

**Wimbledon Fin. Master Fund, Ltd. v Wimbledon
Fund, SPC**

2017 NY Slip Op 30995(U)

May 11, 2017

Supreme Court, New York County

Docket Number: 652771/2016

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

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

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WIMBLEDON FINANCING MASTER FUND, LTD.,

Index No: 652771/2016

Petitioner,

DECISION & ORDER

-against-

THE WIMBLEDON FUND, SPC on behalf of CLASS C
SEGREGATED PORTFOLIO, WIMBLEDON REAL
ESTATE FINANCING MASTER FUND LTD., BANK
OF AMERICA, N.A., and WESTON CAPITAL
MANAGEMENT, LLC,

Respondents.

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SHIRLEY WERNER KORNREICH, J.:

By order dated December 22, 2016, the court granted summary judgment to Wimbledon on its petition against WCM and Class C. *See* Dkt. 146 (the December 22 Decision).¹ The court did not address Wimbledon’s claims against WREF and Bank of America. The court explained:

This decision does not resolve the claims asserted against [WREF]. By order dated October 5, 2016, the court granted Wimbledon’s motion (Seq. 003) for an extension of time to serve WREF. This action will continue against WREF and [Bank of America]. “Bank of America is named as a defendant herein solely for purposes of obtaining the turnover of the funds in [a checking] account [in the name of WREF].” Petition ¶ 8. Neither WREF nor Bank of America responded to the petition.

December 22 Decision at 2 n.1 (citation omitted).

WREF and Bank of America were served [*see* Dkt. 23 & 141], but still have not responded to the petition. On March 17, 2017, Wimbledon filed the instant motion for a default

¹ Familiarity with the December 22 Decision and the two related actions before this court is assumed. All capitalized terms not defined herein have the same meaning as in the December 22 Decision. References to “Dkt.” followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

judgment against WREF and Bank of America. Neither WREF or Bank of America filed opposition to the motion. Class C, however, did file opposition papers. For the reasons that follow, Wimbledon's default judgment motion is granted.

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).

The petition contains the following allegation regarding WREF and Bank of America:

Pursuant to a Pledge Agreement dated as of August 3, 2011, Arius Libra's loan from Partners II was secured by certain assets that the Hallacs and Wellner, among others, had caused WREF to contribute to Arius Libra, including WREF's interest in [the Satori Offshore Debt Fund (the "Satori Fund")] and any distributions that the Satori Fund made to WREF (the "Pledged Collateral"). ...

Pursuant to section 1 of a separate Conditional Assignment and Assumption Agreement between Arius Libra and Partners II, Arius Libra agreed that, “upon the occurrence and continuation of an Event of Default and in accordance with the provisions of Section 4 of the Pledge Agreement, [Arius Libra] hereby assigns and transfers to [Partners II] 100% of Arius Libra’s right, title and interest” in the Pledged Collateral “free of any and all liens, charges and encumbrances.” ... Section 4 of the Pledge Agreement provided that Partners II was entitled to “[c]ollect, receive, appropriate and realize upon the Pledged Collateral or any part thereof” upon the occurrence and continuation of an “Event of Default” under the Secured Note. ... The Secured Note provided in turn that an “Event of Default” would occur if, among other things, Arius Libra “fails to . . . pay the outstanding Principal Sum and accrued interest on or before” December 30, 2011. ...

Arius Libra did not pay the outstanding amounts due under the loan by December 30, 2011, thus causing an Event of Default. Arius Libra has never cured this default, which continues to this day. Therefore, pursuant to the Pledge Agreement, Partners II is entitled to “[c]ollect, receive, appropriate and realize upon the Pledged Collateral or any part thereof.” ...

On or about May 22, 2014, the Satori Fund distributed \$136,224.10 to WREF’s checking account at Bank of America. ... Wimbledon, as assignee of Partners II, demanded that WREF turn over these funds to Wimbledon. Albert Hallac, purporting to act as WREF’s investment manager, refused. Ignoring the terms of the Pledge Agreement and Conditional Assignment and Assumption Agreement—both of which he signed on Partners II’s behalf—Mr. Hallac claimed that Wimbledon Class C, as the purported owner of WREF, might be entitled to the same funds. ...

Because Partners II (and Wimbledon, as its assignee) is entitled to WREF’s interest in the Satori Fund pursuant to the terms of the Pledge Agreement and Conditional Assignment and Assumption Agreement, Wimbledon respectfully submits that WREF and Wimbledon Class C should be directed to turn over to the Sheriff of the City of New York any interest it has in the Satori Fund, including without limitation the \$136,224.10 distribution that WREF received from the Satori Fund on or about May 22, 2014, and any interest thereon, and that Bank of America should be directed to turn over to the Sheriff of the City of New York all funds held in WREF’s name that are traceable to the Satori Fund.

Dkt. 1 at 7-9 (Petition ¶¶ 11-15) (paragraph numbering omitted).

Based on these allegations, Wimbledon asks “the Court to enter an order pursuant to CPLR §§ 5225 and 5227 ... directing [WREF] to turn over to the Sheriff ... any interest it has in

the [Satori Fund], including without limitation any distributions that [WREF] has received from the [Satori Fund]” and “directing [Bank of America] to turn over to the Sheriff ... any monies held in an account by or for the benefit of [WREF] that are traceable to transfers received from the [Satori Fund].” Dkt. 1 at 10-11. Simply put, Wimbledon seeks the \$136,224.10 that the Satori Fund distributed to WREF’s account at Bank of America, plus accrued interest, as well as any other funds in a WREF account at Bank of America attributable to the Satori Fund.

In support of its default judgment motion, Wimbledon submitted an affidavit of merit along with documentation supporting the allegations in its petition. As noted, neither WREF nor Bank of America filed opposition papers. Class C did file opposition, contending that it “possesses a valid interest in the [Satori Fund].” *See* Dkt. 215 at 4. Class C takes this position despite previously expressly denying – in this action – that it has any interest in the Satori Fund. *See* Dkt. 145 (11/17/16 Tr. at 3). Leaving aside the implausible and unjustifiable explanation Class C provides for its about-face,² Class C fails to explain why it has standing to oppose a default judgment sought against another party or, more critically, why its claimed interest in the Satori Fund is relevant.

Even if Class C does have an interest in the Satori Fund, merely noting that fact is not a rebuttal to the allegations in Wimbledon’s petition, which contains well pleaded allegations regarding Wimbledon’s right to the funds in WREF’s account. Class C does not proffer any

² *See* Dkt. 221 at 4-5 (“Class C provides no explanation for its failure to discover these documents earlier even though they clearly have been in Class C’s possession for years before Wimbledon filed its Petition. Indeed, the document on which Class C primarily relies is a 2009 settlement agreement that was signed by Vincent King, the same Class C director who submitted an affidavit in support of Class C’s motion to dismiss the Petition. As such, Class C director Keith Kelty’s representation that Class C obtained this document ‘for the first time’ after the Court entered its turnover order is blatantly false.”).

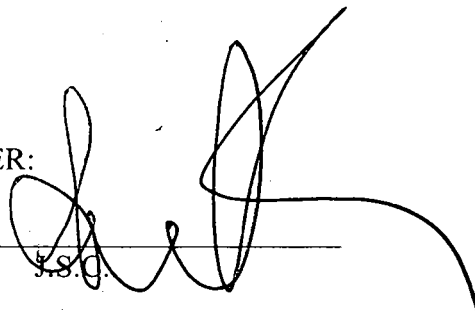
argument as to why Wimbledon's claim to the \$136,224.10 the Satori Fund distributed to WREF lacks merit. Hence, even if Class C has standing to oppose the motion and has some indirect interest in the Satori Fund, it has failed to proffer a meritorious defense. *See New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 (1st Dept 2012) ("In order to successfully oppose a [motion for a] default judgment, a defendant must demonstrate a justifiable excuse for his default **and a meritorious defense.**") (emphasis added), quoting *ICBC Broad. Holdings-NY, Inc. v Prime Time Advertising, Inc.*, 26 AD3d 239, 240 (1st Dept 2006). Accordingly, it is

ORDERED that Wimbledon's motion for a default judgment against WREF and Bank of America is granted; and it is further

ORDERED that after serving a copy of this decision on WREF and Bank of America and e-filing affidavits of service, Wimbledon shall submit a proposed judgment by e-filing it and faxing it to Chambers.

Dated: May 11, 2017

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C