

W. & M. Operating, L.L.C. v Bakhshi

2019 NY Slip Op 32865(U)

September 27, 2019

Supreme Court, New York County

Docket Number: 651200/2015

Judge: Jennifer G. Schechter

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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: PART 54

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W. & M. OPERATING, L.L.C.,

Index No.: 651200/2015

Plaintiff,

DECISION & ORDER

-against-

JON BAKHSHI, FRANK PORCO, JOHN BEST,
and TIMOTHY RUGISFORD,

Defendants.

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FRANK PORCO,

Plaintiff,

-against-

150 RFT VARICK CORP., LINA KAY, BARRY
MULLINEAUX, JED STILLER, HIROKUNI SAI,
G166NY LLC, LARRY HUGHES, and LDH
INVESTMENTS LIMITED PARTNERHIP,

Defendants.

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JENNIFER G. SCHECTER, J.:

Third-party plaintiff Frank Porco moves for a default judgment against third-party defendants 150 RFT Varick Corp. (the Company), G166NY, LLC, Larry Hughes, and LDH Investments Limited Partnership (collectively, the LDH Parties). The LDH Parties did not respond to the motion. The motion is granted in part.

The main action in this case concerned enforcement of a “good guy” guaranty of a nightclub’s unpaid rent.¹ The guarantors were shareholders of the Company, which operated the nightclub. The third-party action involves claims by one of those guarantors, Porco, against (1) the shareholders who paid themselves distributions instead

¹ The main action settled (*see* Dkt. 172 at 6).

of paying the rent and (2) the Company due to its failure to pay him a guaranteed monthly payment. By order dated March 29, 2018, the court granted Porco leave to file an amended third-party complaint (the ATPC) that includes causes of actions for (1) constructive fraudulent conveyance against all of the third-party defendants; (2) intentional fraudulent conveyance against all of the third-party defendants; (3) breach of section 4.1 of the Company's shareholders agreement against all of the third-party defendants; and (4) breach of section 4.2 of the shareholders agreement against the Company (Dkt. 129 [the 2018 Decision] at 20). The court assumes familiarity with the 2018 Decision, which extensively addresses the merits of Porco's claims.

Porco filed the ATPC on April 6, 2018 (Dkt. 130). The LDH Parties were served in June 2018 (*see* Dkts. 178-181). They never filed an answer or moved to dismiss. Less than a year after the default, Porco made this motion for a default judgment on July 10, 2019.² Porco submits an affidavit of merit (Dkt. 188) along with proof of additional service pursuant to CPLR 3215[g] (*see* Dkt. 197).

Porco has made a sufficient showing of merit as against the Company to warrant a default judgment on the fourth cause of action (*see Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]).³ Porco is entitled to recover his one-third portion of the \$25,000 monthly payments from the Company, \$8,333.33 (*see* Dkt. 188 at 4-5), pursuant section

² Barry Mullineaux is the only third-party defendant who appeared and discovery is ongoing (*see* Dkt. 195).

³ Though the 2018 Decision only permitted this claim to be asserted against the Company and the ATPC only asserts the claim against the Company (*see* ATPC at 19), the ad damnum clause seeks joint and several liability against all of the third-party defendants on this claim (*see id.* at 21). That is improper as the court already expressly denied Porco leave to assert veil-piercing claims (*see* 2018 Decision at 11-14).

4.2 of the shareholders agreement (*see* 2018 Decision at 14). The monthly payments stopped being made after February 2012 (*see* Dkt. 188 at 5). Porco is entitled to these payments for the 26 months between March 2012 and when the nightclub shut down in April 2014 – a total of \$216,666.58.⁴

Porco, however, has not made a sufficient showing of merit on the other claims for fraudulent conveyance and breach of contract, which are based on the LDH Defendants' improper distributions from the Company while it was insolvent and when it had not paid its rent--an express violation of section 4.1 of the shareholders agreement (*see* 2018 Decision at 15-17). Porco seeks to set aside conveyances from the Company to the third-party defendants but does not assert how much was conveyed or should be set aside. While the allegation that distributions were paid is deemed admitted due to the LDH Defendants' default (*see Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]), Porco does not submit any proof of the amount of the distributions and without any proof there can be no award. The court recognizes that Porco was unable to obtain discovery from the LDH Defendants due to their default. If Porco lacks the requisite proof, Porco may issue subpoenas (which, if necessary, the court will enforce upon a proper motion to compel and which should be made by order to show cause).⁵ Porco

⁴ The court selects March 15, 2013 as a reasonable intermediate date from which pre-judgment interest shall run (*see Arany v Arany*, 282 AD2d 389, 390 [1st Dept 2001]).

⁵ It is unclear if Porco has the Company's financial records or if such records are sufficient to show the distributions. The court assumes that Porco lacks this information since, if he had it, he would presumably have submitted it in support of this motion. Indeed, Porco recently informed the court that he just obtained a significant amount of bank records in response to a subpoena.

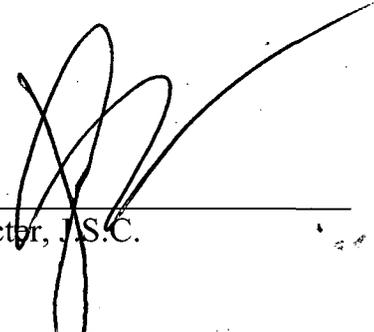
may renew his motion for a default judgment on these claims upon submission of sufficient proof.

That said, Porco cannot recover the \$150,000 he paid to settle the main action (*see* Dkt. 176 at 1). Porco was denied leave to assert a claim for indemnification (*see* 2018 Decision at 6-8) and no such claim is pleaded in the ATPC.⁶ His fraudulent conveyance and breach of contract claims are exclusively based on the distributions that the third-party defendants improperly received and not on his liability to plaintiff (*see id.* at 17-18 [Porco “may be able to offset his liability under the Guaranty **by recovering all distributions** received by the other shareholders since June 2012”] [emphasis added]).

Accordingly, it is ORDERED that Porco’s motion for a default judgment against the LDH Defendants is granted only on the fourth cause of action against the Company, the Clerk is directed to enter judgment in favor of Porco and against the Company in the amount of \$216,666.58 plus 9% pre-judgment interest from March 15, 2013 to the date judgment is entered, Porco’s remaining claims are hereby severed and shall continue, and the balance of Porco’s motion is denied without prejudice and with leave to renew to the extent set forth herein.

Dated: September 27, 2019

ENTER:



Jennifer G. Schecter, J.S.C.

⁶ Porco claims that his third cause of action covers this amount (*see* Dkt. 188 at 6). It does not (*see* PTAC ¶ 78 [“Porco is entitled to compensatory damages in an ... equal to all disbursements from (the Company) accepted by the Third-Party Defendants made at any time during which (the Company’s rent due to (plaintiff) pursuant to the Lease was not paid in full”] [emphasis added]). As previously noted, such a claim was not authorized by the 2018 Decision.