SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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STEVEN RATTNER and MONOMOY FARM, LLC,

Plaintiffs,

-against-

DECLAN ORPEN, DECLAN ORPEN SHOW STABLES, INC. (Florida), and DECLAN ORPEN SHOW STABLES, INC. (New York),

Defendants.

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DECISION AND ORDER

Index No.: 651717/2014
Mot. Seq. No. 001

O. PETER SHERWOOD, J.:

Before the Court is the plaintiff's unopposed motion for an order directing entry of default judgment based on defendants' failure to appear in the action. For the following reasons, the motion is granted in part and otherwise denied.

Background

Plaintiff Steven Rattner is the sole member of Monomy Farm, LLC ("Monomoy Farm"), a limited liability company that operates a horse farm in North Salem, New York. From 2004 through April 2012, defendant Declan Orpen ("Orpen") was employed by plaintiffs.[1] From 2004 through 2005, Rattner personally hired Orpen to train his horses, teach his children to ride and compete, and manage horse-related matters for the Rattner family. In 2005, Rattner formed Monomoy Farm, and hired Orpen to act as its manager, a position in which Orpen served until he left plaintiffs' employ in April 2012.

Plaintiffs' complaint alleges a pattern of self-dealing, fraud, breach of contract, and breach of fiduciary duty by Orpen while employed by plaintiffs. Specifically, plaintiffs allege that Orpen (1) failed to disclose his financial interest in certain contractors that he engaged to perform services

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[1] The remaining defendants in this case are two entities allegedly formed and wholly owned by Orpen. Declan Orpen Show Stables, Inc. (New York), is a New York corporation (the "New York Show Stables"). The New York State Division of Corporations indicates that it remains an active corporation. Declan Orpen Show Stables, Inc. (Florida), is a Florida corporation (the "Florida Show Stables", and collectively with the New York Show Stables, the "Show Stables"). The Florida Department of State, Division of Corporations lists the Florida Show Stables as an inactive corporation, having been dissolved as of November 18, 2013.

for plaintiffs; (2) demanded and received kickback payments for himself and his family members from contractors and realtors who performed work for plaintiffs at plaintiffs' expense; (3) accepted side payments on transactions for the purchase of investment horses without disclosing or distributing them to plaintiffs as contractually required; (4) failed to honor his contractual obligation to return advanced profits on horse investments when the investments did not ultimately realize a net profit; and (5) negligently misrepresented whether work performed on plaintiffs' property complied with applicable rules and regulations.

Plaintiffs commenced this action on June 5, 2014. Plaintiffs served Orpen, an Irish citizen, personally with a copy of the summons and complaint on June 18, 2014 (*see* NYSCEF Doc. No. 5). Plaintiffs served the Show Stables at the Office of the Secretary of the State of New York on June 19, 2014, with additional copies of the summons and complaint mailed to each defendant on July 23, 2014 (*see* NYSCEF Doc. Nos. 6-7). The defendants have not answered or otherwise responded to the complaint. Accordingly, on February 10, 2015, plaintiffs filed the instant motion seeking entry of default judgment.

Discussion

CPLR 3215(a) provides that "[w]hen 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[a]). A judgment by default requires "proof of the facts constituting the claim, the default and the amount due by affidavit made by the party", or a verified complaint (CPLR 3215[f]; *Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer*, 210 AD2d at 61). Plaintiffs seek judgment on counts 1, 3, 4, and 5 of the complaint.[2] Counts 1, 3, and 4 assert claims against Orpen for breach of fiduciary duty, breach of contract, and negligent misrepresentation and omission, respectively. Lastly, count 5 asserts a claim for unjust enrichment against the Show Stables.

I. Count 1 - Breach of Fiduciary Duty

"To establish a breach of fiduciary duty, the plaintiff must show the existence of a fiduciary

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[2] Count 2 of the complaint asserts a claim for fraud. Plaintiffs are not pursuing judgment on that cause of action through this motion.

relationship, misconduct that induced the plaintiff to engage in the transaction in question, and damages directly caused by that misconduct" (*Barrett v Freifeld*, 64 AD3d 736, 739 [2d Dept 2009]). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 N.Y.3d 146, 158 [2008]), "but not in an arm's-length business transaction involving sophisticated business people" (*Barrett* at 739).

Plaintiffs pursue this claim under the "faithless servant" doctrine. Under the faithless servant doctrine, "an employee who acts in any manner inconsistent with his agency or trust and fails to exercise the utmost good faith and loyalty in the performance of his duties is deemed a faithless servant and must account to his principal for secret profits [and forfeit] his right to compensation" (*Mosionzhnik v Chowaiki*, 41 Misc 3d 822, 831 [Sup Ct, NY Cty July 29, 2013] [internal quotation marks omitted]; *see also Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928 [1977] ["One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary"]).

"It is well established that, by defaulting, a defendant admits all traversable allegations contained in the complaint, and thus concedes liability, although not damages" (*Christian v Hashmet Mgt. Corp.*, 189 AD2d 597, 598 [1st Dept 1993]). By virtue thereof, plaintiffs have adequately demonstrated Orpen's liability. Plaintiffs have sufficiently established that Orpen owed plaintiffs fiduciary duties of loyalty and good faith as plaintiffs' employee and agent (*see, e.g.*, Restatement [Third] Of Agency § 8.01 ["An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship"]). Orpen breached those duties by, *inter alia*, (1) failing to disclose his financial interest in certain contractors that he retained to perform work on behalf of plaintiffs; (2) receiving and concealing kickback payments from contractors and realtors who performed work for plaintiffs at plaintiffs' expense; and (3) accepting side payments on transactions for the purchase of investment horses without or accounting for them to plaintiffs.

As to damages, plaintiffs sufficiently established that through the above transgressions, Orpen constitutes a faithless servant (*see Murray v Beard*, 102 NY 505, 508 [1886] ["An agent is held to *uberrima fides* in his dealings with his principal; and if he acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his

conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services"]; *Consol. Edison Co. v Zebler*, 40 Misc 3d 1230[A] [Sup Ct 2013] [defendant constituted a faithless servant by virtue of scheme of receiving bribes and kickbacks]). Under the faithless servant doctrine, Orpen must forfeit any compensation received, even when "the services were beneficial to the principal, or [when] the principal suffered no provable damage as a result of the breach of fidelity by the agent" (*Feiger*, 41 NY2d at 928-29). Accordingly, plaintiffs are entitled to recover all compensation paid to Orpen, whether constituting salary or commissions, during the period of his employment. The bank records, tax forms, and other documents submitted in connection with Mr. Minar's affidavit, sufficiently establish that Orpen received $585,147.37 in salary and commissions during the term of his employment (*see* Minar aff, Exs. 1-7, 11, NYSCEF Doc. Nos. 49-55, 59).

II. Count 3 - Breach of Contract

In count 3 of the complaint, plaintiffs seek expectation damages based on "Orpen's multiple material breaches of the contract to invest in horses for resale (the 'Horse Investment Contract')" (Pls. Br., NYSCEF Doc. No. 45, p. 5). To sustain a breach of contract cause of action in New York, plaintiffs must prove each of the following elements: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages sustained by plaintiff as a result of the breach (*see Kraus v Visa Intl Serv Assn*, 304 AD2d 408 [1st Dept 2003]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Although unclear, it appears that the Horse Investment Contract was an oral contract, as plaintiffs do not attach of copy of the contract to either the complaint or their motion papers. Pursuant to the Horse Investment Contract, Orpen was to locate horses suitable for plaintiffs to purchase as investments, plaintiffs would fund the purchase of the horse and all expenses related to the horses' upkeep, and Orpen would then care for and resell the horse (*see* Compl. ¶ 38). Specifically, plaintiffs allege that the material terms of the Horse Investment Contract required Orpen to: "(a) report all proceeds received on any horse sales to Monomoy Farm and Steven Rattner; (b) report all expenses relating to the investment horses so that those could be deducted from investment horse proceeds; (c) share 50/50 any net proceeds from investment horses after deducting the expenses relating to any investment horse; and (d) return the advances paid to him in the event

of a net loss" (*see* Compl. ¶ 189). Plaintiffs contend that they fully performed under the Horse Investment Contract by funding the purchase and maintenance of several investment horses between 2011 and 2012 (*see* Compl. ¶ 190). Plaintiffs further contend that they advanced Orpen $84,152.40 in anticipated profits from the investment horses, but that the investments did not realize a profit (*see id.* ¶ 191). Plaintiffs lastly allege that Orpen received $15,000 in undisclosed side payments from plaintiff's counter-parties on the investment horse transactions (*see id.* ¶¶ 136-152).

By defaulting, defendants have conceded these allegations (*see Christian*, 189 AD2d at 598). The above allegations sufficiently establish a claim for breach of contract by demonstrating the existence of a contract (the Horse Investment Contract), plaintiff's performance via funding the purchase and maintenance of the investment horses, and defendants' breach of the contract by failing to remit advanced profits and failing to account for side payments received. Plaintiffs have submitted affidavits from Mr. Rattner, and Mr. Minar, plaintiffs' accountant, of the facts constituting the claim, defendants' default, and the damages sustained, thereby satisfying their burden under CPLR 3215(f). Plaintiffs additionally submit sworn testimony from Michael McCormick and Orpen from a federal civil case entitled *Matter of Kennedy v McCormick*, Case No. 5:13-CV-61-Oc-22PRL (Mid. Dist. Florida). McCormick, the buyer of one of the investment horses, testifies that he paid Orpen $10,000 in cash in connection with that transaction (*see* Minar aff, Ex. 8, NYSCEF Doc. No. 56, at 92:24-94:13). Orpen acknowledges receipt of the $10,000 and his failure to account for the payment to plaintiffs (*see id.*, Ex. 9, NYSCEF Doc. No. 57, at 53:3-55:17). Additionally, plaintiffs submit a copy of a check from Kirbys Bridge Brook Arms to Orpen in the amount of $5,000, issued as a kickback for effectuating plaintiffs' purchase of an investment horse (*see id.*, Ex. 10, NYSCEF Doc. No. 58). As such plaintiffs are entitled to default judgment.

Count 3 seeks $99,152.40 in damages. However, $84,152.40 of this amount is duplicative of the amount awarded under count 1. Thus, plaintiffs are entitled to judgment on count 3 in the amount of $15,000, equivalent to the amount of side payments Orpen received and failed to account for under the Horse Investment Contract.

III. Count 4 - Negligent Misrepresentation and Omission

Count 4 of the complaint assets a claim for negligent misrepresentation and omission based on several construction projects (one to build horse stalls, one to repair and improve a driveway, and

one to build a bridge) for which Orpen was tasked with hiring competent contractors. To sustain a cause of action for negligent misrepresentation or omission, "a plaintiff must allege '(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect [or withheld]; and (3) reasonable reliance on the information [or omission]'" (*High Tides, LLC v DeMichele*, 88 AD3d 954, 959 [2d Dept 2011]). Plaintiffs contend that Orpen represented that the construction projects complied with applicable local safety and building codes. However, neither the horse stalls nor the bridge were built to code, and as a result, plaintiffs had to tear both down and have them reconstructed (*see* Compl. ¶ 96, 125).

As with the above claims, defendants have conceded the allegations contained in count 4 by failing to answer or otherwise respond to the complaint (*see Christian*, 189 AD2d at 598). The allegations in the complaint as verified through the affidavits of Steven Rattner and Mike Minar sufficiently establish a claim for negligent misrepresentation by demonstrating (1) that Orpen's employment as manager overseeing the day-to-day operations of plaintiffs' farm (including the construction projects) required him to impart correct information to plaintiffs; (2) that defendants' misrepresented that the construction projects were being completed to code, and failed to disclose kickbacks received from the contractors; and (3) that plaintiffs reasonably relied on Orpen's representations as Orpen was the manager of the farm entrusted with hiring the contractors and overseeing the construction. Additionally, Orpen communicated to plaintiffs, through emails and otherwise, that he was negotiating with various entities in order to hire the most competent and cost-effective contractors for the projects (*see, e.g.*, Compl. ¶ 76). Defendants demonstrated that they were damages by having to tear down the stalls and bridge, and reconstruct them. Plaintiffs submit credit card statements, invoices and receipts evidencing damages in the amount of $1,154,566.66 (*see* Minar aff, Exs. 13-14, NYSCEF Doc. Nos. 61-62).

IV. Count 5 - Unjust Enrichment

Count 5 asserts a claim for unjust enrichment against the Show Stables to recover commission payments made to those entities instead of Orpen at Orpen's request. "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 J*

Wildenstein, 16 NY3d 173, 182 [2011] [citation omitted]). To establish this claim, a plaintiff must show: "(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" (*Id.* at 182 [citations omitted]). While privity is not required, the there must be a connection between the parties that is not "too attenuated" (*id.*). A claim sounding in quasi contract only lies in the absence of an express agreement governing the dispute at issue (*see Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 [1987]).

In support of this claim, plaintiffs submit a "Monomoy Farm Ledger Report" reflecting advances, commissions, and other payments made to the Show Stables for the period of 2008 to 2012. However, this ledger does not clearly reflect to which of the two Show Stables the plaintiffs made the payments. Instead, it merely indicates "Declan Orpen Show Stables" in the top left hand corner of the ledger. Plaintiffs therefore have not carried their burden of demonstrating which, if either, of the two Show Stable defendants in this action were the recipients of the transfers, and therefore enriched. Plaintiffs affidavits in support conflate the two separate legal entities and treat them as if they were one and the same. However, without clarity as to which entity was in fact enriched, judgment cannot be entered on count 5 for unjust enrichment. Accordingly, the motion for an order directing entry of default judgment on count 5 is denied.

Accordingly, it is hereby

ORDERED that the motion for default judgment is GRANTED with respect to counts 1, 3, and 4 of the complaint and otherwise DENIED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs Steven Rattner and against defendant DECLAN ORPEN, in the sum of $1,754,714.03, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

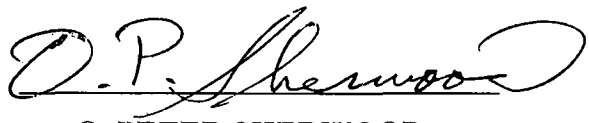
ORDERED that, within fourteen (14) days of entry, plaintiff shall serve a copy of this order with notice of entry upon defendants; and it further

ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Tuesday, June 23, 2015 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

DATED: May 12, 2014

E N T E R,



O. PETER SHERWOOD
J.S.C. 5/11/15