

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

2017 NY Slip Op 31357(U)

June 21, 2017

Supreme Court, New York County

Docket Number: 652631/2016

Judge: Shirley Werner Kornreich

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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.: 652631/2016

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. (RPI), Radar Pictures, LLC (RPL), Radar Pictures Holdings, LLC (RPH), and Trauma 2 Records, LLC (Trauma). The motion is unopposed. For the reasons that follow, BMG’s motion is denied without prejudice and with leave to renew.

The court assumes familiarity with the allegations in the Verified Complaint (Dkt. 2, VC) and with the procedural history of this case prior to the filing of the instant motion, which are discussed in this court’s previous order on BMG’s first renewed motion for a default judgment. Dkt. 55. The case arises from a failed joint venture between BMG, a New York LLC, and defendants, three Delaware LLCs and a California corporation that finance and produce movies and television series. *See* VC ¶¶ 8-12, 15-27. BMG alleges that it gave defendants \$387,500 in advance funds pursuant to two written agreements relating to a joint venture that was to create, acquire, and publish musical works, including music relating to audiovisual works (e.g., movies and television series). November 16, 2011 agreement (Dkt. 61, Agreement); May 1, 2012 amendment thereto (Dkt. 62, Amendment, with Agreement, Contracts). VC ¶¶ 2, 27, 33. BMG

alleges that defendants failed to perform under the Contracts. Specifically, it alleges they did not:

1) present BMG with opportunities to acquire music ownership rights; 2) provide BMG with monthly status reports on the joint venture; and 3) release at least 20 qualifying movies and 3 qualifying television series during the first three years of the Agreement. VC ¶¶ 2, 28-33. BMG also alleges that defendants refused to return BMG's money after multiple demands. VC ¶ 6.

This is BMG's second renewed motion (third motion) for a default judgment on breach of contract.¹ BMG's first renewed motion sought \$387,500 allegedly owed for breach of contract and conversion. Dkt. 47 & 48. The court denied BMG's the motion without prejudice on February 10, 2016, with leave to renew upon submission of copies of the Contracts. Dkt. 55 at 5. The court noted that BMG must establish a contractual relationship with *each* of the corporate defendants to obtain a default judgment against them. *Id.* Additionally, it observed that BMG's conversion claim could not stand in light of BMG's failure to allege facts independent of the breach of contract claim. *Id.*²

BMG again renews its motion for a default judgment for \$387,500, now seeking judgment only on its breach of contract claim. Dkt. 57. 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. 68. BMG, through its counsel, also mailed the agent a copy of the summons pursuant to CPLR 3215(g)(4). Dkt. 67. As per the court's request, BMG attached a copy of the Contracts to their second renewed motion. Plaintiff also annexed affidavits executed

¹ The VC pleads 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 \$387,500 in damages (VC ¶¶ 44 & 63). It further asks for \$600,000 in damages, including punitive damages, for breach of fiduciary duty and fraud. VC ¶¶ 52 & 58.

² The court also noted that defendants had been served with process by overnight mail, as per an agreement by the parties, on defendants' registered agent for service of process. Dkt. 55 at 3.

by its Deputy General Counsel, Keith C. Hauprich (Hauprich Affidavits). Dkt. 60. Defendants have not responded to the motion.

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) (“[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.”). Nonetheless, 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] at least [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) (McGuire, J., concurring) (“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.”), quoting *Joosten v Gale*, 129 AD2d 531, 535 (1st Dept 1987). “The 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) (emphasis added) (citations omitted); see *Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014). Thus, a complaint verified by counsel who lacks personal knowledge of the facts is not sufficient to support entry of default judgment. See *Feffer*, 210 AD2d at 61; *Joosten*, 129 AD2d at 534.

Reviewing the papers submitted by plaintiff in connection with the instant motion, the court finds that the alleged Contracts raise more questions than they answer. The Hauprich Affidavits submitted in connection with BMG’s motion fail to answer any of these questions.

First, neither of the Contracts adequately identify BMG's counterparty. The Contracts are signed and countersigned letters from "BMG Rights Management (US) LLC" sent to an entity or entities referred to only as "Trauma 2 Publishing/Radar Pictures." Dkt. 61 & 62. From the face of the Contracts, it is impossible to know which, if any of defendants RPL, RPI, RPH, and Trauma were bound thereby. Indeed, while plaintiff attached LLC "Statements of Information" that had been filed with the California Secretary of State for RPL (Dkt. 64 at 2), Trauma (Dkt. 64 at 3), and RPH (Dkt. 64 at 4-5),³ the address for the executive office listed on each of the LLC statements (10900 Wilshire Bl.) does not match the address on the contracts (9200 Sunset Boulevard, *see* Dkt. 61 at 2 & 62 at 2).

Second, the ability of BMG's counterparty's signatories to bind any or all of defendants to the Agreement and Amendment is wholly unclear. The Agreement was signed by "Thomas E. van Dell," but it does not indicate his role or title in any organization, much less a role in any of defendants. Dkt. 61 at 9. In the Amendment, the signatories on behalf of "Trauma 2 Publishing/Radar Pictures" are simply referred to as "An Authorized Signatory." Dkt. 62 at 3. The ambiguities in the Contracts would not necessarily be fatal to the entry of a default judgment but for plaintiff's failure to provide an affidavit from anyone purporting to have firsthand knowledge of facts relating to the Contracts, such as: (1) facts sufficient to allege or infer the identity of the signatories to the Amendment; (2) facts sufficient to allege or infer the signatories' ability to bind defendants to the Contracts; and (3) facts sufficient to allege or infer that defendants were bound to the Contracts.

The VC and Hauprich Affidavits fail to provide the necessary firsthand confirmation that defendants were parties to the contracts. While the VC asserts that van Dell (who allegedly

³ On the Statements of Information for RPL and Trauma (but not RPH), RPI is listed under the section listing the LLC's managers (or members for a member-managed LLC). *See* Dkt. 64.

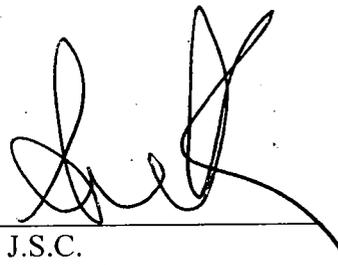
signed the Agreement) and Kahane (to whom both Contracts were addressed) are “[d]efendants’ other principals,” (VC ¶¶ 19 & 21), it is completely silent on the identity of the signatories to the Amendment. Hauprich, who verified the complaint (*see* VC at 14), attested that defendants RPI, RPL, RPH, and Trauma were “understood” to be BMI’s counterparties to the Contracts. Dkt. 60 at 4-5 (Hauprich Feb. 23, 2017 Aff.). Hauprich does not attest to having *any* firsthand knowledge of the facts relating to the formation of the Contracts. Tellingly, an earlier affidavit by Hauprich states, in an obfuscating manner, that “[t]he verified complaint is based on my own knowledge *and the knowledge of my colleagues at BMG.*” Dkt. 60 at 2 (Hauprich July 21, 2016 Aff.) (emphasis added). In sum, there is insufficient evidence that each defendant was a party to the subject contract. 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 an affidavit by a person with firsthand knowledge of the facts relating to the alleged Joint Venture Agreement dated November 16, 2011 (Dkt. 61) and the alleged amendment thereto dated May 1, 2012 (Dkt. 62), explaining who the parties to the contracts are and how they are connected to the signatories; 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: June 21, 2017

ENTER:



J.S.C.

**SHIRLEY WERNER KORNREICH
J.S.C.**