

**Napoleon Grier Enter., Inc. v Next Up Funding, Inc.**

2013 NY Slip Op 30246(U)

January 22, 2013

Sup Ct, New York County

Docket Number: 651060/2011

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 60

NAPOLEON GRIER ENTERPRISES, INC.,

INDEX NO. 651060/2011

Plaintiff,

-against-

MOTION DATE \_\_\_\_\_

NEXT UP FUNDING, INC., JASON WRIGHT,  
ISRAEL HAGAR, ARI GRUENZWEIG and JOHN DOES 1-20,

Defendants.

Motion Seq. Nos. 005, 006

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on these motions to confirm the Referee's Report and for leave to submit a reply and cross-motion for sanctions.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

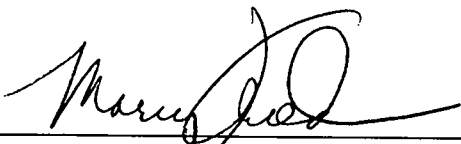
PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that these motions are decided in accordance with the accompanying decision/order dated January 22, 2013.

Dated: January 22, 2013

  
\_\_\_\_\_  
J.S.C. **MARCY S. FRIEDMAN, J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

x

NAPOLEON GRIER ENTERPRISES, INC.,

*Plaintiff,*

- against -

NEXT UP FUNDING, INC., JASON WRIGHT,  
ISRAEL HAGAR, ARI GRUENZWEIG and JOHN  
DOES 1-20,

*Defendants.*

Index No.: 651060/2011

Motion Seqs. 005, 006

DECISION/ORDER

x

This is an action arising from plaintiff's investment in defendant Next Up Funding, Inc.

Plaintiff moves to confirm the report and recommendations of Special Referee Louis Crespo, dated June 27, 2012 and for a final judgment against defendant Israel Hagar (Motion Seq. 005).

By separate motion, plaintiff seeks leave to submit a reply affirmation, and pro se defendant Hagar cross-moves for sanctions (Motion Seq. 006).

By decision on the record on September 23, 2011, this court (Fried, J., now retired) dismissed plaintiff's causes of action against defendants Hagar and Wright for breach of contract and breach of the implied covenant of good faith and fair dealing. In addition, the court severed all claims against Next Up Funding, Inc. and granted defendants' motion to compel arbitration of all such claims. By order dated April 4, 2012, this court (Fried, J.) entered a default judgment on liability as to defendants Jason Wright and Israel Hagar and referred "the issue of damages, including reasonable attorney's fees" to a Special Referee to hear and report with

recommendations.<sup>1</sup>

Hagar failed to appear at the Special Referee's hearing on June 19, 2012. The Special Referee rendered his Report (Ex. D to P.'s Motion), recommending that plaintiff be awarded \$8 million in damages and prejudgment interest at the statutory rate of 9%, that plaintiff not be awarded punitive damages, that plaintiff not be awarded attorney's fees and disbursements, and that final judgment be entered against Hagar.

As a threshold matter, the court accepts plaintiff's reply affirmation. The court also deems defendant Hagar's opposition a motion to vacate his defaults in this action.

It is well settled that in order to vacate a default judgment, a defendant must demonstrate an excuse for his or her non-appearance and a potentially meritorious defense. (See Matter of Commissioner of Social Servs. v Kastriot D., 101 AD3d 574 [1st Dept 2012].)

Here, defendant Hagar fails to satisfy this standard. He demonstrates that his attorney was suspended effective January 6, 2012. However, he offers no excuse for his failure after that date, either pro se or by new counsel, to answer the complaint, to respond to plaintiff's motion for a default judgment, or to appear at the hearing before the Special Referee. He also fails to make any showing of a potentially meritorious defense.

As to whether the Referee's Report should be confirmed, it is well-settled that "the function of a referee [is] to determine the issues presented, as well as to resolve conflicting

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<sup>1</sup> By letter dated August 10, 2012, plaintiff informed the court that it was willing to dismiss its complaint against defendant Ari Gruenzweig without prejudice. By order dated August 31, 2012, this court (Fried, J.) stayed this action against defendant Wright "by virtue of his filing a chapter 7 petition in the United States Bankruptcy Court for the Southern District of New York, Case No. 12-11821."

testimony and matters of credibility. Generally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record. The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor.” (Poster v Poster, 4 AD3d 145 [1st Dept], rearg denied 3 NY3d 605 [2004]; see also Rezzadeh v Lucas, 253 AD2d 698 [1st Dept 1998].) Thus, “the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility.” (Nager v Panadis, 238 AD2d 135, 135-36 [1st Dept 1997]; see also United States Trust Co. of New York v Olsen, 194 AD2d 481 [1st Dept 1993]; Pittoni v Boland, 278 AD2d 396 [2d Dept 2000].)

Applying these precepts, the court finds that the Special Referee’s recommendations are supported by the record. At the hearing, the Special Referee considered the testimony of Napoleon Grier, the principal of plaintiff Napoleon Grier Enterprises, Inc., and admitted documents into evidence, including the Next Up, Inc. investment agreement, emails between plaintiff and Wright, and bank statements for defendants. (Report at 2-5.) Grier testified as to the representations Hagar made to him with respect to the investment in Next Up Funding, Inc., including that “in exchange for providing \$1 million to defendants for the process of leveraging a bank debenture of \$20,000,000, that defendants guaranteed plaintiff a yield of no less than \$8 million as a 100% ‘guaranteed amount’.” (Report at 2.) Grier further testified that he invested \$1 million in reliance on these representations and that he would not have invested the money but for the representations made by defendants. (Report at 2, 4.) Further, Grier testified that Wright and Hagar transferred the \$1 million invested into their personal bank accounts and that Grier

was able to trace the money and demonstrate that “none of it was used for the purpose represented by defendants.” (Report at 3-4.) The Special Referee found Grier’s testimony and the evidence presented to be credible. (Report at 5.)

The Special Referee found that plaintiff was “entitled to recover his bargain, that is, the minimum return of \$8 million” “premised on the finding that but for their fraud, breach of fiduciary duty, conversion, among other acts, defendants would have performed their part of the bargain, leveraged the claimed \$20,000,000 debenture and conveyed to the plaintiff the minimum and guaranteed return of \$8 million.” (Report at 5-6.) Further, the Special Referee found that Hagar breached the investment agreement on October 28, 2010 when he and Wright used plaintiff’s funds to “pay” themselves and cover employee tax withholdings as opposed to making the promised investment of procuring and leveraging a bank debenture of \$20,000,000. (Report at 3-4.)

However, the Special Referee rejected plaintiff’s claim for punitive damages after finding that “plaintiff has failed to present clear, unequivocal and convincing evidence of wilful conduct that was morally culpable, or was actuated by evil and reprehensible motives to support an award of punitive damages.” (Report at 7.) Further, the Special Referee rejected plaintiff’s claim for attorney’s fees and disbursements. At the hearing, plaintiff conceded that there was no statutory authority for an award of attorney’s fees, and the Special Referee found that the investment agreement with Next Up, Inc. provided for an award of attorney’s fees only in the event of an arbitration. (Report at 7-8.)

The Special Referee also recommended that plaintiff be awarded pre-judgment interest at

the statutory rate of 9% from either the date of the breach of the contract, October 28, 2010, or the date of finding of liability, April 4, 2012. (Report at 10.)

At the outset of the hearing, the Special Referee put the following question to plaintiff:

“Let the record reflect that the Court has found defendant Israel Hagar under the default judgment of April 4, 2012 liable for, among other things, breach of contract, breach of fiduciary duty, fraudulent inducement of contract – and conversion?” Plaintiff’s counsel replied, “Exactly.” (Transcript of June 19, 2012 proceedings at 3.) As plaintiff’s counsel knew or should have known, the court dismissed plaintiff’s claims for breach of contract and breach of the implied covenant of good faith and fair dealing and, on plaintiff’s motion for a default judgment, ordered that a default judgment as to liability be entered against Hagar on the claims of fraud, conversion, constructive trust, and breach of fiduciary duty. (See Notice of Motion for Entry of Default Judgment, dated January 31, 2012.) However, the Referee’s determination that Plaintiff is entitled to damages is sustainable under plaintiff’s tort causes of action for fraud, conversion, and breach of fiduciary duty.

The court accordingly confirms the Special Referee’s recommendations in part and rejects them in part. To the extent that the Special Referee found that Hagar breached the investment agreement and that pre-judgment interest should be awarded from the date of the breach, the court rejects the Report, as no contract claims remained before the court. The court confirms the Special Referee’s findings that plaintiff be awarded \$8 million in damages based on liability on the tort claims and that pre-judgment interest at the statutory rate be awarded from the date of finding of liability, April 4, 2012. (See CPLR 5001, 5004.) The court further confirms the findings of the Special Referee that plaintiff not be awarded punitive damages, that plaintiff

not be awarded attorney's fees and disbursements, and that final judgment be entered against Hagar.

Defendant Hagar's cross-motion for sanctions is without merit.

It is accordingly hereby

ORDERED that plaintiff Napoleon Grier Enterprises, Inc.'s motion for an order confirming the report and recommendations of Special Referee Louis Crespo, dated June 27, 2012 and for a final judgment against defendant Israel Hagar is granted to the extent that the report and recommendations are confirmed in part and rejected in part as set forth above; and it is further

ORDERED that plaintiff Napoleon Grier Enterprises, Inc. is awarded judgment against defendant Israel Hagar in the amount of \$8 million with interest in the amount of 9% from April 4, 2012, and costs and disbursements as taxed by the clerk; it is further

ORDERED that plaintiff Napoleon Grier Enterprises, Inc.'s motion for leave to submit a reply affirmation is granted; and it is further

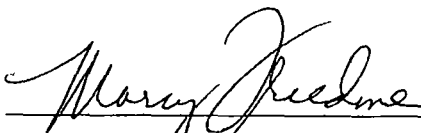
ORDERED that defendant Israel Hagar's cross-motion for sanctions is denied; and it is further

ORDERED that plaintiff Napoleon Grier Enterprises, Inc. shall submit a proposed judgment to the Clerk, including provisions amending the caption to remove "John Does 1-20" as defendants and dismissing all claims as to defendant Ari Gruenzweig; and it is further

ORDERED that plaintiff Napoleon Grier Enterprises, Inc. shall within ten (10) days of the date of entry of this order, serve a copy of this order with notice of entry upon all parties, including Israel Hagar, Jason Wright, and Next Up Funding, Inc. by personal delivery or overnight mail.

This constitutes the decision and order of the court.

Dated: New York, New York  
January 22, 2013

  
\_\_\_\_\_  
MARCY FRIEDMAN, J.S.C.