

Schembre v Saggese
2022 NY Slip Op 30553(U)
February 17, 2022
Supreme Court, New York County
Docket Number: Index No. 656328/2016
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

FRANK SCHEMBRE, KERRY SCHEMBRE,
EXECUTIVE CLEANING CONTRACTORS, INC. o/b/o
EXECUTIVE CLEANING CONTRACTORS PLAN,

Plaintiffs,

- v -

MARIO A. SAGGESE, JVC 1000 CORPORATION,
GAF FINANCIAL GROUP, INC., TIMOTHY JOINT,
JOINT VENTURE CAPITAL, LLC, CHARLES
WRIGHT and EMS GLOBAL ONE, LLC.,

Defendants.

INDEX NO.	656328/2016
MOTION DATE	
MOTION SEQ. NO.	007

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Before the Court is plaintiffs’ motion for an Order: (a) amending the caption to correct the name of one defendant so that the caption reads EMS Global One, Inc., rather than EMS Global One, LLC (“EMS”); and (b) granting plaintiffs a default judgment against defendant Charles Wright. For the reasons that follow, the motion is granted in part and denied in part.

The procedural history is set forth in the detailed Pretrial Conference Order dated January 10, 2022 (NYSCEF Doc. No. 220) and will be summarized here to the extent relevant to the motion. Justice Saliann Scarpulla, the justice to whom this action was originally assigned, dismissed the action as against defendant GAF Financial Group, Inc. in a lengthy opinion dated February 1, 2018 (NYSCEF Doc. No. 216). On April 20, 2018 plaintiffs moved before Justice Scarpulla for a default judgment against defendants Charles Wright and his company EMS based on the alleged failure of those parties to appear at the scheduled conferences, despite their having filed a *pro se* Answer to the Complaint (seq. 004). By Decision and Order dated May 22, 2018

(NYSCEF Doc. No. 108), Justice Scarpulla granted a default judgment as to liability only as against EMS because the corporate entity had not appeared by counsel as required by law but reserved the issue of damages as against EMS for trial. As to defendant Wright, Justice Scarpulla denied the motion without prejudice, holding that while Wright could represent himself as an individual, he had not consented to e-filing and the record contained no evidence that plaintiffs had notified Wright of the conferences. Therefore, Justice Scarpulla allowed plaintiffs to renew the motion should Wright fail to appear at the next conference after adequate notice was given. The motion was not renewed before Justice Scarpulla at any point during the two years that the action remained pending before that justice.

More recently, on the eve of the trial scheduled before this Court following the reassignment of the case, plaintiffs filed a Stipulation of Discontinuance discontinuing the action as against defendants Mario A. Saggese, JVC 1000 Corporation, Timothy Joint, and Joint Venture Capital, LLC (NYSCEF Doc. No. 216), leaving Wright and EMS as the only remaining defendants. Plaintiffs now seek to amend the caption to correctly name EMS and to proceed with the damages inquest against EMS pursuant to Justice Scarpulla's order. With respect to defendant Wright, plaintiffs seek a default judgment against Wright in plaintiffs' favor in the amount of \$544,043.00, calculated based on the sum of \$1,064,000.07 that plaintiffs allegedly paid to defendants, as reduced by the \$520,000.00 that plaintiffs received from the settling defendants, plus statutory interest from December 5, 2016, when this action was commenced.

Plaintiffs are granted leave to amend the caption to correctly name EMS and to proceed with the damages inquest directed by Justice Scarpulla, even though it is unclear whether EMS is a viable entity against which a judgment can be enforced. The situation is far more complex with respect to defendant Wright.

The Complaint in this action, verified by plaintiff Frank Schembre, asserts causes of action against Wright sounding in fraud, breach of contract, and unjust enrichment, alleging that defendants collectively persuaded plaintiffs to invest \$1,064,000.07 in a business venture that turned out to be a complete fraud (NYSCEF Doc. No. 1). The motion for a default judgment against Wright is supported by an extremely brief affidavit from Schembre on personal knowledge (NYSCEF Doc. No. 204). There, Schembre asserts (at ¶ 4) that plaintiffs were defrauded in the amount of \$1,064,000.07 “by defendants Charles Wright and his alter ego company EMS Global One, Inc, which received \$749,865.00 of those sums. ... Defendant Wright was supposed to use those funds to refurbish a Boeing jet. Instead, defendant Wright retained those funds for his own use.”

The only supporting documentation offered is a copy of a check dated December 14, 2012 from defendant Mario Saggese payable to EMS Global One, Inc. in the sum of \$749,865.00 (NYSCEF Doc. No. 210). Oddly, the back of the check appears to be endorsed by Saggese on behalf of EMS. One cannot discern from the back of the check what individual or entity actually received the funds. Wright’s name does not appear anywhere on the check. Nor does Schembre’s. What is more, Schembre’s affidavit does not contain a single allegation to support the claim that EMS is the “alter ego company” of Wright. Thus, the motion papers fail to establish either liability or damages on the part of Wright on the merits pursuant to CPLR 3215.

To the extent plaintiffs may seek to establish their case against Wright based on an alleged failure to appear at conferences, that effort fails as well. In the Decision denying a default judgment against Wright based on Wright’s alleged failure to appear at conferences after having filed an Answer, Justice Scarpulla found that plaintiffs had failed to establish proper notice to Wright of the conference dates. In this Court’s Pretrial Order, this Court noted that the record

only demonstrated a certified mailing to Wright in California of the earlier motion, which plaintiffs acknowledged had never been received by Wright. Plaintiffs' motion contains no indication that plaintiffs made an effort to confirm Wright's address after that time, and this motion was served on Wright by mail to the exact same address previously used.

This Court's Pretrial Order advised plaintiffs that plaintiffs were required to establish that they had cured the notice deficiency previously identified by Justice Scarpulla in the denial of the earlier motion for a default judgment. That has not been done. The Pretrial Order also stated that plaintiffs are required to establish a reasonable excuse for delaying for years before renewing their default judgment motion pursuant to Justice Scarpulla's Order. The motion papers barely do that, referencing only "cognitive issues" claimed by Wright. But what the papers clearly fail to do is establish any basis for liability and damages against Wright when no competent proof has been offered to support plaintiffs' claim that Wright received the funds at issue.

However, as the Court will be proceeding with a damages inquest as against EMS, the Court will give plaintiffs the opportunity to prove at the inquest confirmation of a valid address and proper notice to Wright, as well as alter ego liability and damages. To avoid a waste of resources, the Court directs plaintiffs to first undertake an investigation to ascertain a valid current address for Wright and EMS and to file an affidavit by the party who conducted the search by March 15, 2022. A pretrial conference is scheduled for March 25, 2022 at 2:30 p.m. via Microsoft Teams with appearances and email addresses for all parties to be provided by plaintiffs in a letter efiled by March 15 with the affidavit. The affidavit shall also include proof of notice to Wright and EMS of the conference. At the conference, the Court will confirm the procedures and the date for the inquest, assuming plaintiffs have established proper notice.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted to the extent of directing the Clerk to amend the caption to substitute EMS Global One, Inc., as a defendant in place of EMS Global One, LLC, upon plaintiffs' e-filing of Form EF-23, available on the NYSCEF Home Page, and a copy of this Order directed to the County Clerk; and it is further

ORDERED that plaintiffs' motion for a default judgment against defendant Charles Wright is granted to the extent of setting the matter down for a conference to provide proof of notice to defendants Wright and EMS and, assuming proper notice, to schedule an inquest on liability and damages in accordance with the terms of this Decision, and the motion is otherwise denied; and it is further

ORDERED that a status conference is scheduled for March 25, 2022 at 2:30 p.m. on notice to defendants Charles Wright and EMS Global at an address reasonably calculated to reach defendants pursuant to the evidence adduced in the affidavit to be filed by March 15, 2022.

Dated: February 17, 2022

Barry R. Ostrager

BARRY R. OSTRAGER, J.S.C.

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: