

<b>Chen v Tapmasters Albany, LLC</b>
2018 NY Slip Op 30569(U)
March 27, 2018
Supreme Court, New York County
Docket Number: 654695/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

JOHN CHEN, on Behalf of Himself as a  
Member of OAKRIDGE HOLDINGS GROUP  
LLC, and in the Right of and OAKRIDGE  
HOLDINGS GROUP LLC

INDEX NO: 654695/2017

- v -

DECISION AND ORDER

TAPMASTERS ALBANY, LLC,  
TAPMASTERS NY, LLC, TAPMASTERS  
NEW BRUNSWICK, LLC, TAPMASTERS,  
LLC, GEORGE STREET HOLDINGS, LLC,  
WILLIE J. MINGO, AND NIRAV B. PATEL

MOTION SEQ. NO. 001

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for breach of contract, breach of personal guaranty agreements, and unjust enrichment, and to demand an accounting and an order of attachment, plaintiff John Chen ("Plaintiff") moves for leave to enter a default judgment on all causes of action against defendants Tapmasters Albany, LLC ("Tapmasters Albany"), Tapmasters NY, LLC, Tapmasters New Brunswick, LLC, Tapmasters, LLC (collectively, with Tapmasters Albany, the "Tapmasters Entities"), George Street Holdings, LLC ("George Street Holdings"), Willie J. Mingo ("Mingo") and Nirav B. Patel ("Patel") (collectively, "Defendants"). No opposition is submitted. The motion is granted as to Plaintiff's breach of contract and breach of guaranty claims inasmuch as Plaintiff has submitted proof of proper service of the summons and complaint on Defendants, proof of the facts constituting the claims, and proof of Defendants' failure to answer or appear. See CPLR 3215(f); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). The motion is denied as to Plaintiff's claims for attachment, an accounting and damages for unjust enrichment.

II. BACKGROUND

While the "quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered."

Guzetti v City of New York, 32 AD3d 234, 236 (1<sup>st</sup> Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, *supra*; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983). Plaintiff's submissions include the complaint, an affidavit of merits, an interest sale agreement signed by Patel and by Mingo in his capacity as managing member of Tapmasters Albany, guaranty agreements signed by Patel and Mingo, and a demand letter sent by Plaintiff to the attention of Patel and Mingo at Tapmasters Albany.

### III. DISCUSSION

The court turns first to Plaintiff's first and second causes of action, the breach of contract and breach of guaranty claims against Tapmasters Albany, Mingo and Patel. Plaintiff's proof establishes the necessary elements of a breach of contract claim: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). Further, "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1<sup>st</sup> Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1<sup>st</sup> Dept. 1991). The terms of the subject guaranty agreement are clear, unambiguous, absolute and unconditional and, having defaulted in this action, Patel and Ming have not shown, or even alleged, any fraud, duress or any other wrongful conduct by Plaintiff in regard to the agreement. Moreover, having failed to answer, Defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003). Accordingly, Plaintiff is entitled to default judgment against defendants Tapmasters Albany, Patel and Mingo in the sum of \$505,286.40.

Plaintiff's third cause of action is for a prejudgment attachment order pursuant to CPLR 6201(3), which provides that a court may grant an order of attachment in any action, except a matrimonial action, where the plaintiff has demanded or would be entitled to a money judgment against one or more of the defendants when the defendant, "with intent to defraud his creditors or frustrate the

enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts." As this Decision and Order disposes of Plaintiff's claims and grants Plaintiff a money judgment, it is unclear how a prejudgment remedy (see Koehler v Bank of Bermuda Ltd., 12 NY3d 533, 538 [2009] [distinguishing prejudgment attachment under CPLR article 62 from post-judgment relief under CPLR article 52]) would be applicable here. See also Michaels Elec. Supply Corp. v Trott Elec. Inc., 231 AD2d 695, 695 (2<sup>nd</sup> Dept. 1996) ("Attachment is a provisional remedy designed to secure a debt by preliminary levy upon the property of the debtor to conserve it for eventual execution.").

Moreover, "attachment is a harsh remedy, and the statute must be strictly construed in favor of those against whom it may be applied." P.T. Wanderer Assoc., Inc. v Talcott Communications, Corp., 111 AD2d 55, 489 (1<sup>st</sup> Dept. 1985). Even if a plaintiff shows that her case fits within one of the statutory grounds for attachment in CPLR 6201, the granting of the motion lies in the court's discretion. See, e.g., J.V.W. Investment Ltd. v Kelleher, 41 AD3d 233, 234 (1<sup>st</sup> Dept. 2007); Maitrejean v Levon Properties Corp., 45 AD2d 1020, 1021 (2<sup>nd</sup> Dept. 1974); Dean v James McHugh Construction Co., 43 AD2d 1009, 1010 (4<sup>th</sup> Dept. 1974).

To show that defendants Mingo and Patel assigned, disposed of, encumbered or secreted the funds due to him under the interest sale agreement with intent to defraud, Plaintiff makes a number of conclusory statements in the affidavit of merits alleging that Mingo and Patel diverted such funds for their own benefit and for the benefit of other Tapmasters Entities under their control. Specifically, Plaintiff avers "upon information and belief" that Mingo and Patel used the money to "invest in various real estate properties and side ventures throughout New York and New Jersey." The only example of this that Plaintiff provides is a New Jersey property operated as "Hub City Brewhouse," from which, "[u]pon information and belief, Mingo and Patel receive rent, profits, and other income." Plaintiff alleges that Hub City Brewhouse, which is owned by defendant George Street Holdings, is identical in every respect to the "New Brunswick World of Beer" franchise that Plaintiff formerly owned shares in, and that was formerly located on the same property as Hub City Brewhouse. George Street Holdings's prior registered address as of December 14, 2016 allegedly matches Mingo's home address. Plaintiff avers that these facts prove that Mingo and Patel have fraudulently transferred Tapmasters assets into

George Street Holdings, evidencing "an intent to defraud their creditors and investors." Given the speculative nature of most of these allegations, the First Department's instruction to construe CPLR 6201 strictly in favor of defendants, and the questionable suitability of this remedy at this phase in the proceedings, the court denies Plaintiff's request for an order of attachment.

Plaintiff's fourth cause of action seeks an accounting of all transactions made by Mingo and Patel, individually, and by each of the Tapmasters Entities and George Street Holdings from May 18, 2014 to the present. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." Palazzo v Palazzo, 121 A.D.2d 261, 265 (1<sup>st</sup> Dept. 1986). Generally, "members of a limited liability company may seek an equitable accounting under common law." Gottlieb v Northriver Trading Co. LLC, 58 AD3d 550, 551 (1<sup>st</sup> Dept. 2009). However, a confidential or fiduciary relationship is not created out of the mere fact that two parties stood in the relationship of debtor and creditor. See Kazi v Gen. Elec. Capital Bus. Asset Funding Corp. of Connecticut, 116 AD3d 592 (1<sup>st</sup> Dept. 2014) (finding plaintiffs could not maintain a right to an accounting where no property was pledged and "[t]he dispute was simply between debtors and creditors, which is a contractual relationship, and therefore, not a fiduciary relationship").

Plaintiff's complaint states that his cause of action for an accounting arises from Defendants' breach of the interest sale agreement and guaranties. Those agreements were executed only by Plaintiff, Tapmasters Albany, Mingo and Patel; they create no relationship with the remaining Tapmasters Entities or with George Street Holdings. Moreover, while each of the interest sale agreement and the guaranties produced a contractual relationship among the parties, they did not result in the entrustment of any of Plaintiff's property with any of the Defendants or otherwise produce a fiduciary relationship. In the alternative, Plaintiff raises the argument in his moving papers that Mingo and Patel owed him a fiduciary duty as majority members of the Tapmasters Entities in which Plaintiff was a member. Even assuming this was true after Plaintiff had contracted to sell his interest in all Tapmasters Entities, Plaintiff fails to allege a breach of fiduciary duty. Rather, his claims as to nonpayment of the sale price provided for in the agreement and guaranties are breach of contract claims. See Royal Warwick S.A. v Hotel Representative, Inc., 106 A.D.3d 451, 452 (1<sup>st</sup> Dept. 2013)

(failure to provide shareholder discounts and dividends raised claim based on a contractual, not fiduciary, obligation). As there is no other cognizable claim based on breach of fiduciary duty in Plaintiff's pleadings, he is not entitled to an accounting.

Plaintiff also demands, and is denied, an accounting from the "Syracuse World of Beer franchise," a party not named in this action.

Plaintiff's fifth cause of action alleges that the Tapmasters Entities, Mingo and Patel were unjustly enriched as a result of Plaintiff's initial \$555,169.58 investment in the Tapmasters Entities and his sale of membership interests pursuant to the interest sale agreement. The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to allow the defendant to retain what is sought to be recovered. Paramount Film Distributing Corp. v State of New York, 334 N.Y.S.2d 388 (1972).

The court does not consider Plaintiff's claim as it arises from the interest sale agreement as it is duplicative of his breach of contract claims. See Benham v eCommission Sols., LLC, 118 A.D.3d 605, 607 (1<sup>st</sup> Dept. 2014). As to Plaintiff's initial investment claim, the court does not perceive a basis to find it is against equity and good conscience to allow Defendants to retain the investment. Plaintiff refers to making his investment pursuant to an option agreement and a separate equity purchase, and avers that in exchange for his money he was promised "certain monthly payments" beginning or around December 1, 2014. Plaintiff states that on "one or more" occasions he did not receive his monthly payment, and he decided to sell back his interests in late 2014. Plaintiff offers no details as to the terms of the option agreement and equity purchase, the amount he was purportedly due under the monthly payment provisions, or how many payments he received or did not receive. Plaintiff's showing is insufficient to state a claim for unjust enrichment, even on a default judgment motion.

The court notes that several of the affidavits of service submitted by Plaintiff were executed and notarized in New Jersey, and that the affidavit of John Chen was executed notarized in Singapore, but none of these include the certificate of conformity required by CPLR 2309. The defects do not require the denial of the motion and may be cured by the submission of the proper certificates nunc pro tunc. See Bank of New York v Singh, 139 AD3d 486, 487 (1<sup>st</sup> Dept 2016).

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that Plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment is granted in part and denied in part, without opposition, and it is further,

ORDERED that the Clerk shall enter judgment in favor of Plaintiff and against defendants Tapmasters Albany, LLC, Willie J. Mingo, and Nirav Patel, jointly and severally, in the sum of \$505,286.40, and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the Plaintiff for attorneys' fees and costs under the subject agreements; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel for Plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that Plaintiff shall serve a proposed accounting of attorneys' fees within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of Plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

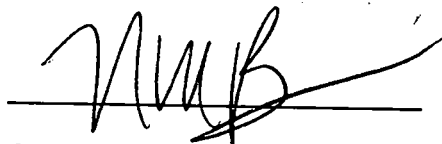
ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, Plaintiff may enter an amended judgment adding the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

ORDERED that Plaintiff shall serve a copy of this order upon Defendants within 15 days of this order.

This constitutes the Decision and Order of the court.

Dated: March 27, 2018

ENTER:   
J.S.C. **HON. NANCY M. BANNON**