

Penske v National Holding Corp.

2025 NY Slip Op 34347(U)

November 11, 2025

Supreme Court, New York County

Docket Number: Index No. 655002/2022

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

MARK PENSKE and UNITED ATLANTIC CAPITAL, LLC,

Plaintiffs,

INDEX NO. 655002/2022

MOTION DATE _____

- v -

NATIONAL HOLDING CORP., B. RILEY WEALTH
MANAGEMENT HOLDINGS, INC., and DARIN POPE,

Defendants.

MOTION SEQ. NO. 009 010

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 414, 415, 416, 417, 418, 419, 420, 421, 422, 452, 453, 454, 455, 456, 457, 568, 572, 575, 588, 592

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 010) 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 566, 569, 571, 576, 589

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

In motion sequence 009, defendants National Holding Corp. and B. Riley Wealth Management Holdings, Inc. (together, Moving Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint.

Moving Defendants first assert that there was no meeting of minds, and therefore, no contract between the parties. As stated on the record on May 9, 2025, the court disagrees and finds there is a contract. (NYSCEF 572, tr at 33:14-22, 36:8-10.) The parties agreed on a purchase price and the equity transferred. (*Id.* at 37:1-5.)

Second, Moving Defendants argue that fraud in factum voided the contract. As stated on the record on May 9, 2025, the motion is denied because this is not fraud in fact. (*Id.* at 37:1-11.) (See e.g. *First Interstate Credit All., Inc. v Bradford G. Brown, M.D., P.C.*, 1988 WL 142488, at *3 [SDNY Dec. 28, 1988] [“A fraud in the factum defense is meant to apply to an uneducated person, unable to read and determine that the document is not what it was represented to him to be and that the signer had no reasonable opportunity to be informed of its true character.”]; *Martin v Citibank*, 64 AD3d 477, 477 [1st Dep’t 2009] [plaintiff signed an agreement with a page allegedly missing that contained an important limitation.]) The court notes that Moving Defendants also have counterclaims for fraud which are not addressed in this motion. It is also noted that, at this time, there is an unresolved issue as to whether UAADC, LLC is a subsidiary of plaintiff United Atlantic Capital, LLC or United Advisors LLC which ties into the fraud claims. (*Id.* at 32:1-14, 33:1-2.)

Finally, Moving Defendants assert that the amended complaint should be dismissed based on plaintiffs’ failure to satisfy certain conditions precedent to closing. As stated on the record on May 9, 2025, the representations and warranties contained in the contract were not conditions precedent. (*Id.* at 36:11-25.)

In motion sequence 010, plaintiffs Mark Penske and United Atlantic Capital, LLC move, pursuant to CPLR 3212, for partial summary judgment in their favor on Count II (breach of contract for failure to pay the modified purchase price) and Count V (breach of contract for failure to pay expenses) of the amended complaint against Moving Defendants. Moving Defendants cross-move to exclude all evidence,

references to evidence, testimony or argument relating to the parties' settlement negotiations and legal conclusions or opinions elicited from witnesses during their deposition testimony.

Plaintiffs motion is granted, in part, to the extent that Moving Defendants are liable for reimbursement of \$41,055.51 (\$20,031.59 in agreed upon expenses owed [see NYSCEF 356, Joint Statement of Fact ¶ 26] + \$21,023.92 in additional NetGain expenses [see *id.* ¶ 28]). Otherwise, the motion is denied as multiple issues of fact exist, including whether plaintiffs performed, whether there a breach by plaintiffs of the representations and warranties in the contract, and if so, was it material,¹ whether plaintiffs actually incurred the remaining expenses they claim, whether plaintiffs intended to mislead the Moving Defendants as to Bolanis liability, and whether plaintiffs uploaded all the Bolanis documents into the Data Room.

As explained on the record, Moving Defendants' cross-motion is denied without prejudice. (NYSCEF 572, tr at 64:21-65:17.)

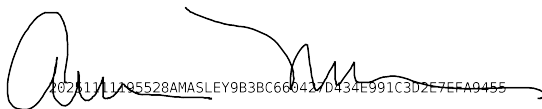
ORDERED National Holding Corp. and B. Riley Wealth Management Holdings, Inc.'s motion for summary judgment dismissing the amended complaint is denied; and it is further

ORDERED that plaintiffs Mark Penske and United Atlantic Capital, LLC's motion for partial summary judgment is granted, in part, and that the Clerk shall enter judgment in favor of plaintiff and against defendants National Holding Corp. and B. Riley Wealth Management Holdings, Inc. in the amount of \$41,055.51; and it is further

¹ On the record, the court stated that it thought Moving Defendants established a breach of the representations and warranties but noted that Moving Defendants did not move for summary judgment on their counterclaims. (NYSCEF 572, tr at 30:5-11.)

ORDERED that the remaining balance of the claims and counterclaims are continued; and it is further

ORDERED that National Holding Corp. and B. Riley Wealth Management Holdings, Inc.'s cross-motion is denied without prejudice.



11/11/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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