

Wilkins Media, LLC v Oxigen Beverages, Inc.

2021 NY Slip Op 30847(U)

March 17, 2021

Supreme Court, New York County

Docket Number: 652438/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

WILKINS MEDIA, LLC,

Plaintiff,

- v -

OXIGEN BEVERAGES INC., OXIGEN BEVERAGES (USA)
INC.

Defendant.

-----X

INDEX NO. 652438/2020

MOTION DATE 06/12/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT .

Upon the foregoing documents, Wilkins Media, LLC's (the **Plaintiff**) motion for summary judgment in lieu of complaint is granted.

The Relevant Facts and Circumstances

Reference is made to a Settlement Agreement (the **Settlement Agreement**; NYSCEF Doc. No. 4), effective January 15, 2020, by and between Wilkins Media, LLC, OXiGEN Beverages Inc. a/k/a Formula Four Beverages Inc. (**OXiGEN Beverages**), and OXiGEN Beverages (USA) Inc. a/k/a Formula Four Beverages (USA) Inc. (**OXiGEN Beverages USA**; OXiGEN Beverages and OXiGEN Beverages USA, collectively **OXiGEN**), pursuant to which OxiGEN would provide the Plaintiff one lump sum payment of \$682,113.36 on March 16, 2020 in resolution of a certain contract dispute that that was before the International Centre for Dispute Resolution (the **Arbitration**) (*id.*, § 1). The Plaintiff would hold the Arbitration in abeyance pending payment,

but the Arbitration would be withdrawn upon full payment to the Plaintiff (*id.* at 3). The Settlement Agreement provided that any prior agreements between the parties were void and that the Settlement Agreement could only be amended or modified in writing:

8. **Sole Agreement.** The Parties expressly represent, covenant and warrant that as of the execution of this Agreement, and except as otherwise set forth herein, any agreements entered into between the Parties, including, but not limited to, August 3, 2018; August 21, 2018; September 11, 2018; September 12, 2018; September 27, 2018 and December 20, 2018 Contracts are void and unenforceable. ***This Agreement may only be amended, supplemented or otherwise modified with the written consent of each of the Parties.***

(*id.*, § 8 [emphasis added]).

The prevailing party in an action to enforce any rights related to the Settlement Agreement was entitled to recover costs, expenses, and attorneys' fees incurred in such an action (*id.*, § 17). The parties additionally agreed that the Defendants would execute a Confession of Judgment which the Plaintiff was entitled to file upon the Defendants' default:

3. **Confession of Judgment.** Contemporaneously with this Agreement, OXiGEN will execute the Affidavit of Confession of Judgment attached hereto as Exhibit A ("Confession of Judgment"), consenting to the entry of a Final Judgment against OXiGEN Inc. and OXiGEN (USA) Inc., jointly and severally, in the "Event of Default" (as that term is defined below). The OXiGEN Confession of Judgment will be held in escrow by Wilkin's counsel pending an Event of Default; and will be returned to OXiGEN or destroyed if, and when, OXiGEN satisfies all of its payment obligations under this Agreement.

...

5. **Event of Default and Filing of the Confession of Judgment.** Should OXiGEN: (a) fail to cure the payment default within five (5) Business Days of its receipt of Wilkin's written notice, then OXiGEN shall be declared to be in material breach of this Settlement Agreement and the Parties agree that Wilkins shall be entitled to immediately file the Confession of Judgment ...

(*id.*, §§ 3, 5).

Finally, the parties agreed to apply New York law to any disputes arising from the Settlement Agreement and resolve the same in New York courts:

23. **Choice of Law and Forum.** Interpretation of the terms and conditions of this Agreement are to be construed in accordance with the substantive laws of the State of New York, irrespective of and without regard for any conflicts of law principles, as to all matters, including matters of validity, construction, effect, enforceability, performance and remedies. All matters relating to the interpretation of this Settlement Agreement or any controversy arising with respect to this Settlement Agreement shall be determined in the New York federal or state courts located in New York, New York. The Parties expressly consent to the personal jurisdiction of these New York courts with respect to any and all matters relating to this Settlement Agreement, and agree not to contest venue placed in these New York courts with respect to any and all matters relating to this Settlement Agreement (including the Confession of Judgment attached hereto as Exhibit A).

