Notice of Cross Motion/Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____
Sur Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____
4	_____

Cross-Motion: Yes No

Upon the foregoing papers,

In this action for breach of a private placement memorandum, plaintiffs move for a default judgment against Aaron Kaufman and for summary judgment in lieu of complaint under CPLR 3213 against defendants Barbarian Films, LLC, Partisan Media Group, LLC, Douglas Kuber, and Ronald Hartenbaum. Defendants Douglas Kuber, and Ronald Hartenbaum cross move for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing plaintiffs' action on the grounds of defense based on documentary evidence.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

The motion for summary judgment in lieu of complaint shall be denied.

Neither the private placement memorandum, the e-mails that purport to modify such memorandum nor the oral agreement to return plaintiffs' contribution upon three months notice constitutes a written instrument for the payment of money only within the contemplation of CPLR 3213. The memorandum is not an "unconditional instrument, evidencing an obligation to pay a sum at a certain time or over a stated period", since, as argued by the cross moving defendants, its terms provide, inter alia, that "If the Redemption Amount (as calculated on the basis of the Redemption Notice) is or would be less than \$500,000, the Manager, in the Manager's sole discretion may reject the Redemption Notice." See Signal Plan, Inc. v. Chase Manhattan Bank, 23 AD2d 636 (1st Dept 1965) ("We conclude that this action is one for breach of contract and not based on 'instrument[s] for the payment of money only' within the meaning of CPLR 3213.")

Plaintiffs Steven Sheck, Infinite Media Concepts Inc. Pension Plan and Richard Johnson's motion for a default judgment under CPLR 3215 based upon the failure of defendant Aaron Kaufman to answer or appear shall be granted. Plaintiffs have submitted proof of service of the summons and complaint and proof of service of this motion upon defendant Aaron Kaufman. Defendant Aaron Kaufman has not answered and has defaulted in appearance on

this motion. Plaintiffs also submit sworn affidavits setting forth the underlying facts of their causes of action as required by CPLR 3215 (f). Plaintiffs further provide proof of the additional mailing upon defendant Aaron Kaufman served on him at his last known address by regular first class mail, which meets the condition for a default judgment in an action based upon nonpayment of a contractual obligation under CPLR 3215 (g) (3).

The court finds that plaintiffs have satisfied the requirements for a default judgment, shall direct that the action against defendant Kaufman be severed and that judgment in the amounts sought be entered against defendant Aaron Kaufman.

Finally, defendant Douglas Kuber and Ronald Hartenbaum's cross motion to dismiss must be denied. Plaintiffs may seek to pierce the corporate veil, "which is not a distinct cause of action but rather 'an assertion of facts and circumstances which will persuade the court to impose corporate obligation on its owner []' (citations omitted)" (Sugar Foods De Mexico v Scientific Scents, LLC, 79 AD3d 1551 [3d Dept 2010]), which allegations must await their formal complaint.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is DENIED; and it is further

ORDERED that within 30 days of entry of this order plaintiffs Steven Sheck, Infinite Media Concepts, Inc. Pension

Plan and Richard Johnson shall serve a formal complaint and a copy of this order with notice of entry upon the non-defaulting defendants; and it is further

ORDERED that defendants BarLarian Films, LLC, Partisan Media Group, LLC, Douglas Kuber, and Ronald Hartenbaum shall move against or serve an answer to the complaint within 20 days after service of the complaint; and it is further

ORDERED that the motion for a default judgment against defendant Aaron Kaufman is GRANTED; and it is further

ORDERED that the action against defendant Aaron Kaufman is hereby severed and the clerk shall enter a judgment against defendant Aaron Kaufman in the amount of (1) \$100,000 for plaintiff Steven Sheck; (b) \$200,000 for plaintiff Infinite Media Concepts, Inc. Pension Plan, and; (c) \$200,000 for plaintiff Richard Johnson, with (d) interest from October 21, 2008, as to the award in favor of plaintiffs Steven Sheck and Infinite Media Concepts, Inc. Pension Plan and, from November 18, 2008 as to the award in favor of plaintiff Richard Johnson; and it is further

ORDERED that the parties are hereby directed to attend a preliminary conference on September 13, 2011, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 103, 71 Thomas Street, New York.

FILED

This is the decision and order of the court.

JUL 06 2011

Dated: July 1, 2011

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE

~~Debra A. James~~

J.S.C.

DEBRA A. JAMES