

Draudt v Hercules Invs., LLC
2022 NY Slip Op 30934(U)
March 18, 2022
Supreme Court, New York County
Docket Number: Index No. 655862/2021
Judge: Sabrina Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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. SABRINA KRAUS PART 57TR

Justice

-----X

CHRISTOPHER DRAUDT,

Plaintiff,

- v -

HERCULES INVESTMENTS, LLC, JAMES MCDONALD,
DOES 1 THROUGH 10

Defendant.

-----X

INDEX NO. 655862/2021
MOTION DATE 03/02/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11 were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOIND)

BACKGROUND

Plaintiff, a resident of New Jersey, commenced this action, seeking damages in the amount of \$796,467.92, for breach of fiduciary duty and negligence, in connection with investments defendants made of behalf of plaintiff.

The summons and complaint were filed on October 7, 2021. Defendants have failed to appear or file an answer. The time within which the defendants may answer or otherwise move to respond to said complaint has expired and has not been extended.

PENDING MOTION

On March 2, 2022, plaintiff moved pursuant to CPLR §3215, for a default judgment against defendants, in the amount of \$796,467.92, for breach of fiduciary duty and negligence. Defendants have failed to appear or submit opposition.

DISCUSSION

CPLR § 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial... the plaintiff may seek a default judgment against [it].” “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.” *Atlantic Cas. Ins. Co. v RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept 2011).

In support of his motion, plaintiff submits an affidavit (NYSCEF Doc 5), the client brochure from Hercules Investment LLC (NYSCEF Doc 6); the contract between the parties (NYSCEF Doc 7); the affirmation of Martin R Kafafian, Esq (NYSCEF Doc 8); a copy of the summons and complaint (NYSCEF Doc 9); and copies of the affidavits of service (NYSCEF Doc 10).

In order to establish a claim for breach of fiduciary duty, plaintiff must establish the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct” (*Deblinger v. Sani–Pine Prods. Co., Inc.*, 107 A.D.3d 659, 660, 967 N.Y.S.2d 394 [2nd Dept 2014]).

In order to establish a claim for negligence plaintiff must establish “a duty owed by the defendant to the plaintiff, a breach thereof, and injury proximately resulting therefrom” (*Solomon v. City of New York*, 66 N.Y.2d 1026, 1027, [Ct of Appeals 1985]).

Plaintiff submits in support a copy of the electronically signed agreement between plaintiff and defendants. The signed agreement establishes both the existence of a fiduciary duty and a duty owed by the defendant. However, plaintiff fails to offer any documentary evidence to support his allegation that his money was invested in funds without his authorization or that he

suffered any losses. Plaintiff does not offer any statements of his account with defendant, which would establish that defendant did in fact invest plaintiff's money and that plaintiff suffered damages.

Even if the court were to find that plaintiff had established a claim for breach of fiduciary duty and negligence, it is unclear from the record whether this court has jurisdiction over the defendants in this action.

Hercules Investments LLC is a California based company. Pursuant to CPLR § 302(a)(1), "long-arm jurisdiction over a nondomiciliary exists where (i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business"

Although the complaint asserts Hercules "routinely and systematically conduct business in the state of New York" the only evidence presented to support that statement is that Hercules Fund, a division of Hercules is a mutual fund traded on NASDAQ. New York courts have held that "a corporation is not doing business' in the State for purposes of conferring jurisdiction because its shares are listed on a stock exchange ..." (*Gilson v. Pittsburgh Forgings Co.*, 284 F.Supp. 569 [S.D.N.Y.1968]).

In addition, service on James McDonald is defective. The affidavit of service states that the summons and complaint were served on James McDonald by service to Beatriz Lima, "as person in charge of the place of business / authorized to accept service on behalf of Hercules Investments, LLC, a California limited liability company at 1718 18 Harriman Lane, #A, Redondo Beach, CA 90278." The affidavit does not indicate that this is McDonald's usual place of business or that an additional mailing was done in accordance with CPLR § 308(2).

Lastly, plaintiff has failed to establish that he complied with the additional mailing requirement under CPLR 3215 (g).

CONCLUSION

Wherefore, it is hereby

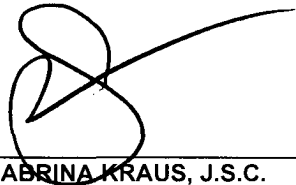
ORDERED plaintiff’s motion for a default is denied; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on defendants Hercules Investments LLC, James McDonald, and attorney Ethan Brown, Esq.; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/suptmanh); and it is further

This constitutes the decision and order of the court.

<p><u>3/18/2022</u> DATE</p>	 <hr/> SABRINA KRAUS, J.S.C.	
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input type="checkbox"/> GRANTED</p> <p><input type="checkbox"/> SETTLE ORDER</p> <p>CHECK IF APPROPRIATE: <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input checked="" type="checkbox"/> DENIED</p> <p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input type="checkbox"/> GRANTED IN PART</p> <p><input type="checkbox"/> SUBMIT ORDER</p> <p><input type="checkbox"/> FIDUCIARY APPOINTMENT</p>
		<p><input type="checkbox"/> OTHER</p> <p><input type="checkbox"/> REFERENCE</p>