

<b>SBM Holdings, LLC v Oliveira</b>
2019 NY Slip Op 30477(U)
February 26, 2019
Supreme Court, New York County
Docket Number: 653140/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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SBM HOLDINGS, LLC, SERIES TRUST NO. 1705, ROYAL  
SWISS CREDIT UNION & CAPITAL TRUST, MELIMAR, INC.,  
and COMMERCIAL MORTGAGE CITY CORPORATION,

Plaintiffs,

- v -

FRANCISCO REIS OLIVEIRA, SBM HOLDINGS, LLC,  
JONATHAN CANNON, MARK OWEN, JOHN DOES, and XYZ  
CORP. 1-10,

Defendants.

INDEX NO. 653140/2018

MOTION DATE 02/15/2019

MOTION SEQ. NO. 002

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42,  
43, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - DEFAULT

**HON. BARRY R. OSTRAGER:**

Upon the foregoing documents, it is ORDERED that plaintiffs' motion for summary judgment on the Complaint as against defendant Francisco Reis Oliveira is granted on default to the extent provided herein and is otherwise denied.

Plaintiffs commenced this action by Summons and Complaint filed on June 22, 2018, seeking to recover significant money damages in connection with a failed bond transaction (NYSCEF Doc. No. 1). The instant motion seeks a default judgment against defendant Francisco Reis Oliveira, who resides in Brazil. An earlier motion for a default judgment was denied by this Court without prejudice to renewal on a fuller set of papers, which has now been provided (see NYSCEF Doc. No. 33). The papers establish jurisdiction over Oliveira and proper service, as well as Oliveira's failure to answer. Proof of the merits pursuant to CPLR 3215 is discussed below.

Plaintiffs are proceeding on three Counts against Oliveira. Count One, asserted only by plaintiff SBM Holdings, LLC, Series Trust No. 1705 ("the Trust") against Oliveira only, sounds

in breach of contract and is based on the November 1, 2017 Business Corporation Agreement signed by the parties (“the BCA”) (NYSCEF Doc. No. 2). Plaintiff Trust seeks to establish this claim through the Affidavit of Burnette Dubose, a Trustee of the Trust and co-owner of plaintiff Royal Swiss Credit Union & Capital Trust (“Royal Swiss”) (NYSCEF Doc. No. 45). Dubose confirms, based on personal knowledge, that the Trust and Oliveira entered into the November 1, 2017 BCA, pursuant to which Oliveira agreed to sell to the Trust a certain bond issued by the European Security Mechanism (“the ESM Bond”) for 60% of the Bond’s face value. Dubose further asserts that Oliveira breached the BCA by, among other things, failing to complete the sale transaction. The evidence offered establishes a prima facie case in favor of the Trust against Oliveira for liability for breach of contract. However, as plaintiff has failed to prove a precise amount of damages, alleging (at ¶37) only that the “Plaintiff Trust has been damaged in an amount no less than €2,000,000,000,” the calculation of damages must await the trial of this action or some other appropriate application.

In Count Six, all plaintiffs seek money damages against defendant Oliveira based on fraud. Plaintiff Trust and Royal Swiss discontinued that claim against Oliveira, leaving plaintiff’s Melimar, Inc. and Commercial Mortgage City Corporation (“CMCC”) as the only parties seeking relief for fraud (see NYSCEF Doc. No. 36). The evidence adduced includes an Affidavit on personal knowledge from Mark Fawer, an officer of Melimar, a New York-based investment company, as well as an Affidavit of Jeffrey Lustbader, the owner of CMCC (NYSCEF Doc. Nos. 41 and 42). Fawer, on behalf of Melimar, along with Lustbader of CMCC, assisted with introductions and some of the mechanics related to the bond transaction.

More specifically, plaintiffs Melimar and CMCC entered into an Irrevocable Master Fee Agreement and Pay Order, dated November 14, 2017, with defendant SBM Holdings, LLC (the

“IMFPA” with “SBM”) (NYSCEF Doc. No. 3). Under the terms of the IMFPA, SBM agreed to pay Melimar and CMCC 2% of the face amount of each and every tranche of the ESM Bond transferred to plaintiff Trust’s sub-account as compensation for consulting and advisory services. Melimar and CMCC allegedly justifiably relied on material misrepresentations of fact by Oliveira regarding the ESM Bond transaction that Oliveira knew were false and that Oliveira made to induce Melimar and CMCC to enter into the IMFPA, thereby causing plaintiffs to incur damages by rendering services in connection with the Bond transaction for which they received no fees because Oliveira’s conduct caused the Bond deal to fail. *People ex re. Schneiderman v Credit Suisse Secs., (USA) LLC*, 31 NY3d 622, 638 (2018).

Although plaintiffs have established a prima facie case of liability, they have not sufficiently established the amount of damages, as the 2% formula in the IMFPA is not dispositive. “In New York, as in multiple other states, the true measure of damage is indemnity for the actual pecuniary loss sustained as a direct result of the wrong or what is known as the ‘out-of-pocket’ rule.” *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017) (internal quotations and citations omitted). “Under that rule, damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained[.] There can be no recovery of profits which would have been realized in the absence of fraud.” *Id.* Thus, plaintiffs’ motion is granted as to liability with damages reserved for trial or some other appropriate application.

Plaintiffs Melimar and CMCC also assert a claim against Oliveira, as well as the other defendants, under Count Seven sounding in unjust enrichment.<sup>1</sup> The theory is that Oliveira was


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<sup>1</sup> Plaintiffs Royal Swiss and the Trust initially joined the other plaintiffs in asserting an unjust enrichment claim against Oliveira in Count Seven of the Complaint but withdrew that unjust enrichment claim as against Oliveira only (NYSCEF Doc. No. 36).

unjustly enriched at plaintiffs' expense and that it would be against equity and good conscience to permit defendant Oliveira to retain the benefit. *Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 (1972). Specifically, plaintiffs Melimar and CMCC allege that Oliveira was enriched by the consulting and advisory services provided by Melimar and CMCC to SBM, which enabled Oliveira to enter into the Bond deal, and that the benefit came at plaintiffs' expense in that Oliveira caused the Bond deal to fail and thereby deprived plaintiffs of fees due them under the IMFPA. As to damages, plaintiffs claim that Oliveira received an "outsized benefit" from plaintiffs' work, and they seek to hold Oliveira liable to the extent that he was enriched monetarily by [plaintiffs'] conduct." (NYSCEF Doc. No. 39 at p 11). The flaw in plaintiffs' argument is that, because Oliveira did not proceed with the Bond deal with the Trust, plaintiffs have not established that Oliveira was enriched by the services rendered by plaintiffs to SBM under the IMFPA. Therefore, plaintiffs' request for relief against Oliveira under Count Seven is denied without prejudice.

Accordingly, it is hereby ORDERED that plaintiffs' motion for summary judgment is granted to the extent of awarding plaintiff SBM Holdings, LLC, Series Trust No. 1705, summary judgment on liability as against defendant Francisco Reis Oliveira on Count One for breach of contract, and further awarding plaintiffs Melimar, Inc. and Commercial Mortgage City Corp. summary judgment on liability on Count Six for fraud, and the motion is otherwise denied.

2/26/2019  
DATE

  
BARRY R. OSTRAGER, J.S.C.  
**BARRY R. OSTRAGER**  
**JSC**

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE