FT Global Capital, Inc. v IT Tech Packaging, Inc.
2024 NY Slip Op 32927(U)
August 16, 2024
Supreme Court, New York County
Docket Number: Index No. 650771/2022
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** — ***Justice*** | **PART** **61M**

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FT GLOBAL CAPITAL, INC.,

Plaintiff,

- v -

IT TECH PACKAGING, INC.,

Defendant.

---X

INDEX NO. 650771/2022

MOTION DATE 06/28/2024

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180

were read on this motion to/for JUDGMENT - DEFAULT.

I. BACKGROUND

In this breach of contract action, counsel for the defendant, IT Tech Packaging Inc., was relieved pursuant to an order dated December 19, 2023 (MOT SEQ 002). No further Notice of Appearance was filed. The plaintiff, FT Global Capital, Inc., previously moved pursuant to CPLR 3125 for leave to enter a default judgment (MOT SEQ 003). By an order dated March 22, 2024, the court denied this motion without prejudice, stating that there had been no demonstrated default since there had been no conference or other court date at which defendant's counsel was required to appear. The court cautioned the defendant that as a corporation, it must be represented by counsel (CPLR 321[b]), and that failure to appear by counsel at the next status conference scheduled for April 11, 2024, could constitute a default under 22 NYCRR 202.27. On April 11, 2024, an attorney appeared for the defendant, but she was not admitted to practice in New York and had not moved for admission *pro hac vice*. The court struck the defendant's answer pursuant to 22 NYCRR 202.27(a) and CPLR 321(b).

The plaintiff moved for a second time pursuant to CPLR 3215 for leave to enter a default judgment against the defendant (MOT SEQ 004). By order dated June 10, 2024, the court denied the motion, as the plaintiff failed to submit proof of service of the summons and complaint and failed to establish proof of the facts constituting its claims. However, the denial was without prejudice to renewal upon proper papers within 30 days.

The plaintiff now moves for a third time pursuant to CPLR 3215 for leave to enter a default judgment against the defendant, in effect, upon its primary cause of action for breach of contract, seeking $2,914,690.20 in damages (MOT SEQ 005). No opposition is submitted. The motion is granted as to the defendant's liability for breach of contract, and the issue of the amount of contract damages and contractual attorneys' fees to be awarded shall be determined by a Special Referee or Judicial Hearing Officer.

II. DISCUSSION

(A) Breach of Contract

"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 (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2nd Dept. 2008])." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649, 651 (2nd Dept. 2011). In support of the instant motion, the plaintiff submits adequate proof of service, submitting an affidavit of service demonstrating that its summons and complaint was served on the defendant by personal delivery to the defendant's authorized agent on February 22, 2022. The plaintiff also provides adequate proof of the facts constituting its breach of contract cause of action, which requires (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). The plaintiff submits the affirmation of its president, Patrick Ko, subscribed and affirmed under penalty of perjury. Additionally, the plaintiff submits its complaint and the defendant's now-stricken answer; the underlying Exclusive Placement Agreement between the parties; and a copy of Schedule A to the Agreement.

Pursuant to Section 1(A) of the Agreement, the plaintiff would introduce the defendant to potential investors (the "Introduced Parties"), who would be listed in Schedule A. If the defendant raised capital from these Introduced Parties, the plaintiff would be entitled to seven and a half percent (7.5%) of the aggregate offering price of the total amount of capital received by the defendant from the Introduced Parties (the "Placement Agent Fee"). Under Section 1(B) of the Agreement, if the defendant issued stock warrants to purchase the defendant's shares in connection with a capital raising transaction, the plaintiff would be entitled, for said transaction,

to receive warrants to purchase shares equal to eight percent (8%) of "the aggregate number of Shares placed in the Placement [i.e., the transaction] . . . to Introduced Parties," with said warrants having "the same terms . . . as the warrants issued to the Investors in the Placement, and [ ] hav[ing] an exercise price equal to the lesser of the price per Share in the Offering or, if applicable, the exercise price of any warrants issued to Investors in the Offering[.]" (the "Placement Agent's Warrants"). Under Section 1(C), the plaintiff would be entitled to the Placement Agent Fee and Placement Agent's Warrants if the defendant conducted a capital raising transaction at any time within twelve (12) months following the termination of the Agreement (the "Tail Period"). Section 4 provides for the termination of the Agreement twelve (12) months after the effective date. Section 9 states that any disputes between the parties may be brought in the state courts of New York and are to be governed by New York law, and that the prevailing party in such an action would be entitled to attorneys' fees and other costs.

