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

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

LONG ISLAND LIGHTING COMPANY doing business as LIPA,	**TRIAL/IAS PART: 22 NASSAU COUNTY**
Plaintiff,	**Index No: 020515-09**
-against-	**Motion Seq. No: 1**
CHESTNUT STATION, INC. and THOMAS CATANESE,	**Submission Date: 5/6/10**
Defendants.	

Papers Read on this Motion:

Notice of Motion, Affidavits in Support (2) and Exhibits.....x
Memorandum of Law in Support.....x

This matter is before the court on the motion by Plaintiff Long Island Lighting Company doing business as LIPA ("Plaintiff" or "LIPA") filed on April 15, 2010 and submitted on May 6, 2010. The Court grants Plaintiff's motion in part and denies it in part. For the reasons set forth below, the Court 1) grants Plaintiff's motion for a default judgment against Defendant Chestnut Station, Inc. on the fourth cause of action in the Complaint in the sum of $118,677.33, plus costs and attorney's fees to be determined at an inquest; 2) denies Plaintiff's motion for a declaratory judgment; and 3) denies, without prejudice, Plaintiff's motion for a default judgment against Defendant Thomas Catanese on the theory of successor liability.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 3215, for 1) a judgment declaring that the lease ("Lease") that is the subject of this action is rescinded and any obligations of Plaintiff thereunder are voided, and 2) a judgment for breach of contract in an amount to be determined by the Court

at the trial of this action, but not less than the sum of a) $118,677.33 paid by Plaintiff to Defendant Chestnut Station, Inc. ("CSI"), b) the salaries paid to Plaintiff's Staff commencing on April 1, 2009 to the date of judgment in the amount of $5,600.55 per week, c) removal costs incurred by Plaintiff in the amount of $2,818.81, d) the additional procurement costs incurred by Plaintiff, together with interest, as determined by the Court, and e) reasonable costs and attorney's fees of this action as determined by the Court.

Defendants have not appeared in this action, and have submitted no opposition or other response to Plaintiff's motion.

B. The Parties' History

The Complaint (Ex. D to P's motion) alleges as follows:

Plaintiff is a corporation organized and existing under the laws of the State of New York ("New York"). CSI was, at all relevant times, a corporation organized and existing under the laws of New York which became inactive on or about July 29, 2009 due to dissolution by proclamation of the New York Department of State. Pursuant to New York State Business Corporation Law ("BCL") § 1006, CSI remains a viable corporate entity that may be sued in all courts and against which remedy may be sought. Defendant Thomas Catanese ("Catanese") was and continues to be President of SCI.

On or about April 3, 2007, Catanese, in his capacity as President of CSI, made a submission to Plaintiff to build-out and lease property to Plaintiff at 2-30 Beach 102nd Street, Far Rockaway Beach, New York 11694 ("Premises"). The parties thereafter entered into the Lease. Plaintiff alleges that CSI and Catanese were aware that Plaintiff's purpose in entering into the Lease was to establish a customer service center in the Rockaways section of Queens. As required by law, the Lease was approved by the New York State Attorney General on or about August 11, 2008 and by the New York State Department of Audit and Control on or about December 3, 2008.

Paragraph three (3) of the Lease, which designates CSI as "Owner" and Plaintiff as "Tenant," provides as follows: [1]

> The term of this lease shall be five (5) years (or until such term shall sooner cease and expire as hereinafter provided) to commence on the Commencement

[1] The Complaint contains an excerpt of paragraph three (3), but the Court has elected to provide the entire paragraph.

> Date (hereinafter defined) with an option for an additional five (5) year extension. The term of this lease shall end on the Expiration Date (hereinafter defined) both dates inclusive, at an annual rental rate as set forth in Article 31 contained in the Rider to this lease which Tenant agrees to pay in equal monthly installments in advance on the first (1st) day of each month during said term, except that Tenant shall pay the first (1st) monthly installment after Owner completes the construction items set forth in the Build Out Schedule, attached hereto as Exhibit A. Upon completion of the items set forth in the Build Out Schedule, Owner shall so notify Tenant in writing and Tenant shall pay the first (1st) monthly installment within ten (10) days after receipt of such notice.

The Build-Out Schedule (Ex. B to Lease) lists the type of work to be completed ("Build-Out Work") and corresponding costs, totaling $168,900.00. The Build-Out Schedule further provides for Plaintiff to pay that $168,900.00 sum in three invervals: 1) 33% after the Lease has been approved by the State Comptroller and filed in the Comptroller's Office, 2) 33% upon completion of rough out of the demised premises, and 3) 33% upon completion of the items listed above, consisting of electric, plumbing, millwork, interior work, garbage removal and control supervision.

On or about January 21, 2009, Catanese provided and Plaintiff accepted a written construction schedule for the Build-Out work ("January Construction Schedule") (Ex. B to P's motion) which provided for a commencement date of January 26, 2009 and a completion date of March 31, 2009. The January Construction Schedule contained the language "Approx 2/26/09 Permit in Place."

Based on the January Construction Schedule, Plaintiff intended to open its customer service center ("Service Center") at the Premises on April 1, 2009. In anticipation of that opening, Plaintiff hired three employees ("Staff") for the Service Center at a total weekly compensation rate of $5,600.55. Since April 1, 2009, Plaintiff has been paying the Staff.

On or about January 12, 2009, Plaintiff paid CSI 1) the sum of $55,737.00, representing the first installation payment for the Build-Out work, and 2) the sum of $7,203.33, representing the security deposit payment under the Lease. On or about March 23, 2009, Plaintiff paid CSI the sum of $55,737.00, representing the second installation payment for the Build-Out Work under the Build-Out Schedule. CSI failed to complete the Build-Out Work as set forth in the January Construction Schedule.

In or about early April of 2009, representatives of Plaintiff and CSI met to discuss CSI's alleged failure to complete the Build-Out Work pursuant to the January Construction Schedule. At that meeting, Plaintiff accepted a new written Construction Schedule ("April Construction Schedule") which Catanese executed on or about March 30, 2009 [sic]. Plaintiff alleges that the April Construction Schedule contained deadlines for completion of the Build-Out Work and provided for an "Opening Date May 1 Monday or try to be sooner" (Compl. at ¶ 26). The April Construction Schedule, which is annexed to Plaintiff's motion as Exhibit C, is a calendar of the month of April 2009 which contains notations in the date boxes reflecting work to be completed and the signature of Catanese with the date "3/30/09." That Schedule includes language, written in a portion of the calendar that does not contain a date, "Opening Date May 1 Monday or try to be sooner."

CSI failed to complete the Build-Out Work as set forth in the April Construction Schedule. Plaintiff attempted, unsuccessfully, to contact CSI and Catanese to obtain an update as to the status of the Build-Out Work. On or about June 12, 2009, counsel for Plaintiff sent a letter to Ira Seplow ("Seplow"), believed to be CSI's counsel, demanding that the Build-Out Work be completed and that CSI provide a response within five (5) days. Seplow advised Plaintiff's counsel that he no longer represented CSI, at which time Plaintiff's counsel forwarded the letter directly to Catanese on behalf of CSI. On or about August 3, 2009, counsel for Plaintiff sent another letter to CSI demanding that construction be completed and that CSI provide a response within five (5) days.

Plaintiff alleges that CSI and Catanese have not responded to Plaintiff's letters and, to date, the Build-Out Work on the Premises has not been completed. Plaintiff submits that it is entitled to completion of all work in the Build-Out Schedule contained in the Lease within a reasonable time. Plaintiff also alleges that, upon information and belief, CSI has not obtained the necessary permits concerning the Build-Out Work. Thus, Plaintiff submits, CSI is in breach of the Lease.

The Complaint contains five (5) causes of action:

First: Plaintiff submits that it has no adequate remedy at law and requests specific performance directing CSI immediately to complete all outstanding Build-Out Work set forth in

the Lease Build-Out Schedule, and to permit Plaintiff to occupy the Premises pursuant to the terms of the Lease,

Second: Breach of Contract for failure to complete the Build-Out Work in accordance with the January Construction Schedule,

Third: Declaratory Judgment, in the event that the Court denies the relief sought in the first and second causes of action, declaring that the Lease is rescinded and voiding Plaintiffs' obligations pursuant to the Lease,

Fourth: Breach of Contract, in the event that the Court denies the relief sought in the first and second causes of action, for breach of the Lease by failing to complete the Build-Out Work within a reasonable time, in accordance with the January or April Construction Schedules, and

Fifth: Cause of Action Against Defendant Catanese under the theory of Successor Liability so that, in the event that CSI's financial condition renders it unable to satisfy any judgment or injunctive relief granted to Plaintiff, Catanese is held liable, as principal of CSI, for any judgment obtained by Plaintiff against CSI.

In his Affidavit in Support dated April 8, 2010, Jeffrey W. McPartland ("McPartland") affirms as follows:

McPartland is the Manager of Customer Service Centers for LIPA and National Grid. Catanese, in his capacity as President of CSI, executed certain certifications in connection with CSI's offer to build-out and lease the Premises to Plaintiff. Plaintiff and CSI thereafter executed the Lease (Ex. A to McPartland Aff.). McPartland swears to the truth of the allegations in the Complaint regarding 1) Plaintiff's purpose in entering into the Lease, 2) the Build-Out Schedules, 3) Plaintiff's hiring of and payment to its Staff, 4) Plaintiff's payments to CSI, 5) the negotiation and alleged acceptance by CSI of the January and April Construction Schedules (Exs. B and C to McPartland Aff.), and 6) CSI's failure to complete the Build-Out Work pursuant to those Schedules.

Paragraph 17.2 of the Lease provides as follows:

> If Owner defaults in fulfilling any of the covenants of this lease, then such default will constitute a default hereunder and Owner will be liable to Tenant for damages sustained by Tenant to the extent they are a result of Owner's default. Owner's liability hereunder is expressly limited to Owner's interest in the real property that is the subject of this lease agreement.

McPartland affirms that Plaintiff has been damages as follows: 1) $118,677.33, representing the sum of the two payments that Plaintiff made for the Build-Out Work, together with the security deposit, 2) $5,600.55 per week, beginning on April 1, 2009 and continuing into the future, representing the compensation that Plaintiff paid to the Staff during the period of CSI's continuing breach, 3) $2,818.81 representing removal costs incurred by Plaintiff for equipment delivered to the Premises in anticipation of its opening, consisting of a) $598.81 for safe removal, b) $425.00 for the removal of a Qmatic Customer Flow System, and c) $1,795.00 for furniture removal, and 4) future damages incurred by Plaintiff in connection with it obtaining alternate space for establishing a customer service center in the same geographical area as the Premises.

Plaintiff's counsel ("Counsel") provides an Affidavit in Support dated April 9, 2010 in which he affirms as follows:

Plaintiff filed the Summons and Complaint ("Complaint") (Ex. D to Counsel's Aff.) on October 7, 2009. Plaintiff served the Complaint on CSI, pursuant to BCL § 306, by delivering two (2) copies of the Complaint to Carol Vogt, an authorized agent in the Office of the Secretary of State of New York. Counsel provides a copy of the corresponding Affidavit of Service (Ex. E to Counsel's Aff.). In addition, on or about November 30, 2009, Plaintiff provided CSI with notice, pursuant to CPLR § 3215(g), together with a copy of the Complaint, by mailing those items to CSI at its last known address via first class mail. Counsel provides a copy of the corresponding Notice (Ex. F to Counsel's Aff.).

On or about October 22, 2009, Plaintiff served Catanese with the Complaint pursuant to CPLR § 308(2) by delivering the Complaint to Catanese's wife at their residence, and mailing a copy of the Complaint to Catanese at his residence. Counsel provides a copy of the corresponding Affidavit of Service (Ex. G to Counsel's Aff.). In addition, on or about November 30, 2009, Plaintiff provided Catanese with notice, pursuant to CPLR § 3215(g), together with a copy of the Complaint, by mailing those items to Catanese at his last known addresses, via first class mail. Counsel provides a copy of the corresponding Notice (Ex. H to Counsel's Aff.). Defendants have failed to answer or otherwise appear in this matter.

Paragraph 8 of the Lease includes the following language:

Owner shall indemnify and save harmless Tenant against and from all liabilities,

> obligations, damages, penalties, claims, costs and expenses (for which Tenant shall not be reimbursed by insurance, including reasonable attorney[']s fees), paid, suffered or incurred as a result of any breach by Owner, Owner's agents, contractors or employees of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of Owner, Owner's agents, contractors or employees[,] invitees or licensees.

