

<b>Penske v National Holding Corp.</b>
2025 NY Slip Op 34312(U)
November 11, 2025
Supreme Court, New York County
Docket Number: Index No. 655002/2022
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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MARK PENSKE and UNITED ATLANTIC CAPITAL, LLC,	INDEX NO. <u>655002/2022</u>
Plaintiffs,	MOTION DATE _____
- v -	MOTION SEQ. NO. <u>018</u>
NATIONAL HOLDING CORP., B. RILEY WEALTH MANAGEMENT HOLDINGS, INC., and DARIN POPE,	<b>DECISION + ORDER ON MOTION</b>
Defendants.	
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 018) 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 649, 650

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

In motion sequence 018, defendants and counterclaim plaintiffs National Holding Corporation and B. Riley Wealth Management Holdings, Inc. (Moving Defendants) move, pursuant to 22 NYCRR § 202.27 to dismiss plaintiffs' amended complaint for failure to appear at the oral argument and virtual conference on August 26, 2025 and to grant a default judgment on Moving Defendants' counterclaims in the amount of \$4,097,447 with interest from the date of each payment. Moving Defendants also seek to sever their counterclaims against counterclaim defendant Darin Pope. There is no opposition to this motion.

22 NYCRR § 202.27 provides that

"[a]t any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

(a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest;

(b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims;

(c) If no party appears, the judge may make such order as appears just.”

On August 16, 2025, the court granted Holwell Shuster & Goldberg LLP’s motion to be relieved as plaintiffs’ counsel. (NYSCEF 627, Decision and Order [mot. seq. no. 017].) The order stated that “[c]orporate defendants can only appear by counsel.” (*Id.* at 1 citing CPLR 321[a] and *Park v Song*, 61 Misc 3d 1047, 1050 [Sup Ct, NY County 2018].) The court directed that the parties to “appear for a virtual conference on August 26, 2025 at 12:30 p.m. to confirm that [plaintiff] United Atlantic Capital, LLC retained counsel and determine whether [plaintiff] Mark Penske will represent himself.” (*Id.* at 2.) Plaintiffs failed to appear on August 26, 2025, and the court held such failure a default. (NYSCEF 643, tr at 3:23-4:8.) To date, plaintiff United Atlantic Capital, LLC has not retained counsel and plaintiff Penske has not appeared on behalf of himself or retained counsel.

22 NYCRR § 202.27(b) permits the court to dismiss the action if defendant appears at a conference and plaintiff does not. The court may also order a severance of any counterclaims. (22 NYCRR § 202.27[b].) Accordingly, the complaint is dismissed and Moving Defendants’ counterclaims against United Atlantic Capital, LLC, Penske, and Pope are severed.

Moving Defendants also seek a default judgment on their counterclaims against United Atlantic Capital, LLC and Penske pursuant to 22 NYCRR § 202.27(a); however, the statute does not provide for that relief. Section

202.27(a) permits the court to grant a default judgment against defendant, if it fails to appear. Reading this section together with §202.27(b) which, as previously stated, permits the court to dismiss the complaint when plaintiff fails to appear and sever any counterclaims, it is clear to the court that §202.27(a) is not applicable to a defendant seeking a default on its counterclaims. Moving Defendants provide no case law to contrary. Rather, the proper statute for Moving Defendants' requested relief is CPLR 3215, which requires the party entitled to judgment based upon a default to demonstrate such "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]; CPLR 3215.) Thus, to the extent Moving Defendants seek a default on their counterclaims against plaintiffs, their motion is denied without prejudice.

Moving Defendants' request to sever its counterclaims against Pope is granted.

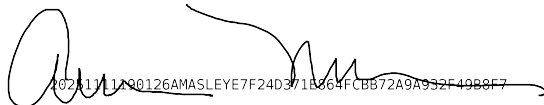
Accordingly, it is

ORDERED that defendants and counterclaim plaintiffs National Holding Corporation and B. Riley Wealth Management Holdings, Inc.'s motion is granted to the extent that plaintiffs' amended complaint is dismissed, and the Clerk is directed to enter judgment in favor of defendants National Holding Corporation and B. Riley Wealth Management Holdings, Inc. dismissing this action, together with costs and

disbursements to those defendants, as taxed by the Clerk upon presentation of a bill of costs; and it further

ORDERED that National Holding Corporation and B. Riley Wealth Management Holdings, Inc.'s counterclaims against United Atlantic Capital, LLC, Penske, and Pope are severed; and it is further

ORDERED that argument on this motion is canceled. The parties shall continue to coordinate with the Part 48 Clerk to reschedule the November 12, 2025 argument on Pope's motion to dismiss the National Holding Corporation and B. Riley Wealth Management Holdings, Inc.'s counterclaims against him.



11/11/2025

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☐

DENIED

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GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE