

Highscore Capital LLC v Fleyshmakher
2021 NY Slip Op 32556(U)
December 2, 2021
Supreme Court, New York County
Docket Number: Index No. 654004/2020
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED PART 43

Justice

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HIGHSCORE CAPITAL LLC,	INDEX NO. <u>654004/2020</u>
Plaintiff,	MOTION DATE <u>06/29/2021</u>
	MOTION SEQ. NO. <u>005</u>

- v -

ALEX FLEYSHMAKHER, GREG FLEYSHMAKHER, G
FLEY INVESTMENTS LLC, MALEX LLC, GRELAX
INVESTMENTS LLC, SAMIGOR GROUP LLC, AGM
BROKERAGE, LLC, and FELIX ELINSON,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 171

were read on this motion to/for

JUDGMENT - DEFAULT

In this action for breach of contract, fraud and declaratory judgments, plaintiff Highscore Capital LLC moves, pursuant to CPLR 3215, for entry of a default judgment against defendants Alex Fleyshmakher (Alex or AF), Malex LLC (Malex) and Samigor Group LLC (Samigor) (collectively, the defaulting defendants) on the first, second, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action in the amended complaint.

BACKGROUND

Plaintiff is a New York limited liability company with headquarters in New Jersey (NY St Cts Elec Filing [NYSCEF] Doc No. 159, John Baranello [Baranello] affirmation, exhibit 4, ¶ 8). Alex, a New Jersey resident, owns and controls Malex, a New Jersey limited liability company (*id.*, ¶¶ 9 and 14). Malex, in turn, owns and controls and Samigor, a New York limited liability company (*id.*, ¶ 17). Samigor is a 25% beneficial owner of real property located at 172 Madison Avenue, New York, New York (NYSCEF Doc No. 142, Tsvi [Steve] Davis [Davis] aff, exhibit B

at 1; NYSCEF Doc No. 144, Davis aff, exhibit D at 35). Defendant Greg Fleyshmakhher (Greg or GF), Alex's brother and a New Jersey resident, owns and controls defendant G Fley Investments LLC (G Fley), a New Jersey limited liability company (NYSCEF Doc No. 159, ¶¶ 10-11 and 13). Alex and Greg, together, own and control defendant AGM Brokerage, LLC (AGM), a New Jersey limited liability company (*id.*, ¶ 16). Through their ownership interests in Malex and G Fley, Alex and Greg own and control defendant Grelax Investments LLC (Grelax), a New Jersey limited liability company (*id.*, ¶ 15). Grelax is a 25% beneficial owner of real property located at 2450 South University Boulevard, Denver, Colorado (together with the New York property, the Properties) (NYSCEF Doc No. 148, Davis aff, exhibit H at 1). Defendant Felix Elinson (Elinson) is Alex's business partner or employee and is a notary public (NYSCEF Doc No. 159, ¶ 12).

On March 15, 2019, Alex, Malex and G Fley executed three separate "Assignment of Membership Interests in LLC" agreements (the Assignments) in which they assigned their membership interests in Malex, Grelax and Samigor to plaintiff for \$6 million (NYSCEF Doc No. 159, ¶ 25). That same date, plaintiff as seller and Alex, G Fley and Malex as purchasers executed a Purchase and Sale Agreement (the PSA) in which plaintiff agreed to sell its membership interests in Malex, Samigor and G Fley to Alex, G Fley and Malex for \$9.995 million (NYSCEF Doc No. 149, Davis aff, exhibit I at 1). The PSA set December 15, 2019 as the closing date on the transaction with **"'TIME IS OF THE ESSENCE' AS AGAINST THE PURCHASER HEREIN"** (*id.*) (emphasis in original). The PSA required Alex, G Fley and Malex to pay non-refundable deposits of \$150,000 each week for four weeks, \$225,000 each week for two weeks, and then \$300,000 each week until the purchase price was paid (NYSCEF Doc No. 159, ¶ 30). In connection with the PSA, Alex and Greg each executed a personal guaranty guaranteeing full payment of the purchase price and "any extension fees" (NYSCEF Doc No. 150, Davis aff, exhibit

J at 1 and 3). Alex, G Fley and Malex made one \$150,000 deposit on March 29, 2019 and partial payments of \$349,975 between March 22 and August 8, 2019 (NYSCEF Doc No. 159, ¶ 30). They failed to pay the balance of \$9,498,025 on the December 15, 2019 closing date (*id.*).

On June 22, 2020, plaintiff, Alex, Greg and AGM executed a Settlement Agreement (the Settlement Agreement) to extend the closing date on the transaction described in the PSA to July 15, 2020 (NYSCEF Doc No. 159, ¶ 34). The Settlement Agreement reset the purchase price to \$9,575,000 to be paid by Alex, Greg or AGM on or before June 26, 2020 and required an additional \$1 million to be paid by Alex, Greg or AGM on or before July 15, 2020 (together, the Settlement Payments) (NYSCEF Doc No. 151, Davis aff, exhibit K at 2). To induce plaintiff to enter into the Settlement Agreement, AGM furnished plaintiff with evidence that it held more than \$36 million in assets in an account at nonparty Morgan Stanley Smith Barney (Morgan Stanley) (NYSCEF Doc No. 159, ¶ 40). The payments were not made (*id.*, ¶ 42). On July 31, 2020, plaintiff sent a demand for payment on the guaranties to Alex and Greg (*id.*, ¶ 43). Alex allegedly acknowledged that he has not honored his obligations (*id.*, ¶ 44).

Plaintiff alleges that it has attempted to exercise its rights as an owner of Malex, Samigor and Grelax by communicating with the entities managing the two Properties, but those entities have refused to recognize plaintiff's membership interests (NYSCEF Doc No. 159, ¶ 45). Defendants have also refused to assist plaintiff (*id.*, ¶ 46). Plaintiff has since learned that Alex has been indicted for participating in a scheme to steer medical prescriptions to pharmacies he or his co-defendants own (NYSCEF Doc No. 159, ¶ 52). On August 18, 2020, Alex communicated with plaintiff and,

“AF tried to persuade Highscore that legal action would be fruitless because: (a) of AF's pending federal criminal prosecution and that he would otherwise refuse to acknowledge Highscore's limited liability company membership interests, and (b) in a new approach,

seventeen months after AF and GF entered into the transaction with Highscore, AF stated that GF would now claim that the whole transaction was a fraud orchestrated by AF against GF and Highscore”

(*id.*, ¶ 56). On November 24, 2020, Morgan Stanley informed plaintiff in response to a subpoena that AGM’s account held \$0.04 not \$36 million (*id.*, ¶ 4).

Plaintiff commenced this action against Alex, Greg, G Fley, Malex, Grelax, Samigor and AGM on August 24, 2020 and later added Elinson as a defendant (NYSCEF Doc Nos. 1-2 and 73-74). The amended complaint pleads 14 causes of action for: (1) breach of the PSA against Alex, G Fley and Malex; (2) breach of the guaranty against Alex; (3) breach of the guaranty against Greg; (4) breach of the Settlement Agreement against Alex, Greg and AGM; (5) a judgment against Alex, Malex, G Fley, Grelax and Samigor declaring that plaintiff is the owner of their membership interests in Malex, Grelax and Samigor; (6) breach of contract against Alex related to the agreement assigning his membership interest in Malex; (7) breach of contract against Malex and G Fley related to the agreement assigning their membership interests in Grelax; (8) breach of contract against Malex related to the agreement assigning its membership interest in Samigor; (9) fraud against Alex, Greg, G Fley and AGM for failing to honor their obligations under the Settlement Agreement; (10) breach of the Assignments against Alex, Malex and G Fley; (11) unjust enrichment against Alex, Malex and G Fley; (12) fraud against Alex, Malex, Samigor and Grelax; (13) fraud against Elinson, Alex and Greg; and (14) notarial misconduct pursuant to Executive Law § 135 against Elinson. On the fifth, sixth, seventh and eighth causes of action, plaintiff seeks declarations that it is the owner of 100% of the membership interests of Malex, Grelax and Smaigor as provided for in the Assignments along with an award of attorneys’ fees. The tenth and eleventh causes of action, both of which seek a judgment of at least \$6 million, are pled in the alternative in the event the causes of action for a declaratory judgment fail.

Greg, G Fley, Grelax, AGM and Elinson have all served answers (NYSCEF Doc Nos. 96, 105 and 133). Counsel purporting to represent the defaulting defendants executed three stipulations extending their time to answer through February 17, 2021 (NYSCEF Doc Nos. 162-164, Baranello affirmation, exhibits 7-9). In the stipulation dated January 21, 2021, the defaulting defendants' counsel agreed that defendants had been served with the amended complaint and that they would not challenge service of process or move for dismissal based upon a lack of personal jurisdiction (NYSCEF Doc No. 162 at 2). Despite having secured three extensions of time, the defaulting defendants have not served an answer. On June 10, 2021, counsel for the defaulting defendants consented to accept service by email of plaintiff's discovery demands on Alex's behalf (NYSCEF Doc No. 165, Baranello affirmation, exhibit 10 at 1).

Plaintiff now moves for a default judgment against Alex, Malex and Samigor on the first, second, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action and for an order compelling them to respond to its discovery demands. In a joint letter to the court dated June 29, 2021, plaintiff, Greg, G Fley, Grelax and AGM stipulated that plaintiff will withdraw without prejudice that part of its motion seeking a declaration on the fifth and seventh causes of action that plaintiff is the owner of Malex's former membership interest in Grelax (NYSCEF Doc No. 171). The defaulting defendants have not submitted opposition.

DISCUSSION

It is well settled that an application for a default judgment must be supported with "proof of service of the summons and the complaint[,] ... proof of the facts constituting the claim, [and] the default" (CPLR 3215 [f]). "[B]y defaulting, a defendant admits all traversable allegations contained in the complaint, and thus concedes liability, although not damages'" (*HF Mgt. Servs.*

LLC v Dependable Care, LLC, 198 AD3d 457, 457 [1st Dept 2021] [citation omitted]; *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

An affidavit of service sworn to on September 4, 2020 reveals that plaintiff served Alex pursuant to CPLR 308 (2) by delivering the summons and complaint to his wife “Maya Fleyshmakher,” a person of suitable age and discretion, on August 26, 2020 at 211 Walnut Drive, Morganville, NJ 07751 (NYSCEF Doc No. 156, Baranello affirmation, exhibit 1 at 1). Copies of the papers were also mailed to Alex at that same address, which the process server had described as Alex’s place of business (*id.*). A second affidavit of service sworn to on December 8, 2020 reveals that plaintiff served Alex pursuant to CPLR 308 (2) by delivering the amended summons and amended complaint to his wife, “Mayya Fleyshmakher,” on December 3, 2020 at the same Morganville address (NYSCEF Doc No. 160, Baranello affirmation, exhibit 5 at 1). At that time, the process server inquired whether Alex was in active service in the military and received a negative reply (*id.*). Copies of the papers were also mailed to Alex at the Morganville address, which the process server had described as Alex’s last known residence (*id.*).

An affidavit of service sworn to on August 31, 2020 reveals that plaintiff served Samigor pursuant to Limited Liability Company Law § 303 by delivering the summons and complaint to the Secretary of State on August 31, 2020 (NYSCEF Doc No. 157, Baranello affirmation, exhibit 2 at 1). A second affidavit of service sworn to on December 7, 2020 reveals that plaintiff served Samigor pursuant to Limited Liability Company Law § 303 by delivering the amended summons and amended complaint to the Secretary of State on December 7, 2020 (NYSCEF Doc No. 161, Baranello affirmation, exhibit 6 at 1). Such service comports with CPLR 311-a.

An affidavit of service sworn to on September 9, 2020 reveals that plaintiff served Malex pursuant to Limited Liability Company Law § 304 by delivering the summons and complaint to

the Secretary of State on September 1, 2020 (NYSCEF Doc No. 158, Baranello affirmation, exhibit 3 at 59). On September 3, 2020, plaintiff sent Malex a notice informing it that process had been served upon it via the Secretary of State (*id.* at 61). The notice was sent by registered mail, return receipt requested to two addresses: 11 Clymer Court, Marlboro, New Jersey 07746 and 211 Walnut Drive, Morganville, New Jersey 07751 (*id.* at 63). A second affidavit of service sworn to on September 8, 2020 reveals that plaintiff served “Malex LLC by Alex Fleyshmakher” on September 3, 2020 by delivering the summons and complaint to Alex’s wife, “Maya Fleyshmakher,” a person of suitable age and discretion at “[d]efendant’s dwelling house” (*id.* at 70). Plaintiff filed an affirmation of compliance with Limited Liability Law § 304 on September 16, 2020 (NYSCEF Doc No. 158, Baranello affirmation, exhibit 3). On December 7, 2020, plaintiff delivered a copy of the amended summons and amended complaint to the Secretary of State (NYSCEF Doc No. 161, Baranello affirmation, exhibit 6). Such service comports with CPLR 311-a.

“The time to seek a default judgment should be measured from the default in responding to the original, not the amended, complaint” (*MTGLQ Invs., L.P. v Shay*, 190 AD3d 527, 528 [1st Dept 2021], *lv denied* 37 NY3d 908 [2021]). Plaintiff has demonstrated that the defaulting defendants have not answered the complaint despite having been given three extensions of time. Plaintiff’s counsel affirms that he spoke to counsel representing the defaulting defendants on March 1, 2021 and that counsel “acknowledged that his clients had defaulted and advised that they would not respond to the Amended Complaint” (NYSCEF Doc No. 155, Baranello affirmation, ¶ 17). Email correspondence from plaintiff’s counsel to the defaulting defendants’ counsel on March 2, 2021 indicates that counsel agreed that service of the papers upon him “will constitute good service on your client” (NYSCEF Doc No. 166, Baranello affirmation, exhibit 11 at 1).

As to the merits, “[t]he quantum of proof necessary to support an application for a default judgment is not exacting; however, some firsthand confirmation of the facts forming the basis for the claim must be proffered” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006]). “[A] complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim” satisfies this statutory requirement (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]). In support, plaintiff tenders an affidavit from one of its members, Davis. Plaintiff has established the merits of the first, second, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action pled against Alex and/or Malex and/or Samigor.

A cause of action for breach of contract requires the existence of a valid contract, the plaintiff’s performance, the defendant’s breach and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff has demonstrated the existence of a valid contract with Alex and Malex, the failure by Alex and Malex to perform thereunder and damages.

To enforce a written guaranty, a creditor need only prove “an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform” (*Gansevoort 69 Realty LLC v Laba*, 130 AD3d 521, 521 [1st Dept 2015] [internal quotation marks and citation omitted]). Plaintiff has demonstrated the merits of this cause of action against Alex. The guaranty reads, in pertinent part, that Alex as “Guarantor, does hereby absolutely, unconditionally and irrevocably, guaranty to [plaintiff] ... the payment of said Purchase Price” of \$9.995 million (NYSCEF Doc No. 150 at 1). Davis avers that despite due demand, Alex has failed to pay plaintiff the amounts due under the PSA and the guaranty (NYSCEF Doc No. 140, Davis aff, ¶ 24).

CPLR 3001 provides, in part, that the “court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” Plaintiff has demonstrated that

the merits of the declaratory judgment causes of action. Davis avers that defendants have prevented plaintiff from being recognized as the holder of the assigned membership interests in Malex, Grelax and Samigor (NYSCEF Doc No 140, ¶ 37). He describes an October 2019 meeting he and Steve Reich for plaintiff attended with nonparty Yitzchak Tessler (Tessler) for Tessler Developments, a company that manages the Properties (*id.*, ¶ 5). Davis explains that Tessler indicated that “he did not want to get involved in the dispute between Highscore and the Fleyshmakher” and “made clear he would not do anything affirmatively to recognize Highscore’s ownership interests” in Malex, Grelax and Samigor (*id.*, ¶ 39). Davis states that plaintiff has not received any of the benefits associated with ownership of Malex, Grelax and Samigor, including income distributions, and has not received any information regarding potential sales of the Properties (*id.*, ¶¶ 42-43).

Thus, as against Malex and Samigor, the motion is granted. As against Alex, the motion is denied without prejudice to renewal. CPLR 3215 (g) provides that, in some instances, a plaintiff must furnish to a defendant in default additional notice of the action. Here, plaintiff submits that it served a notice pursuant to CPLR 3215 (g) (1) by overnight delivery to Alex’s counsel on June 4, 2021. While Alex’s counsel appeared to agree to accept such service, CPLR 3215 (g) (1) is inapplicable. CPLR 3215 (g) (1) provides that “any defendant who has appeared is entitled to at least five days’ notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise.” CPLR 320 (a) states, in relevant part, that a “defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer” (*see generally Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1007 [2d Dept 2020] [discussing the three ways a defendant “appears” in an action]). A

stipulation to extend a defendant's time to answer does not constitute an appearance for purposes of CPLR 320 (a) (*see Mill Val. Celebrity Homes v Empanque Capital Corp.*, 178 AD2d 949, 949 [4th Dept 1991]). Plaintiff contends that counsel served a notice of appearance (NYSCEF Doc No. 168, plaintiff's mem of law at 11; NYSCEF Doc No. 155, ¶ 11), but the notice was not submitted on the motion. Thus, plaintiff has not established that Alex has appeared in the action such that CPLR 3215 (g) (1) applies. As a result, plaintiff must satisfy the additional notice requirements set forth in CPLR 3215 (g) (3) (i) (*see 231st Riverdale LLC v. 7 Star Home Furniture Inc.*, 198 AD3d 524, 524 [1st Dept 2021] [denying a default motion against the guarantor of a commercial lease where the plaintiff failed to satisfy the additional notice requirement]). Plaintiff has not satisfied this statutory requirement. Plaintiff, though, may cure this deficiency by producing the notice of appearance served upon it or by providing satisfactory proof of its compliance with CPLR 3215 (g) (3) (i).

The part of the motion for an order compelling the defaulting defendants to respond to plaintiff's discovery demands propounded to Alex is denied without prejudice to renewal. While a "plaintiff, if it chooses to do so, may press its right to discovery in advance of the inquest, whether for direct use as evidence in proving its damages or for the procurement of information that may lead to such evidence" (*see ICM Controls Corp. v Morrow*, 151 AD3d 1935, 1936 [4th Dept 2017], quoting *Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 574 [1978]), the demands were directed to Alex, only. As discussed above, plaintiff has not demonstrated that it entitled to entry of a default judgment or an inquest as against Alex at this time.

Accordingly, it is

ORDERED that the part of the motion brought by plaintiff Highscore Capital LLC for entry of a default judgment against defendant Alex Fleyshmakher on the first, second, fourth, fifth,

sixth, ninth, tenth and eleventh causes of action (motion sequence no. 005) is denied without prejudice to renewal; and it is further

ORDERED that the part of plaintiff's motion for entry of a default judgment against defendant Malex LLC on the fifth and seventh causes of action as to said defendant's interests in defendant Grelax Investments LLC is hereby withdrawn without prejudice in accordance with the parties' correspondence dated June 29, 2021 (NYSCEF Doc No. 171); and it is further

ORDERED that the part of plaintiff's motion for entry of a default judgment against defendant Malex LLC on the first, eighth, tenth and eleventh causes of action on the issue of said defendant's liability is granted, without opposition; and it is further

ORDERED that the part of plaintiff's motion for entry of a default judgment against defendant Samigor Group LLC on the issue of said defendant's liability on the fifth cause of action is granted, without opposition; and it is further

ORDERED that an inquest on damages due to plaintiff Highscore Capital LLC from defendant Malex LLC on the first, eighth, tenth and eleventh causes of action and a hearing on the fifth cause of action for a declaratory judgment against defendant Samigor Group LLC shall be held at the time of trial or other disposition of this action; and it is further

ORDERED that the part of plaintiff's motion seeking to compel defendants Alex Fleyshmakher, Malex LLC and Samigor Group LLC to respond to the interrogatories and discovery demands dated February 3, 2021 is denied without prejudice to renewal.

12/2/2021
DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

OTHER

☐

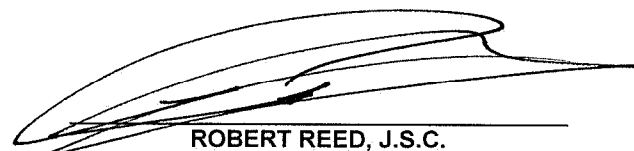
SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE


ROBERT REED, J.S.C.