

BMG Rights Mgt. (US) LLC v Radar Pictures, Inc.

2017 NY Slip Op 30290(U)

February 10, 2017

Supreme Court, New York County

Docket Number: 656080/2016

Judge: Shirley Werner Kornreich

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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 54

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BMG RIGHTS MANAGEMENT (US) LLC,

Index No.: 656080/2016

Plaintiff,

DECISION & ORDER

-against-

RADAR PICTURES, INC., a California corporation;
RADAR PICTURES, LLC; RADAR PICTURES
HOLDINGS, LLC; and TRAUMA 2 RECORDS, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff BMG Rights Management (US) LLC (BMG) moves, pursuant to CPLR 3215, for a default judgment against defendants Radar Pictures, Inc., Radar Pictures, LLC, Radar Pictures Holdings, LLC, and Trauma 2 Records, LLC (collectively, defendants). The motion is unopposed. For the reasons that follow, BMG’s motion is denied without prejudice and with leave to renew.

This case arises from a failed joint venture between BMG, a New York LLC, and defendants, four California-based companies that finance and produce movies and television series. *See* Dkt. 2 [Verified Complaint (VC)] ¶¶ 8-12, 15-24. BMG alleges that the parties entered into a written, November 16, 2011 joint venture agreement and a May 1, 2012 amendment to the joint venture agreement (together, the Agreement). VC ¶ 2. The complaint alleges the Agreement required BMG to tender over \$1 million in advance payments. VC ¶¶ 2 & 27. In exchange, defendants allegedly promised, inter alia, to present BMG with opportunities to acquire ownership rights in music, movies, and television series; to provide BMG with monthly status reports on the joint venture; and to release at least 20 qualifying movies and 3 qualifying series during the first three years of the Agreement. VC ¶ 2.

BMG claims that, on execution of the Agreement, it tendered \$387,000.00 in advances to defendants. VC ¶ 33. However, defendants allegedly failed to present BMG with any acquisition opportunities, failed to provide status reports, released no qualifying series, and released at most only 3 qualifying movies. VC ¶¶ 28-31. Additionally, BMG alleges that defendants undercapitalized the joint venture and usurped business opportunities. VC ¶ 32. BMG further contends that before the parties entered into the Agreement, defendants misrepresented the number of films and television projects under their control and that they were likely to produce and distribute in order to induce BMG to enter into the Agreement. VC ¶¶ 15-24, 49-52. Defendants have refused to return BMG's money after multiple demands. VC ¶ 1.

On May 16, 2016, BMG filed the instant lawsuit, alleging the following causes of action, numbered here as in the complaint: (1) breach of contract; (2) fraudulent inducement; (3) breach of fiduciary duty; (4) conversion; and (5) an accounting. VC ¶¶ 37-69. Pursuant to the contract and conversion claims, BMG seeks \$387,000.00 in damages [VC ¶ 44]; it seeks \$600,000 in damages, including punitive damages, for breach of fiduciary duty and fraud. ¶ 52. Defendants were served with process by delivering a copy of the summons and complaint to defendants' registered agent.¹ Dkt. 6; CPLR 311(a)(1).

Defendants did not timely answer or move to dismiss, and on July 26, 2016, BMG moved for default judgment. Dkt. 7. On August 8, 2016, defendants filed a late answer [Dkt. 17]. BMG agreed to withdraw its motion for default judgment. Dkt. 18. On September 18, 2016, defendants' attorney moved to withdraw as counsel. Dkt. 20. At the October 6, 2016 hearing on defense counsel's withdrawal motion and in its subsequent order, the court granted counsel permission to withdraw and ordered defendants to retain new counsel within 45 days. Dkt. 30

¹ The affidavit of service indicates that the parties agreed to additional service via overnight mail, which the process server made on BMG's behalf. Dkt. 6 at 2.

[October 6, 2016 Order on Defense Counsel's Motion to Withdraw]. The court further ordered that if defendants failed to obtain new counsel within the allotted time, defendants, who were LLCs, would be in default. *Id.* Counsel served defendants with a copy of the court's order and notice of entry via overnight and electronic mail. Dkt. 31-32.

Ultimately, defendants never obtained new counsel and failed to appear for a court-ordered, November 22, 2016 preliminary conference. *See* Dkt. 44. BMG now renews its motion for default judgment, seeking judgment only on the \$387,000.00 allegedly owed for breach of contract and conversion. Dkt. 48. BMG served defendants with notice of this motion by hand-delivering a copy of the motion papers to defendants' registered agent for service of process [Dkt. 53] and by mailing the agent a copy of the same pursuant to CPLR 3215(g)(4). Dkt. 52.

CPLR 3215(a) authorizes the court to enter a default judgment against a party who fails to appear. The moving party must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. CPLR 3215(f); *Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 (2nd Dept 2010) ("A verified complaint may be used as the affidavit of the facts constituting the claim...but it must allege enough facts to enable a court to determine that a viable cause of action exists."); *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (party moving for default must offer firsthand confirmation of facts constituting claim); Siegel, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, p 557, Thomson Reuters ©2014. The evidentiary effect of a default is that the defendant is deemed to admit the traversable allegations in the complaint, including liability. *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984).

Here, BMG's motion is denied without prejudice with leave to renew upon submission of copies of the joint venture agreement and the amendment to it. Although BMG seeks breach of

contract damages, it has not provided a copy of the applicable contract. The court cannot determine the breach of contract claim without a copy of the applicable contract documents. The court notes that BMG must establish a contractual relationship with *each* of the corporate defendants to obtain a default judgment against them.

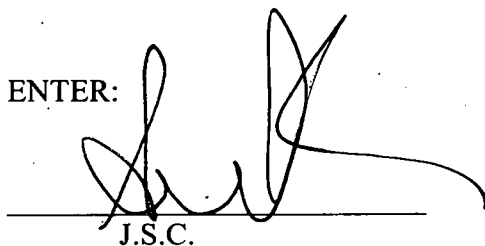
Additionally, while BMG also seeks the damages for conversion, the conversion claim cannot stand. BMG “alleges no independent facts sufficient to give rise to tort liability.” See *Fesseha v TD Waterhouse Inv'r Servs., Inc.*, 305 AD2d 268, 269 (1st Dept 2003) (cause of action for conversion cannot be predicated on mere breach of contract); *Yeterian v Heather Mills N.V. Inc.*, 183 AD2d 493, 494 (1st Dept 1992). Accordingly, it is

ORDERED that plaintiff BMG Rights Management (US) LLC’s motion for a default judgment is denied without prejudice and with leave to renew upon submission of the contract documents necessary to establish BMG’s claims; it is further

ORDERED that BMG shall serve a copy of this order with notice of entry on all defendants within 5 days of its entry on the NYSCEF system.

Dated: February 10, 2017

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.