

TGT, LLC v Advance Entertainment, LLC

2019 NY Slip Op 33239(U)

October 29, 2019

Supreme Court, New York County

Docket Number: 650633/2017

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

-----X
TGT, LLC,

Plaintiff,

- v -

ADVANCE ENTERTAINMENT, LLC, et al.,

Defendants.

INDEX NO. 650633/2017

MOTION DATE _____

MOTION SEQ. NO. 011

**DECISION + ORDER ON
MOTION**

-----X
MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, it is ordered that the motion is denied without prejudice.

In Motion Sequence Number (Motion) 011, Plaintiff TGT, LLC moves, pursuant to CPLR 3215, for a default judgment against defendant David Molner for failure to timely respond to plaintiff's March 12, 2019 fourth amended verified complaint (FAC) (NYSCEF 429 [FAC]). The motion seeks a default judgment against Molner as to the aiding and abetting fraud claim and civil conspiracy claim raised against him in the FAC and seeks \$7.86 million in damages plus attorneys' fees and costs (*id.* ¶¶ 124-131 [second cause of action for aiding and abetting fraud], 147-152 [fifth cause of action for civil conspiracy against Molner and other defendants]). To date, Molner has not answered, responded, or otherwise appeared in this action with respect to the FAC or any prior iteration of the pleadings.

"On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by

submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing" (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, *6-7 [Sup.Ct, NY County 2018] [citations omitted]). "CPLR 3215 (f) requires that an applicant for a default judgment file proof by affidavit made by the [moving] party of the facts constituting the claim" (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]). Because "the [movant] does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists" (*id.* at 70-71).

The court previously found that plaintiff met its burden of establishing its fraud claim against defendants Joseph Meli and Advance Entertainment, LLC (Meli Defendants) in the court's decision and order, entered October 1, 2019, granting in part plaintiff's motion for a default judgment against the Meli Defendants for the fraud claim (the first cause of action in the FAC) raised against those parties. (NYSCEF 448). That decision and order is incorporated here for all relevant purposes.

In support of Motion 011, plaintiff provides proof of proper alternative service of the summons and FAC upon Molner at his apartment building (NYSCEF 430; see CPLR 308 [2]; *F. I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797-98 [1977]; *Charnin v Cogan*, 250 AD2d 513, 517 [1st Dept 1998] [service upon a doorman in an apartment building is adequate under certain circumstances and where the summons and pleadings are also mailed to the defendant]). While service of the FAC is adequate, and plaintiff's counsel states that Molner has not timely responded to the FAC (NYSCEF 423, ¶¶ 4-7, 18-19), plaintiff has not met its burden.

"In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and

abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud” (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [internal quotation marks and citations omitted], *lv denied* 13.NY3d 709 [2009]). “[A]ctual knowledge of the fraud may be averred generally” (*id.* [internal quotation marks and citation omitted] [alteration in original] *In re WorldCom, Inc. Sec. Litig.*, 382 F.Supp.2d 549, 560 [S.D.N.Y.2005] [internal quotation marks omitted]).

“Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated” (*id.* [internal quotation marks and citations omitted]). A plaintiff must plead a claim for aiding and abetting fraud with specificity pursuant to CPLR 3016 (b) and “is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud” (*National Westminster Bank USA v Weksel*, 124 AD2d 144, 149 [1st Dept 1987]). However, “actual knowledge need only be pleaded generally, cognizant, particularly at the pre-discovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant’s state of mind,” and “an intent to commit fraud is to be divined from surrounding circumstances” (*Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]).

Here, plaintiff asserts, in the affidavit of plaintiff’s member, Michael Connors, that it was informed by counsel that Molner drafted the agreement underlying the fraud allegedly perpetrated by the Meli Defendants, a ticket purchase contract between defendant Advance Entertainment, LLC (AE) and nonparty Ambassador Theatre Group Ltd. (ATG) (NYSCEF 400, ¶¶ 52 [“I later learned through information obtained from counsel that the fraudulent ATG Agreement was drafted by Molner . . . ”], 57 [reiterating that, “(b)ased on information received from counsel, I learned that

Molner conspired with Meli in the fraudulent scheme and drafted the ATG Agreement”], 84-88 [alleging that Molner created numerous fake contracts for the Meli Defendants and solicited investors for other fraudulent transactions]; see NSYCEF 419-422 [emails between Meli and Molner regarding transactions other than the underlying ATG transaction]).

While Molner’s actual knowledge and substantial assistance may be inferred as to other transactions, the court declines to infer those elements from Connor’s conclusory statement, lacking any factual support relating to the fraud underlying this action, that plaintiff learned from counsel that Molner drafted the ATG agreement. The four Molner-Meli emails annexed to Connor’s affidavit pertaining to other transactions all pre-date the underlying ATG transaction; three by more than a year and one by more than six months, and plaintiff makes no nonconclusory assertion that Molner was aware of the ATG transaction or substantially assisted the Meli Defendants in carrying out the ATG fraud. Accordingly, the motion is denied as to the aiding and abetting fraud cause of action without prejudice to a new motion.¹

For similar reasons, plaintiff has failed to meet its burden of adequately setting forth the elements of its civil conspiracy claim against Molner. Assuming that the Meli Defendants acted commit a fraud against plaintiff, plaintiff does not allege with nonconclusory facts that Molner and the Meli Defendants had any agreement to commit the underlying ATG fraud or committed any act in furtherance of that fraudulent transaction (see *Faulkner v City of Yonkers*, 105 AD3d 899, 900-01 [2d Dept 2013] [stating that an adequately pleaded claim for civil conspiracy requires an underlying

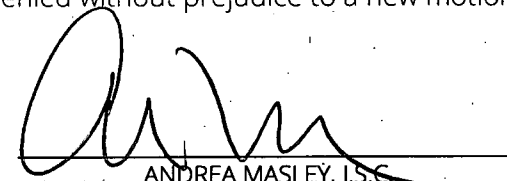
¹ The court notes that many of plaintiff’s submissions are not OCR-searchable in contravention of the Part Rules and the Commercial Division Rules. Plaintiff’s future submissions, if any, shall comport with the applicable Rules and include appropriately-formatted documents or shall be denied.

tort, an agreement between the conspirators as to that tort, and "an overt action in furtherance of the agreement" (internal quotations and citations omitted)).

Accordingly, it is

ORDERED that Motion Sequence Number 011 is denied without prejudice to a new motion.

10/29/2019
DATE



ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: