

Abad v iAero Group Holdco 2 LLC

2023 NY Slip Op 33779(U)

October 24, 2023

Supreme Court, New York County

Docket Number: Index No. 652510/2022

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

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

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CLAUDIA ABAD,

Plaintiff,

- v -

IAERO GROUP HOLDCO 2 LLC, IAERO GROUP
HOLDCO LLC, GSO CAPITAL PARTNERS LP, GSO COF
III AIV-AP LP, GSO COF III AIV-OS LP, GSO COF III AIV-
NOS LP, GSO COF III CO-INVEST AIV-AP LP, GSO COF
III CO-INVEST AIV-OS LP, GSO COF III CO-INVEST AIV-
NOS LP, GSO CO-INVESTMENT FUND-D LP, GSO
CAPITAL OPPORTUNITIES ASSOCIATES III LLC, GSO
COF III CO-INVESTMENT ASSOCIATES LLC, and GSO
CO-INVESTMENT FUND-D ASSOCIATES LLC,

Defendants.

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INDEX NO. 652510/2022

MOTION DATE _____

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 148, 149, 150, 151, 152, 153, 154, 155, 156

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

In motion seq. no. 007, plaintiff moves, pursuant to CPLR 3215(a), for a default judgment against defendants iAero Group Holdco LLC (iAero 1), iAero Group Holdco 2 LLC (iAero 2), iAero Group Holdco 3 LLC (iAero 3), iAero Group Holdco 4 LLC (iAero 4), and iAero Group Holdco 5 LLC (iAero 5).

“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].) “Some proof of liability is also required to satisfy the

court as to the prima facie validity of the uncontested cause of action. The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts.”

(*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994] [citations omitted].)

Proof of Facts

In the amended complaint, plaintiff alleges claims for breach of Section 11 of the iAero 2 Operating Agreement against iAero 1 and iAero 2 (first cause of action), violation of Delaware books and records against iAero 2 (third cause of action), breach Sections 4, 7, and 14 of the iAero 2 Operating Agreement with respect to a restructuring transaction (fourth cause of action), tortious interference with contract against iAero 1, iAero 3, iAero 4, and iAero 5 (fifth cause of action), fraud against iAero 1, iAero 3, iAero 4, and iAero 5 (sixth cause of action), and breach of the covenant of good faith and fair dealing against iAero 1 (seventh cause of action). (NYSCEF 153, Amended Complaint.) Plaintiff seeks production of books and records, an injunction, a declaratory judgment, an unwinding of the restructuring transaction, compensatory damages, and attorneys' fees. (*Id.* at 29.)

CPLR 3215 (f) requires a plaintiff to submit “proof of the facts constituting the claim, the default and the amount due ... by affidavit made by the party.” Here, plaintiff submits an affidavit in support of this motion. (NYSCEF 155, Abad aff.) Plaintiff states that “[a]lthough I have multiple causes of action against the Defaulting Defendants, for purposes of this motion only which seeks a default judgment, I hereby elect the remedy of rescission based upon the Sixth Cause of Action. This election does not apply to the

non-defaulting Defendants.”¹ (*Id.* ¶ 9.) Plaintiff further states that “[b]ecause the value of my original investment was \$13,693,750.00 (Dkt. No. 110, Exhibit A), I seek such sum in rescission plus interest at the New York Statutory rate of 9% from the date of my investment, August 29, 2018.” (*Id.* ¶ 10.)

“On discovery of the fraud . . . : (1) He [or she] may rescind the contract by promptly tendering back all that he [or she] has received under it. He [or she] may then bring an action at law upon the rescission to recover back what he [or she] has paid, or (2) defend an action brought against him [or her] on the contract, setting forth the fraud and rescission as a defense. (3) He [or she] may bring an action in equity for rescission These remedies are based upon a disaffirmance of the contract, in which the party rescinding or desiring to rescind in effect says, you have induced me to enter into this contract by fraud. I offer you what I received. Give me back that which you received, or if that be impossible pay me its value. (4) He [or she] may affirm the contract and sue for his [or her] damages. (5) If sued upon the contract, he [or she] may counterclaim his [or her] damages.”

(*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 56 [1st Dept 2013] [internal quotation marks and citation omitted].) Plaintiff did not bring an action for rescission; in fact, the amended complaint is completely devoid of the word rescission. There is also no indication from the amended complaint or plaintiff’s affidavit that she did rescind the Operating Agreement. Plaintiff elected to sue for breach of contract and fraud, among her other causes of action, seeking monetary damages. She cannot simply state in an affidavit that she now elects rescission on her fraud claim without pleading such. Plaintiff provides no support justifying the election of this remedy at this late stage. Notice or its equivalent is required in cases of rescission. (*E. Heller & Bro. v Cont. Mills*, 196 AD 7, 13 [1st Dept 1921.]

¹ Based on this statement, it is unclear to the court whether plaintiff is withdrawing her other claims against these defendants.

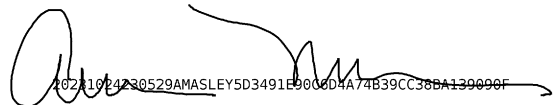
Further, "in an action for rescission, all parties to the agreement must be brought before the court." (*Frymer v Bell*, 99 AD2d 91, 95 [1st Dept 1984] [citations omitted].)

Mario Abad is a party to the Operating Agreement, albeit to only certain provisions, but since plaintiff appears to want the entire Operating Agreement rescinded, he would have to be a party to this action.

Plaintiff's affidavit is also woefully inadequate to support entry of a default judgment. Plaintiff fails to provide firsthand confirmation of the facts to support her claims against these defendants. Plaintiff does not affirm how she was defrauded or how these defendants have breached the Operating Agreement. Absent adequate proof of facts comprising the claim, the court cannot grant this default judgment motion.

Accordingly, it is

ORDERED that this motion is denied.



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10/24/2023

DATE

ANDREA MASLEY, J.S.C.

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