

Simani v Fulbrook Capital Mgt. LLC

2016 NY Slip Op 30664(U)

April 14, 2016

Supreme Court, New York County

Docket Number: 156739/2015

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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BAHAR SIMANI AND SANDRA SHERMAN,

Plaintiffs,

- v -

FULBROOK CAPITAL MANAGEMENT LLC,
and SELVYN SEIDEL,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Index No.
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**DECISION
and ORDER**

Mot. Seq. #001, 2, 3

Plaintiffs, Bahar Simani (“Simani”) and Sandra Sherman (“Sherman”) (collectively, “Plaintiffs”), as former employees of defendant, Fulbrook Capital Management LLC (“Fulbrook”) bring this action to recover for breach of their employment contracts with Fulbrook. Defendant Selvyn Seidel (“Seidel”), along with non-party Emily Law Carroll, are alleged to be the only members of Fulbrook. Seidel is named a defendant in his individual capacity due to his alleged position as Chief Executive Officer of Fulbrook and his position as a joint employer of Plaintiffs along with Fulbrook.

Plaintiffs commenced this action against Fulbrook by filing a Summons with Notice on July 3, 2015. On July 29, 2015, Steven M. Warshawsky e-filed a Notice of Appearance in this matter and a Demand for Complaint on behalf of Fulbrook. Plaintiffs filed a Complaint on August 18, 2015.

On August 26, 2015, Steven M. Warshawsky informed me that he was no longer representing Seidel in the above-captioned matter and that Seidel would represent himself. I was instructed to “direct all communications directly to Selvyn [Seidel].”

On September 2, 2015, the Supplemental Summons with Complaint was served on Seidel under CPLR § 308(2). The Complaint added Seidel as an individual defendant in his individual capacity. By email from Seidel to Plaintiffs’ counsel, Ethan Brecher, dated September 2, 2015, Seidel acknowledged service. Fulbrook

was served with the Supplemental Summons with Complaint and the Complaint separately via New York State Courts Electronic Filing.

On September 20, 2015, Seidel requested an extension of time from Plaintiffs' counsel to respond on behalf of himself and Fulbrook from September 22, 2015 to September 29, 2015. Plaintiffs granted Seidel's request for extension.

On September 29, 2015, Seidel emailed Plaintiffs' counsel. Seidel stated he would not be able to file a timely response and would try to file response by Wednesday, October 6, 2015. Plaintiffs' counsel responded that unless Seidel provided a good reason for his failure to respond, Plaintiffs would make a motion for default judgment.

On October 13, 2015, Seidel requested an extension of time to file an answer and counterclaims. Plaintiffs provided Seidel with an extension until October 30, 2015. Seidel and Fulbrook failed to file any answer or motion on October 30, 2015.

On November 2, 2015, Seidel emailed Plaintiffs' counsel stating that he was unable to file an answer due to illness. Plaintiffs' counsel advised Seidel that there would be no more extensions of time to file and that the Plaintiffs would move for default judgment. On November 4, 2015, Seidel emailed Plaintiffs' counsel stating that he would file an answer and counterclaim that evening. No answer was filed.

Mot. Seq. #1

On November 25, 2015, Plaintiffs moved for default judgment against Fulbrook and Seidel based on their failure to answer the Complaint. Plaintiffs submit the affidavits of merit of Sherman and Simani.

Mot. Seq. #2

On January 4, 2016, Seidel, "individually and on behalf of Fulbrook Capital Management LLC," filed an Order "[r]ejecting Plaintiffs (sic) Motion for Default dated November 25, 2013," and alternatively, "pursuant to CPLR 2004 and 5015(a), granting defendants an extension of time to serve and file opposing papers to Plaintiffs' Motion for Default dated November 25, 2015" and "an answer and counterclaims in this action." Seidel submitted an affidavit, which annexed, a proposed "Answer and Fulbrook CounterClaims" on behalf of Seidel and Fulbrook. The proposed pleading is drafted by Seidel, on behalf of himself individually and on behalf of Fulbrook, as "CEO and Chair" of Fulbrook. As for his excuse in failing to

timely interpose an answer, Seidel states, “It is true that we were unable to and did not serve the answer on the agreed on date of October 31, 2015. The reasons for this were ... because of illness to me, and also to my being outstretched on business including having to be out of the country.”

Plaintiffs oppose.

Pursuant to CPLR § 3012(d), “[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” (CPLR § 3012[d]). In order to be permitted to serve an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate potentially meritorious defenses to the action. (*Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep’t 2008]).

Mot. Seq. 3

Plaintiffs move for an Order disqualifying Seidel from proceeding as Fulbrook’s counsel due the current suspension of his law license and pursuant to the Rules of Professional Conduct 3.7 (22 NYCRR 1200.0 et seq.), which bars advocates who are necessary witnesses on a disputed material fact with respect to claims against their clients from serving as counsel. Plaintiffs submit the attorney affirmation of Ethan A. Brecher, Esq. Annexed to Brecher’s affirmation, inter alia, are copies of: an email sent from Steven M. Warshawsky to Brecher dated August 26, 2015 advising Brecher that Warshawsky was no longer representing Fulbrook; “Answer and Fulbrook Counterclaims,” and a printout from the New York State Unified Court system last visited on January 11, 2016 showing that Seidel’s license has been suspended since November 20, 2013 for failure to pay his biennial registration dues. Defendants do not submit opposition.

CPLR § 321(a) permits parties to prosecute or defend civil actions in person or by an attorney, “except that a corporation or voluntary association shall appear by attorney” (CPLR § 321[a]). An LLC, like a corporation, shields its members from liability and, once formed, is a legal entity distinct from its members. (LLC §§ 102[m], 203[d]). It follows that, consistent with the “general rule” against corporate self-representation, an LLC may not represent itself in a civil action under CPLR § 321(a). (*Michael Reilly Design, Inc. v. Houraney*, 40 A.D.3d 592 [2d Dep’t 2007] [finding that CPLR 321(a)’s prohibition against corporate self-representation extends to LLC’s]).

Here, Plaintiffs have demonstrated entitlement to default judgment on their claims against Defendants, and their motion for default judgment is granted against Defendants. (Mot. Seq. #2). Seidel's motion, on behalf of himself and Fulbrook, for an Order rejecting Plaintiffs' motion or entry of judgment by default and for an Order seeking an extension of time to file an untimely answer and counterclaims is denied. Even if Seidel was able to represent Fulbrook, Defendants have failed to provide a reasonable excuse for their default and to adequately demonstrate that they have a meritorious defense to the allegations in the Complaint. Defendants have further failed to demonstrate any good cause for their failure to file a timely answer.

Wherefore it is hereby

ORDERED that Plaintiffs' motion for default judgment against Defendants Fulbrook Capital Management LLC, and Selvyn Seidel is granted (Mot. Seq. #1); and it is further

ORDERED that Plaintiffs' motion is granted to the extent that an assessment of damages against defendants Fulbrook Capital Management LLC, and Selvyn Seidel is directed (Mot. Seq. #1); and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed (Mot. Seq. #1); and it is further

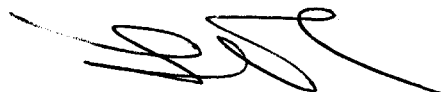
ORDERED that Mot. Seq. #2 is denied; and it is further

ORDERED that Mot. Seq. #3 is denied as moot.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: APRIL 14 2016

APR 14 2016



EILEEN A. RAKOWER, J.S.C.