

<b>MFW Holdings LLC v Fouche</b>
2016 NY Slip Op 30781(U)
April 26, 2016
Supreme Court, New York County
Docket Number: 650582/2015
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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 OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
MWF HOLDINGS LLC, A. EDWARD FRIEDMANN  
2009 TRUST, MARK J. FRIEDMANN, and WENDY  
FRIEDMANN,

Index No.: 650582/2015

**DECISION & ORDER**

Plaintiffs,

-against-

GARY H. FOUCHE, VESTOR HOMES LLC, and  
JASON C. STALLWORTH,

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.:

Plaintiffs MWF Holdings LLC, A. Edward Friedmann 2009 Trust, Mark J. Friedmann, and Wendy Friedmann move, pursuant to CPLR 3215, for a default judgment against defendants Gary H. Fouche and Jason C. Stallworth. Plaintiffs' motion is granted, on default, for the reasons that follow.

Plaintiffs allege that defendants fraudulently induced them to invest in two properties and advance funds to renovate a third property.<sup>1</sup> In total, plaintiffs invested more than \$750,000 with defendants. With respect to the first two properties, plaintiffs allege that defendants promised them a guaranteed 10% return within one year, but that defendants never intended to, and, in fact, never did pay such return to plaintiffs. Instead, they allege defendants pocketed plaintiffs' money, used it to purchase the third property, sold the property for a profit, and kept all of the money.

---

<sup>1</sup> The three properties are referred to as the (1) Amityville Property (155 County Line Road, Amityville, New York); (2) Hempstead Property (133 Windsor Parkway, Hempstead, New York); and (3) Nissequogue Property (322 Old Mill Road, Nissequogue, New York).

On February 25, 2015, plaintiffs commenced this action by filing a summons and complaint. On March 13, 2015, plaintiffs filed an amended complaint (the AC), which contains 11 causes of action: (1) fraud against all defendants; (2) negligent misrepresentation against Fouche; (3-5) breach of contract against all defendants (i.e., one cause of action for each of the three properties); (6) conversion against all defendants; (7) civil conspiracy against all defendants; (8) breach of fiduciary duty against Fouche; (9) specific performance against all defendants; (10) injunctive relief against all defendants; and (11) punitive damages against all defendants. *See* Dkt. 3.<sup>2</sup> The same day the AC was filed, March 13, 2015, defendant Vestor Homes LLC (the entity plaintiffs sent their money to and which Fouche and Stallworth used to transfer the properties) filed a bankruptcy petition in the Eastern District of New York, and this action remains stayed as against it under 11 USC § 362. Plaintiffs served Fouche and Stallworth with the AC [*see* Dkt. 28-29], but they never filed an answer or motion to dismiss.

On March 16, 2016, plaintiffs filed the instant motion for a default judgment on liability against Fouche and Stallworth on the first through eighth causes of action. They do not seek relief on their ninth, tenth, and eleventh causes of action and have withdrawn their request for attorneys' fees. *See* Dkt. 32 at 3. Plaintiffs also seek an inquest on damages. Fouche and Stallworth submitted no opposition to this motion.

“When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him.” CPLR 3215(a). To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting

---

<sup>2</sup> References to “Dkt.” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

the claim. *See* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, at 557. "Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action. The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts." *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (citations omitted); *see Whitemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014). "[A] defaulting defendant is deemed to have admitted all the allegations in the complaint." *McGee v Dunn*, 75 AD3d 624 (2d Dept 2010).

Plaintiffs are entitled to a default judgment on liability. For the reasons set forth in their moving brief, plaintiffs, in their well pleaded AC, have alleged that Fouche and Stallworth made material misrepresentations to induce plaintiffs to invest with defendants and that defendants breached their agreements with plaintiffs by not providing plaintiffs with the promised equity in the properties. In addition, plaintiffs properly pleaded the other causes of action at issue on this motion (e.g., conversion), which appear to have been asserted in the alternative. The only outstanding issue is damages, for which plaintiffs must make an election of remedies – that is, they may either seek rescission or enforcement of their agreements with Fouche and Stallworth. While CPLR 3014 permits plaintiffs to plead inconsistent theories of recovery, they cannot simultaneously seek to enforce their contracts and rescind them. An inquest on damages shall be conducted before a Special Referee, at which point plaintiffs must elect their remedy. Accordingly, it is

ORDERED that the motion by plaintiffs MWF Holdings LLC, A. Edward Friedmann 2009 Trust, Mark J. Friedmann, and Wendy Friedmann for a default judgment against defendants

Gary H. Fouche and Jason C. Stallworth is granted, on default, on liability only on the first through eighth causes of action; and it is further

ORDERED that plaintiffs' ninth, tenth, and eleventh causes of action and their request for attorneys' fees are permitted to be withdrawn; and it is further

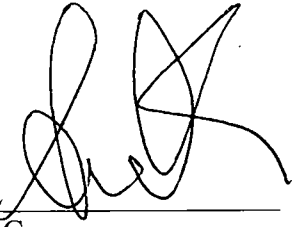
ORDERED that plaintiffs' claims against defendant Vestor Homes LLC are severed and shall continue when the automatic stay is lifted; and it is further

ORDERED that an inquest on damages on the claims against defendants Fouche and Stallworth is referred to a Special Referee to hear and determine; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, plaintiffs shall file a Note of Issue, pay the appropriate fees, and serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that within 3 days of the entry of this order on the NYSCEF system, plaintiffs shall serve a copy of this order upon defendants Gary H. Fouche and Jason C. Stallworth by overnight mail.

Dated: April 26, 2016

ENTER:   
\_\_\_\_\_  
J.S.C.