Ko's affirmation establishes that the Agreement was effective on April 13, 2019, and would thus terminate on April 13, 2020, with a Tail Period extending from April 13, 2020, to April 13, 2021. The defendant conducted three financings through public offerings during the Tail Period, on April 29, 2020, January 14, 2021, and February 24, 2021, respectively, and raised capital from investors, including from the Introduced Parties. However, the defendant failed to pay the plaintiff the Placement Agent Fees or issue the plaintiff the Placement Agent's Warrants, in breach of the Agreement. The plaintiff thus demonstrates the existence of the parties' Agreement and adequately alleges the existence of a contract, its own performance and the defendant's breach, and that some amount of damages resulted. However, no sum certain has been established.

"When an answer is stricken and a default entered, the defendant 'admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages [citation omitted].'" Curiale v Ardra Ins. Co., 88 NY2d 268, 279 (1996), quoting Rokina Opt. Co. v Camera King, 63 NY2d 728, 730 (1984); see Amusement Bus. Underwriters v American Intl. Group, 66 NY2d 878, 880 (1985); Cole-Hatchard v Eggers, 132 AD3d 718, 720 (2nd Dept. 2015); Gonzalez v Wu, 131 AD3d 1205, 1206 (2nd Dept. 2015). Where, however, the damages are for a sum certain or a sum which can be made certain by computation, there is no need to conduct an inquest to assess the appropriate amount of damages. See Curiale v Ardra Ins. Co., supra; Transit Graphics v Arco Distrib., 202 AD2d 241, 241 (1st Dept. 1994). "The term 'sum certain' in this context contemplates a situation in which,

once liability has been established, there can be no dispute as to the amount due." Reynolds Secur., Inc. v Underwriters Bank & Trust Co., 44 NY2d 568, 572 (1978).

In its motion papers, the plaintiff claims it is owed Placement Agent Fees of $1,374,525.00, is "entitled to warrants to purchase [the defendant's] stock in the amount of $1,405,475[,]" and seeks $134,690.20 in contractual attorneys' fees and costs, for total damages of $2,914.690.20. However, the plaintiff does not submit proof sufficient to support these claimed damages. With respect to the Placement Agent Fees and Placement Agent's Warrants, the plaintiff states that its calculations are informed by documentary evidence concerning the three financings completed during the Tail Period, but it fails to submit any of these documents, citing the strictures of the parties' so-ordered confidentiality stipulation. Ko's affirmation provides some limited information regarding each of the subject financings, but this information is often incomplete and/or fails to entirely support Ko's damages calculations.

For example, with respect to the Placement Agent Fees, Ko's affirmation alleges that in the April 2020 financing, the defendant agreed "with Introduced Parties *and other investors*" (emphasis added) to sell 4,400,000 shares of stock in a public offering at a purchase price of $0.58 per share. Based on these figures, Ko calculates that the plaintiff is owed a seven and a half percent (7.5%) Placement Agent Fee of $191,250 for the April 2020 financing (4,400,000 x $0.58 x 0.075). However, this calculation assumes that all the capital raised by the defendant in the April 2020 financing was received from Introduced Parties, when Ko himself states that the subject financing also involved other investors. Similarly, with respect to the Placement Agent's Warrants allegedly due to the plaintiff in connection with each of the subject financings, Ko appears to calculate the number of shares for which warrants should be issued as a percentage of the total shares of stock sold in each transaction, regardless of whether those shares were sold to Introduced Parties or other investors.

Moreover, nowhere in Ko's affirmation or any of the plaintiff's other submissions is an explanation given as to how the plaintiff has arrived at the $1,405,475 net damages figure proffered in connection with the outstanding Placement Agent's Warrants. Stock warrants are contracts that allow the holder to purchase a specified number of shares for a specific price during a specific time period. Reiss v. Fin. Performance Corp., 97 NY2d 195, 198 (2001). In a breach of contract action arising from an agreement to sell securities such as stock warrants in a public offering, monetary damages are measured "by the loss sustained or gain prevented at

the time and place of breach." Simon v Electrospace Corp., 28 NY2d 136, 145 (1971); see also Kaminsky v Herrick, Feinstein LLP, 59 AD3d 1, 12 (1st Dept. 2008). Here, the Agreement required that the Placement Agent's Warrants be issued to the plaintiff at the closing of each of the subject financing transactions. The plaintiff's damages would thus be calculated "by subtracting the exercise price of the [warrants] from the market price of the [defendant's] stock" on the closing date for each of the subject financing transactions. Kaminsky v Herrick, Feinstein LLP, supra at 11-12. However, the plaintiff submits no evidence to establish either the exercise price of the subject warrants or the market price of the defendant's publicly traded stock on any of the relevant closing dates.

(B) Contractual Attorney's Fees

As to attorney's fees, it is well settled that attorneys' fees are recoverable where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010). However, the plaintiff does not submit any affirmation, billing records, invoices or other proof to establish the amount of its attorneys' fees and costs incurred in this matter.

(C) Remaining Causes of Action

In addition to the breach of contract cause of action, the plaintiff's verified complaint alleges four additional causes of action, numbered here as in the complaint, for: (2) specific performance of the Agreement; (3) breach of the covenant of good faith and fair dealing; (4) unjust enrichment; and (5) quantum meruit. However, the plaintiff does not address these causes of action in its supporting papers, seeking relief only upon its breach of contract cause of action. In any event, these causes of action are dismissed as abandoned and/or without merit.

To the extent the verified complaint seeks specific performance, in the form of a directive that the defendant issue all warrants due to the plaintiff under the Agreement, such relief is generally not awarded where, as here, money damages are sufficient to protect the interests of the injured party. See Sokoloff v Harriman Ests. Dev. Corp., 96 NY2d 409, 415 (2001). Moreover, specific performance is not available with respect to a publicly traded corporate defendant that breaches a contract by failing to deliver shares of stock, as is the case here. See Simon v Electrospace Corp., supra. As stated above, money damages based on the exercise price of the warrants and the value of the defendant's shares at the time of the three

relevant financings are sufficient to protect the plaintiff's interests with respect to the subject stock warrants.

Where, as here, "a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed." Mill Fin., LLC v Gillett, 122 AD3d 98,104 (1st Dept. 2014). That is because "implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." Dalton v Educational Testing Serv., 87 NY2d 384, 389 (1995); see 511 W. 232nd Owners Corp. v Jennifer Realty, Co., 98 NY2d 144 (2002). Stated otherwise, "a breach of the covenant of good faith and fair dealing is a breach of the contract itself" (Parlux v Carter Enterp., LLC, 204 AD3d 72, 92 [1st Dept. 2022]) such that a breach of the implied covenant of good faith and fair dealing claim must be dismissed as duplicative if it arises out of the same facts as a breach of contract claim. See MDRN Intelligence Living Wolfhome v Hartford Fin. Svcs. Group, Inc., 216 AD3d 409 (1st Dept. 2023); Ahsanuddin v Addo, 175 AD3d 1213 (1st Dept. 2019).

No cause of action lies to recover for unjust enrichment or quantum meruit where, as here, a plaintiff seeks to recover under a valid express agreement. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); Hagman v Swenson, 149 AD3d 1 (1st Dept. 2017); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012).

III. CONCLUSION

Accordingly, upon the foregoing papers and this court's prior orders, it is

ORDERED that the plaintiff's motion for leave to enter a default judgment against the defendant, in effect, on its first cause of action alleging breach of contract, is granted as to the defendant's liability; and it is further

ORDERED that, in regard to the first cause of action, money damages shall be determined by a Judicial Hearing Officer (JHO) or Special Referee, who shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) The issue of the amount of damages to be awarded to the plaintiff FT Global Capital, Inc. for unpaid Placement Agent Fees owed to the plaintiff pursuant to the parties' Exclusive Placement Agreement in connection with the sale of the defendant IT Tech Packaging Inc.'s shares to "Introduced Parties" in the subject financings dated April 29, 2020, January 14, 2021, and February 24, 2021;

(2) The issue of the amount of damages to be awarded to the plaintiff FT Global Capital, Inc. for the defendant IT Tech Packaging Inc.'s failure to issue to the plaintiff Placement Agent's Warrants pursuant to the parties' Exclusive Placement Agreement, based upon the exercise price of the subject stock purchase warrants and the value of the defendant's shares at the time of the April 29, 2020, January 14, 2021, and February 24, 2021 financings;

(3) The issue of the amount of attorney's fees and disbursements the plaintiff FT Global Capital, Inc. may recover from the defendant IT Tech Packaging Inc. under the parties' Exclusive Placement Agreement;

and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212- 401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts (22 NYCRR 202.44); and it is further

ORDERED that the second, third, fourth, and fifth causes of action of the amended complaint are dismissed; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

8/16/2024
DATE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE