

**Rinehart v Lusardi**

2021 NY Slip Op 32401(U)

October 26, 2021

Supreme Court, New York County

Docket Number: Index No. 657235/2020

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY BANNON PART 42

*Justice*

-----X

HENRY RINEHART, individually and derivatively on behalf  
of GRILLO, LTD.,

Plaintiffs,

- v -

LUIGI LUSARDI, MAURO LUSARDI, RICHARD SNYDER,  
and COLLEEN CROFT

Defendants.

-----X

INDEX NO. 657235/2020

MOTION DATE 10/26/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DEFAULT JUDGMENT.

In this breach of contract action, the plaintiff, Henry Rinehart, on behalf of himself and derivatively on behalf of Grillo, Ltd. ("plaintiff") moves pursuant to CPLR 3215 for leave to enter a default judgment against defendant Richard Snyder, who did not answer or appear. No opposition is submitted. The motion is denied without prejudice.

"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 (2<sup>nd</sup> Dept. 2011). "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 [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1<sup>st</sup> Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1<sup>st</sup> Dept 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., *supra*. 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*. As such, “[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default.” Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2<sup>nd</sup> Dept. 1992).

In his complaint, the plaintiff asserts that in 1999, he entered a business venture with defendants Luigi Lusardi and Mauro Lusardi to operate a restaurant in Manhattan. The entity formed was called Grillo, Ltd, and the restaurant was called “Henry’s”. The plaintiff was the managing partner responsible for daily operations at the restaurant which became a popular neighborhood dining destination. Defendant Snyder became a partner in 2005. Defendant Collen Croft is the trustee of the estate of deceased partner Elio Guaitolini.

In 2018, the plaintiff decided to exit the business and agreed with his partners to close Henry’s. The defendants opened a new restaurant under the name Grillo, Ltd. According to the plaintiff, after fruitless buyout negotiations, he reached an agreement with his partners whereby he would relinquish his shares in Grillo, Ltd. in exchange for, *inter alia*, walking away from the business and being discharged from the business’ debts. As relevant here, the plaintiff alleges that defendant Snyder breached the agreement by failing to remove the plaintiff’s name from the company’s American Express credit card account, thereby failing to discharge the plaintiff from the business’ debts. According to the plaintiff, in late 2018 he became aware of Snyder’s use of corporate funds for personal use via the American Express credit account and notified the other defendants. The plaintiff was then contacted by American Express in 2019, seeking \$28,537.82 from him. The plaintiff does not allege that he paid that or any amount to American Express. Around the same time, the plaintiff was contacted by the landlord of the new restaurant, which had since closed, seeking more than six million dollars in unpaid rent.

In support of this motion, the plaintiff submits only the verified complaint, an attorney’s affirmation, affidavits of service, and a memorandum of law. Initially, the court notes that the complaint alleges six causes of action against Snyder, (1) breach of contract, referring to the 2018 agreement, three for breach of fiduciary duty, (2) for failing to remove the plaintiff from the credit card account and the lease, (3) for his use of corporate funds for personal use without reimbursing Grillo, Ltd, and (4) specifically for the American Express card debt, (5) accounting and (6) unjust enrichment. However, the instant motion papers seek a judgment only as to the

American Express card debt, presumably on the breach of contract theory. In that regard, the Notice of Motion states that the plaintiff seeks \$30,000.00 from Snyder, while the complaint and affirmation in support of the motion demand \$28,537.82, plus interest and attorney's fees. In any event, the papers are deficient in other respects.

To succeed on the motion, the plaintiff must establish 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 Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1<sup>st</sup> Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). The plaintiff relies solely on the verified complaint to establish the facts constituting his claim against Snyder. See CPLR 3215(f). While the complaint is verified by the plaintiff, it contains limited facts and alone does not constitute *prima facie* proof of any claim against Snyder. The plaintiff submits no affidavit of his own nor any affidavit of someone else with personal knowledge. Since counsel claims no personal knowledge of the relevant underlying facts, his affirmation is without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1<sup>st</sup> Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1<sup>st</sup> Dept. 2010). Neither the 2018 subject agreement between the partners nor any statement, document or communication from American Express is submitted. Without the contract, the plaintiff has not sufficiently established the terms of any provision, much less that one was breached by Snyder, and without any proof of the American Express debt, no damages are shown. As previously stated, the plaintiff does not allege, much less demonstrate, that he paid \$28,537.82 or any amount to American Express on behalf of Snyder or any other defendant. The motion papers do not mention the accounting or unjust enrichment causes of action. As a general rule, where, as here, a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1<sup>st</sup> Dept. 2012).

Thus, even assuming the plaintiff has submitted proof of service of the summons and complaint and proof of defendant Snyder's default, he has failed to submit sufficient proof of the facts constituting the claim. See CPLR 3215(f). Since the defects can be cured, denial of the motion is without prejudice to renewal on proper papers within 60 days.

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against defendant Richard Snyder is denied without prejudice to renewal upon proper papers within 60 days of the date of this order; and it is further

ORDERED that the plaintiff and the answering defendants shall immediately confer, commence discovery, and appear for a remote preliminary conference on January 6, 2022 at 11:30 a.m.; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



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

10/26/2021

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER