

Krol v Sino-American Amnity Fund, Inc.

2019 NY Slip Op 33367(U)

November 8, 2019

Supreme Court, New York County

Docket Number: 152529/2019

Judge: W. Franc Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

IGOR KROL, RENATE KROL,

Plaintiffs,

- v -

SINO-AMERICAN AMITY FUND, INC.,

Defendant.

-----X

INDEX NO. 152529/2019

MOTION DATE 08/16/2019

MOTION SEQ. NO. 001

**AMENDED DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15 were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, the motion for default judgment is granted.

Plaintiffs commenced this action seeking to enjoin defendant from operating its business at the property located at 86 Riverside Drive, New York, New York in a manner that has (1) created a public nuisance, private nuisance, and nuisance per se, (2) violated numerous city and state laws and regulations, and (3) caused substantial damage to plaintiff's property.

Defendant is a not-for-profit corporation. Plaintiffs are owners of and reside in the building immediately adjacent to defendant's property. They share a common "party" wall with defendant's facility. According to plaintiffs, during the past decade they have suffered significant damage to their home including, but not limited to; carbon monoxide emanating from defendant's facility seeping into their home, water seeping into their side of the party wall causing damage to their tiles and wallpaper, damage to their facade and basement due to water accumulated on the defendant's roof.

Plaintiffs have attempted to serve defendants by mailing, pursuant to CPLR 312-a, a summons and complaint to defendant at the address where the facility is located, at the presumed

address of the two principals of defendant. Defendant has not responded.

Plaintiffs could not serve defendant via the Secretary of State of New York, because the Secretary of State has not been designated by defendant as an agent for service of process.

On June 21, 2019, plaintiff saw one of defendant's principals emerging from the property. Plaintiff provided the doorman to their building with a copy of the summons and complaint, who then attempted to serve the documents on defendant's principal, who refused service. The doorman left the documents at the principal's feet and thereafter executed an affidavit of service.

CPLR 3215 (a) provides in pertinent part, that when a defendant has failed to appear, plead or proceed to trial the plaintiff may seek a default judgment against him. A plaintiff must demonstrate entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint, (2) proof of the facts constituting its claim, and (3) proof of the defendant's default in answering or appearing. (CPLR 3215[f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2008]).

In the case at bar, plaintiffs have presented proof of adequate service under the CPLR. Plaintiffs have also submitted proof of the facts constituting their claim and proof of defendants' default in answering or appearing in this matter. Having failed to appear in this action by counsel, after being served with the summons and complaint and not having opposed the within motion, after being served, plaintiffs have shown prima facie entitlement to entry of a default judgment against defendant on the issue of liability.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for default judgment against defendant SINO-AMERICAN MITY FUND, INC., is granted on the issue of liability; and it is further

ORDERED that the portion of the Complaint seeking injunctive relief and compensatory damages are referred to a Special Referee to hear and determine (1) the form of the injunctive relief to which Plaintiff is entitled regarding the ongoing nuisance alleged in the Complaint and (2) Plaintiff's damages attributable to the defaulting Defendant; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and determine as specified above; and it is further

ORDERED that counsel for Plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186), or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

November 8, 2019

DATE

Hon. Deborah A. Kaplan
Administrative Judge
Supreme Court, New York County
Civil Branch

Deborah Kaplan

W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE