Bomb First Prods., LLC v Hustla, Inc.
2014 NY Slip Op 33522(U)
June 24, 2014
Supreme Court, New York County
Docket Number: 651753/2012
Judge: O. Peter Sherwood

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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BOMB FIRST PRODUCTIONS, LLC,

Plaintiff,

-against-

HUSTLA, INC., DEREK JACKSON, and JOSHUA BINDER

Defendants.

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DECISION AND ORDER

Index No.: 651753/2012
Mot. Seq. No. 003

O. PETER SHERWOOD, J.:

Before the Court is the plaintiff's unopposed motion for an order directing entry of default judgment against defendants Hustla, Inc., and Derek Jackson. For the following reasons, the motion is granted in part, and denied in part.

Background

Plaintiff filed a summons and complaint in the instant action on May 21, 2012. On October 14, 2012, plaintiff filed a motion to permit alternative service pursuant to CPLR 308(5) and 311(b), which this Court granted on November 28, 2012. Service was thereafter effected by service on the defendants by email on December 3, 2012 (*see* Jekielek aff, NYSCEF Doc. No. 59, ¶ 4; Aff of Service, NYSCEF Doc. No. 17). Defendants appeared in this action by counsel and filed a verified answer on February 15, 2013 (*see* NYSCEF Doc. No. 18). Fact discovery thereafter commenced.

On September 30, 2014, defendants' counsel moved to withdraw as counsel based on defendants' non-payment of their fees. On November 3, 2014, the Court granted defense counsel's motion, directed counsel to serve a copy of the order with notice of entry upon defendants, stayed the action for 30 days, and directed defendants to retain new counsel (or as to the individual defendants, notify the Court that he intended to proceed *pro se*) within 30 days from the date the notice was mailed. Defendants' former counsel filed affirmations of service on defendants on November 6, 2014. Nonetheless, to this date, no new counsel has appeared on behalf of defendants, nor has Mr. Jackson notified the Court of his intention to proceed *pro se*. On January 6, 2015, a compliance conference was scheduled in this matter. Defendants failed to appear.

Discussion

CPLR 3215(a) provides that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, . . . the plaintiff may seek a default judgment against him" (CPLR 3215[a]). A judgment by default requires "proof of the facts constituting the claim, the default and the amount due by affidavit made by the party", or a verified complaint (CPLR 3215[f]; *Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer*, 210 AD2d at 61). By virtue of their failure to comply with this Court's order dated November 3, 2014, and by failing to appear at the status conference scheduled for January 6, 2015, defendants are in default (*see* 22 NYCRR § 202.27[a]; CPLR 321). However, for the following reasons, the motion is granted only with respect to count 1 and otherwise denied.

I. Count 1 - Breach of Contract

Count 1 of the complaint asserts a cause of action for breach of contract. To sustain a breach of contract cause of action in New York, plaintiffs must allege facts showing each of the following elements: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages sustained by plaintiff as a result of the breach (*see Kraus v Visa Intl Serv Assn*, 304 AD2d 408 [1st Dept 2003]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). In support of this cause of action, plaintiff attaches a copy of the executed contract (*see* Damji aff, Ex. A, NYSCEF Doc. No. 57), an affidavit from plaintiff's CEO attesting to the amount paid to defendant pursuant the contract and to defendants' breach (*see* Damji aff, NYSCEF Doc. No. 56), and a portion of Jackson's deposition transcript wherein he admits to receipt of $300,000 pursuant to the terms of the contract (*see* Damji aff, Ex. B, NYSCEF Doc. No. 58). Plaintiff's affidavit attests that the money advanced to defendant, which the contract envisioned to be refundable (*see* Damji aff, Ex. A [Contract], NYSCEF Doc. No. 57, § 2[a]), was not spent for its intended use under the terms of the contract - to record, market and promote an album featuring the music of Frank White (*see* Damji aff, NYSCEF Doc. No. 56, ¶¶ 22-23).

Moreover, because defendants admit that Hustla, Inc., was not formally incorporated at the time the parties executed the contract, and indeed never subsequently was incorporated (*see* Jekielek aff, Ex. F [Jackson Dep. Tr.], NYSCEF Doc. No. 65, 24:14-25), defendant Jackson's legal status in

executing the contract on behalf of the corporation was that of a promoter (*see Clinton Investors Co., II v Watkins,* 146 AD2d 861, 862 [3d Dept 1989]). As such, Jackson himself is personally liable on the contract (*Geron v Amritraj*, 82 AD3d 404, 405 [1st Dept 2011] ["As a promoter executing a contract on behalf of nonexistent corporate entities, defendant's personal liability under the agreement is presumed"]; *Grutman v Katz*, 202 AD2d 293, 294 [1st Dept 1994]; *id.*). Accordingly, Jackson is liable under the contract. Moreover, with regard to Hustla, Inc., although "a corporation which has not yet been formed normally lacks capacity to enter into contract", it may, as here, "be deemed to exist, and thus possess the capacity to contract, pursuant to the doctrine of incorporation by estoppel" (*Rubenstein v Mayor*, 41 AD3d 826, 828 [2d Dept 2007]). Accordingly, Hustla, Inc. is jointly and severally liable on the contract.

Accordingly, plaintiff's motion for an order directing entry of default judgment on count 1 of the complaint is granted.

II. Counts 2 through 4- Unjust Enrichment and Fraud

However, the motion is denied to the extent is seeks entry of default judgment on counts 2 through 4 of the complaint, sounding in unjust enrichment and fraud. Each of these counts are duplicative of the breach of contract cause of action (*Reade v SL Green Operating Partnership*, LP, 30 AD3d 189, 190 [1st Dept 2006] ["Generally, a tort cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the contract cause of action, particularly where, as here, both seek identical damages"]). The unjust enrichment claim (count 2) specifically seeks to recoup the $300,000 that plaintiff paid to defendants pursuant to the express terms of the contract (*see* Compl. ¶ 52-61). Count 3 asserts that defendants fraudulently induced plaintiffs into entering into the contract by misrepresenting that it would use plaintiffs money to, *inter alia*, release an album by Frank White (*see* Compl. ¶ 73). However, allegations concerning misrepresentations of future intention to perform under a contract are insufficient to maintain an action for fraud (*see Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222 [1st Dept 1994]). Count 4 of the complaint asserts a claim for fraud based upon a single allegedly inaccurate and misleading accounting statement provided by defendants to plaintiff. However, there is no allegation that plaintiff relied on this accounting statement for any purpose whatsoever. The complaint merely states that defendants provided the accounting statement "to

cover up their misappropriation of the $300,000 Bomb [sic] in an effort to receive more money from Bomb' (Compl. ¶ 85). There is no allegation however that plaintiff advanced any money other than that paid under the contract. Indeed, the claim merely seeks to recoup the money paid under the contract, and to bootstrap a claim for punitive damages to what otherwise is simply a breach of contract cause of action. Such is impermissible. Accordingly, plaintiff has not demonstrated entitlement to entry of default judgment on counts 2 through 4 of the complaint. Because punitive damages are unavailable on a claim for breach of contract, and defendant has admitted all compensatory damages alleged, damages have been conclusively established, obviating any need for an inquest.

Accordingly, it is hereby

ORDERED that the motion for default judgment is GRANTED as to count 1 of the complaint and otherwise DENIED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs BOMB FIRST PRODUCTIONS, LLC and against defendants HUSTLA, INC. and DEREK JACKSON, jointly and severally, in the sum of $300,000, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that, within fourteen (14) days of entry, plaintiff shall serve a copy of this order with notice of entry upon defendants.

This constitutes the decision and order of the Court.

DATED: June 24, 2014

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD 6/24/14
J.S.C.