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SHORT FORM ORDER

INDEX No. 10-4508

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

***PRESENT:***

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 4-29-10
ADJ. DATE 10-13-10
Mot. Seq. # 001 - MotD
Mot. Seq. # 002 - MD

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| JOHN G. APISSON, JR. and JENNIFER APISSON, and SIBEN & SIBEN, LLP as Assignee of JOHN G. APISSON, JR. and JENNIFER APISSON, | SIBEN & SIBEN, LLP<br>Attorney for Plaintiffs<br>90 East Main Street<br>Bay Shore, New York 11706 |
| Plaintiffs, | MITCHELL TEITELBAUM, Pro Se<br>7705 Queens Boulevard |
| - against - | Elmhurst, New York 11373 |
| MITCHELL TEITELBAUM and LISA TEITELBAUM, | ZACHARY D. KELSON, ESQ.<br>Attorney for Defendant Lisa Teitelbaum<br>10 St. John Street, P.O. Box 1210 |
| Defendants. | Monticello, New York 12701 |

Upon the following papers numbered 1 to 29 read on this motion for default judgment/summary judgment; motion for default judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 26 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 27 - 29 ; Replying Affidavits and supporting papers ___; ~~Other~~ __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that these motions are hereby consolidated for purposes of this determination; and it is further

***ORDERED*** that the motion by the plaintiffs for an order pursuant to CPLR 3215 directing the entry of a default judgment against defendant Mitchell Teitelbaum for failure to appear, answer or otherwise serve a responsive pleading, and pursuant to CPLR 3212 granting summary judgment in their favor as to the defendants' liability, is granted to the extent that, upon a proper submission, the Clerk of the Court is directed to enter a default judgment against defendant Mitchell Teitelbaum, that the plaintiffs are awarded summary judgment against defendant Lisa Teitelbaum, and that the attorney for the plaintiffs is directed to release escrow funds in the sum of two thousand two hundred ninety-two dollars and fifty-three cents ($2,292.53) to the plaintiffs held pursuant to the escrow agreement between the parties dated January 14, 2008, and to release the remaining escrow funds in the sum of two hundred

seven dollars and forty-seven cents ($207.47) to defendant Lisa Teitelbaum, in a manner that she directs in writing to said attorney, and is otherwise denied; and it is further

***ORDERED*** that the plaintiffs shall, within twenty (20) days of this order, serve a copy of this order with notice of entry upon all parties pursuant to CPLR 2103 (b) (1), (2), (3) or CPLR 2103 (c) and shall thereafter file the affidavits of service with the Clerk of the Court; and it is further

***ORDERED*** that the motion (incorrectly denominated as a cross motion) by defendant Lisa Teitelbaum which seeks an order pursuant to CPLR 3215 for a default judgment against defendant Mitchell Teitelbaum for failure to serve an answer to her cross claims is denied.

This is an action to recover monies allegedly paid in error by the plaintiffs pursuant to a contract for the sale of real property, and to obtain the release of certain monies from an escrow account held pursuant to said sale. The complaint sets forth three causes of action, the first and second on behalf of Siben & Siben, LLP as assignee, and the third on behalf of the individual plaintiffs. The first cause of action alleges that, pursuant to a mutual mistake by the parties, the plaintiffs were required to pay $4,566.25 for the second half school taxes due on the property after giving the defendants a credit at the closing based on the understanding that the taxes had been paid. The second cause of action alleges that the defendants have been unjustly enriched in the amount of $4,566.25. The third cause of action alleges that the parties entered into an escrow agreement pursuant to which the plaintiffs are entitled to a release of $2,292.53, which the defendants refuse to authorize.

On or about November 2, 2007, the defendants entered into a written contract of sale in which they agreed to convey their home to the plaintiffs. A review of the rider to the contract reveals that it contains the following relevant language:

> 1. If this rider conflicts in any way with the printed form Contract of Sale, this rider shall control.
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> * * *
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> 16. The parties agree that any error in making final adjustments shall be corrected within ten (10) days after written notification of such error by either party to the other or to their respective attorneys, and this representation shall survive the closing.

On January 14, 2008, title to the property was closed and closing adjustments were made for the school and town taxes. The school taxes for the second half, or the period from January 1, 2008 to June 30, 2008, totaled $4,566.25, and an adjustment of $4,220.00 was given to the defendants for the period of time from the date of closing through June 30, 2008.[1]

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[1] The amount of the credit given at the closing becomes irrelevant as the defendants benefitted in the amount of $4,566.25 after adding the credit they received to the amount which was the responsibility of the defendants to pay for the period from January 1, 2008 to January 14, 2008.

The plaintiffs now move for an for an order pursuant to CPLR 3215 directing the entry of a default judgment against defendant Mitchell Teitelbaum (Mitchell) for failure to appear and answer. CPLR 3215 (a) states, in relevant part that "[w]hen a defendant has failed to appear, plead or proceed to trial on an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." A party seeking a judgment on default is required to submit proof of the service of the summons and complaint, proof of the facts constituting the claim, and proof of the default in answering or appearing (CPLR 3215 [f]; ***Matone v Sycamore Realty Corp.***, 50 AD3d 978, 858 NYS2d 202 [2008], *lv denied* 11 NY3d 715, 873 NYS2d 533 [2009]; ***Allstate Ins. Co. v Austin***, 48 AD3d 720, 851 NYS2d 375 [2008]; ***Grinage v City of New York***, 45 AD3d 729, 846 NYS2d 300 [2007]).

Here, the plaintiffs met their burden by submitting proof of original service and additional service of the summons and complaint upon Mitchell, the verified complaint, and the affidavit of plaintiff John Apisson establishing the facts of the claim. Mitchell, in opposition, failed to demonstrate a reasonable excuse for his default and a meritorious defense to the action (*see*, CPLR 5015 [a] [1]; ***Moriano v Provident New York Bancorp***, 71 AD3d 747, 899 NYS2d 246 [2010]; ***Lipp v Port Auth. of N.Y. & N. J.***, 34 AD3d 649, 824 NYS2d 671 [2006]).

When a default is entered, the defendant "admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" (***Curiale v Ardra Ins. Co.***, 88 NY2d 268, 644 NYS2d 663 [1996]). However, where the damages are for a sum certain or a sum which can be made certain by computation, the defendant is not entitled to an inquest (***Pikulin v Mikshakov***, 258 AD2d 450, 684 NYS2d 598 [1999]; ***Ettinger v Wilke***, 79 Misc 2d 387, 358 NYS2d 597 [1974]; *cf.*, ***Abbas v Cole***, 44 AD3d 31, 840 NYS2d 388 [2007]). "[T]he term 'sum certain' in this context contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments" (***Pikulin v Mikshakov***, *supra*, quoting ***Reynolds Sec. v Underwriters Bank & Trust Co.***, 44 NY2d 568, 406 NYS2d 743 [1978]; *cf.*, ***Bowdren v Peters***, 208 AD2d 1020, 617 NYS2d 66 [1994]). Stated another way, once liability has been established, and there is no dispute as to the amount due, a court can set the amount of damages (***Seaport Park Condominium v Greater New York Mut. Ins.***, 2007 NY Slip Op 33772[U] [Sup Ct, NY County 2007]). Here, the plaintiffs have established their entitlement to a sum certain and Mitchell does not dispute the factual allegations in the verified complaint or the amount claimed therein. In addition, Mitchell fails to address the issue of the escrow held pursuant to the contract between the parties.

Accordingly, the plaintiffs' motion for an order pursuant to CPLR 3215 directing the entry of a default judgment against defendant Mitchell Teitelbaum in the principal amount of $4,566.25 is granted.

The plaintiffs also move for summary judgment alleging that the second half taxes were not paid by the defendants prior to the closing of title, and that they were required to pay the second half taxes in April 2008. While summary judgement cannot be granted against Mitchell because issue has not been joined as to him (CPLR 3212 [a]), the plaintiffs have established their entitlement to summary judgment against defendant Lisa Teitelbaum (Lisa). A review of the record reveals that the plaintiffs paid a credit to the defendants upon the mutual mistake of the parties that the second half school taxes had been paid,

and thereafter they were required to pay the entire amount of the second half school taxes due. Once they discovered the error, the plaintiffs contacted their attorney, plaintiff Siben & Siben, LLP (Siben). On January 7, 2010, Siben wrote to the attorneys for the defendants seeking to correct the error and obtain a return of the money paid. On January 26, 2010, Siben paid the plaintiffs the amount that the defendants owed to them in exchange for an assignment of the plaintiffs' first two causes of action. Lisa acknowledges the mistake of the parties and does not oppose this branch of the plaintiffs' motion. As to the third cause of action, the record reveals that the plaintiffs were not able to verify that the Jacuzzi tub located on the premises was in working order prior to the closing of title in this matter. Consequently, the parties entered into an escrow agreement which provided that the plaintiffs' attorney would hold $2,500.00 in its escrow account, that the plaintiffs would arrange to have the Jacuzzi tub repaired in the event that it was not in working order, that the plaintiffs would be reimbursed out of the escrow proceeds for the cost of said repairs, if any, and that the unused balance of the escrow funds would be refunded to Lisa. Again, Lisa does not dispute the factual allegations made by the plaintiffs.

Accordingly, the plaintiffs' motion is also granted to the extent of granting summary judgment in their favor and against Lisa for the relief demanded in the complaint, and that branch of the plaintiffs' motion which seeks a default judgment is rendered academic.

Lisa moves for an order pursuant to CPLR 3215 for an order directing the entry of a default judgment against Mitchell for failure to serve an answer to the cross claims asserted in her verified answer.[2] The first cross claim alleges that Mitchell was solely responsible for payment of the school taxes due on the property pursuant to the stipulation of settlement in their divorce action and that he should be held responsible for any repayment owed to the plaintiffs. The second cross claim alleges that Mitchell is liable for the payment of Lisa's reasonable attorney's fees in defending this action.

A party is not required to serve an answer to a cross claim unless the cross claim contains a demand for an answer (CPLR 3011). Here, a review of Lisa's verified answer reveals that neither cross claim contains a demand for an answer.

Accordingly, Lisa's motion is denied.

Siben & Siben, LLP, as plaintiff on the first and second causes of action, is entitled to enter judgment against the defendants in the amount of $4,566.25 with interest from January 26, 2010. Siben & Siben, LLP, as escrow agent on the third cause of action, is directed to release the sum of two thousand two hundred ninety-two dollars and fifty-three cents ($2,292.53) to the individual plaintiffs from the escrow account held pursuant to the escrow agreement between the parties dated January 14, 2008, and to release the sum of two hundred seven dollars and forty-seven cents ($207.47) to defendant Lisa Teitelbaum, in a manner that she directs in writing.

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[2] In addition, although not noticed as a part of her cross motion, Lisa requests a stay of a small claims action commenced by Mitchell against her after the commencement of this action which raises the issue of indemnification between the parties for the error in the apportionment of the school taxes. The record does not reveal the current status of that action and the Court does not have enough information to determine if an injunction regarding the small claims action is necessary.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see*, CPLR 3212 [e] [1]).

Dated: DEC 14 2010

J.S.C.
HON. JEFFREY ARLEN SPINNER

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION