

SBM Holdings, LLC v Macario
2022 NY Slip Op 30212(U)
January 19, 2022
Supreme Court, New York County
Docket Number: Index No. 652347/2020
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

Table with case details: SBM HOLDINGS, LLC, SERIES TRUST NO. 1705, Plaintiff, - v - ANTONIO MACARIO LIMA, Defendant. Includes INDEX NO. 652347/2020, MOTION DATE, MOTION SEQ. NO. 001, and DECISION + ORDER ON MOTION.

HON. BARRY R. OSTRAGER

Before the Court is a motion by plaintiff SBM Holdings, LLC, Series Trust No. 1705 ("SBM") for a default judgment against defendant Antonio Macario Lima ("Macario"), a resident of Brazil, in the amount of \$1,725,653,688.40 plus interest based on Macario's alleged involvement in a failed bond transaction. Although service was properly completed and Macario has not appeared or responded to the Complaint, for the reasons that follow, the motion is denied without prejudice to renewal within thirty days on a more complete set of papers.

The motion is supported by an affidavit on personal knowledge from Burnett Dubose, a Trustee of SBM and co-owner of Royal Swiss Credit Union & Capital Trust ("Royal Swiss") (NYSCEF Doc. No. 26). Dubose explains (in ¶ 5) that in October 2017, "representatives of [non-party] Francisco Reis Oliveira ("Oliviera") approached representatives of Royal Swiss to discuss a bond transaction." The two parties ultimately entered into an agreement pursuant to which non-party Oliviera would sell the Bond to SBM, a Trust created by Royal Swiss, as memorialized in a Business Corporation Agreement dated November 1, 2017 (the "BCA", NYSCEF Doc. No. 27). Based on allegations that Oliviera breached the BCA by selling the Bond to a third-party, SBM secured a judgment against Oliviera, also a resident of Brazil, in the

amount of \$1,725,653,688.40 in an earlier action before this Court under Index Number 653140/2018 (see Sept 19, 2019 Decision and September 24, 2019 Judgment, NYSCEF Doc. Nos. 71 and 76).

SBM then commenced this action against Macario by filing a Summons and Complaint on June 9, 2020 (NYSCEF Doc. No. 1). It took a full year for SBM to effectuate proper service on Macario in Brazil during the pandemic (See June 1, 2021 Order, NYSCEF Doc. No. 20). When Macario failed to appear, SBM filed this motion for a default judgment. In the Complaint, SBM asserts four causes of action, all premised on the theory that Macario facilitated Oliveira's breach of the SBA by allegedly helping Oliveira sell the Bond to a third-party, instead of SBM. The four causes of action are: (1) tortious interference with contract; (2) tortious interference with prospective economic advantage; (3) unfair competition; and (4) civil conspiracy. In this motion, SBM is moving for a money judgment on default based only on the First Cause of Action for tortious interference with contract, and counsel asks the Court to hold the other causes of action in abeyance pending a decision on this motion.

In his supporting affidavit, Dubose alleges (at ¶ 16) that soon after the execution of the BCA, "Macario began acting as the primary contact for Mr. Oliveira in all communications regarding the Bond's sale." In the Complaint (¶ 17), SBM alleges that Macario was presented to SBM as a "translator" for Oliveira, who was not fluent in English. Dubose then adds in his Affidavit (at ¶ 20) that, "on January 17, 2018, Mr. Macario told a representative of the Trust [SBM] that Mr. Oliveira was in the process of selling the Bond to another buyer, despite Mr. Oliveira's obligation under the BCA to sell the bond to the Trust. From that conversation, it was clear that Mr. Macario had helped Mr. Oliveira solicit other purchasers for the Bond. It was also clear that he had helped arrange for the Bond's sale to that other party." However, the claim is

completely conclusory and fails to establish that Macario was acting in any capacity beyond that of translator.

In an obvious attempt to strengthen SBM's claim, Dubose adds in his Affidavit (at ¶ 26) that: "After the transaction failed to close, I learned that around the same time that the BCA was being finalized, Mr. Macario was negotiating a side agreement that would have provided him with a significant share of the proceeds from the Bond's sale. That agreement, if executed, would have given Mr. Macario powerful incentive to sell the Bond to the highest bidder, regardless of the BCA's terms." Again, the claim is completely conclusory and lacks evidentiary value, as it may consist on nothing more than inadmissible hearsay referring to a purported agreement that may never have been executed and the terms of which are not known.

Dubose does say at the beginning of his affidavit that "I have read the contents of the Complaint that was filed in this action and affirm that its allegations are true to my knowledge, except for the matters alleged on information and belief, which I believe to be true." But the Complaint, which is not verified, is as conclusory as the Affidavit and fails to establish that Macario was doing anything more than acting as Oliveira's translator. If anything, the Complaint's allegations undermine SBM's claim by alleging (at ¶16) that, "at the end of October, days before the BCA was signed, the Defendant, Macario, entered into a Joint Venture Agreement with Oliveira wherein Macario would receive a portion of the proceeds of Oliveira's sale of the Bond to the Trust." Nowhere is that alleged JV Agreement provided or explained in any detail, and SBM does not even confirm if there is a writing. More significantly, though, the purpose of the alleged JV Agreement may well have been to give Macario an incentive and/or compensation to help Oliveira complete the Bond sale to SBM pursuant to the BCA, and not necessarily to sell the Bond to a third-party as alleged in the motion.

In sum, the evidence offered by SBM fails to prove the facts in admissible form to establish the cause of action of tortious interference with contract (see CPLR 3215). Although the law does not require it, the Court will give SBM one final opportunity to prove its claims, but only one such motion may be made in an effort to conclude this action. Specifically, SBM may move again on notice to Macario for a default judgment, but SBM must seek relief on all four causes of action in the Complaint or withdraw any cause of action that is not addressed. The motion shall be filed within the next thirty days to avoid dismissal of the action. If SBM is unable to obtain the necessary proof and timely file the motion, the Court will accept a Notice of Discontinuance.

Accordingly, plaintiff's motion for a default judgment is denied without prejudice to renewal on proper papers within thirty days. A status conference is scheduled for April 7, 2022 at 10:30 a.m. to confirm the status of the proceedings.

Dated: January 19, 2022



 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE