

Frycz v Brown

2014 NY Slip Op 32556(U)

September 30, 2014

Supreme Court, New York County

Docket Number: 650619/2012

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

JOHN FRYCZ, STEVE R. THOMAS, and STANLEY M. WOJCIK,

Plaintiffs,

INDEX NO. 650619/12

MOTION DATE _____

- v -

MOTION SEQ. NO. _____

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MOTION CAL. NO. _____

ERIC BROWN, IAN BROWN, KEITH GORDON, SCOTT LIEBERMAN, NV II LLC, EXCEL PARKING & MANAGEMENT CORP., FLASH PARKING INC., WEST 14th ST. GARAGE CORP., "XYZ" LLC. AND "ABC" CORP.

Defendants.

"XYZ" INC. And "ABC" CORP. are fictitious entities the true identity of which are unknown.

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answer – Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1-6

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

Plaintiffs previously moved for an Order, pursuant to CPLR §3215(a), for default judgment against defendants NV II, LLC ("NV II"), Excel Parking & Management Corp. ("Excel Parking"), Flash Parking Inc. ("Flash Parking"), West 14th St. Garage Corp. ("West 14th"), XYZ Inc., and ABC Corp. (collectively, "Corporate Defendants") based on defendants' failure to appear in this action, as follows: (a) in favor of Plaintiff, Stanley M. Wojcik ("Wojcik"), in the amount of \$1,492,400.00, plus interest, (b) in favor of Plaintiff, Steve R. Thomas ("Thomas"), in the amount of \$1,200,833.33, plus interest; (c) in favor of Plaintiff, John Frycz ("Frycz") in the amount of \$1,710,416.67, plus interest; (d) in favor of all Plaintiffs collectively in the amount of \$3,000,000 constituting punitive damages; (e) directing the Corporate Defendants to provide an accounting with respect to the subject investments; (f) imposing a constructive trust on the Corporate Defendants' assets; (g) rescinding the subject agreements; and (h) reasonable attorneys' fees. No opposition was submitted.

By decision dated July 1, 2013 and entered on July 3, 2013, the Court denied Plaintiffs' motion seeking default judgment against the Corporate Defendants, stating:

Here, Plaintiffs, in their Verified Complaint and affidavits, assert claims on alternate and conflicting theories of liabilities. Plaintiffs allege that Defendants breached a purported alleged oral investment agreement, and seek to recover promised returns based on the terms of the agreement. However, Plaintiffs also allege that Defendants fraudulently induced Plaintiffs to make the investments and enter into those same agreements, and assert that the

agreements should be rescinded and judgment entered in their favor based on the alleged fraud. Plaintiffs also assert claims of breach of fiduciary based on the alleged fraud, unjust enrichment, and seek civil penalties, punitive damages, and a constructive trust on Defendants' assets.

In their application for default judgment, Plaintiffs seek entry of default judgment on all of their claims, seeking to recover both the alleged promise terms of their investment agreements and to rescind those same agreements based on fraud. In light of these conflicting claims, the Court is unable to ascertain whether Plaintiffs have any viable cause of action to warrant default judgment.

By Notice of Motion e-filed on June 30, 2014,¹ Plaintiffs move for an Order, pursuant to CPLR §3215(a), entering a default judgment against the Corporate Defendants (for the second time) and against individual defendants, Ian Brown ("Brown"), Keith Gordon ("Gordon"), and Scott Lieberman ("Lieberman") based on their failure to appear.

Plaintiffs state, "To avoid any ambiguity, Plaintiffs are not at this time moving for a default judgment on first, second and third causes of action which seek enforcement of the terms of the subject agreements. Plaintiffs are solely seeking default judgment against both the Corporate and Individual Defendants [with the exception of defendant, Eric Brown, which Plaintiffs are not moving against] with respect to the remaining causes of action set forth in the Complaint which relate to the rescission of the subject agreements."

Plaintiffs state that they are not moving for a default judgment against defendant, Eric Brown, at this time because Eric Brown filed a petition for Chapter 7 Bankruptcy. Plaintiffs "specifically reserve their rights to proceed against Defendant Eric Brown once such stay has been lifted."

Plaintiffs seek an Order directing judgment as follows: (a) in favor of Plaintiff Wojcik in the amount of \$1,142,400, plus interest, (b) in favor of Plaintiff Thomas in the amount of \$955,000.00, plus interest; (c) in favor of Plaintiff Frycz in the amount of \$1,355,000.00, plus interest; (d) in favor of all Plaintiffs collectively in the amount of \$3,000,000 constituting punitive damages; (e) directing the Corporate Defendants and the Individual Defendants to provide an accounting with respect to the subject investments; (f) imposing a constructive trust on the assets of the

¹ Plaintiffs filed an Amended Notice of Motion on August 2, 2014, which clarified that Plaintiffs were also seeking a constructive trust against the assets of the Individual Defendants in addition to those of the Corporate Defendants.

Corporate Defendants and the Individual Defendants; (g) rescinding the subject agreements; and (h) reasonable attorneys' fees. No opposition is submitted.

Plaintiffs submit the attorney affirmation of Daniel Singer, which annexes a copy of the Verified Complaint, and affidavits of service attesting to service of the Summons and Complaint on defendants NV II, Excel Parking, Flash Parking, West 14th St. through the New York Secretary of State on March 13, 2013 and proof of additional mailing to these defendants pursuant to CPLR §3215(g)(4). Plaintiffs also provide affidavits of service attesting to service upon defendant, Ian Brown, pursuant to CPLR §308(2) on March 17, 2012, upon Lieberman pursuant to CPLR §308(4) on March 21, 2012, and upon Gordon pursuant to CPLR §308(2) on May 27, 2012. Plaintiffs also provide proof of additional mailing pursuant to CPLR §3215(g)(3) with respect to these individual defendants.

Singer states that as of the date of Plaintiffs' application, these defendants have failed to appear. XYZ Inc., and ABC Corp. are other identities currently unknown to Plaintiffs through which Plaintiffs believe that the individual defendants have conducted the actions as set forth in the Complaint. Plaintiffs also submit the affidavits of Frycz, Thomas, and Wojcik.

The United States Bankruptcy Code provides for an automatic stay of certain prescribed actions against the debtor or the debtor's property (*see 11 USC §362[a]*). As set forth by the Second Department:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy law. It is effective immediately upon filing without further action. Moreover, it is not limited to the litigants, and extends to the non-bankruptcy court as well. Once triggered by a debtor's bankruptcy petition, the automatic stay suspends any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor. This is so because section 362's stay is mandatory and 'applicable to all entities', including state and federal courts.

Carr v. McGriff, 8 A.D. 3d 420, 422 [2d Dept 2004]. *See also Empire Erectors and Electrical Company, Inc. v. Unlimited Locations LLC*, 102 A.D. 3d 419, 419 [1st Dept 2013] ("The automatic stay normally applies to non-debtors only when a claim against a non-debtor will have 'an immediate adverse economic consequence for the debtor's estate.'").

Furthermore, CPLR §3215(c) states in relevant part:

Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter

judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed.

“Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and ‘shall’ dismiss the claim pursuant to CPLR §3215(c).” (*Giglio v. NTIMP, Inc.*, 86 A.D. 3d 301, 308 [2nd Dept. 2011]; see also *Brown v. Andreoli*, 81 A.D.3d 498, 498 [1st Dept. 2011]).

Here, Plaintiffs did not file the instant motion against the defendants until June 30, 2014, over one year after Defendants’ alleged default (in fact, almost two years after the alleged default) and have failed to address any reasonable excuse for its untimeliness. Plaintiffs’ motion is denied as untimely and the action is dismissed as to all defendants except Eric Brown.

Based on the foregoing, it is hereby

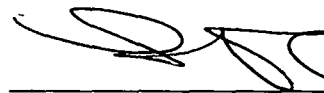
ORDERED that Plaintiffs’ motion for default judgment against defendants, NV II, LLC, Excel Parking & Management Corp., Flash Parking Inc., West 14th St. Garage Corp., XYZ Inc., ABC Corp., Ian Brown, Keith Gordon, and Scott Lieberman is denied; and it is further

ORDERED that the Complaint is dismissed as against defendants, NV II, LLC, Excel Parking & Management Corp., Flash Parking Inc., West 14th St. Garage Corp., XYZ Inc., ABC Corp., Ian Brown, Keith Gordon, and Scott Lieberman and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action as against defendant, Eric Brown, is severed and shall proceed once the stay has been lifted.

This constitutes the decision and judgment of the Court. All other relief requested is denied.

Dated: **SEPTEMBER 30, 2014**



HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE