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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
CHURCH OF SOUTH INDIA MALAYALAM, CONGREGATION OF GREATER NEW YORK,	**NASSAU COUNTY**
Plaintiff,	**Index No: 014717-09**
	Motion Seq. No: 1
-against-	**Submission Date: 11/30/09**
BRYANT INSTALLATIONS, INC. and DANIEL R. BOVE,	
Defendants.	
----------x	

Papers Read on this Motion:

Notice of Motion, Affirmation in Support, Affidavit in Support, Affidavit of Non-Military Status and Exhibits.....x

This matter is before the court on the motion by Plaintiff, filed on November 5, 2009 and submitted on November 30, 2009. For the reasons set forth below, the Court denies Plaintiff's motion for a default judgment.

BACKGROUND

A. Relief Sought

Plaintiff Church of South India Malayalam Congregation of Greater New York ("Plaintiff") seeks an Order 1) pursuant to CPLR § 3215, granting a default judgment in favor of Plaintiff and against Defendants Bryant Installations, Inc. ("Bryant") and Daniel R. Bove ("Bove") (collectively "Defendants") on the first cause of action in the verified complaint ("Complaint") for the sum of $477,500.00, plus interest; and 2) pursuant to CPLR § 3215, granting a default judgment in favor of Plaintiff and against Defendants on the second cause of

action in the Complaint for the sum of $477,500.00, plus interest; and 3) awarding Plaintiff punitive damages in the sum of $1,000.

Defendants have submitted no opposition or other response to Plaintiff's motion.

B. The Parties' History

The Complaint (Ex. A to Motion) alleges that 1) Plaintiff is a not-for-profit religious corporation that maintains a church ("Church"), Vicar's residence ("Residence") and school ("School") located at 3833 Jerusalem Avenue, Seaford, New York; 2) Bryant is a corporation with its principal place of business in Bethpage, New York; and 3) Bove is the principal owner and executive officer of Bryant.

Plaintiff provides an Affidavit in Support of Thomas M. Kunjummen, the Secretary of the Plaintiff church ("Kunjummen"), dated October 30, 2009. Kunjummen affirms as follows:

On or about July 19, 2006, Plaintiff entered into a written contract with Bryant ("Construction Contract") (Ex. E to Motion), pursuant to which Bryant agreed to renovate the Church and construct additions for the Residence and School, for which Plaintiff would pay the lump sum and unit prices set forth in the Construction Contract.

The Court notes that the Construction Contract contains an arbitration clause. Specifically, Section VII(3) of the Construction Contract provides as follows:

> Any disagreement, dispute, controversy or claim rising out of or relating to this Contract or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. Judgment upon the award rendered by Arbitrator(s) may be entered in any Court having jurisdiction thereof.

Plaintiff provides no information regarding whether the parties submitted this dispute to arbitration.

Kunjummen affirms that Bryant began the construction and submitted invoices to Plaintiff, which Bove had either prepared or approved (Ex. F to Motion). The invoices contain Plaintiff's name at the top of the page and reflect that they are from Bryant. The invoices also contain the words "Prepared by" and "Approved by" at the bottom of the page. Some of those invoices reflect that an individual named "George Matthew" either prepared, or approved, the particular invoice. The signature of another individual appears on the invoices. Although that signature is not clearly legible, it appears similar to Bove's signature on the Construction

Contract.

Plaintiff also provides copies of correspondence from Bove to Plaintiff dated 1) September 13, 2006, 2) October 25, 2006, 3) December 1, 2006, and 4) April 12, 2007 (also part of Ex. F to Motion) in which Bove discussed additional work that needed to be done, and the cost of that work. That correspondence addressed issues including 1) a fire sprinkler/alarm system, 2) the removal of columns in a particular room, 3) replacement of a roof, and 4) removal of a septic tank.

In the letter addressing the fire sprinkler/alarm system, Bove advised Plaintiff that certain work was needed to comply with the requirements of the Nassau County Fire Marshall's Office, and that the cost of that work would be $59,850. In the letter addressing the removal of columns, Bove made reference to obtaining an Engineer's approval of sketches regarding the removal of columns, which would require a fee of $500.00 to be paid by Plaintiff. In the letter addressing the roof, Bove advised Plaintiff that the architect believed that the roof needed to be replaced, which would cost $17,300. Finally, in the letter addressing the removal of the septic tank, Bove discussed the removal of that tank pursuant to Nassau County Health Department guidelines, and additional changes that needed to be made that delayed the project for three to four weeks.

Kunjummen affirms that Bryant requested and received payments totaling $1,044,950.00 for contract and extra work that Bryant certified to Plaintiff had been performed. In support thereof, Kunjummen provides, as Exhibit G to the Motion, 1) Plaintiff's "Account QuickReport" for the period January 1 through October 8, 2007 reflecting total payments to Bryant of a number that is difficult to read but appears to be $601,800.00, and 2) a document reflecting Plaintiff's payments to Bryant in 2006 in the sum of $443,450.00. Those two numbers add up to $1,045.250.00, not $1,044.950.00. There are handwritten notes on the second document reflecting 1) the addition of the numbers 443,450 and 571,501, 2) the subtotal of $1,014,950, and 3) the number 1,044,950 below the subtotal, with no explanation of how that total was reached.

