

Silverstein v Azokbb, LLC
2021 NY Slip Op 31825(U)
May 27, 2021
Supreme Court, New York County
Docket Number: 650342/2021
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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DANIEL SILVERSTEIN,

Plaintiff,

- v -

AZOKBB, LLC, LM CAPITAL SOLUTIONS, LLC

Defendant.

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INDEX NO. 650342/2021

MOTION DATE 03/31/2021

MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 21, 22, 26, 27, 40, 41, 42, 43, 44

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 45, 46, 47, 48, 49, 50

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 55, 56, 57, 58, 59, 61

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, the motions are decided as follows:

Plaintiff moves under motion sequence 001 for a default judgment against defendant AZOKBB, LLC. AZOKBB, LLC cross-moves for an Order vacating any default *nunc pro tunc* and retroactively extending the period of time to answer or move as to the Complaint. Defendant, LM Capital Solutions, LLC cross-moves to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) and (7). AZOKBB, LLC also moves to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) and (7) under motion sequence 002. Plaintiff's motion made under sequence 003 is resolved pursuant to the stipulation e-filed May 7, 2021.

Plaintiff commenced the instant action by filing a summons and complaint on January 18, 2021. Defendant AZOKBB, LLC was served pursuant to CPLR 311(1) on February 9, 2021 and

filed its motion to enter a default judgment on March 8, 2021. Thereafter, AZOKBB, LLC filed its cross-motion on March 15, 2021. Pursuant to CPLR 3012(d), Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default. There is strong public policy in favor of resolving cases on the merits, defendant's default was not willful, and plaintiff has not shown any prejudice. Based upon defendant's de minimis delay in answering this action, plaintiff's motion seeking to enter a default judgment is denied and defendant AZOKBB, LLC will be granted additional time to answer or otherwise move as to the instant complaint.

Plaintiff's complaint alleges as follows: Plaintiff, as assignee of Allied Millennial Partners, LLC ("AMP"), seeks damages for breach of contract and a declaratory judgment seeking \$456,440.94 in financial advisory fees allegedly owed pursuant to an Engagement Agreement dated June 1, 2018 between AMP and LuxeMark, now known as AZOKBB, LLC. In June 2018, LuxeMark executed an Engagement Agreement to retain AMP to serve as a financial advisor for the purpose of sourcing investors and facilitating the private placement of debt financing and/or equity investment to grow LuxeMark's business. In return for AMP's services under the Engagement Agreement, LuxeMark, together with "its parent, its direct and indirect subsidiaries and any other entity formed for the purpose of a private capital financing" agreed to pay AMP a cash fee equal to six percent (6.0%) of the dollar value of any consummated transaction (the "Advisory Fee"), deemed to be payable at the closing of any such transaction. Silverstein worked as the lead financial advisor and placement agent for LuxeMark under the Engagement Agreement. AMP introduced LuxeMark to an investor, CCUR Holdings, Inc. ("CCUR"), who signed a letter of intent on October 2, 2018 to enter an investment transaction with LuxeMark. Thereafter, CCUR

formed LM Capital as its wholly owned subsidiary to acquire LuxeMark's operating assets and liabilities. On February 13, 2019, LM Capital entered an agreement to purchase substantially all the operating assets and assume certain liabilities of LuxeMark (the "Asset Purchase Agreement"). The Asset Purchase Agreement provides for the following consideration by LM Capital to LuxeMark: (1) \$1,200,000 in cash at closing; (2) four cash earn-out payments totaling \$4,000,000; (3) warrants to purchase up to 444,630 shares of CCUR common stock valued at \$2,500,000; and (4) \$10,350,000 in debt financing made available to LM Capital for the purposes of working capital. LuxeMark also received equity consideration in the form of a membership interest in LM Capital equal to 20% of LM Capital's outstanding equity capitalization. Plaintiff seeks a total advisory fee of \$528,440.94 consisting of (1) 6% of the \$1,200,000 in cash at closing, or \$72,000; (2) 6% of the net present value of the four cash earnout payments totaling \$4,000,000, adjusted to \$3,037,349, or \$182,240.94; (3) 6% of the value of the warrants totaling \$2,500,000, or \$150,000; and (4) 6% of the \$10,350,000 capital commitment to LM Capital adjusted to reflect LuxeMark 20% interest in LM Capital (in other words, 6% of \$2,070,000), or \$124,200. At closing, LuxeMark paid AMP \$72,000 of the Advisory Fee, which reflected the portion of the Advisory Fee attributable to the \$1,200,000 in cash LuxeMark received at closing, but LuxeMark thereafter refused to pay AMP the remaining principal amount of \$456,440.94 that is owed to AMP, resulting in the instant action.

On a motion to dismiss based upon documentary evidence, defendant must present evidence which "utterly refutes" plaintiff's allegations and establishes a defense as a matter of law, *See, Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 (2002). "On a motion to dismiss pursuant to CPLR R. 3211(a)(7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable

inference. The test to be applied is whether the complaint “gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments.” *JP Morgan Chase v J.H. Electric of NY*, 69 A.D.3d 802. The elements of a cause of action for breach of contract are, the existence of a contract, plaintiff’s performance under the contract, a breach by the defendant, and damages, See, *JP Morgan Chase v. J.H. Elec. Of New York, Inc.*, 69 A.D.3d 802 (2d Dept. 2010).

In support of defendants’ motions, defendants submit the affidavits of Robert Costomiris, a part owner of AMP, John Parmigiani, the CEO of AMP and Avraham Zeines, the CEO of AZOKBB, LLC. Mr. Costomiris’ affidavit establishes that the \$72,000.00 initial installment was paid to AMP at the closing, that there would be a future 6% commission on any future cash payments made to AZOKBB, LLC (Luxemark) and that any commission on the 20% of LM Capital Solutions stock that was transferred to Luxemark would be waived. Mr. Parmagiani’s affidavit establishes that AMP makes no representation that any payments were due to AMP as commissions under the Engagement Agreement. Mr. Zeines’ affidavit establishes that the agreement was negotiated based upon a 6% commission of cash payments actually made, and that no cash payments were ever made after the closing of the sale due to a lack of performance.

Factual affidavits do not constitute documentary evidence within the meaning of the statute. See *Flowers v. 73rd Townhouse LLC*, 99 A.D.3d 431, 431, 951 N.Y.S.2d 393 (1st Dep’t 2012). As such, defendants have failed to present evidence which “utterly refutes” plaintiff’s allegations and establishes a defense as a matter of law, raising only issues as to the valuation of any potential commissions under the Engagement Agreement. Further, an examination of

plaintiff's complaint reveals that plaintiff has sufficiently pled causes of action for breach of contract as against both defendants. As such, it is hereby

ORDERED that plaintiff's motion seeking to enter a default judgment against AZOKBB, LLC is DENIED; and it is further

ORDERED that AZOKBB, LLC's cross-motion seeking an extension of time to answer the complaint is GRANTED; and it is further

ORDERED that AZOKBB, LLC's motion and LM Capital Solutions, LLC's cross-motion to dismiss are DENIED; and it is further

ORDERED that the defendants shall serve an answer to the complaint within 20 days from the date of this Order; and it is further

ORDERED Motion Seq. No. 003 is permitted to be WITHDRAWN; and it is further

ORDERED that pursuant to the so-ordered stipulation e-filed on May 7, 2021 the Clerk shall seal NYSCEF Doc. Nos. 47 and 50 pursuant to Section 216.1 of the Uniform Rules of the Trial Courts.

5/27/2021

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

LAURENCE L. LOVE, J.S.C.