SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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THOMAS H. BROWNELL,

Plaintiff,

- v -

JSD FUND II, LLC and RICHARD HARRIS,

Defendants.

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INDEX NO. 652972/2024

MOTION DATE 09/12/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30

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

The plaintiff, Thomas H. Brownell, seeks to recover monies allegedly due upon a 2018 promissory note signed by defendant Richard Harris as manager of defendant JSD Fund II, LLC ("JSD"). Harris filed an answer *pro se* on August 28, 2024, purportedly for himself and on behalf of JSD. Brownell now moves pursuant to CPLR 3215 for leave to enter a default judgment against both defendants. Harris, acting *pro se*, opposes the motion and cross-moves pursuant CPLR 3012(d) for leave to compel acceptance of the late answer. Brownell's motion is granted as against JSD on the issue of liability, damages to be determined at trial or inquest, and denied as against Harris. Harris' cross-motion is granted as to him individually.

Initially, the court notes that while Harris is permitted to represent himself, he may not appear on behalf of or represent JSD, a Delaware limited liability company. A corporate entity may only appear by counsel. See CPLR 321(a); Matter of Sharon B., 72 NY2d 394 (1988); Lopez-Reyes v Heriveaux, 144 AD3d 486 (1st Dept. 2016). The failure of a corporation to appear by counsel constitutes a default, permitting entry of a default judgment against it. See Id; World on Columbus, Inc. v L.C.K. Restaurant Group, Inc., 260 AD2d 323 (1st Dept. 1999).In addition to the proof of JDS's failure to answer or appear, Brownell has submitted proof of the summons and complaint on JSD and proof of the facts constituting his claim. See CPLR 3215(f); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). Brownell's

proof establishes his breach of contract claim against JSD by showing: (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). Having failed to answer, JSD is "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leas. Corp., 100 NY2d 62, 70-71 (2003).

Brownell submits, *inter alia,* the subject promissory note and his own affidavit of merit. Under the terms of the note, JSD was obligated to pay Brownell $750,000 upon either the date on which JSD closed on the last sale of several parcels of land or on the twelfth month anniversary from JSD's purchase of the parcels. JSD was also obligated to pay interest at 4% per annum on the $750,000, as well as an "Additional Payment", which is described as "30% Net Cash From Sales less the Management Fee". In his affidavit, Brownell states that JSD failed to make any payment when due and owes a total of $1,152,119 - the principal sum of $750,000 plus $402,119 in unpaid interest, plus the "Additional Payment" due. However, he does not explain or provide any calculation for the "Additional Payment" or provide any calculation of the interest. As such, he fails to establish the total amount due from JSD.

Contrary to Brownell's contention, he may not proceed against Harris on an individual or alter-ego liability theory as Harris signed the note only in his capacity as manager of the corporate defendant. It is well settled that a "corporation exists independently of its owners, as a separate legal entity, [and] that the owners are normally not liable for the debts of the corporation[.]'" Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 109 (1st Dept. 2002), *quoting* Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135, 140 (1993). Only a "deliberately stated, unambiguous and separate expression" can personally obligate an officer or agent of a corporation. PNC Capital Recovery v Mechanical Parking Systems, Inc., 283 AD2d 268, 270 (1st Dept. 2001), *appeal dismissed* 98 NY2d 763 (2002); see Georgia Malone & Co. v Reider, 86 AD3d 406 (1st Dept. 2011) *aff'd* 19 NY3d 511 (2012). Here, there was only one signature on the promissory note, that of Harris in his corporate capacity.

'"Generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2)

that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.'" Sutton 58 Assocs. LLC v Pilevsky, 189 AD3d 726, 729 (1st Dept. 2020), *quoting* Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 47 (2018). No such showing was made. Without merit is Brownell's argument that "numerous conversations and emails" in which Harris admitted that he disregarded JSD's corporate form and used JSD's funds for his own personal benefit establish Harris' individual liability. However, these "numerous" communications are not submitted, save for one email dated January 9, 2024, in which Harris tells Brownell that he did not pay the amounts owed due to unexpected cost overruns on the underlying real estate projects and that he needed time to secure other funds to repay the debt and to hire counsel. This falls far short of the necessary showing to impose alter ego or individual liability. Indeed, Harris makes that very argument in his opposition and cross-motion. Furthermore, that Harris was the individual who signed the note and contacted Brownell about the default is of no moment since "[i]t is axiomatic that 'a corporation can only act through an individual.' " Worthy v New York City Housing Auth., 21 AD3d 284, 286 (1st Dept. 2005) *quoting* Nevin v Citibank, 107 F Supp 2d 333, 350 (SDNY 2000).

In regard to the cross-motion, it is well settled making a determination under CPLR 3012(d), the court takes into account the excuse offered for the defaulting party's delay in responding, any possible prejudice to the non-defaulting party, the absence or presence of willfulness, and the potential merits of defaulting party's defense. See Emigrant Bank v Rosabianca, 156 AD3d 468 (1st Dept. 2017); Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008). Here, it is undisputed that the complaint was filed on June 12, 2024, and served on Harris on June 14, 2024, that Harris contacted Brownell several times thereafter seeking an extension of time to answer, citing a present inability to pay and a search of counsel. Brownell denied a final request for an additional extension. Harris answered on August 28, 2024, a week after Brownell moved for a default judgment. This reflects a minimal delay and an absence of willfulness. Harris also has at least one potentially meritorious defense - there is no demonstrated basis for imposing individual or alter ego liability, as discussed herein. Nor is there any discernible prejudice to Brownell in allowing the late answer as he was granted judgment on liability as against JDS and contractual and/or statutory interest accrues from any delay in payment.

The parties are encouraged to explore settlement.

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3125 for leave to enter a default judgment is granted as against defendant JSD Fund II LLC only on the issue of liability, damages to be determined at trial or inquest, and the motion is otherwise denied, and it is further

ORDERED that the cross-motion is granted to the extent that the answer of defendant Richard Harris, individually (NYSCEF Doc. #23), is deemed timely served on the plaintiff, and it is further

ORDERED that the plaintiff and defendant Richard Harris shall appear for a preliminary conference on January 9, 2024, at 11:30 a.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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11/18/2024
DATE

NANCY M. BANNON, J.S.C.

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