

<b>Thompson v Nelson</b>
2022 NY Slip Op 33577(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 651072/2022
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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LU-SHAWN THOMPSON d/b/a BENBOW INVESTING  
GROUP, LLC,

INDEX NO. 651072/2022

Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

ALIYA J. NELSON, HARVEY K. NEWKIRK,  
STREAMTEAM MEDIA, LLC, and OMNIS, LLC,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19,  
20, 21, 22, 23, 24, 25, 26

were read on this motion to/for JUDGMENT - DEFAULT

In motion sequence number 001, plaintiff Lu-Shawn Thompson d/b/a Benbow Investing Group, moves, pursuant to pursuant to CPLR 3215, for a default judgment against defendants Aliya J. Nelson, Harvey K. Newkirk, Streamteam Media, LLC (Streamteam), and Omnis, LLC (Omnis). Plaintiff also seeks an immediate inquest on the issue of damages.

Plaintiff alleges that defendant Nelson solicited plaintiff to invest in a production of live streaming concerts by defendant Streamteam. (NYSCEF 1, Summons and Verified Complaint ¶13.) The concerts were to be streamed on defendant Omnis's streaming platform. (*Id.*) Plaintiff alleges that Nelson made misrepresentations to induce plaintiff into entering into a revenue share agreement with Streamteam. (*Id.* ¶¶16-17.)

During the negotiation of this agreement defendants Nelson and Newkirk sent plaintiff a sponsorship deck, which confirmed performances by three artists. (*Id.* ¶22.) In consideration of the revenue share agreement, plaintiff invested \$162,000. (*Id.* ¶24.) After executing the revenue share agreement, Nelson informed plaintiff that one of the artists had not confirmed its performance and sought to amend the revenue share agreement to include additional performances. (*Id.* ¶25.) “On June 22, 2020, Defendant Newkirk informed Plaintiff that if she agreed to the proposed amendment to the Revenue Share Agreement, Plaintiff’s \$162,000 investment would be allocated such that \$72,900 would be spent on the Nicky Jam concert, \$30,780 would be spent on a Brytiago concert, \$30,780 would be spent on a Darell concert, \$16,200 would be spent on a Noriel concert and \$11,340 would be spent on the Kevvo concert.” (*Id.* ¶28.) Plaintiff entered into an amended revenue share agreement with Streamteam. (*Id.* ¶29; NYSCEF 8, Amended Revenue Share Agreement.)

“The terms of the Revenue Share Agreement and the amended Revenue Share Agreement provide that the Plaintiff’s investment would be used solely by Streamteam to secure the right to produce, record and distribute live performances by the Nicky Jam, Brytiago, Darell, Noriel and Kevvo. The Revenue Share Agreement and the amended Revenue Share Agreement specifically contemplated the performances being streamed on the Omnis Player Platform.” (*Id.* ¶30.) The revenue share agreement and amended agreement provided plaintiff with the right to inspect Streamteam’s books and records. (*Id.* ¶31.)

Having not received any revenue payments after the concerts occurred, plaintiff requested payment and documentation evidencing how plaintiff’s investment was spent.

(*Id.* ¶32.) “Newkirk provided a spreadsheet identifying that Streamteam actually paid \$24,049 in expenses and other costs to produce the Kevvo concert. This was in violation of Defendant Newkirk’s agreement to spend \$11,340 on the Kevvo concert. Additionally, the spreadsheet provided by Defendant Newkirk evidenced that Streamteam spent \$94,301 on the Brytiago concert. This was in violation of Newkirk’s agreement to spend \$30,780 on the Brytiago concert. The spreadsheet provided by Newkirk provided no expenditure information on concerts from Darell, Noriel or Nicky Jam.” (*Id.* ¶33.) Plaintiff alleges that defendants failed to account for \$50,000 of plaintiff’s investment and any portion of the investment not spent should have been returned to plaintiff. (*Id.* ¶¶35-36.)

“On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant’s default in answering or appearing.” (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, \*6-7 [Sup Ct, NY County 2018] [citations omitted].)

#### Proof of Facts Constituting Plaintiff’s Claim

A “judgment can only be entered upon submission of the requisite proof. Such proof must include proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due.” (*Chase Manhattan Bank (N.A.) v Evergreen Steel Corp.*, 91 AD2d 539, 539 [1st Dept 1982] [internal quotation marks and citations omitted].) “Given that in default

proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists. Indeed, defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003] [citations omitted].)

Here, plaintiff alleges in the verified complaint causes of action for fraudulent inducement (against Nelson and Newkirk), breach of good faith and fair dealing (against all defendants), breach of fiduciary duty (against Nelson and Newkirk), fraudulent misrepresentations (against Nelson and Newkirk), breach of contract (against Streamteam), breach of contract – third party beneficiary (against Omnis), unjust enrichment (against Nelson), constructive trust (against Nelson and Newkirk), and accounting (against all defendants). (NYSCEF Doc. No. [NYSCEF] 1, Summons and Verified Complaint; NYSCEF 2, Verification Aff.)

Plaintiff has set forth sufficient proof of facts of her claims for fraudulent inducement (against Nelson and Newkirk), fraudulent misrepresentations (against Nelson and Newkirk), breach of contract (against Streamteam) and unjust enrichment (against Nelson) by alleging facts to support the elements of each of those causes of action to enable the court to determine that a viable cause of action exists.

In regard to plaintiff’s claim for breach of contract against Omnis based on a third party beneficiary theory, “a party asserting rights as a third-party beneficiary must allege: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for its benefit, and (3) that the benefit to it is sufficiently

immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate it if the benefit is lost.” (*Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 478, 480 [2d Dept 2017] [citation omitted].) Plaintiff was allegedly informed that Omnis breached its agreement with Streamteam, and that there was “no long term or short term deal in place for distribution or monetization of content and Omnis did not run any of Streamteam’s advertisements for their show” which had made a previous concert successful. (NYSCEF 1, Summons and Complaint ¶¶40.) However, plaintiff fails to allege that she was an intended beneficiary and that the benefit is immediate to indicate an assumption by Omnis of a duty to compensate plaintiff directly if the benefit is lost. Thus, judgment will not be entered on this claim.

In regard to plaintiff’s claim for breach of fiduciary duty against Nelson and Newkirk, plaintiff “must allege that (1) defendant owed [her] a fiduciary duty, (2) defendant committed misconduct, and (3) [plaintiff] suffered damages caused by that misconduct.” (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011] [citations omitted].) Here, plaintiff’s conclusory allegation that Newkirk owed her a fiduciary duty is not sufficient proof of claim. “A conventional business relationship, without more, is insufficient to create a fiduciary relationship. Rather, a plaintiff must show special circumstances that transformed the parties’ business relationship to a fiduciary one.” (*Legend Autorama, Ltd. v Audi of Am., Inc.*, 100 AD3d 714, 717 [2d Dept 2012].) Plaintiff alleges nothing more than a conventional business relationship between her and Newkirk.

As to Nelson, plaintiff alleges that a fiduciary relationship was created when Nelson deposited plaintiff's investment in Nelson's attorney escrow account, indicating a duty owed. Thus, judgment is granted only as to Nelson. As a constructive trust also requires the existence of a fiduciary relationship (see *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]), judgment as to plaintiff's constructive trust claim is granted only as to Nelson.

Plaintiff has provided sufficient proof of her accounting claim but only against Nelson and Streamteam. With Streamteam, plaintiff alleges a contractual right to an accounting and a fiduciary duty owed by Nelson. As to Omnis and Newkirk, "[t]he failure to establish the existence of such a fiduciary relationship also precludes [a default] judgment for an accounting against them." (*Id.* at 474.)

Plaintiff also cannot sustain a breach of good faith and fair dealing against Nelson, Newkirk, and Omnis as those defendants are not parties to the agreement sued upon, and that is a fatal defect. (*Veneto Hotel & Casino, S.A. v German Am. Capital Corp.*, 160 AD3d 451, 452 [1st Dept 2018] [citation omitted].) As to Streamteam, this claim is based on the same allegations as the breach of contract claim, and thus, is duplicative. (See *Kim v Francis*, 184 A.D.3d 413, 414 [1st Dept 2020].) Judgment will not be entered on this claim.

#### Proof of Service and Proof of Default

Plaintiff has submitted proof that defendants were served with the summons and verified complaint (NYSCEF 18-22, Affidavits of Service.) Further, plaintiff's counsel affirms that defendants failed to answer the verified complaint. (NYSCEF 16, White aff ¶5.)

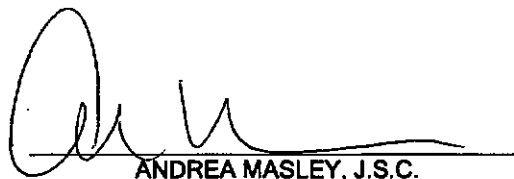
Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is granted, in part, and the matter shall be set down for an assessment of damages; and it is further

ORDERED that plaintiff's counsel is directed to contact the Part 48 Clerk to schedule an inquest on damages on those claims upon which judgment is granted.

Motion Seq. No. 01:

10/17/2022  
DATE

  
ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENC  
F