

<b>Thomas NG v Green Machine Bio-Sys. of S.Carolina, Inc.</b>
2015 NY Slip Op 31454(U)
July 31, 2015
Supreme Court, New York County
Docket Number: 652713/2013
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

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THOMAS NG, OWEN WANG, and T&O CAPITAL, INC.

Plaintiffs,

-against-

Index No. 652713/2013  
Motion Date: 05/29/2015  
Motion Seq. No. 003

GREEN MACHINE BIO-SYSTEMS OF SOUTH CAROLINA, INC.; HAROLD F. FISHER, JR. A/K/A/ HANK FISHER, Individually; HANK FISHER, INC.; KATHY MARIE FISHER, Individually; KATHY MARIE FISHER, INC.; PHILLIP GAMBELLI A/K/A PHIL GAMBELLI, Individually; MARK FERRARA, Individually; GREEN MACHINE BIOSYSTEMS, INC.; MICHAEL G. FISHER, Individually; FAUSTO ALVAREZ, Individually; JOSEPH DAMIANO, Individually; NHN ENTERPRISES, INC.; ADAM BORISUK, Individually; ADAM BORISUK, INC.; NADINE AGLIATA, Individually; COASTAL BIODIESEL GROUP, INC.; MARK L. HEFNER, Individually; GARY M. BERNS A/K/A GARY BURNS, Individually; GREEN ACRES COSTA RICA A/K/A GREEN ACRES FARMS; EDUARDO ACOSTA, Individually; the ESTATE OF HAROLD F. FISHER, A/K/A HANK FISHER, and his heirs, assigns and inheritors; JASON DAMIANO, INC.; JASON DAMIANO, Individually; TRI-STATE ECOLOGY CORP.; JOHN BOKLAK, ESQ., Individually; POINTS SOUTH HOLDING, INC.; CARLOS H. PACHECO MURILLO, Individually; AB&P Consultores; JOHN DOES 1-10; XYZ CORPORATIONS 1-10

Defendants.

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**BRANSTEN, J.**

In motion sequence 003, Plaintiffs Thomas Ng, Owen Wang, and T&O Capital Inc. ("Plaintiffs") move for a default judgment under CPLR § 3215 against Defendants Jason Damiano, Joseph Damiano, and Adam Borisuk. Plaintiffs also seek a default

judgment against Defendants Green Machine Bio-Systems of South Carolina, Inc., Kathy Marie Fisher, Gary Berns a/k/a Gary Burns, Kathy Marie Fisher, Inc., and Points South Holding, Inc. (collectively the "Other Defendants"). Second, Plaintiffs seek a temporary restraining order under CPLR § 6301 enjoining Defendants Jason Damiano, Joseph Damiano, and Adam Borisuk from liquidating assets to satisfy any judgment rendered in favor of Plaintiffs. Finally, Plaintiffs seek costs and attorneys' fees under Uniform Court Rules 130-1.1 and 130-2.1.

For the reasons that follow, Plaintiffs' motion is denied in its entirety.

### **BACKGROUND**

In August 2013, Plaintiffs filed this action to recover monies that Plaintiffs invested in an allegedly defunct corporation named "Green Machine." (Compl. ¶ 50.) Green Machine is a grease recycling company that converts used cooking oil into fuel. *Id.* ¶ 3. Plaintiffs allege that that they invested \$201,265.00 in Green Machine, which the Defendants took without providing Plaintiffs any ownership shares in the company and when Plaintiffs sought return of their investment, they were refused. *Id.* ¶¶ 14, 49. Plaintiffs then filed this action against thirty Defendants, alleging twenty different causes of action.

Each Defendant was served with the summons and complaint in August 2013. Defendants Joseph Damiano, was served on August 23, 2013, by affixing and mailing a

copy of the summons and complaint to his dwelling at 18 Waltress Road, Apartment 1, Ronkonkoma, NY 11779. Defendant Adam Borisuk was served on August 23, 2013, by affixing and mailing a copy of the summons and complaint to his dwelling at 11 Avis Drive, Holbrook, NY 11741. Defendant Kathy Marie Fisher was personally served on August 23, 2013, at her dwelling, 165 Greatneck Hill Road, Southampton, NY 11968. Kathy Marie Fisher, Inc., Hank Fisher, Inc., and Points South Holding, Inc. were served on August 23, 2013, via authorized agent Kathy Marie Fisher at her dwelling, 165 Greatneck Hill Road, Southampton, NY 11968. Defendant Gary Berns a/k/a Gary Burns was served on August 12, 2013, by delivering the summons to Brett Berns, a person of suitable age and discretion, at Defendant Gary Berns a/k/a Gary Burns' dwelling, 2450 NE 135th Street, North Miami, FL 33181. Finally, Defendant Green Machine Bio-Systems of South Carolina, Inc. was served on August 14, 2013, via authorized agent Jodi Wyles at 1703 Laurel Street, Columbia, SC 29201.

In lieu of an answer, Defendants Jason Damiano, Joseph Damiano, Adam Borisuk, filed a motion to dismiss Plaintiffs' complaint. On July 16, 2014, the Court granted the motion to dismiss in part and denied in part as to Jason Damiano, Joseph Damiano, and Adam Borisuk.<sup>1</sup> Five causes of action survived the motion to dismiss, including breach of contract, breach of implied contract, breach of implied covenant of good faith and fair

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<sup>1</sup> The Court also granted the motion to dismiss in its entirety against Defendants Nadine Agiliata, NHN Enterprises, Inc., Jason Damiano, Inc., Adam Borisuk, Inc., and Tri-State Ecology Corp.

dealing, avoidance and recovery of constructive fraudulent conveyances, and avoidance and recovery of intentional fraudulent conveyances.

In its accompanying order, the Court directed Defendants Jason Damiano, Joseph Damiano, and Adam Borisuk to serve an answer to the remaining causes of action within twenty days after Plaintiffs' service of a copy of the order on them with notice of entry. Nearly one year later, on April 9, 2015, Plaintiffs filed a notice of entry for the order granting the motion to dismiss from July 2014. To date, Jason Damiano, Joseph Damiano, Adam Borisuk, and the "Other Defendants" have not served an answer to the complaint. On May 4, 2015, Plaintiffs filed the present motion for (1) default judgment against Jason Damiano, Joseph Damiano, Adam Borisuk, and the "Other Defendants"; (2) a preliminary injunction against Jason Damiano, Joseph Damiano, and Adam Borisuk enjoining them from liquidating assets in anticipation of judgment; and (3) attorneys' fees incurred for five preliminary status conferences between August 26, 2014 and February 17, 2015 that counsel for Defendants Jason Damiano, Joseph Damiano, and Adam Borisuk failed to attend.

## DISCUSSION

### I. PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT

#### A. Motion for Default Judgment Standard

Under CPLR § 3215, a plaintiff may seek a default judgment against a defendant “when [that] defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed.” CPLR § 3215(a). A defendant served with the summons and complaint, within the state, is in default if the defendant fails to answer the complaint within twenty days of the date of service. *See* CPLR § 3012(b). A defendant served with the summons and complaint, outside the state, is in default if the defendant fails to answer the complaint within thirty days of the date of service. *See* CPLR § 3012(c). “If the plaintiff fails to take [action] for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” CPLR § 3215(c).

On any application for judgment by default, the applicant shall file (1) proof of service of the summons and complaint, and (2) proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. CPLR § 3215(f). Where a default judgment is awarded, the judgment shall not exceed in amount or differ in type from that demanded in the complaint. CPLR § 3215(b).

**B. Default Judgment as to Jason Damiano, Joseph Damiano, and Adam Borisuk**

Plaintiffs move for default judgment against Jason Damiano, Joseph Damiano, and Adam Borisuk under CPLR § 3215. Plaintiffs' motion for default judgment against Jason Damiano, Joseph Damiano, and Adam Borisuk is denied because (1) the motion seeks more than was demanded in the complaint and (2) there is no proof of service of the summons and complaint attached to the motion.

***1. The Judgment Amount Sought***

The judgment awarded shall not exceed in amount or differ in type from that demanded in the complaint. CPLR § 3215(b); *Gluck v. W. D. Allen Mfg. Co.*, 53 A.D.2d 584, 585 (1st Dep't 1976) (holding that the trial court erred by allowing plaintiff to amend its prayer for relief at an inquest after defendant defaulted and erred by granting judgment beyond that demanded in the complaint).

In their motion papers, Plaintiffs seek judgment for \$202,665.00, despite the fact that the complaint only seeks \$201,265.00 for the causes of action that remain after the motion to dismiss was partially granted. Therefore, the motion for default judgment is denied as to Jason Damiano, Joseph Damiano, and Adam Borisuk.

***2. Proof Required***

On any application for default judgment, the applicant shall file (1) proof of service of the summons and complaint, and (2) proof of the facts constituting the claim,

the default and the amount due by affidavit made by the party. CPLR § 3215(f). While the First Department has not ruled on whether failure to file proof of service of the summons and complaint is a prejudicial error, the Second Department has held that it is a prejudicial error. See *Daniels v. King Chicken & Stuff, Inc.*, 35 A.D.3d 345, 345 (2d Dep't 2006) (ruling that the trial court properly denied plaintiff's motion for default judgment where plaintiff failed to present proof of valid service of the summons and complaint); *Levi v. Oberlander*, 144 A.D.2d 546, 547 (2d Dep't 1988); *Nemetsky v. Banque Dev. De La Republique Du Niger*, 59 A.D.2d 527, 527 (2d Dep't 1977), *aff'd*. 48 N.Y.2d 962, 962 (1979). The Third Department has reached the same conclusion. See *Brown v. Midrox Ins. Co.*, 108 A.D.3d 921, 923 (3d Dep't 2013).

Plaintiffs have failed to attach proof of service of the summons and complaint to their motion papers, and therefore Plaintiffs' motion papers are deficient. Accordingly, Plaintiffs' motion for default judgment is also denied on these grounds as to Jason Damiano, Joseph Damiano, and Adam Borisuk.

### **C. Default Judgment as to the "Other Defendants"**

Plaintiffs next seek default judgment against the "Other Defendants" under CPLR § 3215. However, Plaintiffs' motion for default judgment as to the "Other Defendants" must be denied, and the complaint is dismissed in its entirety as abandoned against the "Other Defendants," for failure to take action for the entry of judgment within one year of the "Other Defendants'" default.

A plaintiff may seek a default judgment against a defendant “when [that] defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed.” CPLR § 3215(a). “If the plaintiff fails to take action for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” CPLR § 3215(c); *see Herzbrun v. Levine*, 23 A.D.2d 744, 744 (1st Dep’t 1965), *see also Valentin v. Rinder*, 65 A.D.2d 716, 716 (1st Dep’t 1978).

In order to avoid having the complaint dismissed as abandoned, a plaintiff must (1) show sufficient cause why the complaint should not be dismissed and (2) submit an affidavit of merits. *Herzbrun v. Levine*, 23 A.D.2d at 744; *Valentin v. Rinder*, 65 A.D.2d at 716.

No such showing has been attempted here.

Even where such a showing has been attempted, the First Department has emphasized a plaintiff’s duty to prosecute his or her action. For example, in *Herzbrun v. Levine*, 23 A.D.2d at 744, the First Department rejected an excuse that the plaintiff moved to West Germany as sufficient cause for failing to take action within one year. The court indicated that a party’s general statement of moving and losing contact with their attorney is not a sufficient cause for failure to take action within a year of the

default. *Id.* The court further noted that the plaintiff failed to make a showing that their cause of action had merit. *Id.* As a result, the court remanded the case to be dismissed. *Id.*

In *Valentin v. Rinder*, 65 A.D.2d at 716, the First Department rejected an excuse that plaintiff's counsel repeatedly contacted the defendant, encouraging defendant to answer the complaint, but that defendant's counsel did not respond to those communications. There, the defendant failed to answer the complaint and was in default as of June 1974. *Id.* Plaintiff, however, did not move for an entry of default until November 1977. *Id.* Plaintiff argued that it made efforts to reach out to defendant to obtain an answer to the complaint and was unaware defendant had retained new counsel. *Id.* The court explained, "the duty of prosecuting. . . [an] action rests upon the [person] who brings it, not the [party] who defends it" *Id.* (citing *Sortino v. Fisher*, 20 A.D.2d 25, 30 (1st Dep't 1963)). The court concluded the plaintiff did not fulfill its obligation because plaintiff never made an effort to determine why communications to previous counsel went unanswered and was under no obligation to wait for an answer to the complaint. *Valentin v. Rinder*, 65 A.D.2d at 716. Therefore, the court dismissed the complaint as abandoned. *Id.*

In this case, as in *Herzbrun v. Levine* and *Valentin v. Rinder*, Plaintiffs have failed to take action against the "Other Defendants" within one year of their default, and therefore the court, *sua sponte*, must dismiss the complaint against the "Other Defendants" as abandoned.

All of the “Other Defendants” have failed to answer the complaint and are in default. Defendants Kathy Marie Fisher; Kathy Marie Fisher, Inc.; Hank Fisher, Inc.; and Points South Holding, Inc. each were served on August 23, 2013. Since these Defendants were served in Southampton, NY, they defaulted as of September 12, 2013. Defendant Green Machine Bio-Systems of South Carolina, Inc. was served on August 14, 2013. Since it was served in Columbia, SC, Green Machine Bio-Systems of South Carolina, Inc. defaulted as of September 13, 2013. Defendant Gary Berns a/k/a Gary Burns was served in North Miami, FL, on August 12, 2013. Accordingly, he defaulted as of September 12, 2013.

Notwithstanding the “Other Defendants” defaults in 2013, Plaintiffs failed to move for default judgment until May 15, 2015. Because Plaintiffs moved for default judgment against the “Other Defendants” twenty months after the default, Plaintiffs have failed to take action within the timeframe required under CPLR § 3015(c). Moreover, Plaintiffs have made no showing of sufficient cause as why the complaint should not be dismissed. Therefore, the motion for default judgment as to the “Other Defendants” is denied and the complaint is dismissed in its entirety as abandoned as to the “Other Defendants.”

## II. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs also seek a preliminary injunction under CPLR § 6301, enjoining Defendants Jason Damiano, Joseph Damiano, and Adam Borisuk from liquidating assets in anticipation of judgment. Plaintiffs' motion is denied because Plaintiffs have failed to make a factual showing explaining why injunctive relief should be granted, and in any event, have not demonstrated irreparable harm or that the balance of the equities tips in their favor.

“A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual or where plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or continuance of an act, which if committed or continued, would produce injury to the plaintiff.” CPLR § 6301. A preliminary injunction is a “drastic remedy,” and thus “is appropriate only where a party has established (1) likelihood of success on the merits of the pending action, (2) irreparable injury absent such relief, and (3) a balancing of equities in favor of the relief sought.” *N.Y. Auto. Ins. Plan v. N.Y. Sch. Ins. Reciprocal*, 241 A.D.2d 313, 314 (1st Dep't 1997). The movant must provide “clear and convincing” evidence as to each of these three elements. *See Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). The movant must make a factual showing for a preliminary injunction to be granted; conclusory speculation

is insufficient. See *U.S. Re Companies, Inc. v. Scheerer*, 41 A.D.3d 152, 155 (1st Dep't 2007) (concluding that "speculation is not a basis for the imposition of a preliminary injunction").

**A. Likelihood of Success on the Merits**

To assess the likelihood of success on the merits, "the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action." *1234 Broadway LLC v. West Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011). "Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." *Id.*

Plaintiffs make sufficient factual allegations here. Plaintiffs allege that they invested a total of \$201,265.00 into Defendant Green Machine of South Carolina, Inc. Plaintiffs provide copies of checks totaling their first investment of \$195,000.00. See Ian H. Kaufman's Affirmation in Support Exhibit A. Plaintiffs also provide copies of a wire transfer for \$6,265.00, which Plaintiffs allege was their second investment. See Ian H. Kaufman's Affirmation in Support Exhibit J. Therefore, Plaintiffs have tendered clear and convincing evidence demonstrating a likelihood of success on the merits.

### **B. Irreparable Harm**

A preliminary injunction is not appropriate in an action seeking solely money damages. *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 549 (2000) (holding that an unsecured creditor suing to collect a debt is not entitled to preliminary injunctive relief to prevent the debtor's dissipation of assets prior to judgment).

Plaintiffs seek only money damages in the causes of action remaining in their complaint. Because plaintiffs seek only money damages, a money judgment alone would undo any harm done to Plaintiffs. Even if a preliminary injunction was appropriate here, Plaintiffs only make conclusory allegations – in one sentence, no less – that they will suffer irreparable damage if Jason Damiano, Joseph Damiano, and Adam Borisuk are not enjoined from liquidating their assets. A more factual showing is required in order to satisfy the clear and convincing evidence standard required for this element. *See Axelrod*, 72 N.Y.2d. at 750. Therefore, Plaintiffs' motion seeking a preliminary injunction as to Jason Damiano, Joseph Damiano, and Adam Borisuk is denied on these grounds.

### **C. Balance of the Equities**

Finally, Plaintiffs fail to make an argument that the balance of the equities tips in their favor – save for one statement that “it is . . . in the interests of equity for this court to restrain defendants Joseph Damiano, Jason Damiano and Adam Borisuk from liquidating assets so that an eventual judgment in favor of plaintiff may be rendered.” *See Ian H.*

Kaufman's Affirmation in Support ¶ 28. Therefore, Plaintiffs have not presented clear and convincing evidence that the balance of equities tips in their favor. Accordingly, Plaintiffs' motion seeking a preliminary injunction as to Jason Damiano, Joseph Damiano, and Adam Borisuk is denied on these grounds.

### **III. PLAINTIFF'S MOTION FOR COSTS, SANCTIONS, AND ATTORNEYS' FEES**

Finally, Plaintiffs seek costs, sanctions, and attorneys' fees under 22 NYCRR § 130-1.1 and 22 NYCRR § 130-2.1 for Defendants' alleged failure to appear at five preliminary conferences: August 26, 2014, September 23, 2014, October 28, 2014, December 2, 2014, December 16, 2014, and February 17, 2015.

#### **A. 22 NYCRR § 130-1.1**

A party's conduct merits sanctions under 22 NYCRR § 130-1.1 if "... (2) it is undertaken primarily to delay or prolong the resolution of the litigation." The First Department has interpreted this language to mean "intentionally protract[ing] the case while lacking a good faith belief in the merit of the action." *Sakow v. Columbia Bagel, Inc.*, 32 A.D.3d 689, 690 (1st Dep't 2006).

Plaintiffs allege that Defendants' counsel's failure to give timely notice that he would miss conferences is evidence of intent to prolong the litigation. *See* Ian H. Kaufman's Affirmation in Support ¶ 33. However, that fact shows only that Defendants'

counsel failed to appear, not that he did so to prolong the litigation. Therefore, the motion for costs, sanctions, and attorneys' fees under this section is denied.

**B. 22 NYCRR § 130-2.1**

Under 22 NYCRR § 130-2.1(a), “[t]he court in its discretion, may impose financial sanctions or in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court.” A court should sanction an attorney only where his or her conduct was deliberate or without good cause. *See ACS-NY v. Pizarro*, 285 A.D.2d 406, 406 (1st Dep’t 2001). “Good cause” includes circumstances beyond the attorney’s control. *Id.* at 406-407. The court shall consider all the attending circumstances including the explanation, if any, offered by the attorney for his or her non-appearance. (22 NYCRR §130-2.1(b)).

Defendants’ counsel provided an explanation for missing the conferences – that cancer treatment made it impossible for him to attend. Illness is certainly outside of one’s control and therefore constitutes good cause for failing to appear. Accordingly, Plaintiffs’ motion for costs, sanctions, and attorneys’ fees under this section is also denied.

Counsel are warned, however, that failure to appear at a scheduled court appearance will no longer be excused, and that any future absences require express leave from this Court in accordance with this Court's Part Rules.

### CONCLUSION

Accordingly, it is

ORDERED that Plaintiffs' motion for default judgment is denied as to Defendants Jason Damiano, Joseph Damiano, and Adam Borisuk; and it is further

ORDERED that Plaintiff's motion for default judgment is denied as to Defendants Green Machine Bio-Systems of South Carolina, Inc., Kathy Marie Fisher, Gary Berns a/k/a Gary Burns, Kathy Marie Fisher, Inc., and Points South Holding, Inc.; and it is further

ORDERED that the complaint is dismissed as to Defendants Green Machine Bio-Systems of South Carolina, Inc., Kathy Marie Fisher, Gary Berns a/k/a Gary Burns, Kathy Marie Fisher, Inc., and Points South Holding, Inc. and the clerk is directed to enter judgment in favor of these Defendants dismissing the action, together with costs and disbursements to Defendants, as taxed by the clerk upon presentation of a bill of costs; and it is further


ORDERED that Plaintiffs' motion for a preliminary injunction as to Jason Damiano, Joseph Damiano, and Adam Borisuk is denied; and it is further

ORDERED that Plaintiffs motion for costs, sanctions, and attorneys' fees is denied; and it is further

ORDERED that counsel for Plaintiffs and the remaining Defendants shall appear for a preliminary conference in Room 442, 60 Centre Street, on Tuesday, September 1, 2015, at 10AM.

Dated: New York, New York  
July 31, 2015

ENTER

  
Hon. Eileen Bransten, J.S.C.