

**Fred R. Gumbinner Living Trust v Kronos Advanced
Tech., Inc.**

2021 NY Slip Op 32391(U)

October 26, 2021

Supreme Court, New York County

Docket Number: Index No. 656315/2020

Judge: Louis L. Nock

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

THE FRED R. GUMBINNER LIVING TRUST, FRED
GUMBINNER, TRUSTEE; and RICHARD SUN,

Plaintiffs,

- v -

KRONOS ADVANCED TECHNOLOGIES, INC.,

Defendant.

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INDEX NO. 656315/2020

MOTION DATE 06/14/2021,
07/02/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 58, 59, 60, 61, 62, and 63

were read on this motion for DEFAULT JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion for PRO HAC VICE ADMISSION.

LOUIS L. NOCK, J.

Upon the foregoing documents, and after argument, and upon due deliberation, it is ordered that the referenced motions are denied for the reasons stated hereinbelow.

This is an action to enforce the terms of a convertible promissory note delivered by defendant corporation to plaintiff trust with a face amount of \$75,000 (NYSCEF Doc. No. 2), and a convertible promissory note delivered by defendant corporation to plaintiff individual with a face amount of \$125,000 (NYSCEF Doc. No. 3). The action was commenced November 16, 2020. Defendant then removed the action on January 20, 2021, to the U.S. District Court for the Central District of California and after litigation by the parties in that forum, the action was remanded to this court on May 25, 2021. But on June 14, 2021, plaintiffs filed a motion for a default judgment (motion seq. no. 001). Defendant thereafter appeared by way of local counsel –

Daniel R. Marx, Esq. – on June 25, 2021, for the admission of a California attorney, Marc S. Applbaum, Esq., as counsel for the defendant *pro hac vice* (motion seq. no. 002). Plaintiffs vigorously oppose the motion for *pro hac vice* admission.

The Motion for a Default Judgment (seq. no. 001) is Denied:

Defendant’s local counsel pragmatically points out that defendant had been actively involved in the litigation of the instant controversy since January 20, 2021, when it sought removal of the action to the U.S. District Court for the Central District of California and engaged in litigation in that forum until the action was remanded back to this jurisdiction by federal order dated March 25, 2021 (*see*, NYSCEF Doc. No. 18). Plaintiffs moved for a default judgment on June 14, 2021 (NYSCEF Doc. No. 19). A mere eleven days afterward, defendant appeared by way of its *pro hac vice* motion and also, thereafter, filed papers in opposition to the motion for a default judgment. This set of circumstances does not resemble the type of situation which would warrant the granting of judgment “on default.” Defendant has undeniably taken this litigation seriously and has been involved in its defense, both in this action and in the California federal District Court action. Under such circumstances, this court is loath to bring a halt to defendant’s defense through a sudden grant of final judgment as plaintiffs would have this court do.

This is especially so in light of defendant’s counsel’s statement of a meritorious defense. Defendant’s counsel posits that the action is untimely based on the notion that the promissory notes came due on or about April 27, 2010, which starts the six-year accrual period under CPLR 213 (2); but this action was commenced ten years later, in 2020. In addition, defendant’s proposed answer (NYSCEF Doc. No. 60) asserts various affirmative defenses, including one for offset. In circumstances such as these, where a defendant is shown to have been actively involved in the litigation and has endeavored to put forth a meritorious defense (subject to

satisfaction of its burden of proof and final court determination), the proper exercise of discretion of judicial discretion would be to allow this action to proceed on the merits and to compel the acceptance of defendant's answer filed herein as NYSCEF Document No. 60, pursuant to CPLR 2004 (*see also*, CPLR 3012 [d]).

Accordingly, the motion for a default judgment is denied.

The Motion for *Pro Hac Vice* Admission (seq. no. 002) is Denied:

Defendant is represented by local counsel – Daniel R. Marx, Esq. In opposition to the motion for *pro hac vice* admission of California attorney Marc S. Applbaum, Esq., plaintiffs draw the court's attention to Mr. Applbaum's "Certificate of Standing" from the State Bar of California (NNYSCEF Doc. No. 41), which, while confirming his current active status, notes no less than two prior suspensions from practice. The record, additionally, contains evidence of a sanction levied against Mr. Applbaum by the U.S. District Court in California in the form of an obligation to pay adversary attorneys' fees and costs in the amount of \$22,855.05 (*see*, NYSCEF Doc. No. 55).¹

Admission of attorneys *pro hac vice* is a matter of discretion. The rules of the Court of Appeals provide that out-of-state attorneys "**may be admitted *pro hac vice* in the discretion of any court of record**" (22 NYCRR 520.11 [a] [1] [boldfacing added]). The rules of the Appellate Division, First Department, synchronize with that policy of discretion (*see*, 22 NYCRR 602.2 ["may be admitted . . . in the discretion of the court"]). Neither Mr. Applbaum, or local counsel, Mr. Marx, have presented this court with any compelling reason why Mr. Applbaum's requested

¹ Curiously, Mr. Applbaum submits only one page of that nine-page document (*compare* NYSCEF Doc. No. 55 [nine-page, complete, federal order, submitted by plaintiffs] *with* NYSCEF Doc. No. 57 [page 8 out of the nine-page document, submitted by Mr. Applbaum]).

participation as a co-counsel of record is vital to the defense of the action. As noted at the outset, this action involves a suit on two promissory notes.

Thus, after due deliberation, the court exercises its discretion in not granting the motion for *pro hac vice* in this particular case due to the observations hereinabove made.²

Accordingly, it is

ORDERED that plaintiffs' motion for a default judgment (seq. no. 001) is denied; and it is further

ORDERED that the proposed answer filed in this action as NYSCEF Doc. No. 60 shall be deemed the answer in this action; and it is further

ORDERED that defendant's motion for *pro hac vice* admission of California counsel is denied; and it is further

ORDERED that counsel for the parties are directed, within 30 days from the filing of this order, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf>, to the Principal Court Attorney of Part 38 at lfurdyna@nycourts.gov.

² The instant denial of admission relates, obviously, only to California counsel's request to be officially recognized as co-counsel of record. Except for court appearances and execution and submission of filings, nothing prevents said counsel from offering assistance to local counsel in a non-official capacity, subject to local counsel's willingness to accept such offers of assistance (*see*, NYSCEF Doc. No. 57 [Applbaum Reply Aff.] ¶ 7 [indicating California counsel's involvement "in prelitigation and settlement discussions"]).

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>10/26/2021</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE