

**Asher Enters., Inc. v Digital Brand Media & Mktg.
Group, Inc.**

2014 NY Slip Op 33921(U)

September 9, 2014

Supreme Court, Nassau County

Docket Number: 600717-14

Judge: Jerome C. Murphy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

ASHER ENTERPRISES, INC.,

Plaintiff,

TRIAL/IAS PART 23

Index No.: 600717-14

Motion Date: 7/11/14

Sequence No.: 001

DECISION AND ORDER

- against -

**DIGITAL BRAND MEDIA & MARKETING GROUP,
INC. And LINDA PERRY,**

Defendants.

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....	1
Notice of Cross-Motion, Affirmation and Exhibits.....	2
Affirmation in Opposition to Cross-Motion, Verified Complaint and Exhibits..	3
Verified Answer with Counterclaim.....	4

PRELIMINARY STATEMENT

Plaintiff brings this application for an order pursuant to CPLR § 3215, granting a default judgment in favor of plaintiff and against defendants, and granting plaintiff such other and further relief as to the Court may seem just and proper. Defendants oppose this application herein.

BACKGROUND

Plaintiff extended financing to Digital Brand Media & Marketing Group, Inc. (“Digital Brand”) on three occasions. On February 1, 2013, plaintiff obtained a Convertible Promissory Note for \$42,500.00, upon which there is a principal balance of \$5,000.00. Digital Brand executed a similar note to plaintiff for \$37,500 on April 25, 2013, which balance remains unpaid. The third note for \$32,500.00 was issued to plaintiff on June 5, 2013, and the principal balance is

\$32,500.00. Plaintiff seeks a judgment for \$75,000.00 and an additional \$37,500.00 as claimed lost profits plaintiff would have realized had the stock in lieu of cash been made available to them in accordance with the conversion notice. Plaintiff has not provided copies of the convertible notes which serve as the basis for their claim.

Plaintiff commenced this action against Digital Brand and its principal, Linda Perry, by filing a Summons and Verified Complaint. The Complaint contains four causes of action. The First alleges the three notes and contemporaneous Securities Purchase Agreements, and that the notes gave plaintiff the right to convert any part of the outstanding and unpaid principal amounts and accrued interest into fully paid and non-assessable shares of common stock, and that a default of the notes would occur upon Digital Brand's failure to comply with the reporting requirements of the Securities Exchange Act of 1934. It further alleges that Digital Brand failed to file a Form 10Q for the quarterly period ending November 30, 2013 on or before the due date of January 14, 2014. Plaintiff served a Notice of Default on February 7, 2014, stated to be Exh. "A" to the complaint, but not attached to the moving papers.

The Second Cause of Action alleges Fraud in the Inducement by both defendants in that they misrepresented their intention to remain compliant with the reporting requirements of the Exchange Act. The Third Cause of Action alleges breach of contract against both defendants, in that plaintiff has been deprived of the opportunity to acquire and dispose of the common stock of Digital Brand and that the markets for the stock can no longer be created. The Fourth Cause of Action seeks legal fees and litigation costs as allegedly provided for in the Agreements.

Defendants cross-move for an Order pursuant to CPLR § 2004 granting defendants an extension of time to answer, and directing plaintiff to accept the answer previously filed and served. Defendant asserts that Linda Perry has not personally signed or guaranteed any of the debentures, and is not personally responsible.

Defendants also contend in their cross-motion that they have a meritorious defense to the claimed default in filing. They assert that the Securities and Exchange Commission advise them on or about November 15, 2013, that their previous auditor, Sherb & Co., was no longer authorized to practice before the SEC. Defendant then filed an unaudited statement on December 16, 2014, although the SEC Rules and Regulations require annual reports to be

audited. While it is not entirely clear, defendants seem to aver that they filed an audited 10Q report on February 14, 2014, seven days after the notice of default served upon them by plaintiff.

They challenge the Second Cause of Action, alleging Fraud in the Inducement, in that they fail to plead with the particularity needed to assert a claim for fraud. They also claim that the Third and Fourth Causes of Action are merely assertions of damages, and do not constitute independent causes of action.

Defendants also contend that they have a reasonable excuse for their failure to file within the applicable time limit. After receipt of the notification that their former auditor had been disqualified from practicing before the SEC, they agreed to have the work performed by a company which acquired the business of their former auditor. Despite assurances from that company, the preparation of the audited statements were delayed, thus leading to the late filing of the 10Q.

DISCUSSION

The decision whether to grant a default judgment is left to sound judicial discretion (*Shah v. New York State Dep't. Of Civil Service*, 168 F.3d 610, 615 [2d Cir.1999]; *Briarpatch Ltd. V. Geisler Roberdeau, Inc.*, 513 F.Supp.2d 1, 3 [S.D.N.Y. 2007]). In considering whether a default judgment is appropriate, the Court must first consider whether service of process has been properly effectuated upon the defaulting defendant; and second, whether the unchallenged facts alleged in the complaint state a legitimate cause of action (*Kee v. Hasty*, 2004 WL 807071 at 4 [S.D.N.Y] *citing*, 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2688 [3d ed. 1998]).

The plaintiff must establish by affidavit of an individual with personal knowledge, or similarly verified complaint, facts sufficient to establish the claims alleged (*Dyno v. Rose*, 260 A.D.2d 694 [3d Dept. 1999]). Where the verified complaint is conclusory, and devoid of factual allegations, constituting the claim alleged, a motion for default judgment shall be denied (*Celnick v. Freitag*, 242 A.D.2d 436 [1st Dept. 1997]; *Luna v. Luna*, 263 A.D.2d 470 [2d Dept. 1999]).

The next consideration which the Court must consider is the appropriate level of damages to be awarded plaintiff. By defaulting, a defendant admits to all well-pleaded allegations, except those pertaining to damages (*Greyhound Exhibitgroup, Inc. V. E.L.U.L Realty Corp.*, 973 F.2d

155, 158 [2d Cir.1992]; *Traffic Sports USA, Inc. v. Segura*, 2008 WL 4890164 [E.D.N.Y.]). “(W)here the plaintiff has filed reasonably detailed affidavits and a memorandum of law pertaining to the damages requested . . . and the defendant has failed to make an appearance in the case, the Court can make an informed recommendation regarding damages without an evidentiary hearing.” *Id.* at 5.

Service of Process

Plaintiff has effected service on Linda Perry in accordance with CPLR §308(2) by delivering copies of the Summons and Complaint upon her on March 14, 2014, at her actual place of business at 747 Third Avenue, New York, New York. The service upon a person of suitable age and discretion was followed by mailing on March 15 to the usual place of business.

Digital Brand Media is a foreign corporation authorized to do business in the State of New York. Plaintiff made personal service upon a representative of the New York State Attorney General in accordance with Business Corporation Law § 307 and subsequently mailed a copy by certified mail return receipt requested to the office address of the corporation.

Statement of Cause of Action

First Cause of Action. Plaintiff asserts that the Agreement and Notes entitled them to convert the notes to common shares of defendant corporation upon a breach of the Agreement, including failure to comply with filing requirements of the Securities and Exchange Act. Plaintiff has not provided copies of the Notes or the Agreements, and the Court is unable to determine if the First Cause of Action states a valid claim in the absence of the documents forming the basis for the claim.

There is no allegation that defendant Linda Perry personally obligated herself to the Agreements or on the Notes, and the First Cause of Action fails to adequately state a cause of action against her.

Second Cause of Action. Plaintiff claims that defendants committed fraud in the inducement by their concerted intent to fail to comply with the filing requirements of the SEC. Plaintiff has failed to plead this claim with the specificity required by CPLR § 3016(b), which states that “(w)here a cause of action, or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall

be stated in detail.” A defendant claiming that it was fraudulently induced into an agreement must plead and prove (1) a false representation of fact (2) known by the party to be false, or made with reckless disregard for its truth (3) made with the intent to deceive and induce the other to act (4) upon which the other party relied (5) to their detriment. (*Pan Atlantic Group v. Isacsen*, 114 A.D.2d 1022 [2d Dept. 1985]).

Plaintiff simply claims that defendants intended to breach the contract. They do not assert a specific representation of a fact made by defendants, known to be untrue or recklessly made, upon which they relied to their detriment. Were plaintiff’s second cause of action to constitute a valid claim, each and every breach of contract would be subject to a claim of fraud, in that defendant always intended to breach the terms of the Agreement.

There is no evidence submitted that defendant Linda Perry, acting in other than her representative capacity, misrepresented any material fact upon which plaintiff relied to their detriment. The Second Cause of Action does not state a cause of action against either defendant.

Third and Fourth Causes of Action. Neither of these causes of action state independent basis for liability against defendants. Rather, they are itemization of claimed damages in the event plaintiff succeeds in their action against defendants.

The Court declines to grant plaintiff’s application for default judgment. There appears to be, at best, a single viable cause of action against the corporate defendant; but even that is questionable because of the failure of plaintiff to produce documentary evidence of the terms of the agreement, and whether the difficulties surrounding the failure to file a year-end report with the SEC constituted a breach of the Agreement.

Courts have clearly expressed their preference that matters be determined on the merits. Defendants have indicated that their failure to provide an audited copy of the 10Q Report was occasioned by the loss of their usual auditor and the delay in providing the audit by his replacement. There is a further issue as to the significance of the delay in filing the audited report, and whether or not the delay actually violated the terms of the Agreements or Notes.

Under these circumstances, the Court exercises its broad discretion in denying the motion by plaintiff for default judgment against defendants. The cross-motion by defendants is granted and plaintiff is directed to file a Verified Answer in the form submitted within 20 days of the

receipt of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 9, 2014

ENTER:



JEROME C. MURPHY
J.S.C.

ENTERED

SEP 18 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE