

**Starvox Entertainment Inc. v June Entertainment,
LLC**

2018 NY Slip Op 32256(U)

September 12, 2018

Supreme Court, New York County

Docket Number: 650306/2017

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON

PART

IAS MOTION 42EFM

Justice

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INDEX NO. 650306/2017STARVOX ENTERTAINMENT INC., STARVOX TOURING, INC.,
and WAIT UNTIL DARK STARVOX INC., and COREY ROSSMOTION DATE 06/04/2018

Plaintiff,

MOTION SEQ. NO. 005

- v -

JUNE ENTERTAINMENT, LLC, RUBICON FALLS
ENTERTAINMENT, LLC, RUBICON FALLS CANADA, LLC,
JORDAN HOLDINGS, LLC, JOHN RYAN, BARRY WALDMAN, R.
SCOTT REID, and ONE ENTERTAINMENT, LLC, and DOES 1-2,
ETC.**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 97, 98, 99, 100, 101,
102, 103, 118, 122

were read on this motion to/for

JUDGMENT - DEFAULT

In this action to recover for breach of contract and fraud in connection with investments made by the plaintiffs with respect to several Broadway plays, the plaintiffs move for leave to enter a default judgment against defendant One Entertainment, LLC (OEL). No opposition is submitted. The motion is denied without prejudice to renewal upon proper papers.

In relevant part, the amended complaint states that the defendants June Entertainment, LLC, Rubicon Falls Entertainment, LLC, Rubicon Falls Canada, LLC, John Ryan, Barry Waldman, and R. Scott Reid (the June parties) entered into certain agreements with the plaintiff related to the performance of the shows "Sleuth," "Grease" and "Wait Until Dark" on or off Broadway in New York. Pursuant to one agreement, the parties allegedly agreed that the June parties would secure the actor Al Pacino for a role in a Broadway production of the play, "Wait Until Dark." The plaintiffs further allege that on February 8, 2016, they wire-transferred \$50,000 to OEL, at the June parties' instruction, as a deposit for Pacino to play the role. On October 11, 2016, the plaintiffs discovered that Pacino did not intend to play the role. They further allege that on January 31, 2017, they demanded that OEL return the \$50,000 they had transferred to OEL within 3 days of the date of the demand and that, to date, OEL has not returned the

deposit. Their amended complaint asserts causes of action against OEL sounding in breach of fiduciary duty, conversion, and money had and received, and for an accounting.

By decision and order dated July 5, 2018, this court dismissed the amended complaint as against the defendants R. Scott Reid, Rubicon Falls Entertainment, LLC, and John Ryan, Jr.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). In support of their motion, the plaintiffs submit the summons and complaint, the verified amended summons and complaint, an affidavit of the plaintiff Corey Ross, founder, owner, and officer of the corporate plaintiffs, an affirmation of the plaintiff's attorney, and an invoice from JPMorgan Chase Bank reporting that \$50,000 was debited from a payroll account in the name of Starvox Touring Inc. Hair, and remitted to One Entertainment at an address on Weddington Street in Maplewood, New Jersey. Also submitted is an affidavit of "Javier Sanchez" of "First Legal" purporting to show that on April 20, 2017, affix-and-mail service of the summons and amended complaint was made upon OEL at the same number address on Weddington Street, but in Van Nuys, California, identified as "the dwelling place and usual place of abode of Brent T. Johnson, an officer, director and/or general agent of defendant." The submissions also include an affidavit which alleges that "Ingie Markovich" of West Hollywood, California, served OEL with the summons and amended complaint by mailing the same to Brent Johnson at the Weddington Street, Van Nuys address, on November 4, 2017.

The only allegations that the plaintiffs make with reference to OEL are within the verified amended complaint, and consist of the assertions that the plaintiffs wire transferred \$50,000 to OEL at the instruction of the June parties, and that when it was discovered that Pacino would not play a role in the production of "Wait Until Dark," "OEL as a fiduciary was required to return Plaintiff's \$50,000 that had been sent to OEL." Attached to the amended complaint as an exhibit is a transfer receipt from JP Morgan Chase Bank, indicating that a payroll account in the name of "Starvox Touring Inc Hair" was debited for \$50,000.00 on February 16, 2016. The beneficiary was listed as "One Entertainment" at an address in Maplewood, New Jersey, and the receipt was marked "Deposit Al Pacino June Entertainment." Also attached is a letter from the plaintiffs' counsel dated January 31, 2017, addressed to "One Entertainment" at an address

in Los Angeles, California, demanding that OEL wire transfer \$50,000 within three days to an account with Bank of America in Beverly Hills, California. The affidavit of Corey Ross submitted in support of the instant motions makes no mention of OEL or the \$50,000.

The plaintiffs' submissions do not afford a basis for finding OEL liable on their causes of action sounding in breach of fiduciary duty and for an accounting, as there is nothing to support the existence of a fiduciary relationship between OEL and the plaintiffs. As to the plaintiffs' conversion claim, an action for conversion of money made be made out "where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." Thys v Fortis Securities LLC, 74 AD3d 546, 547 (1st Dept. 2010) (quotation omitted). Although the plaintiffs identify a specific fund, they provide no proof to support their assertion that OEL had an obligation to return the fund, beyond their conclusory and wholly unsupported allegation that OEL had a fiduciary duty to the plaintiffs. Moreover, the plaintiffs provide no explanation for the discrepancies in the entity names, addresses, and accounts identified in the transfer receipt and demand letter. The latter issue must be clarified in order to make a showing that OEL actually received money belonging to the plaintiff, as is required to state a cause of action for money had and received. See Litvinoff v Wright, 150 AD3d 714 (2nd Dept. 2017); Amanat v Bank of Leumi Trust Co. of New York, 243 AD2d 257 (1st Dept. 1997).

In any event, even assuming that the plaintiffs had submitted proof of the facts constituting the claims (CPLR 3215[f]), the motion must be denied since the plaintiffs fail to show that OEL was properly served in accordance with CPLR 311-a or Limited Liability Company Law § 303. CPLR 311-a provides that service on a limited liability company is proper where a plaintiff personally delivers the requisite documents to (1) any member of the limited liability company within the state, if management is vested in the members, (2) a manager of the limited liability company within the state, if management is vested in one or more managers, (3) an agent appointed to receive process, or (4) any other person designated to receive process. CPLR 311-a also permits process to be made upon a limited liability company pursuant to article three of the Limited Liability Company Law. Limited Liability Company Law § 303(a) provides for service of process on the Secretary of State in some circumstances.

The plaintiffs provide no explanation for the discrepancies in OEL's addresses on various documents, nor do they proffer any basis for their determination that the Van Nuys,

California address was the appropriate address for service of process of the summons and complaint. In addition, while the affidavit of due diligence purportedly detailing the attempts by "Sarkis Arabyan" to serve OEL at the Van Nuys address describes the location as a business address, in the affidavit of service by Ingie Markovich states the same location was the dwelling place and usual place of abode of OEL's agent. There is no showing of compliance with the additional mailing requirement of CPLR 3215(g).

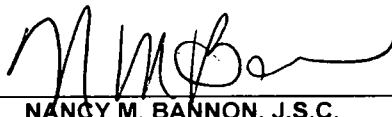
The court further notes that the affidavit of Ross, as well as the verification of the amended complaint, were executed and notarized in Canada, and that the affidavits of service were executed and notarized in California, but do not include the certificate of conformity required by CPLR 2309.

Accordingly, it is

ORDERED that the plaintiffs' motion for leave to enter a default judgment against the defendant One Entertainment, LLC, is denied without prejudice to renewal upon proper papers.

This constitutes the Decision and Order of the court.

9/12/2018
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

APPLICATION:

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CASE DISPOSED
GRANTED
SETTLE ORDER

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DENIED

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NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER

☐

OTHER