SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2**

Justice

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INDEX NO. 654282/2016

FERMO JAECKLE,

MOTION SEQ. NO. 001

Plaintiff,

- v -

JOHN JURASIN, JOHN DOE, JANE DOE, and ABC CORP.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DECLARATORY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this action for, *inter alia*, common law and securities fraud, plaintiff Fermo Jaeckle ("Jaeckle") moves, pursuant to CPLR 3215 and 3213, for a default judgment and for summary judgment in lieu of a complaint against defendant John Jurasin ("Jurasin"). After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion, which is unopposed, is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

On January 19, 2011, Jaeckle entered into a securities purchase agreement with Radiant Oil & Gas, Inc. ("Radiant"), pursuant to which he agreed to invest $475,000 ("the principal amount") in the company. (Doc. 7 at 2, 17–28.) The agreement was signed by Jurasin acting in his official capacity as Radiant's chief executive officer. (*Id.* at 28.) Based on the securities

purchase agreement and the investment, Jaeckle and Jurasin, again acting in his official capacity, executed a promissory note in Jaeckle's favor on February 1, 2011. (*Id.* at 2, 9–14.) The promissory note provided a maturity date of July 31, 2011, by which date Radiant was to immediately pay Jaeckle "any and all outstanding principal and Interest due and owing under the Note . . . ." (*Id.* at 3, 9.) The note also provided for a 10% per annum interest rate on Jaeckle's investment based on a 360-day year. (*Id.*)

Radiant failed to pay Jaeckle any portion of the principal amount and the accrued interest on July 31, 2011. (*Id.* at 3.) According to Jaeckle, Radiant's failure to pay the principal amount and the accumulated interest by the maturity date constituted an "event of default." (*Id.* at 3–4.) On March 19, 2014, Jaeckle sent a written notice to Radiant stating his intention to declare the amount due and owing after ten days. (*Id.* at 4, 32–33.) On April 28, 2014, after Radiant had paid neither any portion of the principal amount nor the accumulated interest, Jaeckle sent a second notice to Radiant declaring the entire amount as due and payable. (*Id.* at 4, 35.)

Jaeckle thereafter filed suit against Radiant in the United States District Court for the Southern District of New York ("the District Court action") based on Radiant's failure to pay any portion of the amount owed under the promissory note at the time, which was $628,846.12. (Docs. 7–9, 11, 13–14.) In the District Court action, Jaeckle's claims against Radiant were for failure to pay the promissory note and for breach of contract. (Doc. 7 at 6–7.) In opposition to Jaeckle's claims, Radiant contended that it was not liable for breach of contract or for failure to pay the promissory note because repayment of Jaeckle's investment was "conditioned upon a broker-dealer of securities named John Thomas Financial ("JTF") raising new capital for [Radiant.]" (*See* Docs. 4 at 4, 14 at 2–13.) In the District Court action, Radiant filed, by way of a third-party complaint, causes of action against John Thomas Financial, LLC for fraud, fraud in

the inducement, and breach of contract. (Doc. 14 at 11–12.) On May 2, 2016, the District Court (Stanton, J.) granted Jaeckle's motion for summary judgment against Radiant, and awarded Jaeckle $751,252.33. (Doc. 11 at 3.)

On August 15, 2016, Jaeckle commenced the captioned action by serving a summons with notice on Jurasin alleging, *inter alia*, common law fraud and fraudulent omissions, breach of fiduciary duty, negligence, and malfeasance. (Doc. 1.) Jurasin never demanded service of the complaint. (Doc. 4 at 3.) On December 21, 2017, Jaeckle filed a motion for a default judgment against Jurasin (Doc. 3). Jaeckle argues that Jurasin, as an officer of Radiant, is personally liable to him because Jurasin caused Radiant to answer in the District Court action that Radiant's repayment of the principal amount and accrued interest was conditioned on JTF's ability to raise new capital for Radiant. (Doc. 4 at 4–5.) According to Jaeckle, neither the promissory note nor the securities purchase agreement made repayment of the loan contingent upon JTF raising capital for Radiant. (*Id.* at 5.) Therefore, Jaeckle asserts, because Jurasin was the CEO of Radiant and Radiant admitted in its answer in the District Court action that the promissory note and securities purchase agreement misrepresented material facts since those documents did not condition repayment of the loan on JTF's ability to raise new capital, Jurasin is personally liable. (*Id.* at 5–6.) Jaeckle seeks $851,655.47 in damages. (*Id.* at 7.)

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CLPR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts

constituting the claim, and proof of the defaulting party's default in answering or appearing." *Atlantic Cas. Ins. Co. v. RJNJ Servs. Inc.*, 89 AD3d 649, 651 (2d Dept. 2011).

CPLR 3213 further states that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." The plaintiff may establish his "entitlement to summary judgment in lieu of [a] complaint by submitting a promissory note executed by [the] defendant[] and proof of [the] defendant['s] failure to make payments according to its terms." (*Blumenstein v Waspit Group, Inc.*, 140 AD3d 620, 620 [1st Dept 2016].) "Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense." (*Zyskind v FaceCake Mktg. Techs., Inc.*, 101 AD3d 550, 551 [1st Dept 2012].)

Here, Jaeckle has established his prima facie entitlement to summary judgment in lieu of a complaint against Radiant, and he argues against Jurasin, by submitting the promissory note and the securities purchase agreement that the two parties executed, as well as proof that Radiant has not paid any amount thereunder. (Docs. 4 at 6, 7 at 8–30, 11 at 3.) (*See SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996] (a plaintiff's prima facie case under CPLR 3213 includes submitting proof of the agreement to pay as well as defendant's failure to make payments pursuant to the agreement).) The promissory note provides that, "[o]n the Maturity Date, unless, and to the extent, converted into Preferred Stock, and any all outstanding principal and Interest due and owing under the Note shall be immediately paid by the Company" (*id.* at 9) to Jaeckle. Although the promissory note refers to the securities purchase agreement (*id.* at 9, 11, 13), no provision in either document conditions the repayment of Jaeckle's investment in Radiant

on JTF's ability to raise new capital. Therefore, since Jaeckle's claim is based upon the express terms of the note, he argues that has established his prima facie case by proof of the promissory note and Jurasin's failure to personally tender payments thereunder. (*See E. New York Sav. Bank v Baccaray*, 214 AD2d 601, 602 [2d Dept 1995] (holding that plaintiff established prima facie case under CPLR 3213 when his claim was based exclusively on the terms of the promissory note without resort to the securities purchase agreement).)

Nevertheless, this Court finds that Jaeckle is not entitled to a judgment against Jurasin in his personal capacity. In an affirmation supporting his motion for a default judgment, plaintiff, citing *Lichtman v Mount Judah Cemetery*, 269 AD2d 319 (1st Dept 2000), argued that "[i]t is well-settled that the officers of a corporation may be held personally liable for torts committed on behalf of the corporation." (Doc. 4 at 6.) However, to hold a corporate owner liable for an underlying corporate obligation, a plaintiff must pierce the corporate veil. (*See Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140–41 [1993].) "[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 result in plaintiff's injury." (*Ciavarella v Zagaglia*, 132 AD3d 608, 608–09 [1st Dept 2015].)

Jaeckle has not satisfied this two-part test. In seeking to pierce the corporate veil, a "[p]laintiff must plead and prove with specific facts that the corporation has been used to conduct the personal business of the owner or shareholder . . . ." (*Brito v DILP Corp.*, 282 AD2d 320, 321 [1st Dept 2001]; *see also Bonanni v Straight Arrow Publs., Inc.*, 133 AD2d 585, 587 [1st Dept 1987] ("To disregard the corporate form, it must be established not only that an individual controlled a corporation, but also that the corporation was used for the transaction of

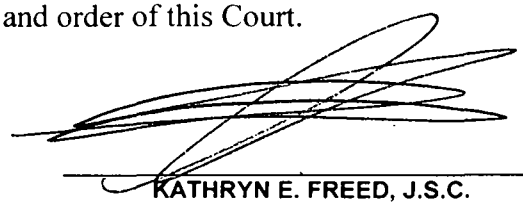
[a] shareholder's personal business.").) In fact, Jaeckle admits in his supporting papers that Jurasin signed both the promissory note and the securities purchase agreement in his representative capacity as an officer of Radiant. (Docs. 7 at 14, 28; 12 at 2.) Additionally, Jaeckle has failed to produce any evidence of how Jurasin's alleged fraud was used for his personal business. (*See Padilla v Edison Transport, Inc.*, 104 AD3d 518, 518–19 [1st Dept 2013] (refusing to pierce corporate veil where there was a lack of evidence that defendant "was doing business in his individual capacity, or that he used his corporate position for personal rather than corporate ends.") (citation omitted).)

Given the above, Jaeckle is not entitled to either a default judgment or to summary judgment in lieu of a complaint because he has not established Jurasin's personal liability absent a piercing of the corporate veil.

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff Fermo Jaeckle's motion for a default judgment against defendant John Jurasin is denied; and it is further

ORDERED that this constitutes the decision and order of this Court.



10/01/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE