SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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JEFFREY MARCUS, INDIVIDUALLY AND DERIVATIVELY as a shareholder of 166-33 JAMAICA AVE. ASSOCIATES, INC., 1829 BOONE AVENUE CORP. and FABRICS SAVE-A-THON MANHATTAN, INC., as a partner in MARC V REALTY ASSOCIATES, and as a member of MURTLE VENTURE FIVE, LLC, 2450 FLATBUSH PLAZA LLC, MARCC BROTHERS HOLDINGS LLC and MARCUS & SONS REALTY, LLC.

Plaintiff,

- v -

JACK MARCUS, FABRICS SAVE-A-THON INDUSTRIES, INC.,166-33 JAMAICA AVE. ASSOCIATES INC.,1829 BOONE AVENUE CORP., FABRICS SAVE-A-THON MANHATTAN INC., MARC V REALTY ASSOCIATES, MYRTLE VENTURE FIVE, LLC,2450 FLATBUSH PLAZA LLC, MARC BROTHERS HOLDINGS LLC, MARCUS & SONS REALTY, LLC,

Defendants.

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INDEX NO. 655568/2021

MOTION DATE 07/05/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

This action arises from an alleged dispute between plaintiff Jeffrey Marcus and certain members of his family as to his interest in and/or distributions or other monies owed to him from their various family real estate companies, all named as defendants. He claims that each entity is equally owned by him and his four brothers, but he names only one brother, Jack Marcus, as a defendant. The plaintiff alleges that each brother had an equal 20% interest in each entity, and he identifies Jack Marcus as the “controlling corporate officer” of each entity. The plaintiff states claims sounding in, *inter alia*, breach of fiduciary duty, waste, conversion, and unjust enrichment against his brother, defendant Jack Marcus (Jack), and the corporate defendants.

By an order dated April 26, 2022, the court denied a prior motion by the plaintiff pursuant to CPLR 3215 for leave to enter a default, finding that the plaintiff failed to submit the requisite

proof of the facts constituting the claim as required by CPLR 3215(f) (MOT SEQ 001). The denial was without prejudice to renew upon proper papers. The plaintiff now moves for a second time for leave to enter a default judgment against all defendants. No opposition is submitted. The motion is denied as the plaintiff failed to cure the defects in the prior motion and thus again failed to meet the requirements of CPLR 3215(f).

As the court observed in its April 26, 2022, decision and order, the gravamen of the plaintiff's claims in this action is that defendant Jack Marcus, in his capacity as the "controlling corporate officer" of the defendant family entities, wrongfully approved approximately $10 million in "no-interest loans" from the entities to the defendant Fabrics Save-A-Thon Industries, Inc. (FSAT), a now-defunct corporation of which Jack was "executive officer." However, the court opined that the verified complaint is devoid of allegations to as to the date the alleged loans were made, the instrument or any other means by which the loans were made, and any terms the loans included other than an apparent prohibition on the accrual of interest. Nor did the plaintiff submit any documentary proof of the loan agreement. The court also observed that the plaintiff likewise failed to provide any support for his claim of entitlement to a share of distributions generated by the family entities with respect to investments made with unaffiliated entities.

The plaintiff's submissions on the instant motion include his own affirmation, which he represents is submitted in lieu of an affidavit for religious reasons; an affirmation of counsel; the plaintiff's prior moving papers, consisting of a notice of motion, attorney's affirmation, and a CPLR 3215(g) letter to the defendants purporting to enclose an additional copy of the summons and complaint; miscellaneous organizational documents for 1829 Boone Avenue Corp., Fabrics Save-A-Thon Manhattan, Inc., Marc V Realty Associates, Marcus & Sons Realty, LLC, and Myrtle Venture Five, LLC, from the 1980s through 2000; 2021 tax returns for Myrtle and Marc Brothers; emails between the plaintiff's accountant and the accountant for the family entities; spreadsheets prepared by the accountant for the family entities; and Myrtle's general ledger for the year 2021.

The plaintiff's submissions fail to cure the defects identified in the court's first decision and order as to his derivative claims regarding the no-interest loan. The plaintiff provides a scattering of organizational documents and/or tax filings with respect to only six of the defendant

family entities, notably omitting any corporate documentation related to FSAT. Financial documentation demonstrating the distribution of money from a family entity to FSAT is provided for only one family entity. Though the plaintiff complains that he has not been able to obtain "everything that [he] is entitled to" due to "acrimony" with his brother, he provides no evidence of any efforts he made to obtain further documentation. Significantly, the plaintiff does not proffer proof of any degree of control over FSAT by Jack, let alone any misconduct that would support the plaintiff's contention that Jack breached his fiduciary duties to the family entities. See Besen v Farhadian, 195 A.D3d 548 (1st Dept. 2021); Kaufman v Cohen, 307 AD2d 113 (1st Dept 2003).

Moreover, none of the plaintiff's submissions include the date the loans were made, the instrument by which the loans were made, or any terms of the loans. At best, the plaintiff provides evidence suggesting that Myrtle, a family entity for which both Jack and the plaintiff are marked as "LLC member-managers" in the most recent tax returns, transferred $234.06 to FSAT in 2021. This is insufficient to establish the *prima facie* validity of the plaintiff's derivative claims for breach of fiduciary duty, conversion, corporate waste, unjust enrichment, or diversion of corporate opportunity against Jack and/or FSAT (the first through twenty-third causes of action). It is likewise insufficient to establish the plaintiff's direct breach of fiduciary duty claim against Jack (twenty-fifth cause of action) or his direct breach of contract claim against Marc V based on Marc V's alleged funding of the no-interest loan without the consent of the plaintiff (twenty-fourth cause of action). Nor does the plaintiff establish entitlement to an award of over $3 million in accrued interest on the no-interest loan.

With regard to his individual breach of contract claim seeking distributions from the family entities (twenty-fifth cause of action), the plaintiff submits an email from his accountant stating that the plaintiff is owed distributions from the family entities and spreadsheets prepared by the defendant's accountant containing a breakdown of the "Total Due" to the plaintiff. No affidavit or affirmation of any accountant elaborating upon the spreadsheets is provided. Nonetheless, the summary worksheet indicates that the outstanding amount owed to the plaintiff as of December 31, 2019, was $1,074,694.41. However, it is not clear from any submission which entity owes the amount. To be sure, the plaintiff provides no breakdown of the total sum demonstrating the amounts owed by each of the family entities, separately, apparently of the erroneous belief that joint and several judgment against all family entities for the total amount due is proper. Nor does the plaintiff provide all of the agreements he alleges entitle him to

dividends, and which he contends were breached. Thus, while the proof submitted indicates that some amount may be owed to the plaintiff, there are significant gaps in the evidence as to the provisions purporting to entitle the plaintiff to dividends, and an absence of evidence establishing what amount is owed to the plaintiff from each of the family entities he sues. These defects preclude entry of judgment in plaintiff's favor on the breach of contract claims.

As explained in the prior order, CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. See Joosten v Gale, 129 AD2d 531 (1st Dept 1987). The proof submitted must establish a *prima facie* case. See id; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). The plaintiff again fails to meet that burden. Thus, the court again need not determine whether the plaintiff submitted proof of service on all defendants sufficient to meet the requirements of CPLR 3215(f).

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's second motion for leave to enter a default judgment pursuant to CPLR 3215 is denied.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/02/2022
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER