

**Parker Mgt. N.Y., LLC v United States El., Inc.**

2015 NY Slip Op 32014(U)

October 28, 2015

Supreme Court, New York County

Docket Number: 650359/2015

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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PARKER MANAGEMENT NEW YORK, LLC,  
PARKER OFFICE BUILDING, L.P., PARKER FOREST  
HILLS, L.P., PARKER YELLOWSTONE, L.P., and  
PARKER QUEENS, L.P.

Plaintiff,

- v -

UNITED STATES ELEVATOR, INC.,  
  
Defendant.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Index No.  
650359/2015

**DECISION  
and ORDER**

Mot. Seq. #001

Plaintiffs, Parker Management New York, LLC, Parker Office Building, L.P., Parker Forest Hills, L.P., Parker Yellowstone, L.P., and Parker Queens, L.P (collectively, "Plaintiff"), to recover liquidated damages arising out of a written agreement (the "Contract"), dated March 14, 2011, between Plaintiff and defendant, United States Elevator, Inc. ("Defendant"). Plaintiff claims that, pursuant to the Contract, Plaintiff hired Defendant to perform elevator modernizations to the premises located at, 104-20, 104-40, and 104-60 Queens Boulevard, Forest Hills, New York 11375 (collectively, the "Premises").

Plaintiff commenced this action on February 6, 2015, by Summons and Complaint.

Plaintiff now moves for an Order, pursuant to CPLR § 3215, granting judgment on default in favor of Plaintiff and against Defendant in the sum of \$1,392,000.00 together with attorney's fees incurred in this action.

In support, Plaintiff submits: the affidavit of Cynthia M. Wong ("Wong"), the registered managing agent of the Premises, dated June 26, 2015; copies of the pleadings herein; the affidavit of service of Plaintiff's summons and complaint upon Defendant; the affidavit of additional mailing upon Defendant pursuant to CPLR §

3215(g); the Contract; and, a letter dated November 5, 2014, notifying Defendant that of Plaintiff's election to terminate the Contract (the "Termination Letter").

No opposition is submitted.

CPLR § 3215 provides, in relevant part: "[o]n any application for judgment by default, the applicant shall file proof ... of the facts constituting the claim, the default and the amount due by affidavit made by the party." (CPLR § 3215[f]). CPLR § 3215 does not contemplate that default judgments are to be "rubberstamped" once jurisdiction and a failure to appear have been shown. (*Feffer v. Malpeso*, 210 A.D.2d 60, 61 [1st Dep't 1994]; see also *Gagen v. Kipany Prods.*, 289 A.D. 2d 844, 846 [3d Dep't, 2001] ["[T]he granting of a default judgment does not become a 'mandatory ministerial duty' upon a defendant's default."]). Rather, some proof of liability is required to satisfy the court as to the prima facie validity of the uncontested cause of action. (*Feffer*, 210 A.D.2d at 61). The standard of proof on an application for judgment by default "is not stringent, amounting only to some firsthand confirmation of the facts". (*Id.*).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, \*9 [1st Dep't 2009]). In addition:

Parties to a contract may provide for anticipatory damages in the event of failure to complete performance within the time specified, as long as such agreement is neither unconscionable nor contrary to public policy. Absent statutory authority, the imposition of penalties or forfeitures contravenes public policy. If the amount stipulated in the liquidated damage clause is manifestly disproportionate to the actual damage, then its purpose is not to "provide fair compensation but to secure performance by the compulsion of the very disproportion." Thus, the rule has evolved that when the damages flowing from the breach of a contract are easily ascertainable, or the damages fixed are plainly disproportionate to the injury, the stipulated sum will be treated as a penalty, but, where they are uncertain, or difficult, if not incapable, of ascertainment, then a provision liquidating them in advance of loss will be

enforced, if the amount liquidated bears a reasonable proportion to the probable loss. Whether the sum stipulated represents a liquidation of the anticipated damages or a penalty is a question of law, with due consideration for the nature of the contract and the attendant circumstances. Moreover, the agreement should be interpreted as of the date of its execution, not the date of its breach.

*(X.L.O. Concrete Corp. v. John T. Brady & Co., 104 A.D.2d 181, 183-84 [1st Dep't 1984]).*

In the affidavit of Wong, Wong avers:

9. This action was commenced to recover monies due to Plaintiff by reason of Defendant's default under a contract dated March 14, 2011, whereby Defendant was hired to perform elevator modernizations to the Premises (the "Contract"). A copy of the Contract is annexed hereto as Exhibit "D."

10. In a letter dated November 5, 2014 (the "Termination Letter"), Plaintiff notified Defendant that; pursuant to the terms of the Contract, Plaintiff elected to terminate the Contract due to Defendant's default thereunder. A copy of the Termination Letter is annexed hereto as Exhibit "E."

11. The Termination Letter further advised Defendant that, pursuant to Section 2(4) of the Contract, Plaintiff would seek to recover liquidated damages in the amount of \$1,392,000.00, broken down as \$4,000.00/day for 348 days. See Exhibits "D" and "E."

12. Based on the foregoing, Plaintiff is entitled to a default judgment against Defendant in the sum of \$1,392,000.00 together with attorneys' fees incurred in this action.

(Wong Aff. ¶¶ 9-11).

With respect to liquidated damages, the Contract provides:

Liquidated Damages: Time is of the essence to this Agreement and all obligations thereunder. The parties acknowledge and agree that if the Contractor fails to accomplish substantial completion of any portion of the Work within the time set forth in Subsection 2(3), as may be extended by the Owner, the Owner shall sustain extensive damages and serious loss as a result of such failure. The exact amount of such damages will be uncertain in amount, or difficult to prove. Therefore, the Owner and the Contractor agree that if the Contractor fails to achieve substantial completion of the Work within the time required by this Agreement, the Owner shall be entitled to retain or recover from the Contractor, as liquidated damages and not as a penalty, the sum of \$4,000.00 for every calendar day that the Contractor is in default, commencing upon the first day following expiration of the contract time and continuing until the actual date of substantial completion. Such liquidated damages are hereby agreed to be a reasonable pre-estimate of damages the Owner shall incur as a result of delayed completion of the Work. It is agreed that the Contractor shall credit the Owner with the amount of said damages against any amounts due under this Agreement and the Owner may, at its option, deduct the amount of said damages against any amounts due to the Contractor.

(Wong Aff., Ex. D ¶ 2[4] [Contract]).

The Termination Letter states:

Dear Billy/Dan:

Notice is hereby given pursuant to Section 17 of the Contract between the parties dated March 14, 2011, that Owner hereby terminates the Agreement effective immediately, due to your failure to, among other things, to diligently and timely prosecute the Work required herein

and in accordance with the agreed upon work schedule and timeline, failed to perform the terms of the Agreement, even after numerous notices and correspondences to you concerning your failures and breach of the Agreement. You failed to deliver, including but not limited to, mechanical, hoists, controllers and gears, in which Owner paid issued to you, joint checks payable to GAL and US Elevator.

We will be seeking damages including but not limited to:

1. Pursuant to Section 2(4) Liquidated Damages at 348 week days for delays at \$4000 a day, in the amount of \$1,392,000.00;
2. Equipment paid and not delivered on site in the amount of \$184,021.90;
3. Open Violations in the amount of \$188,539.46.

(Wong Aff., Ex. E [Termination Letter]). The Termination Letter is signed by Steven Pipes, as Plaintiff's president.

Here, Plaintiff fails to provide sufficient first-hand confirmation of the facts to support a breach of contract claim against Defendant. Although Wong's affidavit references Defendant's "default" under the Contract (Wong Aff. ¶¶ 9-10), Wong's affidavit does not provide sufficient information for the reviewing Court to determine whether Defendant "fail[ed] to accomplish substantial completion of any portion of the Work" for purposes of the Contract's liquidated damages provision. (Wong Aff., Ex. D ¶ 2[4] [Contract]). In addition, Plaintiff's complaint is not verified and the Termination Letter, which is not executed by Wong, is insufficient to satisfy CPLR § 3215(f)'s requirement for proof the facts constituting the claim, the default and the amount due. (CPLR § 3215[f]).

Accordingly, Plaintiff's application for a default judgment against Defendant is denied.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for default judgment is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: October 28, 2015

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EILEEN A. RAKOWER, J.S.C.