

**Benjamin Dev. Co., Inc. v DJH Mech.  
Assoc., Ltd.**

2008 NY Slip Op 31949(U)

June 30, 2008

Supreme Court, Nassau County

Docket Number: 5705-07/

Judge: Leonard B. Austin

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**SUPREME COURT - STATE OF NEW YORK  
IAS TERM PART 12 NASSAU COUNTY**

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**  
Justice

\_\_\_\_\_  
**BENJAMIN DEVELOPMENT CO., INC.,**

**Plaintiff,**

**-against-**

**DJH MECHANICAL ASSOCIATES, LTD.,**

**Defendant.**

\_\_\_\_\_ x

**Motion R/D: May 9, 2008  
Submission Date: May 9, 2008  
Motion Sequence No. 002/MOT D**

**COUNSEL FOR PLAINTIFF  
BAUMAN KATZ & GRILL, LLP  
28 West 44<sup>th</sup> Street  
Suite 900  
New York, NY 10036**

**DJH Mechanical Assoc., Ltd.  
155 Kingsbridge Road East  
Mount Vernon, NY 10550**

**ORDER**

The following papers were read on Plaintiff's unopposed motion for leave to renew its motion for default judgment against Defendant pursuant to CPLR 3215:

- Notice of Motion dated April 14, 2008;
- Affidavit of Elvira Barisano sworn to on April 14, 2008;
- Affidavit of Omar Ventegeat sworn to on April 7, 2008.

Plaintiff, Benjamin Development Co., Inc. ("Benjamin"), moves for leave to renew its motion for default judgment against the Defendant, DJH Mechanical Associates, Ltd. ("DJH"), for an order pursuant to CPLR 3215 granting Plaintiff a default judgment on its first cause of action and granting an inquest. DJH has failed to appear, answer, or move with regard thereto.

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### **BACKGROUND**

Benjamin is a domestic corporation with its principal office located in Garden City, New York.

Benjamin alleges that, on or about December 20, 2001, it entered into an agreement ("Contract") with DJH. Pursuant to the Contract, DJH agreed to render services relating to the heating, ventilation and air conditioning systems at the Allen Cathedral Senior Residences located at 107-20 Merrick Boulevard, Queens, New York ("Building"). In addition, Benjamin alleges that DJH agreed to render said services in compliance with the obligations and requirements of the City of New York and all applicable codes and regulations. Pursuant to these terms, DJH installed the systems in the Building.

According to the complaint, on or about November 10, 2003, DJH executed a "Final Statement of Account" in which DJH certified that its work was completed in satisfaction of both the Contract terms and the requirements of the Building Department of the City of New York.

On June, 13 2006, the Building received a Notice of Violation from the Environmental Control Board of the City of New York holding the Building in violation of §122 (b)(1) of the Air Pollution Control Code of the New York City Administrative Code. The violation was issued because the Building permitted the operation of fuel burning equipment without obtaining an operating certificate from the Environmental Control Board.

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As a result, Benjamin alleges it was forced to hire another firm to complete the work that DJH failed to properly complete and accordingly incurred the expense thereof. Benjamin seeks to recover the damages it sustained because of DJH's failure to perform its contractual obligations.

This action was commenced by filing a summons and verified complaint with the Nassau County Clerk on September 5, 2007. The summons and verified complaint were served on DJH via the Secretary of State on September 7, 2007. DJH was also mailed a copy of the summons and verified complaint on September 20, 2007 at its place of business pursuant to CPLR 3215(g). DJH's time to appear, answer, or move has expired and its time to do so has not been extended.

In November 2007, Benjamin moved for leave to enter a default judgment and to have an inquest taken against DJH. By order, dated March 10, 2008, this Court denied that motion based upon Benjamin's failure to submit proof which would substantiate its right to a default judgment. Benjamin was granted leave and renew its motion upon proper proof. Benjamin now moves to renew its motion for a default judgment. Plaintiff has now submitted a copy of the Contract, Final Statement of Account, and Notice of Violation & Hearing. These documents were not submitted with the initial motion.

#### DISCUSSION

CPLR 2221 permits a motion to renew based upon new facts that were not provided in the prior motion, that would change the prior determination or demonstrate a change in the law that would change the prior determination; and must contain

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reasonable justification for the failure to present such facts on the prior motion. See, Veitsman v G&M Ambulette Serv. Inc., 35 A.D. 3d 848, 848 (2<sup>nd</sup> Dept. 2006). The requirement of showing newly discovered facts “is a flexible one, and a court, in its discretion, may grant renewal upon facts “is a flexible one, and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion.” Cronwall Equities v. Int’l Links Dev. Corp., 255 A.D. 2d 354, 355. (2<sup>nd</sup> Dept. 1988). The Court’s order of March 2008 allowed for renewal upon submission of proper proof. Therefore, consideration of this motion for renewal is appropriate.

CPLR 3215 permits a party to obtain a default judgment against a defendant who defaults in appearance. An application for leave to enter a default judgment must be supported by proof of service of the summons and complaint, an affidavit made by a person with actual knowledge of the facts surrounding the claim and proof of the default. Siegel, *New York Practice* 4<sup>th</sup> §295; and CPLR 3215(f). The party seeking a default judgment must establish the existence of a *prima facie* cause of action against the defaulting party. Joosten v. Gale, 129 A.D.2d 531 (1<sup>st</sup> Dept. 1987).

Benjamin alleges a cause of action for breach of contract against DJH. The element of a cause of action for breach of contract are: the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2<sup>nd</sup> Dept. 1986).

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Benjamin has established that the summons and verified complaint were served on DJH on September 7, 2007, through the Secretary of State pursuant to Business Corporation Law § 306(b)(1). Benjamin gave the required additional notice pursuant to CPLR 3215(g) on September 20, 2007 by mailing a copy of the summons and verified complaint to DJH at its place of business, 155 Kingsbridge Road East, Mount Vernon, New York 10550.

Omar Ventegeat, Vice President of Benjamin, has provided an affidavit of the facts surrounding the claim, and provided documentation of the Contract, Final Statement of Account, and Notice of Violation. The relevant facts indicate that Benjamin entered into a written contract with DJH to install three fuel burners in the Building located at 107-20 Merrick Boulevard, Queens, New York. The contract indicates “[t]he work is to be...in conformance with all applicable building codes and requirements.” DJH installed the three burners, and subsequently executed a Final Statement of Account, certifying the work to be completed in accordance with the requirements of the Building Department of the City of New York and in accordance with the project’s plan and specifications.

According to the Final Statement of Account, Benjamin has paid \$881,613.00 out of the \$913,500.00 contract for the installation. On or about July 13, 2006, a Notice of Violation (“Violation”) was received by Benjamin stating that the Building was in violation of §122 (b)(1) of the Air Pollution Control Code of the New York City Administrative Code. The Violation stated that the building caused or permitted the use or operation

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of fuel burning equipment without first obtaining the required certification, Benjamin was required to retain another company to correct and complete the work, and incurred extra costs as a result.

Given Plaintiff's establishing its *prima facie* right to the relief it seeks and DJH's unexcused default, Plaintiff should be granted a default judgment.

Where the amount of damages claimed on default is not a sum certain or an amount that can be calculated with certainty, the Court should set the matter down for a hearing on the issue of damages. CPLR 3215(a)(b). See also, Siegel, *New York Practice 3<sup>rd</sup>* §293. Since the amount of Benjamin's damages cannot be ascertained with certainty as the complaint seeks damages of "no less than \$200,000" in addition to legal fees, the matter must be set down for a hearing on the issue of damages.

With respect to legal fees, attorneys' fees cannot be charged to a defendant unless authorized by statute, court rule or written agreement of the parties. See, Campbell v. Citibank, 302 A.D. 2d 150, 154 (1<sup>st</sup> Dept. 2003). See also, Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y. 2d 487, 491 (1989). The Contract does not provide for attorneys' fees under any circumstances. Therefore, no legal fees can be awarded herein.

Accordingly, it is,

**ORDERED**, that Plaintiff's motion for leave to renew is **granted**, and it is further,

**ORDERED**, that Plaintiff's motion for leave to enter a default judgment is **granted** as to liability only; and it is further,

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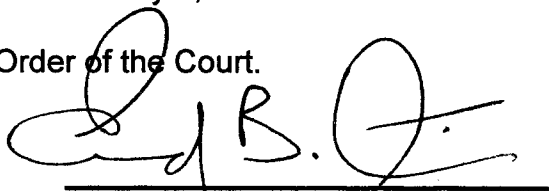
**ORDERED**, that this matter is set down for a hearing before Special Referee Schellace on July 29, 2008 at 10:00 a.m. to hear and determine all issues relating to the calculation of damages, and it is further,

**ORDERED**, that upon determination of damages by Special Referee Schellace, the Nassau County Clerk is directed to enter judgment in accordance with the terms of this Order, together with appropriate interest, costs, and disbursements as taxed by the County Clerk, and it is further,

**ORDERED**, that Plaintiff's counsel serve upon the Defendant and file with the Clerk of the Court, a copy of this order with Notice of Entry and a Notice of Inquest and shall pay the appropriate filing fees on or before July 7, 2008.

This constitutes the decision and Order of the Court.

Dated: June 30, 2008  
Mineola, NY

  
Hon. LEONARD B. AUSTIN, J.S.C.

**ENTERED**  
JUL 02 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE