MBK Entertainment, Inc. v Pate
2015 NY Slip Op 31208(U)
July 10, 2015
Supreme Court, New York County
Docket Number: 652505/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MBK ENTERTAINMENT, INC.,

Plaintiff,

Index No. 652505/2014

DECISION and ORDER

\- against -

Mot. Seq. #002

KIMBERLY PATE, professionally known as "K. MICHELLE" and CHASE LANDIN LLC,

Defendants.

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

Plaintiff, MBK Entertainment, Inc. ("Plaintiff" or "MBK"), brings this action for breach of contract, injunctive relief, accounting and unjust enrichment to recover money allegedly owed under a management agreement dated March 26, 2012 (the "Agreement") between Plaintiff and individual defendant, Kimberly Pate, professionally known as "K. Michelle" ("Pate"). Plaintiff claims that, pursuant to the Agreement, Plaintiff agreed to provide management services to Pate for a period of three years, with an automatically exercised one-year option period, in exchange for a commission fee. Plaintiff claims that Pate breached the Agreement by, *inter alia*, signing an exclusive management agreement with non-party Atom Factory prior to the expiration of the term of the Agreement and failing to pay commission fees and reimbursable expenses allegedly owed to Plaintiff under the Agreement. In addition, Plaintiff claims that entity defendant, Chase Landin LLC ("Chase"), operates as Pate's alter ego. Plaintiff claims that Chase is liable for Pate's obligations under the Agreement.

Plaintiff commenced this action on August 14, 2014, by summons with notice. Plaintiff filed a complaint on September 5, 2014.

Plaintiff now moves for an Order, pursuant to CPLR § 3215, granting judgment on default in favor of Plaintiff and against Defendants for past commissions in the amount of $226,374.75; and, directing an inquest as to the amount of future damages. In support, Plaintiff submits: the attorney affirmation of Robert S. Meloni ("Meloni"), dated March 9, 2015; the affidavit of merit of Jeff Robinson ("Robinson"), Plaintiff's principal, dated March 9, 2015; Plaintiff's summons and complaint; the affidavit of service of Plaintiff's initiatory papers upon Pate by personal delivery to a person of suitable age and discretion at Pate's place of residence and subsequent mailing, dated September 18, 2014; a copy of the LLC Formation Document for Chase on file with the Delaware Secretary of State; the affidavit of service of Plaintiff's initiatory papers upon Chase by personal delivery to Chase's managing agent as authorized agent to accept service of process, dated October 28, 2014; the affidavit of nonmilitary service dated March 2, 2015; the affidavit of additional mailing upon Pate, dated March 9, 2015; a copy of a lease agreement indicating Pate's place of residence; a copy of the Agreement; and, a copy of the Commissions Spreadsheet.

Defendants oppose. Defendants submit: the attorney affirmation of Gregory Griffith ("Griffith"), dated April 9, 2015; the attorney affirmation of Matthew J. Middleton ("Middleton"), dated April 9, 2015; the declaration of Joseph E. Porter, III ("Porter"), dated April 9, 2015.

Turning first to Plaintiff's motion for a default judgment, CPLR § 3215 provides, in relevant part: "[o]n any application for judgment by default, the applicant shall file proof ... of the facts constituting the claim, the default and the amount due by affidavit made by the party." (CPLR § 3215[f]). CPLR § 3215 does not contemplate that default judgments are to be "rubberstamped" once jurisdiction and a failure to appear have been shown. (*Feffer v. Malpeso*, 210 A.D.2d 60, 61 [1st Dep't 1994]; *see also Gagen v. Kipany Prods.*, 289 A.D. 2d 844, 846 [3d Dep't, 2001] ["[T]he granting of a default judgment does not become a 'mandatory ministerial duty' upon a defendant's default."]). Rather, some proof of liability is required to satisfy the court as to the prima facie validity of the uncontested cause of action. (*Feffer*, 210 A.D.2d at 61). The standard of proof on an application for judgment by default "is not stringent, amounting only to some firsthand confirmation of the facts". (*Id.*).

In the affidavit of Robinson, Robinson avers that he is the principal owner of MBK (Robinson Aff. ¶ 5). Robinson further avers that, "[d]uring early 2012, Pate sought out [Robinson's] assistance as a successful manager and music producer in New York" and that, "MBK and Pate ultimately entered into an agreement that was

memorialized in a written agreement dated as of March 26, 2012 which was signed by Ms. Pate and MBK (the 'Agreement')." (*Id.* ¶ 8). Robinson avers that, "the term of the Agreement would run three years from the effective date of the Agreement with an automatically exercised 1 year option period, unless MBK gave earlier notice of termination" and that no such notice was given. (*Id.* ¶¶ 10-11).

Robinson further avers that "[t]he Agreement provided that in exchange for the Plaintiff's management services, Pate would pay and/or cause to pay to Plaintiff 'a sum equivalent to twenty percent (20%) of [Pate's] Gross Compensation' (the 'Commission')." (*Id.* ¶ 12). Robinson avers:

> The term Gross Compensation applied to all of Pate's activities in the entertainment industry, and included, without limitation, compensation received on all pre-existing agreements, agreements entered into during the Term of the Agreement, all modifications, extensions and substitutions of those agreements, and all products created by Pate and/or services rendered by Pate prior to or during the term of those agreements in connection with her activities in the entertainment industry, including, but not limited to, master recordings, musical compositions, audio-only and audiovisual works, merchandise, sponsorships and endorsements.

(*Id.* ¶ 13).

The affidavit of Robinson describes various terms relating to Plaintiff's compensation under the Agreement, including that Plaintiff's Commission was to be paid "when Gross Compensation '[was] [sic] received by or credited to' Pate or to any person, firm or corporation on Pate's behalf." (*Id.* ¶¶ 14-17). Robinson avers that, "[o]ver the next two years [following the execution of the Agreement], MBK performed specific managerial functions and services" for Pate, and that, "[t]he parties' relationship and performance of their respective obligations under the Agreement continued successfully and without issue for over two years". (*Id.* ¶¶ 20[a]-[m], 22).

Robinson avers, "[d]espite the aforementioned outstanding results achieved and having another two years to run on the term of the Agreement, on June 27. 2014, Pate disclosed to an officer of MBK that she was considering switching management. I firmly rejected Pate's attempt at early termination of the Agreement."

(*Id.* ¶ 23). Robinson further avers that, "in July 2014, I discovered that Pate had signed with a new management company, Atom Factory", and that, "MBK has not released Pate from the remainder of the term of the Agreement or her continuing obligations thereunder, including, *inter alia*, the payment of its Commission, and continues to be ready, willing and able to perform all of its management obligations thereunder." (*Id.* ¶¶ 24-25).

With respect to damages, Robinson avers that the Commissions Spreadsheet annexed to Plaintiff's moving papers "is a business record maintained by Plaintiff for each of its clients, including Pate, demonstrates that Pate currently owes MBK the running balance of $226,374.75 in commissions, as of October 4, 2014 as the outstanding amount not yet paid by Defendant under the Agreement." (*Id.* ¶ 26). In addition, Robinson avers that, "[b]ased upon her unwarranted repudiation of the Agreement through, among other things, her improper engagement of a competitor management company, Atom Factory, Pate will continue to owe MBK its Commissions under the Agreement." (*Id.* ¶ 27).

Accordingly, Plaintiff demonstrates sufficient "first-hand confirmation" of the facts to support the entry of a default judgment as against Pate pursuant to CPLR § 3215.

However, with respect to entity defendant Chase, to prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). A cause of action for unjust enrichment is available "only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." (*Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 [2012]). Additionally, in order to prevail on a reverse veil-piercing claim, the plaintiff must demonstrate: (1) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (2) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil. (*see American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 [2d Cir., 1997] *citing State v. Easton*, 169 Misc. 2d 282, 647 N.Y.S.2d 904, 908-09 [Sup. Ct. 1995]; *Harvardsky Prumyslovy Holding, A.S.,-V Likvidaci v. Kozeny*, 117 A.D.3d 77, 83 [1st Dep't 2014]).

Here, Robinson avers:

> [Chase] is a Delaware limited liability company that handles the business and accounting aspects of providing Pate's entertainment related services. Ms. Pate is the sole and controlling member of [Chase]. [Chase] operates as a "loan out" company that furnishes the services of Pate in the entertainment industry, and acts as the conduit that collects and distributes the flow of entertainment related income from Pate's entertainment endeavors.

(Robinson Aff. ¶ 29). Robinson further avers, "[a]ll checks that I have ever seen that were payable to Defendant Pate were made out to [Chase]" and that "[Chase] was the issuer for every commission check paid to MBK Entertainment Inc." (*Id.* ¶¶ 31-32). Additionally, Robinson avers that, "[w]hile [Chase] is not a party to the Agreement at issue, its collection and improper withholding of management commissions that under equity and good conscience should be paid to Plaintiff establishes Plaintiffs claim for unjust enrichment as against [Chase] in the sum certain amount of $226,374.75." (*Id.* ¶ 33).

Accordingly, Plaintiff fails to demonstrate sufficient "first-hand confirmation" of the facts to satisfy the Court as to the prima facie validity of Plaintiff's claims against Chase. Chase was not a party to the subject Agreement, and Plaintiff fails to provide any additional documentation or testimonial evidence to demonstrate that Chase was unjustly enriched in the amount of $226,374.75 at Plaintiff's expense. Nor does Plaintiff provide additional documentation or testimonial evidence to demonstrate that Pate used any alleged domination over Chase to commit a fraud or wrong that injured Plaintiff. (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012] [finding that, allegations of control, "unaccompanied by allegations of consequent wrongs", are insufficient, without more, to plead a basis to pierce the corporate veil]).

Turning now to Defendants' opposition, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." (CPLR § 3012[d]). In order to be permitted to serve an untimely answer as timely, a defendant must provide both a reasonable excuse for the delay and demonstrate

potentially meritorious defenses to the action. (*Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep't 2008]). Additionally, "[a]s a matter of general policy, disposition of controversies on the merits is favored." (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dep't 1964]).

Here, Defendants argue that Defendants have a reasonable excuse for their failure to answer Plaintiff's complaint, because Defendants actively sought advice from counsel in California, where Pate resides. Defendants argue that Pate's California counsel advised Pate that the California Labor Commissioner has exclusive jurisdiction over certain disputes between artists and managers. Defendants further argue that, based on this advice, Defendants reasonably believed that the instant action would be resolved before the California Labor Commissioner and did not initially retain New York litigation counsel to appear herein.

However, pursuant to CPLR § 320, "[a]n appearance shall be made within twenty days after service of the summons, except that if the summons was served on the defendant . . . pursuant to . . . [CPLR § 308(2)] . . . the appearance shall be made within thirty days after service is complete." (CPLR § 320[a]). As Plaintiff's affidavits of service upon Pate and Chase were filed with the Clerk of the Court on September 24, 2014, to avoid defaulting, Defendants were required to appear no later than October 24, 2014. (CPLR §§ 320[a]; 308[2]). Thus, any reasonable excuse for defaulting must have occurred before October 24, 2014. (*Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 A.D.3d 616, 618 [1st Dep't 2012]). Here, Pate did not retain the California attorney who advised Pate that the instant dispute was subject to the exclusive jurisdiction of the California Labor Commissioner (Porter Dec. ¶ 3) as counsel until November 2014, (*id.*), after Defendants' time to answer had passed.

Furthermore, Defendants do not submit an answer in the proposed form annexed to Defendants' papers, and Plaintiff's failure to provide sufficient proof of the facts constituting Plaintiff's claim against Chase is not tantamount to a meritorious defense on Defendants' part.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for default judgment is granted only as against Pate; and it is further

ORDERED that the clerk is directed to enter judgment in favor of Plaintiff, MBK Entertainment, Inc., and against defendant, Kimberly Pate, professionally known as "K. Michelle", in the sum of $226,374.75, with interest at the statutory rate (from 9/24/2014), as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that an assessment of future damages against Pate is directed at the time of trial of this action.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: July 10, 2015

EILEEN A. RAKOWER, J.S.C.