

Riemer & Braunstein LLP v Sutton
2018 NY Slip Op 31948(U)
August 8, 2018
Supreme Court, New York County
Docket Number: 653339/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN

PART IAS MOTION 33EFM

Justice

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INDEX NO. 653339/2017

RIEMER & BRAUNSTEIN LLP,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001; 002; 003

- v -

ISAAC SUTTON, BLUCO ENERGY LLC, TARSIER LTD, TARSIER ENERGY LTD, GOCOM CORPORATION,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 17, 42, 43, 44, 45, 46, 47, 48, 59

were read on this motion to/for PRELIMINARY INJUNCTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 49

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for VACATE STAY

Based on the foregoing, it is decided that Motion Sequence 001 and 002 are granted; Motion Sequence 003 is denied.

In this enforcement of a money judgment action, plaintiff Riemer & Braunstein, LLC (R&B) seeks payment from self-represented defendant Isaac Sutton (Sutton), and corporate defendants BluCo Energy, LLC (BluCo), Tarsier Ltd. (Tarsier), Tarsier Energy Ltd. (Tarsier Energy), and GoCom Corporation (GoCom) for unpaid legal fees in the amount of \$127,477.18. Plaintiff also seeks to enforce its attorney's lien against assets and interests of BluCo. This decision and order addresses plaintiff's motion sequences (MS) 1 to 3. MS 1 is for a preliminary injunction preventing defendants from transferring assets and ownership interests in BluCo; MS 2 is for entry of default judgment against BluCo, GoCom, Tarsier, and Tarsier Energy and to dismiss defendant Sutton's counterclaims; and MS 3 is to vacate the ongoing stay of discovery. MS 2 will be addressed first as it controls the outcomes of the other two motions. The decisions and orders are as follows:

Facts

In March 2015, defendants GoCom and BluCo retained plaintiff to represent them in a litigation regarding a loan with non-party Vantage Commodities Financial Services, LLC (Vantage) (*see BluCo Energy LLC v Vantage Commodities Financial Services, LLC*, Sup Ct, New York County, June 6, 2016, index No. 650095/15) (NYSCEF Doc. No. 1 – Complaint at ¶18). Plaintiff successfully negotiated a settlement between the parties in that action, wherein Vantage transferred 100% of the membership interest in BluCo to GoCom, with plaintiff, acting as counsel, retaining the Membership Certificates of BluCo (*id.* at ¶¶ 23-24). Plaintiff was not paid for its services in that action and the Membership Certificates are still in plaintiff's possession, subject to plaintiff's charging and retaining liens (*id.*).

Notwithstanding plaintiff's control over the Membership Certificates, GoCom proceeded to sell its 100% Membership Interest in BluCo to Tarsier/Tarsier Energy for less than fair consideration and was rendered insolvent and unable to pay plaintiff (*id.* at ¶27). At all relevant times, defendant Sutton was the Chief Executive Officer (CEO) and controlling shareholder of GoCom, the CEO and managing member of BluCo, the CEO and Chairman of Tarsier and Tarsier Energy, and purportedly dominated and controlled all of the companies at the time of the transfer of the BluCo Membership Interests from GoCom to Tarsier and Tarsier Energy (*id.* at ¶28). Plaintiff alleges that this transaction was fraudulent and void ab initio as the Membership Certificates were not transferred and the transaction was merely an attempt to hinder GoCom's and BluCo's creditors (*id.* at ¶¶29-30).

To recover its unpaid fees of \$120,225.79, plaintiff brought suit against GoCom. A default judgment was entered on February 2, 2017 (*Riemer & Braunstein LLP v GoCom Corporation*, Sup Ct, NY Cty, Feb. 7, 2017, Index No. 654299/16) (NYSCEF Doc. No. 1 at ¶¶ 32-33). In its effort to enforce judgment, plaintiff properly served notice of the default entry to GoCom. Plaintiff additionally served Tarsier a Restraining Notice with Information Subpoena and a Subpoena Duces Tecum and Ad Testificandum on April 10, 2017 and served Sutton with a Subpoena Duces Tecum and Ad Testificandum on April 10, 2017, to determine the location of GoCom's assets (*id.* at ¶36). Tarsier and Sutton did not appear for noticed depositions and did not produce the requested documents (*id.* at ¶¶ 35, 37). GoCom has yet to pay any portion of the default judgment.

Plaintiff initiated this instant action seeking to: (1) enforce its attorney's lien against all defendants; (2) recover fraudulent conveyances under New York Debtor and Creditor Law; (3) enjoin all defendants from transferring or selling BluCo assets or interests; (4) recover damages sustained due to Sutton's fraudulent conveyance of the subject companies' assets and interests; (5) recover based on quantum meruit against BluCo; (6) pierce the corporate veil of all defendants as they are alter-egos of Sutton; (7) impose civil contempt charges against Sutton and Tarsier; and (8) impose criminal contempt charges against Sutton.

Discussion

Plaintiff's Motion for Default Judgment as to GoCom, BluCo, Tarsier, and Tarsier Energy (Motion Sequence 2)

Plaintiff's default judgment motion (MS 2) is granted. Plaintiff filed its Complaint in this action on June 19, 2017 (NYSCEF Doc. No. 36). Service of the Summons and Complaint was made on BluCo, GoCom, and Tarsier Energy at the Secretary of State's office on June 29, 2017 (NYSCEF Doc. No. 32 – Affidavits of Service). Defendant Tarsier was served on June 30, 2017, and Tarsier's managing agent received the Summons and Complaint at that time. Plaintiff submitted a proper affirmation of merit (NYSCEF Doc. No. 35-36). None of the corporate defendants answered the complaint. Only defendant Sutton filed a pro se Answer with attached counterclaims. Sutton's Answer purported to respond on behalf of the corporate defendants (NYSCEF Doc. No. 23). Pursuant to CPLR §321(a), corporate entities must "appear" by attorney, and therefore Sutton, who is not an attorney, may not represent the corporate defendants in this action (*see Mail Boxes Etc. USA, Inc. v Rupert Higgins*, 281 AD2d 176 [1st Dept 2001]; *Michael Reilly Design, Inc. v Houraney*, 40AD3d 592, 593 [2d Dept 2007]).

Plaintiff proceeded to file this motion for default judgment on August 21, 2017. The corporate defendants did not appear with counsel until September 7, 2017 (NYSCEF Doc. No. 40). The return date for the motion for default judgment was September 12, 2017. The parties were scheduled to appear on October 11, 2017, but this was adjourned until October 18, 2017, at defendants' request (NYSCEF Doc. No. 41). The corporate defendants responded to plaintiff's motion for default judgment and for a preliminary injunction on October 17, 2017 (NYSCEF Doc. Nos. 42-47), and defendants did not file answers to the Complaint until December 12, 2017 (NYSCEF Doc. Nos. 50-54). The parties did not stipulate to a later return date nor did they request an adjournment before the return date, as required by New York Codes, Rules and Regulations (22 NYCRR §202.8[e]). New York County Justices Rule 14 states that "[p]apers or letters regarding a motion should not be presented to the court after submission of the motion in the Motion Submission Part Courtroom, or after argument in the Part... except with the advance permission of the court. Material presented in violation of this Rule will not be read." As such, the corporate defendants' responses are untimely and is disregarded.

In any event, even if this court were to consider defendants' papers, they provide no rationale for defendants' untimely filing and are insufficient to establish a meritorious defense. To avoid entry of default judgment upon a failure to appear or answer, "a defendant is required to demonstrate both a justifiable excuse for the default and a meritorious defense" (*Young v Richards*, 26 AD3d 249, 250 [1st Dept 2006]). Defendants' submissions fail on both counts. While defendants did submit Sutton's notarized "Answer for Order to Show Cause" and Sutton's notarized "Answer and Counterclaims", neither of the documents were executed in relation to

the default motion, and there is no proof that the documents were sworn testimony (NYSCEF Doc. Nos. 45-46). These documents therefore do not constitute an affidavit from someone with personal knowledge, necessary to establishing a meritorious defense (*see Torres v Harmonie Club of City of New York*, 122 AD3d 518 [1st Dept 2014] [plaintiff failed to demonstrate a meritorious claim against defendant because she did not provide an affidavit from a person with knowledge of the facts underlying her claim]). More critically, the documents submitted fail to provide any reasonable rationale for the untimely filing by defendants (NYSCEF Doc. Nos. 42-46). There was no reasonable excuse for the delays and the papers, as submitted, are insufficient to establish a meritorious defense.

As such, the time within which the defaulting corporate defendants may answer or otherwise move to respond to the complaint has expired and has not been extended. Defendants have not filed a timely answer to the complaint or submitted opposition to the motion for default. Plaintiff timely filed its motion for entry of default judgment.

The second branch of MS2 is plaintiff's motion to pierce the corporate veil and hold BluCo, GoCom, Tarsier, and Tarsier Energy liable for the damages done to plaintiff. "[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]). Factors to be considered when determining that a corporation was dominated and controlled to commit a fraud or wrong include: inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors; and common office space or telephone numbers (*see Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st Dept 2009]). Plaintiff's submissions show that GoCom, Tarsier, and Tarsier Energy were mere instrumentalities used to perpetuate the fraudulent conveyance of BluCo's assets for valueless Tarsier penny stock (NYSCEF Doc. No. 35 at ¶¶19, 46-55). The transaction left BluCo insolvent and without adequate working capital to pay plaintiff's attorney's fees (*id.* at 19-20). The corporate defendants "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against" the plaintiff (*Morris*, 82 NY2d at 142).

Plaintiff's requested relief to: (1) enforce its attorney's lien against all defendants pursuant to New York Judiciary Law §475; (2) enforce New York Debtor and Credit Law §§271, 273, and 278(a) and declare the BluCo transfer to GoCom and subsequent sale of BluCo Membership Interest to Tarsier and Tarsier Energy void and requiring a public sale of the Membership Interest of BluCo and crediting the sale to plaintiff's judgment; (3) issue an injunction against the corporate defendants to prevent any transfer of BluCo assets or funds until the public sale of BluCo; and (4) pierce the corporate veil and hold GoCom, Tarsier, and Tarsier Energy jointly and

severally liable for the judgment because they abused the corporate form to avoid payment of plaintiff's attorney's fees are all granted.

The portion of the motion regarding contempt charges against the defendants is denied. The power to find a party in contempt of court is "discretionary and is to be exercised in the light of the facts and circumstances in each particular case" (*In re Hildreth*, 28 AD2d 290, 292 [1st Dept 1967]). The court likewise declines to issue criminal contempt charges.

Plaintiff's Motion to Dismiss Defendant Sutton's Counterclaims (Motion Sequence 2)

Defendant Sutton is the only remaining defendant as he provided a timely answer to the Complaint. In his Answer, Sutton raised a variety of counterclaims against the plaintiff on behalf of the corporate defendants (NYSCEF Doc. No. 26). The counterclaims do not clearly demarcate specific causes of action, but instead summarily seek: "(A) [an] order setting aside the judgment against GoCom, as it required arbitration; (B) order instructing plaintiff to deliver certificate held by plaintiff in escrow to GoCom; (C) order instructing to return \$100,000 from court bond to GoCom; (D) sanctions against the plaintiff for frivolous law suit; (E) sanctions against the plaintiff for breaching the Attorneys' code of Ethics; (F) sanctions for misrepresenting of facts to the court; and (G) sanctions by the court for harassing the defendants" (*id.* at 3).

Counterclaims A through C are dismissed outright, as discussed above, Sutton does not have the capacity to represent the corporate defendants in this action (*see* CPLR §321(a)).

Turning to counterclaims D through G, in deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

Sutton's counterclaim D for sanctions for a frivolous lawsuit fails to state any cognizable cause of action (*see 360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 554 [1st Dept 2011] [no independent cause of action for sanctions under §130-1.1 exists]; *Calabro & Assoc., P.C. v Katz*, 26 Misc.3d 137[A] [App Term, 1st Dept 2010]). There is also no abuse of process since "the mere commencement of the underlying civil action... via proper judicial process of provisional orders of attachment enjoining claimants from transferring or secreting assets are insufficient to form the basis for

an abuse of process claim” (*Park v State*, 226 AD2d 153, 154 [1st Dept 1996]; *see also Curiano v Suozzi*, 63 NY2d 113, 116 [1984]).

Sutton’s counterclaim E for breaching the attorney’s code of ethics fails to state a valid claim. “The violation of a disciplinary rule does not, without more, generate a cause of action” (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [1st Dept 2003]). Further, Sutton does not describe which rule plaintiff has even violated nor provide any factual basis for any alleged attorney misconduct.

Sutton’s counterclaims F and G similarly fail to state a valid cause of action. There are no recognized causes of action regarding sanctions for misrepresenting facts to the court or for harassing the defendants. Even if these were valid causes of action, Sutton has failed to provide more than conclusory allegations in his answer regarding plaintiff’s conduct (*see Wilson*, 43 AD2d at 234).

Plaintiff’s Motion for a Preliminary Injunction (Motion Sequence 1)

Plaintiff’s motion for a preliminary injunction as to defendant Sutton is granted. Pursuant to CPLR §6301, “[a] party moving for a preliminary injunction must establish a likelihood of success on the merits, irreparable harm if the injunction were not granted, and a balance of equities in the movant’s favor.” Plaintiff seeks to enjoin Sutton from transferring his ownership interest and/or assets of BluCo (NYSCEF Doc. No. 14 – Pltf’s Memo of Law at 6). The transfer of the BluCo Membership Interests from GoCom to Tarsier and Tarsier Energy was done with disregard for plaintiff’s valid attorney’s liens (*id.*).

Plaintiff has demonstrated a likelihood of success on its first cause of action to enforce its liens for attorney’s fees. As plaintiff already possesses charging and retaining liens over the BluCo Membership Interest and BluCo Membership Certificates, the purported BluCo transfer to Tarsier and Tarsier Energy is void. New York Judiciary Law §475 articulates that “the attorney who appears for a party has a lien upon his or her client’s cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment...in his or her client’s favor, and the proceeds thereof in whatever hands they may come.” Further, “[t]he court upon the petition of the client or attorney may determine and enforce the lien” (*id.*). As plaintiff received, and retains, the original Membership Certificates of BluCo, plaintiff has liens over the Membership Interest of BluCo and is likely to succeed on its cause of action to enforce attorney’s fees.

Plaintiff demonstrates the requisite irreparable harm if Sutton is not preliminarily enjoined from transferring the ownership or assets of BluCo. The sale of an ownership interest in a company constitutes irreparable harm (*see Spivak v Bertrand*, 147 AD3d 650, 651 [1st Dept 2017]; *Datwani v Datwani*, 102 AD3d 616 [1st Dept 2013]). The BluCo Membership Interest and BluCo itself are unique assets and plaintiff has a valid lien on the Membership Interest. Were Sutton to transfer or

sell his BluCo assets, plaintiff will likely be unable to sell the Membership Interest to satisfy its judgment against BluCo and GoCom.

Plaintiff shows that balance of the equities favors enjoining defendant Sutton. Enjoining Sutton will preserve the status quo and allow the plaintiff to sell the BluCo Membership Interest to satisfy its judgment. Sutton and the defaulting defendants have already demonstrated a willingness to transfer BluCo's assets and interests among Sutton's entities. A preliminary injunction will prevent Sutton from doing so going forward.

Plaintiff's Motion to Vacate Stay of Discovery (Motion Sequence 3)

Plaintiff's motion to vacate the stay of discovery is moot pursuant to the resolution of motion sequence 1 and motion sequence 2. CPLR §3214 "automatically stays disclosure until determination of the motion." As plaintiff's motion pursuant to CPLR 3211(a) has been resolved, the automatic stay is lifted.

Accordingly, based on plaintiff's evidence, plaintiff is entitled to a preliminary injunction. It is therefore

ORDERED that, due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of plaintiff Riemer & Braunstein, LLP and against Defendant Isaac Sutton and that Plaintiff is entitled to a preliminary injunction on the ground that Defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the Plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of \$120,225.79 conditioned that plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the Defendant all damages and costs which may be sustained by reason of this injunction; Defendant, his agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of Defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

- (a) Selling or transferring any interests or assets of BluCo, it is further

ORDERED that counsels are directed to appear for a preliminary conference in Part 33, 71 Thomas Street, New York, New York on September 26, 2018, at 10:00 AM, it is further

ORDERED, that plaintiff Riemer & Braunstein, LLP is granted a default judgment against defendants BluCo, GoCom, Tarsier, and Tarsier Energy (motion

sequence 2) in the amount of \$120,225.79, and statutory interest accruing from August 21, 2017, at the statutory rate, plus costs, it is further

ORDERED, that defendants BluCo, GoCom, Tarsier, and Tarsier Energy, their agents, servants, employees, and all other persons acting under the jurisdiction, supervision, and/or direction of defendant are enjoined and restrained from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise any of the following acts:


(a) Selling or transferring any interests or assets of BluCo, it is further

ORDERED that a copy of this decision and order with notice of entry is to be served on all parties within 20 days of entry of this order and proof of service is to be filed with the New York County Clerk within 20 days of said service, it is further

ORDERED, that plaintiff's motion to dismiss counterclaims (motion sequence 2) is granted, and defendant's counterclaims are dismissed, it is further

ORDERED, that plaintiff's motion to vacate the automatic stay of discovery (motion sequence 3) is denied as moot, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment as written as to defendants BluCo, GoCom, Tarsier, and Tarsier Energy.

<u>8/8/2018</u> DATE	 MARGARET A. CHAN, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE