Lau v Lazar
2017 NY Slip Op 31104(U)
May 19, 2017
Supreme Court, New York County
Docket Number: 651648/2013
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GLEN LAU, MD, MEDICAL FOREFRONTS OF BROOKLYN, LLC, MEDICAL FOREFRONTS EQUIPTMENT, LLC, MEDICAL FOREFRONTS FINANCIAL SERVICES, LLC, MEDICAL FOREFRONTS MANAGEMENT SOLUTIONS, LLC, and MEDICAL FOREFRONTS, LLC,

Plaintiffs,

-against-

TERRY LAZAR, TMS ENTERPRISES, LP, TDK HEALTHCARE CONSULTING, LLC, and THE AMBULATORY SURGERY CENTER OF BROOKLYN, LLC d/b/a NEW YORK CENTER FOR SPECIAL SURGERY,

Defendants.

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Index No.: 651648/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

The court assumes familiarity with this action, which is explained in extensive detail in the court's January 18, 2017 decision on the parties' summary judgment motions. *See* Dkt. 242 (the SJ Decision).[1] The SJ Decision required the parties to call the court on February 7, 2017 for a pre-trial conference. *See id.* at 50. Plaintiffs' counsel called; defendants' counsel did not. That is because while the summary judgment motions were sub judice, by order dated February 25, 2016, the court granted defendants' counsel's motion to withdraw. *See* Dkt. 229. That order required, on pain of default, the corporate defendants to retain new counsel and defendant Terry Lazar to do so or proceed pro se, and attend a status conference on April 7, 2016. Defendants did not retain new counsel or attend the April 7, 2016 conference. *See* Dkt. 233. Defendants have been in default since that time. After defendants defaulted again on the February 7, 2017

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system. Familiarity with the prior decisions of this court and the Appellate Division also is assumed.

pre-trial conference, on March 21, 2017, plaintiffs filed the instant motion for a default judgment. The motion, which was served on defendants [*see* Dkt. 278] and fully submitted without opposition, is granted for the reasons that follow.

Pursuant to CPLR 3215 and 22 NYCRR 202.27, where, as here, a party fails to appear at a conference directed in connection with an order relieving their counsel, they should be held in default. *See 60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511 (1st Dept 2013). A defaulting defendant "admits all traversable allegations in the complaint, including the basic allegation of liability." *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984); *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003) ("defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them."); *Port Parties, Ltd. v Merch. Mart Props., Inc.*, 102 AD3d 539, 540 (1st Dept 2013). That being said, a defendant's default does not "give rise to a 'mandatory ministerial duty' to enter a default judgment against it. Rather, [the plaintiff is] required to demonstrate that [it has] a viable cause of action." *Resnick v Lebovitz*, 28 AD3d 533, 534 (2d Dept 2006) (citation omitted); *see Guzetti v City of New York*, 32 AD3d 234, 235 (1st Dept 2006), quoting *Joosten v Gale*, 129 AD2d 531, 535 (1st Dept 1987) ("CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action"). However, "[t]he standard of proof is not stringent, amounting only to some firsthand confirmation of the facts." *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (citations omitted); *see Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014).

While the merits of plaintiffs' remaining claims should be evident from the SJ Decision, their merit is further set forth in the affidavit submitted by plaintiff Glen Lau on the instant motion. *See* Dkt. 248. Lau's affidavit makes clear that he is only seeking the entry of judgment on certain of his remaining claims and discontinuing others. With respect to the latter, Lau states:

> In order to advance the conclusion of this litigation, I request that the Court permit Plaintiffs **to voluntarily discontinue all claims that would require a trial to determine damages only after an evidentiary hearing**. These include:
>
> a. First Cause of Action – share of revenues under the Services Agreement.
>
> b. Second Cause of Action – commission under the Billing Agreement on post-lockout billing.
>
> c. Third Cause of Action – commission on pre-lockout billing other than the $6,846.89 claimed herein.
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> d. Fourth Cause of Action – damages related to recruitment of other doctor participants.
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> e. Fifth Cause of Action – failure to pay 10% of operating expenses.
>
> f. Sixth Cause of Action – revenues due under the Amended Operating Agreement.
>
> g. Eighteenth Cause of Action – non-payment of MFFS billing fee (10% of gross revenues).
>
> h. Nineteenth Cause of Action – all revenues that would have accrued but for the breach of contract.
>
> i. Twenty-Second Cause of Action – all post-lockout billing fees and commissions "that would have accrued."
>
> j. Twenty-Third Cause of Action – post-lockout billing fees.

Dkt. 248 at 12-13 (emphasis added).

He also explains the five categories of claims on which plaintiffs seek a default judgment, setting forth the basis for the claims and the amounts sought. The first category is billing services (the second, third, twentieth, twenty-first and twenty-second causes of action), for which plaintiffs seek judgment: Against [defendants Ambulatory Surgery Center of Brooklyn (the Surgery Center)] and Terry Lazar, in favor of [plaintiff Medical Forefronts Financial Services, LLC (MFFS)], for $6,846.89 in commissions and $75,100 in software costs, a total of $81,946.89. At no time while MFFS was providing billing services to the Surgery Center did the Surgery Center pay for those services. The sum due to MFFS includes the contracted 6% commission on $114,114.83 billed, or $6,846.89. The sum due also includes $75,100 in software expenses. None of this was paid to MFFS. Dkt. 248 at 7 (emphasis and citations omitted).

The second category is "Money Advanced to Lazar Controlled Entities" (the ninth, eleventh, thirteenth, and fifteenth causes of action), for which plaintiffs seek judgment:

> Against [defendant TMS Enterprises LP (TMS Enterprises)], in favor of Glen Lau, for $136,200, based on non-repayment of money advanced to the benefit of TMS. With an expectation of repayment, [Lau] paid $136,200 to a New York Commercial Bank Account on behalf of TMS Enterprises, in three equal payments of $45,400, on November 6, 2012, December 28, 2012, and on or about March 1, 2013, to cover mortgage payments on the building housing the Surgery Center at 313 43rd Street, Brooklyn, NY. I was not repaid this sum[; and]
>
> Against [] TMS Enterprises, in favor of [plaintiff Medical Forefronts, LLC (MF)], for $45,400, based on non-repayment of $45,400 advanced to the benefit of [TMS Enterprises]. On or about January 31, 2013, MF, at [Lau's] behest, with an expectation of repayment, paid $45,400 to a New York Commercial Bank account on behalf of TMS Enterprises, to cover mortgage payments on the Surgery Center building at 313 43rd Street, Brooklyn, NY, which housed the Surgery Center. MF was never repaid[; and]
>
> Against [defendant TDK Healthcare Consulting, LP (TDK)], in favor of Glen Lau, for failure to repay $276,400 advanced to the benefit of [TDK]. With an expectation of repayment, [Lau] wired $276,400 in funds between September 24,

> 2012 and April 1, 2013 to [TDK], to keep [TDK] financially solvent. TDK was a wholly owned entity through which Lazar functioned, and its insolvency could have affected the financial viability of the Surgery Center. The money was never repaid[; and]
>
> Against [TDK], in favor of MF, for $33,000 for failure to repay money advanced to the benefit of [TDK]. In addition, on or about January 31, 2013, MF, at [Lau's] behest, with an expectation of repayment, wired $33,000 directly to [TDK] to keep TDK financially solvent. The money was never repaid.

Dkt. 248 at 7-8 (emphasis and citations omitted).

The third category is unreimbursed payroll and benefits (the sixth, seventeenth, and twenty-fourth causes of action), for which plaintiffs seek judgment:

> Against [the] Surgery Center and Lazar, jointly and severally, in favor of [plaintiff Medical Forefronts Management Solutions (MFMS)], for $404,186.11 for unreimbursed payroll and benefit expenses paid on behalf of the Surgery Center. The Surgery Center made only a few payments for staffing costs and services rendered by MFMS under the Staffing Services Agreement. The balance due from the Surgery Center to MFMS is $404,186.11. It was never paid.

Dkt. 248 at 8 (emphasis and citations omitted).

The fourth category is "Unpaid Equipment Lease Payments and Equipment Not Returned" (the first, sixth, eighteenth, and twenty-fifth causes of action), for which plaintiffs seek judgment:

> Against [the] Surgery Center and Lazar, jointly and severally, in favor of [plaintiff Medical Forefronts Equipment, LLC (MFE)], in the sum of $233,733.53, for unpaid lease payments prior to repossession. At no time did [the] Surgery Center make a payment for equipment leased to it. The equipment was retrieved in June and July 2013. ... [T]he amount due on [the leases] was ... 233,733.53 ... [and;]
>
> Against [the] Surgery Center and Lazar, jointly and severally, in favor of MFE, in the sum of $22,995.58, for medical equipment delivered under Operating Lease Agreements but not returned. Despite the efforts of the Court to bring about the return of all leased equipment, first with a Preliminary Injunction and then with an Order to Show Cause for Contempt, the Surgery Center remains in possession of $22,995.58 worth of MFE's medical equipment ...

Dkt. 248 at 9-10 (emphasis, citations, and itemized amounts omitted).

The fifth and final category is "Expenses Advanced and Not Reimbursed" (the first, sixth, seventeenth and eighteenth causes of action), for which plaintiffs seek judgment:

> Against [] Lazar and [the] Surgery Center, jointly and severally, in favor of [plaintiff Medical Forefronts of Brooklyn, LLC (MFB)] for $1,273,198 in expenses advanced and not reimbursed. [Pursuant to Lau's] authority as manager of the Surgery Center, with an expectation of repayment from the Surgery Center, pursuant to Section 3.10 of the Services Agreement, [Lau] caused MFB to advance $1,273,198.12 for numerous items, including but not limited to, renovations and repairs to bring the Defendants' existing facility up to code as required by the DOH; purchases to upgrade technology; stock medical and office supplies; recruitment of surgeons for syndication; and payment of utilities and trash removal costs for the entire building. MFB was not repaid[; and]
>
> Against [] Lazar and [the] Surgery Center, jointly and severally, in favor of [] Lau, in the sum of $86,765, for expenses advanced for equipment leases entered into prior to the business relationship with Glen Lau. [Pursuant to Lau's] authority as manager of the Surgery Center, [Lau] made several direct payments, with an expectation of repayment from the Surgery Center, to Sterling Bank and Somerset Capital Group, Ltd. ("Somerset"), totaling $86,765,31, between March 20, 2013 and April 26, 2013 to pay for equipment leases that the Ambulatory Surgery Center of Brooklyn had incurred with Sterling Bank and Somerset, before the formation of the joint venture. [Lau] was not repaid[; and]
>
> Against [] Lazar and [the] Surgery Center, jointly and severally, in favor of [] Lau, in the sum of $612,000, for expenses advanced but not reimbursed. In August 2012, [pursuant to Lau's] authority as manager of the Surgery Center, [Lau] advanced, with an expectation of repayment, an additional $612,600 to the Surgery Center, from [Lau's] bank accounts, to pay for operational expenses pursuant to Section 3.10 of the Services Agreement. Section 3.10, unlike 3.10.1, had no five-year repayment term. [Lau] was not repaid[; and]
>
> Against [] Lazar and [the] Surgery Center, jointly and severally, in favor of MFB, for $345,000, invested to preserve a future ownership opportunity, which could not be consummated because of the breach. The Letter of Intent provided, at paragraph 9, that MFB would invest $250,000 in exchange for a five-year option to purchase an additional 9% interest in the Surgery Center. The Letter of Intent stated that if the option was not exercised, or the purchase not consummated, MFB would be repaid its original investment plus 5% interest per annum. This arrangement was restated in the Services Agreement, at Section 3.12.4. This

> investment was made; in fact, MFB paid $95,000 extra. The money was never returned after the Agreement was cancelled by Mr. Lazar's actions.

Dkt. 248 at 10-12 (emphasis and citations omitted).

Based on the foregoing, which is a sufficient showing of merit on a default judgment motion, the court finds that plaintiffs are entitled to a default judgment on the amounts requested with 9% pre-judgment interest running from the earliest date of breach -- the lockout on April 26, 2013.[2] Accordingly, it is

ORDERED that plaintiffs' motion for a default judgment against defendants is granted, and the Clerk is directed to enter judgment, with 9% pre-judgment interest to run from April 26, 2013 to the date judgment is entered: (1) in favor of MFFS and against the Surgery Center and Lazar, jointly and severally, in the amount of $81,946.89; (2) in favor of Lau and against TMS Enterprises in the amount of $136,200; (3) in favor of MF and against TMS Enterprises in the amount of $45,400; (4) in favor of Lau and against TDK Consulting in the amount of $276,400; (5) in favor of MF and against TDK Consulting in the amount of $33,000; (6) in favor of MFMS and against the Surgery Center and Lazar, jointly and severally, in the amount of $404,186.11; (7) in favor of MFE and against the Surgery Center and Lazar, jointly and severally, in the amount of $233,733.53; (8) in favor of MFE and against the Surgery Center and Lazar, jointly and severally, in the amount of $22,995.58; (9) in favor of MFB and against Lazar and the Surgery Center, jointly and severally, in the amount of $1,273,198; (10) in favor of Lau and against Lazar and the Surgery Center, jointly and severally, in the amount of $86,765; (11) in favor of Lau and against Lazar and the Surgery Center, jointly and severally, in the amount of

[2] While this is not the date that the subject funds were actually transferred, the record is devoid of a specific agreed upon date for repayment. The court views the April 26, 2013 lockout as a material breach of the parties' agreements, and, hence, an appropriate date to begin computing pre-judgment interest.

$612,000; and (12) in favor of MFB and against Lazar and the Surgery Center, jointly and severally, in the amount of $345,000; and it is further

ORDERED that all remaining claims in this action (i.e., the claims on which plaintiffs did not seek a default judgment and defendants' remaining counterclaims) are dismissed with prejudice.

Dated: May 19, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.