

<b>100 Mile Fund, LLC v Weiss</b>
2017 NY Slip Op 30998(U)
May 11, 2017
Supreme Court, New York County
Docket Number: 655288/2016
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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100 MILE FUND, LLC,

Index No.: 655288/2016

Plaintiff,

**DECISION & ORDER**

-against-

CHARLES WEISS, HARRIET MOUCHLY-  
WEISS, STRATEGY XXI HOLDINGS, INC.,  
AND REPUTATIONAL RISK  
MANAGEMENT, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

This is an action to collect on a promissory note executed by defendants Charles Weiss, Harriet Mouchly-Weiss, Strategy XXI Holdings, Inc. (Strategy), and Reputational Risk Management, Inc. (Risk Management) (collectively, defendants), and made payable to plaintiff 100 Mile Fund, LLC. Plaintiff moves, pursuant to CPLR § 2221(e), to renew its October 5, 2016 motion for summary judgment on the Note in lieu of a complaint against Ms. Mouchly-Weiss, Strategy, and Risk Management [Motion Seq 002]. CPLR § 3213. Alternatively, plaintiff moves for summary judgment in lieu of a complaint against Ms. Mouchly-Weiss, Strategy, and Risk Management. The motion is unopposed. For the reasons that follow, plaintiff's motion to renew is granted, and upon renewal, plaintiff's motion for summary judgment against Harriet Mouchly-Weiss, Strategy, and Risk Management is granted.

The court assumes familiarity with the facts and procedural background of this case as set forth in its December 20, 2016 decision on plaintiff's first summary judgment motion (the 2016 Decision). *See* Dkt. 9 at 3-4. In the 2016 Decision, the court granted summary judgment to plaintiff against defendant Charles Weiss, but denied plaintiff's motion as to the remaining

defendants, and denied plaintiff's request for attorneys' fees. *Id.* at 4–5. The court noted that plaintiff failed to demonstrate proper service of process on Ms. Mouchly-Weiss, Strategy, and Risk Management, and failed to provide any basis for its request for attorneys' fees. *Id.* On the instant motion, plaintiff submits additional proof as to service on Ms. Mouchly-Weiss and the corporate defendants and of its entitlement to attorneys' fees.

“A motion for leave to renew is intended to bring to the court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention.” *Tishman Const. Corp. of N.Y. v City of N.Y.*, 280 AD2d 374, 376 (1st Dept 2001); CPLR 2221(e)(1-3) (motion to renew shall contain reasonable justification for the failure to present such facts on the prior motion). “This requirement, however, is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made.” *Tishman*, 280 AD2d at 376–77 (“[E]ven if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to defeat substantive fairness.” (quotation omitted)).

As to Ms. Mouchly-Weiss, Plaintiff submits a copy of a previously omitted Loan Agreement and Guaranty which, together with the Note, form an integrated agreement between the parties (the Loan Documents). *See* Dkt. 22 at 15 [Loan Agreement] ¶ 8.14. Under the Loan Agreement, all defendants consented to service of process under federal law [*id.* at ¶¶ 8.13 & 8.14],<sup>1</sup> which permits personal service on an individual by “leaving a copy of [the summons and complaint] at the individual's dwelling or usual place of abode with someone of suitable age and

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<sup>1</sup> This service of process provision applies to any lawsuit “arising out of or relating to any of the Loan Documents or the Loan.” Dkt. 22 at 15 ¶ 8.13.

discretion who resides there.” See Fed. R. Civ. P. 4(e)(1)(B). Plaintiff also provides a copy of Mr. Weiss’s and Ms. Mouchly-Weiss drivers’ licenses [Dkt. 22 at 34] demonstrating that they live at the same address. The affidavit of service [Dkt. 8] shows that plaintiff served copies of the original summons and motion papers for all defendants upon Mr. Weiss at his residence (i.e. 415 East 52<sup>nd</sup> Street, Unit 9HC).

In light of the foregoing submissions, the court finds that plaintiff properly served Ms. Mouchly-Weiss under the Loan Agreement and FRCP 4(e) by serving Mr. Weiss at the home where he resides with Ms. Mouchly-Weiss. Although plaintiff provides no explanation for why it did not include the Loan Agreement with its original motion papers, the court has discretion to grant plaintiff’s motion to renew in the interest of justice. *Tishman*, 280 AD2d at 376–77.

CPLR § 311(a)(1) permits service on a domestic or foreign corporation by delivering a copy of the summons to “an officer, director, managing or general agent” of the corporation. CPLR 311(a)(1). On renewal, plaintiff submits proof that Ms. Mouchly-Weiss was the president of both Strategy and Risk Management at the time that plaintiff filed this lawsuit. Ms. Mouchly-Weiss signed the Loan Agreement and Guaranty on behalf of both corporate defendants as “president” [see Dkt. 22 at 18 & 20], and the Loan Agreement identifies Ms. Mouchly-Weiss as the corporate defendants’ president. *Id.* at 4, ¶ 1.1. Plaintiff’s service of process on Mr. Weiss at Ms. Mouchly-Weiss’ residence, however, did not suffice as to the corporate defendants. See *Bezoza v. Bezoza*, 83 AD3d 578, 579 (1st Dept 2011); *Skelly v Margus Co.*, 203 AD2d 276, 276 (2d Dept 1994).<sup>2</sup> Nonetheless, the corporate entities were properly served because plaintiff

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<sup>2</sup> Pursuant to CPLR 308(2), a natural person may be served “by delivering the summons within the state to a person of suitable age and discretion” at the natural person’s home or residence. However, such delivery *cannot* effect service on a corporation unless the “person of suitable age and discretion” to whom the documents are delivered is *also* “authorized by appointment or by law to receive service” on behalf of the corporation. *Bezoza v Bezoza*, *supra*; see *Skelly v.*

additionally served both corporate defendants on January 27, 2017 (within 120 days of the commencement of this action),<sup>3</sup> by service on the New York Secretary of State as agent of the corporate defendants pursuant to BCL §306(b)(1), and by personal delivery, on January 28, 2017, to Ms. Mouchly-Weiss. *See* Dkt. 27–30.

Finally, the Loan Agreement supports plaintiff's request for attorneys' fees. As noted in the 2016 Decision, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 (1989). Here, paragraph 8.18 of the Loan Agreement provides that defendants will reimburse plaintiff for litigation expenses, including attorneys' fees, that plaintiff incurs in exercising its rights under the Loan Documents. Dkt. 22 at 16, ¶ 8.18 ("ACTIONS. [Risk Management and Strategy] agree[] that [plaintiff], in exercising the rights, duties, or liabilities of [plaintiff] or [corporate defendants] under the Loan Documents, may commence...any action purporting to affect... the Loan Documents and [corporate defendants] shall immediately reimburse [plaintiff] upon demand for all such expenses so incurred...by [plaintiff], including, without limitation, attorneys' fees and expenses and court costs."). Paragraph 10 of the Guaranty contains a similar provision. *See id.* at 25, ¶ 10 ("ATTORNEYS' FEES...If any attorney is engaged by [plaintiff] to enforce or defendant any provision of...any of the Loan Documents, or as a consequence of

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*Margus Co., supra* (holding that service on wife of corporate officer was not proper service on corporation). Since Mr. Weiss has not been shown to be "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service" on behalf of the corporate defendants, service upon Mr. Weiss did not effectuate service upon Strategy or Risk Management.

<sup>3</sup> This action was commenced on October 5, 2016. The 120-day deadline for service of the summons and notice pursuant to CPLR 306-b did not elapse until February 2, 2017.

any Default under the Loan Documents...[Mr. Weiss and Ms. Mouchly-Weiss] shall pay to [plaintiff], immediately upon demand all attorneys' fees and costs incurred by [plaintiff] in connection therewith, together with interest thereon from the date of such demand until paid at the rate of interest applicable to the principal balance of the Note..."). Ergo, the court grants plaintiff's renewed request for reasonable attorneys' fees. Accordingly, it is

ORDERED that the motion of plaintiff 100 Mile Fund, LLC for leave to renew its motion for summary judgment in lieu of a complaint is granted on default; and it is further

ORDERED that, upon renewal, the Court grants plaintiff's motion for summary judgment against defendants Harriet Mouchly-Weiss, Strategy XXI Holdings, Inc., and Reputational Risk Management, Inc.; and it is further

ORDERED that the judgment entered on January 6, 2017 against defendant Charles Weiss (Dkt. 16) is hereby vacated, and the Clerk is directed to enter judgment in favor of plaintiff 100 Mile Fund, LLC and against defendants Charles Weiss, Harriet Mouchly-Weiss, Strategy XXI Holdings, Inc., and Reputational Risk Management, Inc., jointly and severally, in the amount of \$1,186,613, with interest at the rate of 22% per annum from March 25, 2016 until the date of this decision, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

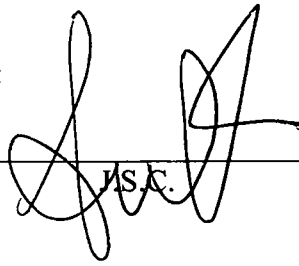
ORDERED that the issue of reasonable attorneys' fees that plaintiff is entitled to recover from defendants Charles Weiss, Harriet Mouchly-Weiss, Strategy XXI Holdings, Inc., and Reputational Risk Management, Inc. is severed and is referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine, and within 7 days of the entry of this order on NYSCEF, plaintiff shall serve a copy of it with notice of entry, as

well as a completed information sheet,<sup>4</sup> on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date, and notify the parties of the time and date of the hearing; and it is further

ORDERED that within 10 days of the entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendants by overnight mail.

Dated: May 11, 2017

ENTER:

  
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J.S.C.

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

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<sup>4</sup> Copies of the Information Sheet are available at:  
<http://www.nycourts.gov/courts/ljd/supctmanh/SR-JHO/SRP-InfoSheet.pdf>