

<b>Remedios v Dreambuilder Invs., LLC</b>
2022 NY Slip Op 30937(U)
March 18, 2022
Supreme Court, New York County
Docket Number: Index No. 657680/2019
Judge: Jennifer Schechter
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JENNIFER SCHECTER PART 54**

*Justice*

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**INDEX NO. 657680/2019**

OSCAR REMEDIOS, PARKLAND PROPERTIES, LLC,

**MOT SEQ NOS 006 007**

Plaintiffs,

- v -

DREAMBUILDER INVESTMENTS, LLC, DBI GROUP HOLDINGS, LLC, PETER ANDREWS, GREGORY PALMER, ELIZABETH EISS,

**DECISION + ORDER ON MOTIONS**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 193, 194, 195, 196, 197, 198, 202, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 245, 246, 247, 248, 251, 252, 253, 254, 255, 256, 257, 259

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 203, 204, 205, 206, 207, 208, 209, 210, 211, 213, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238

were read on this motion to/for DISMISS.

By order dated December 23, 2021, the court granted plaintiffs' motion to strike the DBI Defendants' answer due to their discovery violations (Dkt. 187). Plaintiffs now move for a default judgment. Plaintiffs no longer seek a default judgment against defendant Elizabeth Eiss (*see* Dkt. 227 at 4 n 1). The other DBI Defendants oppose the motion and move to stay or dismiss the action based on the parties' March 22, 2021 settlement agreement (Dkt. 208 [the Settlement Agreement]), as amended on July 15, 2021 (Dkt. 209 [the Amendment]).

The Settlement Agreement does not provide a basis to stay or dismiss the action and plaintiffs' motion for a default judgment is granted.

The Settlement Agreement

The DBI Defendants' pleadings have been stricken based on their discovery misconduct. By violating discovery rules, defendants gave up the right they otherwise would have had to assert defenses that are required to be pleaded in an answer pursuant to CPLR 3018, including a defense based on a release (*John T. Brady & Co. v City of New York*, 104 Misc 2d 773, 778 [Sup Ct, NY County 1980], *aff'd* 84 AD2d 517 [1st Dept 1981]; *see Herman v Herman*, 179 AD3d 594, 595 [1st Dept 2020]). Thus, absent a motion to vacate their

default, which has not been filed, it is too late for them to move to dismiss on the ground that plaintiffs' claims are barred by the release in the Settlement Agreement. The DBI Defendants forfeited that defense when their answer was stricken and by failing to move to vacate the October 12 or December 23, 2021 orders.\* Regardless, plaintiffs had the right to proceed with this action due to the DBI Defendants' breach of the Settlement Agreement.

It is undisputed that the DBI Defendants defaulted on both the Settlement Agreement and the Amendment by failing to pay in accordance with their terms. The parties originally agreed that a stipulation of discontinuance would not be filed until the DBI Defendants paid \$50,000 (Dkt. 208 at 4). After they only paid \$10,000, the parties agreed to extend the payment deadline but increased the amount to \$75,000 (Dkt. 209 at 3-4). That amount also was not timely paid. This is relevant in two respects. First, the nonpayment is a default under the Settlement Agreement that triggers plaintiffs' election of remedies under ¶ 6, giving rise to a dispute about the meaning of the remedy plaintiffs elected in ¶ 6(e)--to "reopen the lawsuit" (*see* Dkt. 208 at 5). Second, the parties dispute whether the nonpayment constitutes a failure to satisfy the terms of the Settlement Agreement within the meaning of the prefatory clause of ¶ 8 such that plaintiffs' release of their claims in this action have not become effective (*see id.* ["Upon satisfaction of the terms of this Agreement..."]).

Paragraph 6(e) provides that "plaintiffs may, in their sole discretion, reopen the Lawsuit, **or** commence any other legal proceedings in the event that the Lawsuit cannot be reopened, to pursue any and all remedies available to enforce the Confessed Judgments and/or this Agreement" (*id.* [emphasis added]). The court rejects the DBI Defendants' argument that the words "pursue any and all remedies available to enforce the Confessed Judgments and/or this Agreement" in ¶ 6(e) modifies the words "reopen the Lawsuit" rather than merely "commence any other legal proceedings in the event that the Lawsuit cannot be reopened." This textual interpretation is not persuasive and is inconsistent with other provisions of the agreement.

First, the nomenclature "reopen the lawsuit" is telling. It assumes the action has been discontinued. In other words, it assumes the initial \$50,000 was paid so a stipulation of discontinuance would have been filed, resulting in the action being marked disposed, thus necessitating a reopening of the action. Here, however, the action does not even need to be "reopened" since it was never discontinued.

But even if the action had to be reopened, other provisions of the agreement demonstrate the parties' intent that plaintiffs could do so and resume the litigation (*see Westmoreland*

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\* The DBI Defendants did not even raise the Settlement Agreement in opposition to the motion to strike their answer, which suggests that they know the defense lacks merit because not only did they default in this case, they also defaulted on Settlement Agreement too.

*Coal Co. v. Entech, Inc.*, 100 NY2d 352, 358 [2003] [agreement must be "read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" and its meaning must not "be distorted where undue force is given to single words or phrases"]. If plaintiffs could not continue with the litigation upon default, then the parties would have agreed to the filing of a stipulation of discontinuance with prejudice after execution. They did not. Instead, even after the initial payments were made and confessions of judgments were produced the action would still not be dismissed with prejudice. Notably, the parties bargained for a with-prejudice dismissal in other situations, such as in the latter part of ¶ 6(e), so their deliberate decision to not do so at execution along with the conditional nature of the releases evidences their intent to permit the litigation to continue at plaintiffs' election upon default. The conditional nature of the releases demonstrates this intent because the claims could not be litigated if the releases went into effect at execution. If that were not the parties' intent, as is common in many settlement agreements, the releases would have been made effective upon execution. The court cannot adopt an interpretation of the Settlement Agreement that leaves the prefatory words of ¶ 8 "without force and effect" (*ARHC BSHUMMO01, LLC v Big Spring Prop. Holdings LLC*, 191 AD3d 519 [1st Dept 2021], citing *Cara Assocs., L.L.C. v Milstein*, 140 AD3d 657 [1st Dept 2016]; see *22 Gramercy Park, LLC v Michael Haverland Architect, P.C.*, 170 AD3d 535, 536 [1st Dept 2019]).

Additionally, if plaintiffs opted to "reopen the Lawsuit," they first had to unwind a portion of the settlement by returning the Loans defendants (Dkt. 208 at 4-5, ¶ 6[d]), evincing the parties' intent to litigate the underlying transactions and not simply enforce the settlement.

For these reasons, plaintiffs' interpretation of the Settlement Agreement is the only reasonable one and unambiguously permits them to have proceeded with the litigation. The parties must have intended there to be some obligations under the Settlement Agreement that the DBI Defendants needed to perform to constitute their "satisfaction of the terms of this Agreement." They never performed the most basic, initial requirement to pay a fraction of the overall settlement amount so not even a discontinuance without prejudice was required. Plaintiffs therefore have validly exercised their right to proceed with this action.

The DBI Defendants' argument that, for the action to proceed, plaintiffs were required to return the \$10,000 payment they made under the Settlement Agreement is rejected as there is no basis for it in the Settlement Agreement. Paragraph 6(d) only provides that "in the event that Plaintiffs elect to reopen the Lawsuit in accordance with paragraph 6(e), Plaintiffs must first return any Loans it holds to DBI or its designee" (Dkt. 208 at 4-5). Plaintiffs, however, were not provided with any Loans (addressed in the preceding paragraphs) and nothing in ¶ 6(d) or any other provision of the Settlement Agreement requires return of the \$10,000 payment made under paragraph 1(a)(i) (*see id.* at 1). The \$10,000 payment will simply be deducted from the judgment. That is what would have

been done under the confessions of judgment (*see id.* at 4) so the parties must have intended for the cash payments to be credited against the amount owed upon default.

### Default Judgment

"A defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" (*Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]). Since the DBI Defendants' answer was stricken they "are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Thus, while plaintiffs' allegations are deemed true they still must substantiate the legal basis for their claims and provide sufficient proof of damages.

An inquest should not be necessary on the breach of contract claim upon submission of proof of a sum certain owed under the March 1, 2009 promissory note (Dkt. 2 [the PNSA]; *see Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012]). In the PNSA, defendant Dreambuilder Investments, LLC (DBI) agreed to repay to plaintiff Parkland Properties, LLC (Parkland) \$500,000, in monthly installments, with 21% annual interest, with a maturity date of August 1, 2011 (Dkt. 2 at 4). The PNSA replaced a prior note from 2007, which was deemed fully satisfied (*id.* at 10). The principal amount was increased in 2010 to \$526,250 (Dkt. 245 at 2). Plaintiffs claim that, since 2009, DBI made payments on the PNSA totaling \$163,090 (*id.* at 3), and that at the end of 2021, the total amount owed was \$1,613,160.12 (*id.* at 3-4), such that they are owed this amount minus the \$10,000 payment. DBI, however, submitted conflicting records of the amount that it repaid (*compare* Dkt. 245 at 3-4, *with* Dkt. 255 at 3; *see also* Dkt. 254). While the parties agree on the amount repaid in certain years, they disagree about the amount repaid in others. Presumably, these amounts should be capable of reconciliation without a hearing since DBI's numbers appear to come from records provided by plaintiffs (*see* Dkts. 253, 254). The court cannot direct the entry of judgment until these issues are resolved.

Turning to the rest of the claims, plaintiffs also assert detailed veil piercing allegations in the amended complaint (Dkt. 49 at 27-30). By virtue of defendants' default, they are deemed true and are sufficient to pierce the corporate veils of DBI (under New York law) and DBIGH (under Delaware law) based on the allegations that Andrews treated them as alter egos in a manner that defrauded investors and creditors (*see Pensmore Investments, LLC v Gruppo, Levey & Co.*, 2019 WL 2106091, at \*5 [Sup Ct, NY County May 14, 2019], *affd as mod. on other grounds*, 184 AD3d 468 [1st Dept 2020]). Thus, all three DBI Defendants will be held liable on the breach of contract claim.

The fraud claim, however, is duplicative (*MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 165 AD3d 108, 114 [1st Dept 2018]), notwithstanding the request for punitive damages, which, in any event, is unwarranted (*id.* at 115 ["A party cannot bootstrap a fraud claim


seeking duplicative relief merely by alleging a potential for punitive damages"]; *see Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 419 [1st Dept 2020]). Moreover, there is no basis to award a recovery to plaintiff Oscar Remedios since the PNSA provides that the money is payable to his company, Parkland.

Sanctions are denied. But the PNSA contains a prevailing party clause (Dkt. 2 at 5). While defendants do not proffer any credible challenge to any specific portion of the billing records, the court nonetheless finds the \$95,407 billed by Diaz, Reus & Targ, LLP (*see* Dkt. 198) and the \$55,709.35 billed by Nesenoff & Miltenberg, LLP (*see* Dkt. 196) to be excessive and that a reduction for some block billing is warranted. The DBI Defendants will not be required to pay for unnecessary work that could have been avoided. In light of the work performed and the amount in controversy (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]), the court finds that it would be reasonable to award Parkland a total of \$120,000 in attorneys' fees and expenses.

The DBI Defendants' other arguments are unavailing. The court, to be sure, has been made aware of a recently-filed related action in which the DBI Defendants assert claims for breach of the Settlement Agreement (*see* Dkt. 241). While the court declines to impose sanctions on these motions, the court will not opine on whether sanctions would be warranted in the new action if it proceeds.

Accordingly, it is ORDERED that plaintiffs' motion for a default judgment is GRANTED, the DBI Defendants' motion to stay or dismiss the action is DENIED, and plaintiffs' request for sanctions is DENIED; and it is further

ORDERED that by March 23, 2022, plaintiffs shall e-file and email the court a letter, not to exceed 3 pages, addressing the amount repaid by DBI, to which a 3-page response may be e-filed and emailed by March 28, 2022.

<p style="text-align: center;"><u>3/18/2022</u> DATE</p>	 <small>20220318154518JSCHECTER9338581D09FB427484CD7F656A70085E</small> <hr/> <b>JENNIFER SCHECTER, J.S.C.</b>						
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