

Alghafly v Ewiess

2019 NY Slip Op 33502(U)

November 20, 2019

Supreme Court, New York County

Docket Number: 650335/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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KHALID ALGHAFLY, AHMAD ALKHAMEES,
MOHAMMED ALHULEIMI, FAHAD ALSHAIKH, and
HAMZA ALALI,

Plaintiffs,

- v -

FADI EWIESS, a/a/a "Fadi Awise,"

Defendant.

INDEX NO. 650335/2019

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is ordered that the motion is granted in part.

Plaintiffs move, pursuant to CPLR 3215, for a default judgment against defendant for failure to timely respond to plaintiffs' summons and unverified complaint (NYSCEF 76). In motion 02, plaintiffs seek a default judgment as to their conversion, fraud, breach of contract, unjust enrichment, and breach of fiduciary duty claims (*id.*). To date, defendant, who was personally served on January 23, 2019, (NYSCEF 4) has not answered, responded, or otherwise appeared.

"On a motion for a default judgment under CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing" (*Medina v Sheng Hui Realty LLC*, 2018 WL 2136441, *6-7 [Sup Ct, NY County 2018] [citations omitted]). "CPLR 3215 (f)

requires that an applicant for a default judgment file proof by affidavit made by the [moving] party of the facts constituting the claim" (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]).

The movant may, however, file a "verified complaint instead of the affidavit when the complaint has been properly served" and, because "the [movant] does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists" (*id.* at 70-71).

Plaintiffs have met their burden as to the fraud claims.

In support of this motion, plaintiffs provide proof of service of the summons and complaint upon defendant (NYSCEF 77-78), as well as affidavits of each of the plaintiffs setting forth the facts of their involvement with defendant's allegedly fraudulent investment scheme (see NYSCEF 79, 87, 91, 104, 117). Plaintiffs' counsel further states that no answer or other response to the complaint was timely interposed (NYSCEF 70).

"The elements of fraud are a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages" (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [1st Dept 2010]), and the factual allegations supporting a fraud claim must be stated with particularity under CPLR 3016 (b). Together, plaintiffs state in their affidavits that defendant intentionally misrepresented that they would receive large amounts of interest (22%) for their invested funds transferred to defendant's business, nonparty Golden Bridge Ltd. (Golden Bridge), and that those investments were "guaranteed" by a nonparty, international financial institution in order to coerce plaintiffs into wiring funds to Golden Bridge, knowing that the promised return rates, guarantees, and promise that the investments could be withdrawn at any time were false. (NYSCEF 79, 87, 91, 104, and 117). Plaintiffs further assert that they reasonably relied on defendant's misrepresentations and were damaged by transferring funds to Golden

Bridge, which were not returned and which did not generate the promised profits. Accordingly, the motion is granted as to the fraud claims.

The motion is denied as to the remaining claims as plaintiffs do not adequately allege or demonstrate with their submissions that they contracted with or transferred funds to defendant; rather, they entered contracts with and wired funds to Golden Bridge. Further, plaintiffs do not adequately establish a fiduciary relationship between plaintiffs and defendant, individually, or that plaintiff, individually, converted or benefited from the allegedly fraudulent investments. Accordingly, the motion is denied as to the conversion, breach of contract, breach of fiduciary duty, and unjust enrichment claims, which are severed and shall continue separately from the fraud claims resolved in this decision and order.

With respect to the fraud claims, the plaintiffs assert that they transferred the following sums to Golden Bridge: Allghafly, \$255,319; Alkhamees, \$50,000; Alhuleimi, \$146,000; Alshaikh, \$117,779; and Alali, \$13,000. Plaintiffs' request for pre-judgment interest dating from April 11, 2017 (the date on which defendant pleaded guilty in federal court) is granted. Plaintiffs' request, in the complaint, for punitive damages is denied as wholly unsupported in their submissions in connection with this motion.

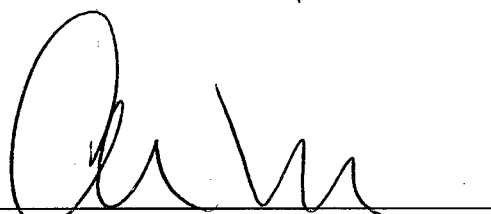
Accordingly, it is

ORDERED that plaintiffs' motion for a default judgment, motion sequence 002, is granted in part and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$570,398, together with interest at the statutory rate from April 11, 2017, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, for a total sum of \$_____, and plaintiff shall have execution thereof; and it is further

ORDERED that the second cause of action for fraud is severed and the remainder of the action continues; and it is further

ORDERED that the parties shall appear for a status conference on 1/28/20 at 12 am/pm.

11/20/2019
DATE


ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
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