

**Kellner v Belbeck**

2014 NY Slip Op 32396(U)

September 9, 2014

Sup Ct, New York County

Docket Number: 650434/2014

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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MARK R. KELLNER and STEPHEN D. FRIEND,  
as Trustee of the Mark R. and Michele R. Kellner  
2011 Trust for the Kellner Children,

Index No.: 650434/2014

**DECISION & ORDER**

Plaintiffs,

-against-

MICHAEL S. BELBECK, HOLWORTHY CAPITAL  
PARTNERS LLC, and HOLWORTHY CAPITAL LLC,

Defendants.  
-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiffs Mark R. Kellner and Stephen D. Friend move for a default judgment, pursuant to CPLR 3215, against defendants Michael S. Belbeck, Holworthy Capital Partners LLC (the General Partner), and Holworthy Capital LLC (the Fund Manager). Plaintiffs' motion is granted, on default, for the reasons that follow.

In March 2013, plaintiffs invested \$1 million in non-party Holworthy Capital Fund LP (the Fund), a Delaware limited partnership. Belbeck controls the Fund through the General Partner and the Fund Manager. To induce plaintiffs to invest, Belbeck provided plaintiffs with a series of written offering materials. Plaintiffs allege the offering materials contain numerous fraudulent representations made for the purpose of inducing plaintiffs to invest. They contend the representations include falsehoods about how the money would be invested, the Fund's investment process, and the qualifications of the investment managers. Shortly after plaintiffs invested, they learned that Belbeck had improperly invested their money in unqualified trades (short trades that bet on a drop in the equity markets). The trades quickly led to losses in excess of \$150,000. More importantly, the trades did not conform to the type of investments that Belbeck had represented the Fund would engage in. Plaintiffs requested the return of their

investment. Belbeck responded that the Fund had ceased all investment activity as of April 1, 2013 and only held cash. Nonetheless, Belbeck refused to return plaintiffs' money. In December 2013, plaintiffs submitted a Withdrawal Request to the Fund's administrator, but that request was ignored. In addition to improper trading activity, plaintiffs also contend that Belbeck looted the Fund for his own personal use. Belbeck justified his defalcations by claiming the Fund incurred more than \$50,000 in "expenses", even though the Fund only engaged in a few trades.

Plaintiffs commenced this action on February 10, 2014. The complaint asserts 9 causes of action: (1) fraudulent inducement; (2) conversion; (3) constructive trust; (4) breach of fiduciary duty; (5) aiding and abetting breach of fiduciary duty; (6) negligent misrepresentation; (7) unjust enrichment; (8) an accounting; and (9) declaratory and injunctive relief. Defendants were served.

In addition, plaintiff moved by order to show cause for a temporary restraining order (TRO) to freeze the Fund's assets and for disclosure of the Fund's current financial statements. The court issued the requested TRO (Dkt. 21) and later issued a preliminary injunction in an order dated February 21, 2014. *See* Dkt. 30. Approximately one month later, after defendants failed to fully make the financial disclosures ordered by the court, the court issued a series of directives to the Fund's administrator, including an order to produce the Fund's current bank statements and the identification of the accounts in which plaintiffs' money was being held. *See* Dkt. 32. During a March 18, 2014 telephone conference in which counsel for the Fund's administrator participated, it was confirmed that such information was provided to plaintiffs. *See* Dkt. 42. However, at the end of that call, defendants' counsel informed the court of his intention

to move to withdraw from representation, which he did on March 20, 2014. The motion was granted in an order dated June 16, 2014 (Dkt. 79). The parties were directed to appear for a status conference on July 17, 2014, and the corporate defendants, the General Partner and the Fund Manager, were cautioned that they would be in default if they did not appear by counsel at that conference. On July 17, 2014, plaintiffs' counsel appeared for the conference, but neither Belbeck nor an attorney for the corporate defendants appeared. Plaintiffs' counsel was instructed to file an affirmation memorialising defendants' default, which the court so-ordered on July 18, 2014. *See* Dkt. 88.

On August 20, 2014, plaintiffs filed the instant motion for a default judgment. The motion seeks a default judgment on the grounds that defendants (1) never filed an answer or moved to dismiss; and (2) defaulted on the July 17, 2014 conference. Defendants were duly served, but did not oppose the motion.

“When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him.” CPLR 3215(a). To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. *See* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, at 557.

Plaintiffs are entitled to a default judgment due to defendants' failure to answer the complaint or appear for the court ordered status conference on July 17, 2014. In support of their motion, plaintiffs submit an affidavit of merit that establishes that plaintiffs were fraudulently induced to invest in the Fund and that, after investing, Belbeck made improper short investments and wrongfully took Fund money under the pretext of such amounts being “expenses”.

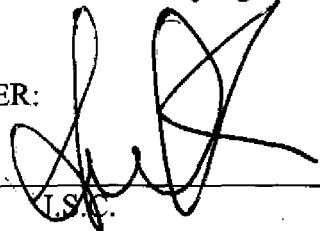
Plaintiffs, therefore, are entitled to recover against defendants in the amounts set forth in the attached judgment.<sup>1</sup> Accordingly, it is

ORDERED that the motion by plaintiffs Mark R. Kellner and Stephen D. Friend for a default judgment against defendants Michael S. Belbeck, Holworthy Capital Partners LLC, and Holworthy Capital LLC is granted; and it is further

ORDERED that the Clerk is directed to enter the attached judgment.

Dated: September 10, 2014

ENTER:



A handwritten signature in black ink is written over a horizontal line. Below the line, the letters "U.S.C." are printed in a small, sans-serif font.

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<sup>1</sup> Since the judgment includes an order directing the Fund's administrator to release plaintiffs' money, plaintiffs' June 2, 2014 motion (Seq. 003) seeking such relief is moot and will be marked as such by the court.

**SHIRLEY WERNER KORREICH  
J.S.C**

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

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MARK R. KELLNER and STEPHEN D. FRIEND, :  
as Trustee of the Mark R. and Michele R. Kellner :  
2011 Trust for the Kellner Children, :  
  
Plaintiffs, :  
  
v. :  
  
MICHAEL S. BELBECK, HOLWORTHY CAPITAL :  
PARTNERS LLC, and HOLWORTHY CAPITAL :  
LLC, :  
  
Defendants. :  
----- X

Index No. 650434/2014  
I.A.S. Part 54  
Justice Shirley Werner Kornreich

~~XXXXXXXXXX~~  
JUDGMENT

WHEREAS Plaintiffs Mark R. Kellner and Stephen D. Friend, as Trustee of the Mark R. and Michele R. Kellner 2011 Trust for the Kellner Children (collectively, "Plaintiffs"), filed the Summons and Complaint in this action on February 10, 2014;

WHEREAS the Summons and Complaint was duly served on each of Defendants Michael S. Belbeck, Holworthy Capital Partners LLC and Holworthy Capital LLC (collectively, "Defendants") on February 13, 2014; and service was also effected on each of the Defendants on February 10, 2014, by delivery of the Summons and Complaint to counsel for Defendants, which the Court ordered at a hearing on February 14, 2014, was deemed proper service;

WHEREAS each of the Defendants initially had appeared in the action prior to the default set forth below;

WHEREAS by an Order entered July 18, 2014, the Court held that each of the Defendants is in default for failure to appear in and defend the action;

WHEREAS Plaintiffs' Complaint includes monetary claims for a liquidated sum certain, and requisite proof of these claims and the amount thereof has been established;

WHEREAS Plaintiffs' Complaint also includes claims for the return of monies that Plaintiffs invested with Defendants, which such monies are held in capital accounts belonging to Plaintiffs with Holworthy Capital Fund LP, a limited partnership investment fund managed and controlled by Defendants, and such capital accounts are held and maintained by Defendants for Plaintiffs' benefit;

WHEREAS the Court issued an Order, entered February 21, 2014, granting a preliminary injunction freezing the monies in Plaintiffs' capital accounts, which such injunction remains in effect;

WHEREAS in further proceedings Defendants identified the financial institutions which hold the monies in Plaintiffs' capital accounts and the specific accounts (by account numbers) at those institutions in which Plaintiffs' monies are held, *to wit*: Bank of America New York (account no. 48XXXXXXXX67) and Interactive Brokers (account no. UXXXXX36), both such accounts being nominally in the name of Holworthy Capital Fund L.P. and holding monies beneficially owned by and belonging to Plaintiffs;

WHEREAS the total amount of Plaintiffs' monies presently held in the foregoing accounts at Bank of America New York and Interactive Broker is \$567,595.95;

WHEREAS Plaintiffs' Complaint further includes a claim seeking a declaration that the indemnification and advancement provisions set forth Section 2.2(c) of the Agreement of Limited Partnership of Holworthy Capital Fund LP are void and unenforceable in connection with Plaintiffs' claims; and

WHEREAS Plaintiffs have moved for entry of default judgment, pursuant to CPLR § 3215, against each of the Defendants, and the motion having been heard by this Court, the Honorable Shirley Werner Kornreich, I.A.S. Part 54.

NOW, upon the reading and filing of the Affidavit of Scott M. Himes, sworn to on August 20, 2014, and the exhibits annexed thereto, which include proofs of service of the Summons and Complaint upon Defendants; the Affidavit of Mark R. Kellner, sworn to on August 18, 2014, and the exhibits annexed hereto; and the Summons and Complaint, together with proofs of service thereof, it is hereby

ORDERED, DECREED AND ADJUDGED that Plaintiff Mark R. Kellner, having an address at 4351 Gulfshore Blvd. North, Apt. 19-S, Naples, FL 34103; and Plaintiff Stephen D. Friend, as Trustee of the Mark R. and Michele R. Kellner 2011 Trust for the Kellner Children, having an address at 4351 Gulfshore Blvd. North, Apt. 19-S, Naples, FL 34103, shall have judgment and recover, jointly and severally, against each of Defendant Michael S. Belbeck, having addresses at 370 Central Park West, Suite 101, New York, New York 10025; 92 Robinson Lane, London, Ontario N5X 3V4, Canada; and c/o Parkwood Hospital, 801 Commissioners Road East, London, Ontario N6C 5J1, Canada; Defendant Holworthy Capital Partners, LLC, having an address at 370 Central Park West, Suite 101, New York, New York 10025; and Defendant Holworthy Capital LLC, having an address at 370 Central Park West, Suite 101, New York, New York 10025, as follows:

(1) Awarding

(a) to *Plaintiff Mark R. Kellner* the sum of \$650,000, plus prejudgment interest at the rate of 9% per annum from March 25, 2013 (the date Kellner paid his monies to Defendants for investment) to July 18, 2014 (the date of the Order finding Defendants in default) in the amount of \$77,220.00, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements in the amount of \_\_\_\_\_ as taxed by

the Clerk, for the total amount of \$ \_\_\_\_\_, and that said Plaintiff have execution therefor; and

(b) to Plaintiff *Stephen D. Friend, as Trustee of the Mark R. and Michele R. Kellner 2011 Trust for the Kellner Children*, the sum of \$350,000, plus prejudgment interest at the rate of 9% per annum from March 21, 2013 (the date the Trust paid its monies to Defendants for investment) to July 18, 2014 (the date of the Order finding Defendants in default) in the amount of \$41,895.00, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements in the amount of \_\_\_\_\_ as taxed by the Clerk, for the total amount of \$ \_\_\_\_\_, and that said Plaintiff have execution therefor;

(2) Ordering that the monies held in the accounts at Bank of America New York and Interactive Broker under the name Holworthy Capital Fund L.P. that are subject to the Court's preliminary injunction imposing a freeze be released, turned over and paid to Plaintiffs as follows:

(a) from the account at Bank of America New York (account no. 48XXXXXXXX67), (i) the amount of \$162,970.44 to Plaintiff *Mark R. Keller*; and (ii) the amount of \$87,753.32 to Plaintiff *Stephen D. Friend, as Trustee of the Mark R. and Michele R. Kellner 2011 Trust for the Kellner Children*;

(b) from the account at Interactive Broker (account no. UXXXXX36), (i) the amount of \$205,966.92 to Plaintiff *Mark R. Keller*; and (ii) the amount of \$110,905.27 to Plaintiff *Stephen D. Friend, as Trustee of the Mark R. and Michele R. Kellner 2011 Trust for the Kellner Children*; and

(c) *provided that* recovery by either of the Plaintiffs of any of the amounts set forth in this Paragraph (2) shall reduce by such amount the recoverable damages under Paragraphs (1) (a) and (1) (b) as may correspond to such recovery for either of the Plaintiffs, respectively;

(3) Declaring that the indemnification and advancement provisions set forth Section 2.2(c) of the Agreement of Limited Partnership of Holworthy Capital Fund LP are void and unenforceable; and

(4) Ordering that damages in addition to the amounts set forth in Paragraph (1) on causes of action set forth in the Complaint may be assessed by inquest upon further application by Plaintiffs to the Court or the Clerk of the Court, or to the appropriate Court office for inquest upon reference.

Judgment signed this 9 day of Sept., 2014.

  
**SHIRLEY WERNER HORNREICH**  
J.S.C.