Kunjummen affirms that, on or about December 1, 2007, after receiving payment of "substantially all of the contract proceeds" (Aff. of Kunjummen at ¶ 6), Bryant, without cause and while substantial work remained to be done, stopped work and abandoned the project. On March 3, 2008, Plaintiff terminated the Construction Contract. Plaintiff provides a copy of that

termination notice (Ex. H to Motion) which is dated February 25, 2008. In that termination notice, Plaintiff advised Bove that Plaintiff would terminate the Construction Contract effective March 5, 2008, due to Bryant's alleged default by 1) illegally diverting contract payments, 2) failing to remove a lien filed by a plumbing company; 3) failing to correct defective work; and 4) refusing to complete the work contemplated by the Construction Contract.

In support of its allegation that Bryant breached the Construction Contract, Plaintiff provides a copy of an evaluation that Plaintiff prepared of Bryant's allegedly defective work ("Evaluation") (Ex. I to Motion). That Evaluation was apparently prepared in connection with this litigation, as Kunjummen affirms that it was prepared "at Plaintiff's request" (Aff. in Support at ¶ 8) and the cover page of the Evaluation contains the language "Confidential, For Settlement Purposes Only, Not to be Disclosed Without Consent." The Evaluation includes a three page document dated January 30, 2008 and titled "Incomplete and defective work" that provides a description of work that Defendants were supposed to complete, and an indication that Plaintiff considered Defendants' performance either "incomplete," "defective," or "damage [sic]." Plaintiff also provides, as part of Exhibit I, copies of photographs depicting the allegedly incomplete work that Defendants performed.

Kunjumman affirms that it will cost Plaintiff $235,000.00 to replace or complete the work that Defendants allegedly performed improperly. Kunjumman affirms that Plaintiff will spend $67,500 to repair/replace the air conditioning system. He affirms, further, that Plaintiff is entitled to: 1) a $50,000 credit due to Bryant's installation of an inferior stucco facing at an exterior wall, 2) a $65,000 credit due to Bryant's improper installation of wood, rather than, metal joists, and 3) a $20,000 credit due to Bryant's use of the incorrect building materials for the Residence. He also avers that, due to Bryant's substantial delay in completing the project, Plaintiff incurred damages of more than $40,000. Kunjumman submits that, as a result of Bryant's material breaches of the Construction Contract, Plaintiff has incurred damages exceeding $477,500.00.

Kunjumman also affirms that Bove engaged in fraudulent conduct including 1) submitting false payment requests and certifications; and 2) misrepresenting that he properly compensated subcontractors and vendors. In support of Plaintiff's allegation that Bove did not properly compensate those subcontractors and vendors, Plaintiff provides copies of mechanic's

liens that were filed by a subcontractor alleging non-payment (Ex. J to Motion). Kunjumman also submits that Bove's conduct was wilful and asks the Court to award punitive damages in the sum of $1,000,000, in addition to the damages of $477,500.00 that Plaintiff requests.

In his Affirmation in Support, counsel for Plaintiff ("Counsel") submits that Defendants owe Plaintiff the sum of $477,500 in damages resulting from Defendants' alleged breach of the Construction Contract, plus interest. Plaintiff also seeks punitive damages in the sum of $1 million, in connection with Defendants' allegedly egregious conduct.

Counsel affirms that Defendants were served with copies of the Summons and Complaint, and provides Affidavits of Service reflecting that service (Exhibits B, C and D to Motion). Counsel affirms, further, that Defendants have not appeared, answered or moved with respect to the Complaint and submits that the Court should grant Plaintiff's motion for a default judgment.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a default judgment against the Defendants by establishing 1) Defendants breach of the parties' Construction Contract, 2) Defendants' damages as a result of Plaintiff's alleged breach, 3) Defendants' fraudulent conduct in making certain representations to Plaintiff, 4) Defendants' wilful conduct, warranting punitive damages, 5) Plaintiff's proper service of the Complaint on Defendants, and 6) Defendants' failure to appear, answer or move with respect to the Complaint.

Defendants have submitted no response to Plaintiff's motion.

RULING OF THE COURT

A. Plaintiff has not Established its Right to a Default Judgment against Defendants

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, (2) consideration, 3) performance by the plaintiff, (4) breach by the defendant, and (5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

The Court concludes that Plaintiff has demonstrated proper service of the Complaint upon Defendants. The Court also concludes, however, that there are factual issues precluding the granting of Plaintiff's motion for a default judgment. Certain documentation before the Court, including the correspondence from Bove, raises issues regarding the extent to which Defendants and Plaintiff complied with their obligations under the Construction Contract. That correspondence suggests that there were disputes as to the payment for and performance of certain work, including installation of sprinkler systems and replacement of the roof, that make the entry of a default judgment inappropriate. Those same disputes raise issues about whether any non-performance by Defendants was wilful and, therefore, the appropriateness of a punitive damage award.

B. The Contract at Issue Requires the Parties to Arbitrate this Dispute

CPLR § 7501, titled "**Effect of arbitration agreement**" provides:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General*, *supra*, at 75, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator's reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984). Additionally, where there is a broad arbitration clause, all questions with respect to

the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator. *Schlaifer v. Sedlow*, 51 N.Y.2d 181 (1980); *Inryco, Inc. v. Parsons & Whittemore Contractors. Corp.*, 55 N.Y.2d 666 (1981).

The Court concludes that the dispute at issue is governed by the mandatory arbitration clause in the Construction Contract. Plaintiff has provided no information regarding Plaintiff's compliance with that arbitration clause.

In light of the foregoing, the Court denies Plaintiff's motion in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
January 26, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.