

<b>Holtz v MySlabs, Inc.</b>
2025 NY Slip Op 31919(U)
May 22, 2025
Supreme Court, New York County
Docket Number: Index No. 650665/2024
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X  
TERENCE HOLTZ

Petitioner,

- v -

MYSLABS, INC.,

Respondent.

INDEX NO. 650665/2024

MOTION DATE 02/07/2024,  
01/15/2025

MOTION SEQ. NO. MS 001 003

**DECISION + ORDER ON  
MOTION**

-----X  
HON. MARGARET A. CHAN:

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

were read on this motion to/for

MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

Petitioner Terence Holtz brings this special proceeding pursuant to section 1005 of the Limited Liability Company Law (LLCL) and section 623 of the Business Corporation Law (BCL) to fix the fair value of petitioner's former interest in respondent My Slabs, Inc. (respondent) and to recover costs and fees associated with this proceeding (MS 001). Petitioner now also moves pursuant to CPLR 3215 for an order granting default judgment against respondent company for failure to hire new counsel in violation of CPLR 321 and seeking an inquest on the issue of damages (MS 003; NYSCEF # 44, Notice of Motion). The motion is unopposed. For the reasons below, the default motion and petition are granted.

Pursuant to CPLR 3215, petitioner may move for default judgment "[w]hen a [respondent] has failed to appear, plead or proceed to trial of an action" (CPLR 3215 [a]). Generally, a movant seeking default judgment must submit the following materials: (1) proof of service of the summons and complaint/petition or summons with notice; (2) an affidavit of facts constituting the claim and the amount due; and (3) an affidavit showing the default in answering or appearing (*id.* 3215 [f]; *see also Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]). Moreover, a corporation can be held in default if it fails to appear by attorney (*World on Columbus, Inc. v L.C.K. Rest. Group, Inc.*, 260 AD2d 323, 324 [1st Dept 1999], citing CPLR 321).

Here, there is no dispute that respondent was served with the petition, as respondent previously appeared and answered with counterclaims (*see* NYSCEF # 15, Answer & Counterclaims; *see also* NYSCEF # 12, Aff of Service; NYSCEF # 13, Resp's Notice of Appearance). There is similarly no dispute that respondent has now defaulted by failing to substitute counsel.

Respondent is a corporation and is therefore required to be represented by counsel; it cannot appear *pro se* (CPLR 321 [a]). But respondent has not had counsel since November 8, 2024. Respondent's former counsel Romano Law PLLC (Romano Law) first appeared in this action on February 28, 2024 (NYSCEF # 13). On November 8, this court granted Romano Law's motion to withdraw as counsel for respondent and stayed the action for 30 days after service of the order to give respondent time to hire new counsel (*see* NYSCEF # 40, Order at 2-3). Romano Law was also ordered to serve notice of the order on respondent via email (*id.*). Petitioner submits evidence showing Romano Law did so on November 18, 2024 (NYSCEF # 50, Email Notice to Respondent). The stay therefore ended on December 18, 2024, and yet to date respondent there has been no notice of appearance by counsel for respondent (*see* NYSCEF # 45, Sluka Aff, ¶ 13; *see also* NYSCEF # 55, 05/13/2025 Letter from Ptr [pointing out respondent has not appeared or opposed this motion]). Respondent is therefore in default (*see World on Columbus, Inc.*, 260 AD2d at 324 ["The corporate defendant was properly held in default on the motion for failure to appear by attorney"]).

Petitioner also submits sufficient proof of facts constituting the claim against respondent. Under LLCL § 1005, following a merger, a business entity must within ten days offer any former member who dissented to the merger "a written offer to pay in cash the fair value of such former member's membership interest" (LLCL § 1005 [a]). If the former member and the entity cannot agree on a price within ninety days of that offer, the entity may within twenty days file a special proceeding to determine the fair value of the dissenting member's interest pursuant to BCL §§ 623(h), (i), (j), and (k) (LLCL § 1005 [b]; BCL § 623 [h] [1]). If the entity "fails to institute such proceeding within such period, any dissenting shareholder may institute such proceeding not later than thirty days after the expiration of such twenty day period" (BCL § 623 [h] [2]).

Petitioner submits his Verified Petition in place of an affidavit. The Verified Petition alleges that petitioner held a 33.35% membership interest in non-party My Slabs, LLC, the prior company (the Company) (NYSCEF # 46, Verified Petition, ¶ 18). On September 15, 2023, the Company called for a meeting of its members to vote on a potential merger with respondent My Slabs Inc. (a different company), with My Slabs, Inc. to be the surviving party (*id.* ¶ 19). Petitioner timely sent a written notice of dissent eleven days later (*id.* ¶ 20). However, a majority of members approved the merger, which became effective on October 5, 2023 (*id.* ¶¶ 21-22).

On October 6, 2023—the day after the merger became effective—respondent offered petitioner \$30,000 for his interest in the former Company (*id.* ¶ 23). Five days later on October 11, 2023, petitioner rejected the offer because it only considered the Company's cash on hand and not its (1) customer list; (2) goodwill; (3) large social media following; (4) “chat forum;” (5) proprietary data; (6) “specific and aggressive plans for expansion;” and (7) *bona fide* claims against executives for excess compensation and breach of fiduciary duty (*id.* ¶¶ 26, 34-35).

Per the various timelines in LLCL § 1005 and BCL § 623(h), the parties had until January 6, 2024, to agree on an appropriate value for petitioners' shares (LLCL § 1005 [b] [ninety days from offer]). But the parties did not come to an agreement, and so respondent had until January 26, 2024, to initiate a special proceeding (BCL § 623 [h] [1] [twenty days to bring special proceeding]). When respondent failed to bring a proceeding by that date, petitioner had the option to bring the special proceeding himself by February 26, 2024 (BCL § 623 [h] [2] [thirty days to bring proceeding if company does not]). Petitioner thus timely filed the Verified Petition in this special proceeding on February 7, 2024 (NYSCEF # 1; *see also* NYSCEF # 46).

Based on the foregoing, petitioner has sufficiently demonstrated facts constituting his claim for an appraisal of the fair value of his shares (*see Woodson*, 100 NY2d at 71 [without the benefit of discovery, the affidavit need only allege enough facts to enable a court to determine that a viable cause of action exists]). And when considering this showing in conjunction with respondent's failure to file a notice of appearance for new counsel on the docket, petitioner has sufficiently demonstrated its entitlement to default judgment in this special proceeding.

The only remaining question is the measure of damages, *i.e.*, the fair value of petitioner's interest in the Company and the costs and fees associated with this proceeding. The court will therefore grant petitioner's request for an inquest to determine damages and refer the matter to a Special Referee/JHO to hear and report on this issue.

Accordingly, it is hereby,

ORDERED that petitioner's motion for default judgment against respondent My Slabs, Inc. is granted, and an inquest will be held against respondent on the issue of damages; and it is further

ORDERED that the inquest is referred to a Special Referee/JHO to hear and report with recommendations; and it is further

ORDERED that counsel for petitioner 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, upon the Special Referee Clerk in the General Clerk's Office

(Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date to hear and report as to the amount of damages; 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); and it is further

ORDERED that within 15 days of efileing this order, petitioner shall serve a copy of this decision and order by email and regular mail on respondent My Slabs Inc., and efile proof of such service with the court.

5/22/2025

DATE

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☒

REFERENCE

MARGARET A. CHAN, J.S.C.