SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ACCESS AMERICA FUND, LP, TAYLOR INTERNATIONAL FUND, LTD., JAYHAWK PRIVATE EQUITY FUND II, L.P., SILVER ROCK II, LTD, MAGEE-WOLFSON, LLC, FENG BAI, EOS HOLDINGS LLC, NOEL ROBYN, STEVE MAZUR, RL CAPITAL PARTNERS L.P., NAMTOR GROWTH FUND LP, JON GUNDLACH, ANTHONY POLAK, JAMIE POLAK, RONALD LAZAR, DOMACO VENTURE CAPITAL FUND, MID-OCEAN CONSULTING LTD, TRILLION GROWTH CHINA LP, MATT HAYDEN, GREG GLYMAN, KARLSON KA, TSON PO, SIMON YICK, CHARLES SHEARER, J. EUSTACE WOLFINGTON, MARY MARGARET TRUST, JENNIFER SPINNEY AS EXECUTOR FOR D. SPINNEY, MARISA A. MAGEE, JON WOLFSON, JUSTIN WOLFSON, JW ASSET MANAGEMENT LLC, JW GP LLC, JW PARTNERS LP, LESLIE WHEELER, BHARAT SAHGAL, ROBERT KIRKLAND, MARY BETH SHEA, LUCIANO BRUNO, WILLIAM ROSEN, CMT INVESTMENTS LLC, WARBURG OPPORTUNISTIC TRADING FUND LP, ROBERT SHEARER, RICHARD SHEARER, DAVID OFMAN, MERRY LEE CARNALL, THOMAS E. NOLAN,

Plaintiffs,

-against-

ORIENTAL DRAGON CORPORATION f/k/a EMERALD ACQUISITION CORPORATION,

Defendant.

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Index No.: 652110/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Plaintiffs move, pursuant to CPLR 3215, for a default judgment against defendant Oriental Dragon Corporation (Oriental). No opposition was submitted. Nonetheless, for the reasons that follow, plaintiffs' motion is denied.

The plaintiffs in this action claim to be shareholders of Oriental, a Cayman Islands corporation. Oriental wholly owns non-party Merit Times International Limited, a British Virgin Islands company, which, in turn, owns all of the outstanding capital stock of non-party Shandong MeKeFuBang Food Limited (Shandong), an entity incorporated under the laws of the People's Republic of China. Shandong produces and distributes fruit juice concentrate for use in the pharmaceutical, health supplement, and food and beverage industries. Simply put, plaintiffs own equity in Oriental, a holding company that owns the rights to a China-based fruit juice business.

Plaintiffs acquired their equity in Oriental pursuant to a Subscription Agreement. *See* Dkt. 28.[1] They did so with the understanding and intent that Oriental would register its shares to be traded on a Unites States stock exchange and conduct an initial public offering (IPO), a fact reflected in the Subscription Agreement. Section 5.7 of the Subscription Agreement provides that Oriental "shall submit an application to list and trade" its shares on an exchange (such as Nasdaq or the New York Stock Exchange) within 30 days of the Registration Statement (which it is required to file pursuant to section 7.1) being declared effective. *See* Dkt. 28 at 18. Section 7.1 requires Oriental, within 30 days of closing, to file a Registration Statement with the SEC and to use commercially reasonable efforts to keep its Registration Statement continually effective. The Subscription Agreement is governed by Delaware law and provides that the parties submit to jurisdiction in New York County "with respect to any dispute arising under this Agreement or the transactions contemplated hereby or thereby." *See id.* at 23.

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

On April 19, 2016, plaintiffs commenced this action by filing a complaint with five causes of action: (1) breach of sections 5.7 and 7.1 of the Subscription Agreement; (2) breach of the implied covenant of good faith and fair dealing; (3) fraudulent inducement of the Subscription Agreement; (4) fraud; and (5) unjust enrichment. Plaintiffs seek damages for Oriental's failure to conduct an IPO due to its withdrawal of its Registration Statements, which occurred after Oriental's auditors found serious problems with its financials. Plaintiffs proffer two theories of liability. First, they seek damages for Oriental's breach of its obligation to "have the Registration Statement declared effective and to have the shares listed for trade on a senior exchange and to submit an application to list and trade its shares on a senior exchange no later than 30 days after the Registration Statement being declared effective." *See* Complaint ¶ 22. Second, plaintiffs allege that Oriental falsely represented that it would comply with its registration obligations under the Subscription Agreement and, therefore, plaintiffs were fraudulently induced into investing in Oriental. After serving Oriental (*see* Dkt. 6) and Oriental's failure to respond to the complaint, on September 6, 2016, plaintiffs filed the instant motion for a default judgment.[2]

"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 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

[2] It should be noted that, prior to filing a motion for a default judgment, on June 15, 2016, plaintiffs submitted a proposed judgment to the County Clerk, which, of course, was rejected. A party may not seek the entry of judgment until the court grants a motion for a default judgment.

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 Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014). Moreover, "a defaulting defendant is deemed to have admitted all the allegations in the complaint." *McGee v Dunn*, 75 AD3d 624 (2d Dept 2010). Nonetheless, "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown." *Guzetti v City of New York*, 32 AD3d 234, 235 (1st Dept 2006), quoting *Joosten v Gale*, 129 AD2d 531, 535 (1st Dept 1987).

Here, the court finds that the complaint was properly served and that it properly pleads the elements of plaintiffs' claims for breach of the Subscription Agreement. Nonetheless, the balance of plaintiffs' motion is woefully deficient. Most fundamentally, plaintiffs' complaint and moving brief are devoid of any discussion of what law applies to plaintiffs' claims. There is no reason for the court to simply assume that New York law applies. The Subscription Agreement, as noted, is government by Delaware law. According to the complaint, many of the plaintiffs do not reside in New York or are foreign entities. The defendant also is a foreign entity. Under New York's choice of law rules, with respect to plaintiffs' non-contract claims (e.g., fraud), it seems doubtful that New York law would apply. *See Cooney v Osgood Mach., Inc.*, 81 NY2d 66, 72 (1993). It also is unclear whether different law would apply to each of the plaintiffs' claims given the various jurisdictions in which they are incorporated and domiciled. The court cannot conduct a conflict of law analysis without knowing what other laws may apply.

Aside from plaintiffs' failure to set forth the governing law, plaintiffs' brief merely recites the governing standard on a default judgment and the requisite proof of service, but does

not explain why the facts pleaded in their complaint satisfy each element of their causes of action. Given the claims asserted here, this is not a trivial concern. For instance, if New York law applied, that the parties' rights are governed by a written contract (i.e., the Subscription Agreement) would preclude recovery on plaintiffs' unjust enrichment claim. *See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). Likewise, while breach of contract and fraudulent inducement claims may be pleaded in tandem, plaintiffs' separate claim for fraud appears to be duplicative of its claim for breach of contract. *See Wyle Inc. v ITT Corp.*, 130 AD3d 438, 438-42 (1st Dept 2015). And under Delaware law, which governs the Subscription Agreement, the implied covenant claim does not appear to be viable. *See Haney v Blackhawk Network Holdings, Inc.*, 2016 WL 769595, at *8 (Del Ch 2016) ("The implied covenant [of good faith and fair dealing only] applies where a contract lacks specific language governing an issue.") (citation and quotation marks omitted).

Then, too, plaintiffs cannot simultaneously seek damages for breach of contract while seeking to rescind it on the ground of fraudulent inducement. While these claims may be pleaded in the alternative, plaintiffs are obligated to make an election of remedies when seeking damages. *See Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 (1st Dept 1996) ("where a plaintiff may seek recovery on alternative theories, he must make an election of remedies at trial or ... summary judgment.") (citations omitted); *see also On the Level Enterprises, Inc. v 49 E. Houston LLC*, 104 AD3d 500, 501 (1st Dept 2013) ("Because McGrath chose to move for summary judgment on both its contract and quasi contract claims, the motion court erred in failing to grant LLC's motion seeking dismissal of the quantum meruit claim. While a party is permitted to plead inconsistent theories of recovery (CPLR 3014), it must elect among

inconsistent positions upon seeking expedited disposition."). Indeed, it is unclear what damages are appropriate on the breach of contract claim. Plaintiffs suggest they are entitled to the market value of their shares because the result of Oriental's breach is that their shares are not currently tradable on a public exchange. Leaving aside the method plaintiffs proffer to compute the current share price (an issue on which the court will not opine at this juncture), plaintiffs do not explain why, as a matter of Delaware law, these damages are recoverable on the alleged breaches of contract.[3]

For these reasons, plaintiffs' motion for a default judgment is denied without prejudice and with leave to refile to rectify the issues raised herein.[4] At a minimum, plaintiffs' renewed motion shall explain: (1) what law applies to each claim asserted by each plaintiff; (2) why each cause of action is properly pleaded and meritorious; and (3) the legal basis for their damages demand, including an appropriate election of remedies. To the extent there is no non-frivolous basis for maintaining certain of the claims (e.g., the seemingly duplicative fraud, implied covenant, and unjust enrichment claims), the motion should indicate that such claims are not being pursued. Accordingly, it is

[3] The court does not mean to suggest that the damages proposed by plaintiffs are not recoverable. Rather, when such a significant amount is sought on default, a far more robust legal explanation is warranted. *See* Dkt. 26 at 14 (plaintiffs seek approximately $65.5 million in damages).

[4] If and when a subsequent motion is filed, a copy of this decision shall be served on Oriental as an exhibit to the motion.

ORDERED that plaintiffs' motion for default judgment against defendant Oriental Dragon Corporation is denied without prejudice and with leave to refile in accordance with this decision within 30 days of the entry of this order on the NYSCEF system.

Dated: October 31, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C