Paragraph 35 of the Rider includes the following language:

> Owner shall indemnify and hold Tenant harmless from and against any and all liability, claim, loss, damage or expense, including reasonable attorneys' fees... resulting from any default by Owner in the performance of Owner's obligations under this lease or from any act, omission or negligence of Owner or any contractors, agents and employees of Owner.

Counsel provides documentation from the New York Department of State, Division of Corporations website reflecting that CSI's current status is "Inactive - Dissolution by Proclamation/Annulment of Authority (Jul 29, 2009)" (Ex. J to Counsel's Aff.). Counsel also provides copies of the letters that he sent to Defendants and their counsel in June and August of 2009, as described in the McPartland Affidavit, discussed *supra*.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a default judgment by demonstrating that 1) CSI has defaulted and breached its obligations under the Lease by failing to complete the Build-Out Work in accordance with the January or April Construction Schedules; 2) as a result of Defendants' breach and default, Plaintiff has been damaged in the amounts set forth by McPartland in his Affidavit; 3) Plaintiff served Defendants with the Summons and Complaint; and 4) Defendants failed to appear or otherwise respond to the Summons and Complaint. Plaintiff contends, further, that it is entitled to recover its costs and disbursements in this action, including attorney's fees, pursuant to the applicable provisions in the Lease and Rider. Plaintiff also submits that, despite its apparent dissolution by proclamation, CSI remains a viable corporate entity for purposes of this action. Finally, Plaintiff maintains that it is entitled to relief against Catanese on the theory of successor liability.

RULING OF THE COURT

A. Motion for Default Judgment

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).

B. Relevant Contract Principles

The elements of a cause of action for breach of contract are: 1) formation of a contract between the parties, 2) performance by plaintiff, 3) defendant's failure to perform, and 4) resulting damage. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). The plaintiff must establish the provisions of the contract the defendant is alleged to have breached. *Sud v. Sud*, 211 A.D.2d 423 (2d Dept. 1995); *Atkinson v. Mobil Oil Corp.*, 205 A.D.2d 719 (2d Dept. 1994).

When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864 (2d Dept. 2006). A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). The best evidence of what parties to a written agreement intend is what they say in their writing. *Id.* at 569, *quoting Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992). The court is to give practical interpretation to the language employed and the parties' reasonable expectations. *Slamow v. Del Col*, 174 A.D.2d 725, 726 (2d Dept. 1991), *aff'd.* 79 N.Y.2d 1016 (1992).

Where a contract fails to state a date for the completion of a construction project, a reasonable time is implied. *Teramo & Co., Inc. v. O'Brien-Sheipe Funeral Home, Inc.*, 283 A.D.2d 635, 636 (2d Dept. 2001). What constitutes a reasonable time for performance of a contract depends on the facts and circumstances of the particular case, including the subject matter of the contract, the situation of the parties, their intention, what they contemplated at the time the contract was made, and the circumstances surrounding performance. *Id.*

C. Liability of Dissolved Corporation

Business Corporations Law § 1006, titled "Corporate action and survival of remedies

after dissolution," provides as follows:

> (a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing:
>
> (1) The directors of a dissolved corporation shall not be deemed to be trustees of its assets; title to such assets shall not vest in them, but shall remain in the corporation until transferred by it in its corporate name.
>
> (2) Dissolution shall not change quorum or voting requirements for the board or shareholders, or provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws.
>
> (3) Shares may be transferred and determinations of shareholders for any purpose may be made without closing the record of shareholders until such time, if any, as such record may be closed, and either the board or the shareholders may close it.
>
> (4) The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it.
>
> (b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation).

A corporation continues to exist, while undergoing dissolution, for so long as it is necessary to satisfy its debts and it may sue or be sued until its business affairs are fully adjusted. *Wells v. Ronning*, 269 A.D.2d 690, 692 (3d Dept. 2000). Corporate liabilities include contractual obligations. *Rodgers v. Logan*, 121 A.D.2d 250, 253 (1st Dept. 1986).

D. Action Against Directors or Shareholders of Corporation

In an action by a creditor to satisfy or enforce a corporate liability, a creditor must ordinarily exhaust his remedies at law by obtaining a judgment against the corporation and by the return of an execution unsatisfied. *Rodgers v. Logan, supra*, 121 A.D. 2d at 253. Where, however, it is impossible or futile to obtain such judgment, the creditor may maintain an action directly against the directors or shareholders, even though no judgment has been obtained. *Id.*

See also Wells v. Ronning, 269 A.D.2d 690, 692 (3d Dept. 2000), in which the Third Department held that, where it is impossible or futile for a creditor to exhaust its remedies against a corporation by obtaining a judgment against it, a creditor may maintain an action directly against directors or shareholders to the extent they received from or continue to hold assets which were the corporation's. In *Wells*, however, based on its conclusion that the record revealed only minimal details of the corporate dissolution and suggested that title to the corporation's sole asset remained in the corporation, and given the lack of support for the trial court's decision to pierce the corporate veil, the Third Department concluded that there were unresolved factual issues concerning the personal liability of the sole shareholder. *Id.* at 693. The Third Department, therefore, reversed that portion of the trial court's decision that imposed personal liability on the sole shareholder of the corporation and remitted that matter to the trial court for resolution of factual issues concerning his personal liability. *Id.* at 693.

E. Counsel Fees

Provisions or stipulations in contracts for payment of attorney's fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977). Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that they are reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). The court should consider the following factors in determining the reasonable value of the services rendered: 1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, 2) the lawyer's experience, ability and reputation, 3) the amount involved and benefit resulting to the client from the services, 4) the customary fee charged for similar services, 5) the contingency or certainty of compensation, 6) the results obtained, and 7) the responsibility involved. *Diaz v. Audi of America, Inc.*, 57 A.D.3d 828, 830 (2d Dept. 2008). In making an award of attorney's fees, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered. *NYCTL 1988-1 Trust v. Shabbos, Inc.*, 37 A.D.3d 789, 791 (2d Dept. 2007), quoting *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006).

F. Declaratory Relief

Declaratory relief is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action. *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931), *reh den.*, 256 N.Y. 681 (1931).

G. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated its right to a default judgment against Defendant CSI on the fourth cause of action in the Complaint, in light of the submitted documentation demonstrating that 1) CSI and Plaintiff entered into the Lease; 2) Plaintiff made payments to CSI in the sum of $118,677.33, representing the sum of the two payments that Plaintiff made for the Build-Out Work, together with the security deposit, 3) CSI defaulted under the Lease and the parties' subsequent agreements by failing to complete the required Build-Out Work within the time frames of the January or April Construction Schedules; 4) Plaintiff properly served the Summons and Complaint on CSI; and 5) CSI failed to answer or otherwise appear in this action. The Court declines to award the additional damages sought by Plaintiff, including payments to Staff and equipment removal, on the grounds that the Court cannot conclude that such an award is appropriate based on the record before it.

The Court declines to issue a declaratory judgment on the grounds that the Court, by this decision, is providing a full and adequate remedy to Plaintiff.

The Court also denies, without prejudice, Plaintiff's motion for a default judgment against Defendant Catanese on the basis that the Court has insufficient information regarding the circumstances of the dissolution of CSI to warrant the imposition of personal liability against Defendant Catanese.

The Court determines that Plaintiff is entitled to judgment in the sum of $118,677.33, representing the sum of the two payments that Plaintiff made for the Build-Out Work, together with the security deposit.

The Court also determines that an award of attorney's fees, and costs and disbursements, is appropriate in light of the relevant provisions in the Lease. As there is an insufficient record before the Court to determine the counsel fee award, those matters are referred to an inquest as well.

Accordingly, it is

ORDERED, that Plaintiff have judgment by default against Defendant Chestnut Station, Inc. in the amount of $118,677.33; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the determination of counsel fees and other costs, pursuant to CPLR § 3215, on August 17, 2010 at 10:00 a.m.; and it is further

ORDERED, that Plaintiff's attorneys shall serve upon Defendant Chestnut Station, Inc. a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue, and shall pay the appropriate filing fees on or before August 3, 2010. Plaintiff shall effect that service by a) mailing a copy, certified mail, return receipt requested, to Defendant Catanese at the three (3) addresses to which Plaintiff previously mailed the Notice Pursuant to CPLR § 3215(g); and b) publishing a copy of this Order in the New York Daily News, every day for one week, prior to August 17, 2010; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against Defendant Chestnut Station, Inc. in accordance with this decision and the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
July 15, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUL 20 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE