T2T3C1, LLC v Bombo Sports & Entertainment, LLC
2016 NY Slip Op 31746(U)
September 19, 2016
Supreme Court, New York County
Docket Number: 651838/2016
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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T2T3C1, LLC,

Index No.: 651838/2016

Plaintiff,

DECISION & ORDER

-against-

BOMBO SPORTS & ENTERTAINMENT, LLC, and ROBERT S. POTTER,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff T2T3C1, LLC moves, pursuant to CPLR 3215, for a default judgment against defendants Bombo Sports & Entertainment, LLC (Bombo) and Robert S. Potter. Plaintiff's motion is granted, on default, for the reasons that follow.

I. Procedural History & Factual Background:

Plaintiff seeks to collect on two notes (the Notes) as assignee of the original lenders.

The first is a December 15, 2009 note executed by Potter in favor of non-party Theodore H. Ashford, II[1] in the amount of the $1 million, which carries an interest rate of 10% per annum, compounded monthly, and has a maturity date of April 30, 2016. *See* Dkt. 1 at 11[2] (the 2009 Note), 18 (the 2015 Amendment).[3] The 2009 Note is governed by Delaware law and contains a

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[1] Ashford was acting in his capacity as trustee of the Revocable Trust of Theodore H. Ashford U/A Dated 5/30/00.

[2] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

[3] The original maturity date was February 28, 2010, but was extended by virtue of numerous written amendments. *See* Dkt. 27 at 2-3 (listing all amendments, which are attached as exhibits); *see also* Dkt. 1 at 18-19 (background section of the 2015 Amendment, which recites all of the amendments). The most recent, operative version is the 2015 Amendment, dated April 30, 2015.

permissive Delaware forum selection clause. *See id.* at 16. Section (1)(b)(i) of the 2015 Amendment provides that the balance due on the 2009 Note may be accelerated by the lender upon the occurrence of an Event of Default (*see id.* at 20), defined in section (e) of the Original Note. *See id.* at 12-13.[4] In an agreement dated April 4, 2016, Ashford assigned his rights under the 2009 Note to plaintiff. *See* Dkt. 27 (Ashford Aff.) at 92 (assignment).

The second note at issue, dated May 1, 2012, was executed by Potter and Bombo in favor of non-party Michael Carr in the amount of $500,000, carrying 3% annual interest, compounded semi-annually, with a maturity date of April 30, 2013. *See* Dkt. 1 at 24 (the 2012 Note). The 2012 Note does not contain a choice of law or forum selection clause. The 2012 Note was secured by 100% of the stock of Bombo.[5] *See id.* The lender also had the right to convert all or part of the loan into Bombo equity at a $10 million valuation. *See id.* Defendants have not

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It should be noted that the manner in which the instant motion was filed violated many of this part's rules (e.g., exhibits not filed as separate documents; no memorandum of law was submitted). Most disturbingly, counsel submitted a proposed judgment to the County Clerk *prior* to even moving for a default judgment. *See* Dkt. 8. If plaintiff desired expedient resolution, it could have move for summary judgment in lieu of complaint; it did not.

[4] In addition to there being a post-maturity non-payment default, plaintiff also claims that certain defined Events of Default occurred. The court grants judgment based on non-payment, not on the alleged Events of Default, which have not been sufficiently substantiated by plaintiff. Plaintiff claims that a civil action commenced against Bombo and Potter in a Pennsylvania federal district court is an Event of Default, but it is not clear that action falls within the definition of Event of Default under section (e)(ii) of the Original Note. The court notes that this section, as quoted in the complaint, fails to mention (due to the use of ellipses) that not all litigation is an event of default, but only certain types, such as bankruptcy. *Compare* Complaint ¶ 12, with Dkt. 1 at 12. Plaintiff has not sufficiently explained how the federal action falls within section (e)(ii), nor does plaintiff sufficiently explain how and why section (e)(iv) was violated due to noncompliance with a Life Insurance Pledge Agreement. Regardless, since the April 30, 2016 maturity date has passed, there is no question that the 2009 Note is in default.

[5] Potter was the CEO and Managing Member of Bombo.

repaid any portion of the 2012 Note. On April 4, 2016, Carr assigned his rights under the 2012 Note to Plaintiff. *See* Dkt. 28 (Carr Aff.) at 8 (assignment).

On April 6, 2016, plaintiff commenced this action by filing a complaint with two causes of action: (1) breach of the 2009 Note, asserted against Potter; and (2) breach of the 2012 Note, asserted against Potter and Bombo. Defendants were duly served, including the additional service required by CPLR 3215(g).[6] Defendants never answered the complaint or moved to dismiss. On August 22, 2016, plaintiff filed the instant motion for a default judgment. Plaintiff seeks the $1 million principal amount of the 2009 Note and the $500,000 principal amount of the 2012 Note, plus interest.

"When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him." CPLR 3215(a). To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. *See* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, at 557. "Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action. 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) (citations omitted); *see Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014). "[A] defaulting defendant is deemed to have admitted all the allegations in the complaint." *McGee v Dunn*, 75 AD3d 624 (2d Dept 2010).

Plaintiff has complied with these requirements. It established the debt owed on the Notes and defendants' default thereunder. With respect to damages, plaintiff submitted charts

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[6] In addition to filing affidavits indicating that Potter was personally served, plaintiff also filed an

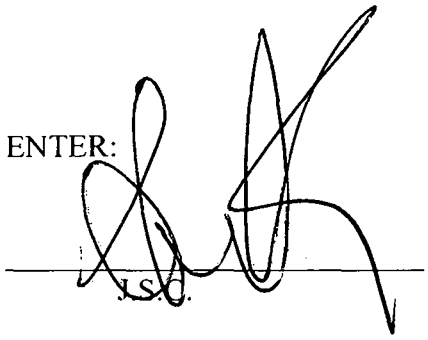
calculating the interest that has accrued on the Notes as of August 5, 2016. Taking into account some interest payments that were made, those charts show that $592,081.78 has accrued on the 2009 Note and that $67,721.17 has accrued on the 2012 Note. *See* Dkt. 28 at 12-16. Accordingly, it is

ORDERED that the motion by plaintiff T2T3C1, LLC for a default judgment against defendants Bombo Sports & Entertainment, LLC (Bombo) and Robert S. Potter is granted, and Clerk is directed in enter judgment: (1) in favor plaintiff and against Potter in the amount of $1,592,081.78 plus 10% interest, compounded monthly, from August 6, 2016 to the date judgment is entered; and (2) in favor plaintiff and against Bombo and Potter, jointly and severally, in the amount of $567,721.17, plus 3% interest, compounded semi-annually, from August 6, 2016 to the date judgment is entered; and it is further

ORDERED that within 3 days of the entry of this order on the NYSCEF system, plaintiffs shall serve a copy of this order on defendants along with notice of entry by overnight mail.

Dated: September 19, 2016

ENTER:



SHIRLEY WERNER KORNREICH
J.S.C

admission of personal service signed by Potter. *See* Dkt. 29 at 36.