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

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AHARON GUTTERMAN, MD and AHARON GUTTERMAN MD PLLC,

Index No.: 655440/2016

Plaintiffs,

DECISION & ORDER

-against-

STANLEY STARK, NICHOLAS MONROY, ILYA KOGAN, FINPRIME ASSET MANAGEMENT LLC, JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, N.A., LUIS A. VINAS, MD and L.A. VINAS MD, PA,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiffs Aharon Gutterman, MD and Aharon Gutterman MD PLLC (Gutterman Entity) move, pursuant to CPLR 3215, for a default judgment against defendants Stanley Stark and FinPrime Asset Management LLC (FinPrime), on all causes of action asserted against them. For the reasons that follow, plaintiffs' motion is denied without prejudice.

This case arises out of Gutterman's investment in an ambulatory care surgical facility which was to be built in West Palm Beach, Florida. Gutterman is an anesthesiologist residing in Brooklyn. Complaint ¶ 2. He conducts his medical practice through Gutterman Entity, a New York professional LLC. *Id.* ¶ 3. Stark, a New York resident, is Managing Director of FinPrime, a Delaware financial management and investment firm located in New York and Florida. *Id.* ¶¶ 4, 7. Defendant Ilya Kogan, a New York resident, while employed by JPMorgan Chase, allegedly worked part-time for FinPrime. *Id.* ¶ 6. As of March 2016, he worked fulltime at FinPrime as a Regional Director. *Id.* Defendant Nicholas Monroy (with Stark, Kogan, and FinPrime, the FinPrime Defendants) is a Florida resident and was a Regional Director at FinPrime until March

2016. *Id.* ¶ 5. Luis A. Vinas is a plastic surgeon residing in Florida and practicing through a Florida professional association, L.A. Vinas MD, PA (Vinas Entity). *Id.* ¶¶ 10-11.

In early 2015, Kogan, while he worked at Chase rendering financial and investment advisory services, referred Gutterman to Stark at FinPrime. Complaint ¶¶ 14-15. Kogan touted Stark as someone with expertise in surgery centers, the area in which Gutterman wished to invest. *Id.* Gutterman was not told of Kogan's affiliation with FinPrime. *Id.* ¶ 17. Gutterman and Stark met at a Manhattan restaurant to discuss Gutterman's interest in investing in an ambulatory surgery center (ASC). *Id.* ¶¶ 15, 18. Unlike an Office Based Surgery Center (OBS), an ASC may be owned by individuals that do not perform surgery there and may charge potentially lucrative facility fees. *Id.* ¶ 21. During their meeting, Stark allegedly falsely touted his experience and expertise in ASCs, which bear onerous regulatory requirements, and told Gutterman that he could "get it done" for him. *Id.* ¶¶ 16, 18, 24-27.

Months later, in September 2015, Stark informed Gutterman of an investment opportunity to convert Vinas's offices into a surgical center where Vinas and other surgeons could operate. *Id.* ¶¶ 19, 21-22. Stark, Monroy, and Kogan introduced Gutterman to Vinas, and the parties discussed forming a partnership to establish an ASC. *Id.*

Gutterman, Vinas, and FinPrime entered a Memorandum of Terms dated December 21, 2015, and governed by New York law (Agreement). *Id.* ¶ 23. The Agreement, which was "effective upon signature by all parties," stated that Gutterman Entity, Vinas Entity, and FinPrime would form a partnership and "join efforts to expedite creation of new surgical facility in West Palm Beach at the current location of Dr. Vinas practice." Dkt. 6 at 17 (Agreement). Gutterman was to provide up to $500,000 cash (by his choice of investment or loan), receiving 45% equity in the proposed partnership and exclusive rights to provide anesthesiology services at

the facility. *Id.* at 17-19. Additionally, Vinas, Gutterman, and FinPrime were to share certain revenues from the facility, including facility fees. *Id.* at 19. Vinas was to receive "sweat equity", serving as an unsalaried Medical Director. *Id.* at 17-18. FinPrime was to receive a 7.5% management fee as well as a 15% commission on all investment amounts received by the partnership. *Id.* at 20.

Per the Agreement, Gutterman was entitled to a refund if certain milestones went unmet:

> Dr. Gutterman will receive back all funds if partnership is not formed by January 19, 2016. If the facility is not completed by April 30, 2016, Dr. Gutterman may exit the business in which case he will receive all unused funds.

Id. at 19.[1] The Agreement further specified that "[e]ach party will pay own expenses; No financial obligations whatsoever will exist for the other party." *Id.* at 20. Vinas and Gutterman executed the Agreement in their individual capacity, and an unidentified individual executed the Agreement on FinPrime's behalf. *Id.* at 21; *see also* Complaint ¶ 23. Following execution of the Agreement, Gutterman invested $412,610, paid to FinPrime (Gutterman Aff. ¶¶ 31, 43);[2] paid $12,946.87 directly to Medical Arts Support Corporation as project "biomed consultants" (*id.* ¶ 44);[3] and allegedly incurred over $35,000 in additional expenses.[4] *Id.* ¶¶ 45-48.

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[1] In their sixth cause of action for breach of contract, plaintiffs assert a right to receive back ***all*** invested funds if the facility was not completed by April 30, 2016 (Complaint ¶ 79); however, failure to meet this deadline merely gave Gutterman rights to ***unused*** funds, and by continuing to invest after April 30, 2016, in lieu of exiting the business, he waived his rights under that clause (but did not waive all rights to sue for breach of other contractual provisions).

[2] A $200,000 initial payment was made in two installments in 2015: $50,000 on October 13th, and $150,000 on December 29th. Gutterman Aff. ¶ 43. Although the contemplated partnership was not formed by the January 10, 2016 deadline, and the facility was not completed by April 30, 2016, Gutterman invested another $212,610 between April 4th and August 25th, 2016. *Id.* ¶¶ 26, 34, 43.

[3] These two invoices were paid December 10, 2015 and August 24, 2017. Dkt. 68 (invoices).

[4] These additional expenses were (1) $19,900 in legal fees from October 2015 to July 2016 (Gutterman Aff. ¶¶ 45-46); (2) $2,200 to another doctor for performing Gutterman's cases during

The proposed facility faced numerous regulatory hurdles, among which was Kogan and Stark's alleged lack of experience with ASC facilities. Complaint ¶¶ 29, 36-37. In early 2016, the governing Florida agency determined that the proposed facility was not compliant with regulations, and the municipality refused to issue the required permits. *Id.* ¶ 26. The proposed location failed to meet minimum size requirements. *Id.* ¶ 33. Moreover, Vinas refused to move his office upstairs, as required for regulatory compliance and as the parties had contemplated would be done if necessary. Gutterman Aff. ¶ 30.

A subsequent written agreement was never entered, and construction was never completed. Complaint ¶¶ 23, 83. Gutterman argues that if the FinPrime Defendants had the claimed experience or performed due diligence, circumstances upon which he relied, they would have known of the regulatory requirements that rendered the project unfeasible. *Id.* ¶¶ 36-37. He contends that the FinPrime Defendants continued to spend his money and persuaded him to contribute more money, all the while collecting fees, even after they knew that the project could not be accomplished on the terms contemplated by the Agreement. *Id.* ¶ 37.

Gutterman further alleges that the FinPrime Defendants—after pocketing $75,000 in commissions—spent his money indiscriminately, including paying $75,000 to an inexperienced general contractor and improperly paying Vinas's rent. *Id.* ¶¶ 32-33, 35, 39. He claims that FinPrime had an undisclosed conflict of interest as Vinas's financial advisor and manager, knew of Vinas's financial difficulties from the start, paid Vinas's expenses, and "defer[red] to Vinas when it came to his having to relocate his office" to comply with regulations. Gutterman Aff. ¶ 38. Gutterman avers that over $150,000 of his funds "remain unaccounted for." *Id.* ¶ 39.

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his early 2016 travels to Florida (*id.* ¶ 47); and (3) $13,959.14 for "airfare, meals and related items incurred in connection with the project" (*id.* ¶ 48; Dkt. 72 (receipts)).

Plaintiffs commenced this action on October 13, 2016 by summons with notice and filed a complaint on November 22, 2016, asserting the following causes of action, numbered here as in the Complaint: (1) breach of fiduciary duty against JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (collectively, Chase); (2) negligence against Chase; (3) malpractice against the FinPrime Defendants; (4) negligence against the FinPrime Defendants; (5) negligent misrepresentation against FinPrime, Stark, and Kogan; (6) breach of contract against FinPrime, Vinas, and Vinas Entity; (7) breach of covenant of good faith and fair dealing against FinPrime, Vinas, and Vinas Entity; and (8) breach of fiduciary duties against Vinas and Vinas Entity.

Plaintiffs purportedly served Stark and FinPrime with the Summons with Notice at their place of business by delivery to Arty Milins on October 18, 2016, and by mail to the same address on October 19, 2016. Dkt. 62 (Zelmanovitz Aff.) ¶ 3; Dkt. 64 at 2 (10/20/2016 Service Aff.). Stark served a notice of appearance on plaintiffs' counsel on November 4, 2016, demanding service of papers at his residence. Dkt. 65 (Notice of Appearance). On November 22, 2016, plaintiffs served the Complaint on Stark and FinPrime by overnight express mail. Dkt. 64 at 4 (11/22/16 Service Aff.). On August 3, 2017, counsel for plaintiffs served an additional copy of the Summons with Notice and the Complaint on Stark at his residence by first class mail pursuant to CPLR 3215(g)(3)(i). Dkt. 73 (CPLR 3215(g) Aff.) ¶¶ 2-3. FinPrime never appeared, and neither FinPrime nor Stark filed an answer. Dkt. 62 (Zelmanovitz Aff.) ¶¶ 3, 8.

Vinas, Vinas Entity, and Chase moved to dismiss in January 2017. Seq. 001 and 002. At oral argument, counsel for Vinas stated that Vinas Entity had filed for bankruptcy, resulting in an automatic stay as to Vinas Entity. Dkt. 42 (6/20/17 Oral Arg. Tr.) at 20; *see also* Dkt. 79 (Notice

of Bankruptcy).[5] The court granted Chase's motion to dismiss the First and Second Causes of Action against Chase, and denied Vinas's motion. Dkt. 45-46.

This is plaintiffs' second default judgment motion. Their first, which was filed on August 7, 2017, failed to specify the cause of action forming the basis for the requested default judgment. Dkt. 48 (first motion) at 1. At the August 24, 2017 preliminary conference, the court reminded plaintiffs' counsel that their motion—like any other substantive motion—required a supporting legal brief. Counsel withdrew the original motion on August 28, 2017, and filed a second motion on August 31, 2017, accompanied by a brief. [6] Plaintiffs now seek a default judgment against Stark and FinPrime on Plaintiffs' Third, Fourth, Fifth, Sixth, and Seventh Causes of Action, jointly and severally, in the amount of $461,616. Dkt. 61 (second motion) at 1.

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. CPLR 3215(f). "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); *see Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014). Nonetheless, a defendant's default does not "give rise to a 'mandatory ministerial duty' to enter a default judgment against it. Rather, the [plaintiff is] required to demonstrate that [it] at least [has] a viable cause of action." *Resnick v Lebovitz*, 28 AD3d 533, 534 (2d Dept 2006) (citation omitted); *see Guzetti v City of New York*, 32 AD3d

[5] Counsel for Vinas advised the court during an October 2017 teleconference that Vinas, as an individual, also intended to file for bankruptcy, but no proof of such filing has been made of record in this case. On November 20, 2017, counsel for Vinas moved to withdraw as counsel; his declaration submitted in support of that motion is silent on his clients' declaration of bankruptcy.

[6] Plaintiffs' briefing is deficient by any measure. More than half of the submitted brief either paraphrases or copy and pastes from the complaint. Plaintiffs cite little to no authority applicable to this case. Finally, plaintiffs fail to support their claim that their legal and other expenses were "directly attributable to the investment," much less recoverable.

234, 235 (1st Dept 2006) (McGuire, J., concurring) ("CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action."), quoting *Joosten v Gale*, 129 AD2d 531, 535 (1st Dept 1987). The defaulting party "admits all traversable allegations in the complaint, including the basic allegation of liability." *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984); *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003) ("[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences ...."). Defendant does not admit the conclusions as to damages. *See Rokina*, 63 NY2d at 730.

Plaintiffs' motion is denied as to the claims against FinPrime because FinPrime was not properly served. Under CPLR 311(a)(1), personal service upon a corporation shall be made by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." Personal service on a corporation may also be made on the secretary of state as agent pursuant to BCL 306 or 307. While a natural person may be served by delivering the summons to a "person of suitable age and discretion" at the natural person's residence under CPLR 308(2), such delivery cannot effect service on a corporation unless the person to whom the documents are delivered is ***also*** authorized to receive service on the corporation's behalf. *Bezoza v Bezoza*, 83 AD3d 578, 579 (1st Dept 2011); *see also Hossain v Fab Cab Corp.*, 57 AD3d 484, 485 (2d Dept 2008). The affidavit of service (Dkt. 64 at 2) refers to the recipient, Arty Milins, as "a person of suitable age and discretion who is employed at" 40 Wall Street, 28th Floor.[7] The record is silent

[7] Curiously, the Complaint lists FinPrime's office location as 40 Wall Street, ***29th*** floor, not 28.

on Mr. Milins' employment by FinPrime or authorization to receive service on its behalf. Plaintiffs' motion for a default judgment against FinPrime is therefore denied without prejudice.

As to Stark, the motion is denied as to the third cause of action for malpractice. The Complaint alleges that Stark "became the financial and investment advisor" for Gutterman, but failed to use "reasonable and proper skill in providing financial and investment advice" and to "properly manage [his] account." Complaint ¶¶ 52-58. Malpractice is professional misfeasance. *Chase Scientific Research, Inc. v NIA Grp., Inc.*, 96 NY2d 20, 24 (2001). "[P]rofessional malpractice [requires] that a professional failed to perform services with due care and in accordance with the recognized and accepted practices of the profession ...." *Fred Smith Plumbing & Heating Co. v Christensen*, 233 AD2d 207, 208 (1st Dept 1996). Professionals, in the context of professional malpractice, refers to the learned professions such as architects, engineers, lawyers, and accountants. *See Chase Scientific*, 96 NY2d at 29-30. Financial advisors are not professionals. *See Starr v Fuoco Grp. LLP*, 137 AD3d 634, 634 (1st Dept 2016), *leave to appeal dismissed*, 28 NY3d 1083 (2016).

Plaintiffs' fourth cause of action for negligence is also deficient. The Complaint summarily alleges that Stark failed in his duty to investigate the prospective investment, to ensure competent construction of the facility, and to manage the investment. Complaint ¶¶ 64-65. "[T]o prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.'" *Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 (2016), reargument denied, 28 NY3d 956 (2016), quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 (1985). A duty to competently render investment advice must arise from a contract. *See Starr*, 137 AD3d at 634. As neither the complaint nor the briefing identify where Stark's duty of care originates or how

Stark's breaches of his duty caused the claimed damages—particularly as to plaintiffs' expenses[8]—plaintiffs' motion is denied as to the fourth cause of action.[9]

Plaintiffs' fifth cause of action for negligent misrepresentation also fails. Plaintiffs allege that, in or about April 2015, Stark misrepresented his and FinPrime's experience and expertise in establishing ASCs. Complaint ¶¶ 69-71. "[N]egligent misrepresentation requires ... (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance ...." *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007). As Stark lacks professional status, some other identifiable source of a special duty of care is needed. *Kimmell v Schaefer*, 89 NY2d 257, 263 (1996). Moreover, a fiduciary relationship is required, *see Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 (1st Dept 2000), and "the requisite relationship between the parties must [also] have existed ***before*** the transaction from which the alleged wrong emanated, and not ***as a result of it***." *Gregor v Rossi*, 120 AD3d 447, 448 (1st Dept 2014) (emphasis added). Plaintiffs allege no specific facts indicating a special relationship between Stark and Gutterman ***in April 2015***—as far as the court can tell, the two simply met one time at a restaurant. While a fiduciary relationship arose later, the complaint identifies no

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[8] Plaintiffs' claimed expenses appear to include bar tabs—several of which cost thousands of dollars—and baggage fees. *See* Dkt. 72 (Travel and other expenses) at 1-6.

[9] Leave is granted *sua sponte* to replead. If, as alleged, Gutterman "reposed confidence in [Stark] and reasonably relied on [him for his] superior expertise or knowledge," Stark owed Gutterman ***fiduciary*** duties as his financial and investment advisor and as manager, through FinPrime, of Gutterman's invested funds. *Sergeants Benev. Ass'n. Annuity Fund v Renck,* 19 AD3d 107, 110 (1st Dept 2005). Allegations of Stark's self-dealing, conflict of interest, and failure to prudently advise Gutterman may give rise to a breach of fiduciary duty. *See id.* at 111, 117; *In re Estate of Wallens*, 9 NY3d 117, 122 (2007). For any claimed losses, plaintiffs must identify whether it was Gutterman or Gutterman Entity that sustained them, as the record is unclear. *See generally* Dkt. 67-72 (payments and expenses).

misrepresentations occurring thereafter as the basis for this cause of action. Default judgment is therefore denied as to plaintiffs' fifth cause of action.[10]

Plaintiffs' motion is likewise denied as to the sixth and seventh causes of action, for breach of the Agreement and the implied covenant of good faith and fair dealing. Plaintiffs cannot sue Stark in his individual capacity for breach of the Agreement, or an implied covenant thereto, where Stark was not a party to that Agreement. *See Bri-Den Const., Inc. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355 (1st Dept 2008). Accordingly, it is

ORDERED that plaintiffs' motion for a default judgment is denied; and it is further

ORDERED that the court *sua sponte* grants plaintiffs leave to amend their complaint within 20 days of entry of this order on NYSCEF; and it is further

ORDERED that within 10 days of entry of this order on NYSCEF, plaintiffs shall serve a copy of this order with notice of entry on defendants by overnight mail.

Dated: December 18, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[10] Plaintiffs may replead the fifth cause of action to specify Stark's actionable misrepresentations and their timing vis-à-vis Gutterman's relationship with Stark. A cause of action for fraud may also exist. *See 1810 E & J Rest. Corp. v Red and Blue Parrot, Inc*, 150 AD3d 648 (2d Dept 2017) (setting forth elements for fraud). Both negligent and fraudulent misrepresentation must be pled with the specificity required by CPLR 3016(b). *See Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 479-80 (1st Dept 2015).