(*id.*, § 23).

By letter dated March 18, 2020, the Plaintiff provided written notice of OXiGEN's default for failure to make any payment and provided five business days to cure the default pursuant to the Settlement Agreement (NYSCEF Doc. No. 5). On June 12, 2020, the Plaintiff filed the instant motion against OXiGEN Beverages Inc. and OXiGEN Beverages (USA) Inc. (collectively, the **Defendants**) for summary judgment in lieu of complaint.

Discussion

Pursuant to CPLR § 3213, a motion for summary judgment in lieu of complaint may only be granted when the action is based on an instrument for the payment of money. To meet its prima facie burden on such a motion, the plaintiff must prove that there was an unconditional promise

to pay a sum certain and the defendant's failure to pay (*DDS Partners, LLC v Celenza*, 6 AD3d 347, 348 [1st Dept 2004]). Once a prima facie showing is made, the defendant must present admissible evidence that raises a triable issue of fact to preclude liability (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

The Plaintiff's motion for summary judgment in lieu of complaint must be granted. The parties executed a binding contract for the payment of money, and the Defendants failed to pay or otherwise raise a material issue of fact (*see J.D. Structures, Inc. v Waldbaum*, 282 AD2d 434, 436 [2d Dept 2001] [a settlement agreement is an instrument for the payment of money]; *Torres & Leonard, P. C. v Select Professional Realities, Ltd.*, 118 AD2d 467, 468 [1st Dept 1986]; NYSCEF Doc. No. 19, ¶¶ 12, 19). The Defendants' argument that the parties agreed to an oral modification of the Settlement Agreement in June 2019 fails because the Settlement Agreement specifically states that any prior agreements between the parties were "void and unenforceable" (NYSCEF Doc. No. 4, § 8). In fact, the Defendants confirmed that the Plaintiff could "expect payment in full" (NYSCEF Doc. No. 16). For the avoidance of doubt, Jon Selame's affidavit should not be disregarded. The omission of a certificate of conformity is a mere irregularity rather than a fatal defect that was corrected on reply and accepted nunc pro tunc (NYSCEF Doc. Nos. 3, 19; *see Wager v Rao*, 178 AD3d 434, 435 [1st Dept 2019], citing *Matapos Tech. Ltd. v Cia. Andina de Comercio Ltd*, 68 AD3d 672, 673 [1st Dept 2009]; CPLR § 2001). Thus, the Plaintiff's motion for summary judgment in lieu of complaint is granted.

Accordingly, it is

ORDERED that the Plaintiff's motion for summary judgment in lieu of complaint is granted; and it is further

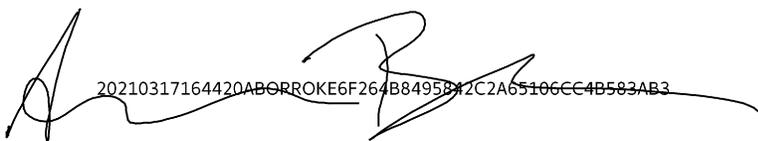
ORDERED that the Clerk is directed to enter judgment in favor of Wilkins Media, LLC and against OXiGEN Beverages Inc. and OXiGEN Beverages (USA) Inc. in the amount of \$682,113.36, plus statutory interest of 9% from March 16, 2020 until the date of entry of judgment, plus statutory interest of 9% per annum from the date of entry of judgment, plus costs and disbursements as allocated by the Clerk. The plaintiff shall have execution thereof; and it is further

ORDERED that that portion of the Plaintiff's motion that seeks the recovery of reasonable attorneys' fees is severed and the issue of the amount of attorneys' fees that Plaintiff may recover against the Defendants is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the Plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this

¹ Available on the Court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.

matter on the calendar of the Special Referee’s Part for the earliest convenient date to hear and determine the amount of reasonable attorneys’ fees and costs; and it is further ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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3/17/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: