

Nemens v HFZ 344 W. 72nd St. Owner, LLC

2023 NY Slip Op 31604(U)

May 10, 2023

Supreme Court, New York County

Docket Number: Index No. 651490/2022

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

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SUSAN TANNENBAUM NEMENS,

Plaintiff,

- v -

HFZ 344 WEST 72ND STREET OWNER, LLC,

Defendant.

-----X

INDEX NO. 651490/2022

MOTION DATE 04/20/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12

were read on this motion for DEFAULT JUDGMENT.

Upon the foregoing documents, plaintiff's motion for entry of a default judgment is granted in part in accordance with the following memorandum decision.

Background:

This action arises out of defendant's renovation of its real property located at 340-344 West 72nd Street, New York, New York (the "premises") (complaint, NYSCEF Doc. No. 1, ¶ 3). Plaintiff is the owner of the adjoining building, having an address of 338 West 72nd Street, New York, New York (the "adjoining premises"). The parties entered into a license agreement dated August 2014 pursuant to which plaintiff allowed defendant access to the adjoining premises in order to set up a sidewalk bridge and roof protection (the "Protection Work"), for which defendant paid plaintiff \$25,000 (license agreement, NYSCEF Doc. No. 9, ¶ 19). The license agreement was for a term of one year and terminated on the earlier of: (i) the conclusion of the one year; (ii) the completion of the project; or (iii) on ten days' notice of termination by plaintiff to defendant (*id.*, ¶ 2). The agreement could also be extended in increments of six months (*id.*).

In the event that the agreement was extended beyond the initial year, defendant agreed to pay

plaintiff \$1,000 per month “until the removal of the Protection Work or earlier termination of [the agreement]” (*id.*, ¶ 19). Upon the earlier of the termination of the agreement or completion of the Protection Work, defendant was to remove any debris, and all of defendant’s “tools and equipment and unused materials in or on the adjoining premises” (*id.*, ¶ 5[F]).

Plaintiff had allowed the work to continue beyond the initial year (August 2014 to August 2015), which this court construes as a *de facto* extension of the agreement.¹ Such work was ongoing as of August 31, 2021, whereupon plaintiff’s counsel sent a letter to defendant’s counsel, dated August 31, 2021, giving notice that plaintiff was terminating the agreement (termination letter, NYSCEF Doc. No. 10). The letter further stated that defendant owed plaintiff \$16,000 in unpaid monthly license fees (i.e., 16 months’ worth of unpaid extension-period monthly fees), and was to immediately remove the Protection Work from the adjoining premises (*id.*). To date, plaintiff alleges that the Protection Work has not been removed, and that monthly license fees continue to accrue beyond said \$16,000 (Nemens aff., NYSCEF Doc. No. 5, ¶¶ 12-14).

Plaintiff commenced this action by summons and complaint filed March 30, 2022, seeking the sum of \$92,000 from defendant, representing the total amount of monthly license fees alleged to be owed as of the date of filing of the complaint. Plaintiff now moves for a default judgment due to defendant’s non-appearance in this action. No papers were served in opposition to the motion.

Discussion:

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts

¹ The agreement’s extension clause does not require any form of formal notice (*see*, NYSCEF Doc. No. 9 ¶ 2).

constituting the claim, and proof of the defendant's default (CPLR 3215). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “[D]efaulters 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]). Nevertheless, “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of N.Y.*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, by submission of affidavits of service and extra mailing (NYSCEF Doc. Nos. 2, 8), and the affirmation of plaintiff’s counsel attesting to defendant’s failure to answer (NYSCEF Doc. No. 4, ¶ 4), plaintiff establishes proof of service and defendant’s default. However, the terms of the license agreement limit the relief available to plaintiff. Specifically, plaintiff seeks judgment in the amount of \$104,000, on the grounds that the monthly license fee continued to accrue following termination. Contrary to plaintiff’s position, though: the license agreement cuts off the license fee upon the “removal of the Protection Work or earlier termination of this Agreement” (license agreement, NYSCEF Doc. No. 9, ¶ 19). Plaintiff is, thus, limited to whatever license fees were outstanding at the time she terminated the agreement, which, pursuant to the termination letter, amounted to \$16,000 (termination letter, NYSCEF Doc. No. 10).

Plaintiff also seeks an order declaring that the license agreement has been terminated and compelling defendant to remove the Protection Work from the adjoining premises. Plaintiff has properly terminated the agreement pursuant to its terms. Upon the termination of the agreement,

defendant is obligated to remove “(i) all debris resulting [from the Protection Work], and (ii) all of Licensee’s tools and equipment and unused materials in or on the Adjoining Premises, at Licensee’s sole cost and expense” (license agreement, NYSCEF Doc. No. 9, ¶ 5[F]). The court notes that this provision does not specifically reference removal of the “Protection Work” itself when the license agreement terminates, making specific reference only to “debris” and “tools and equipment and unused materials.” But to construe the agreement as permitting defendant to leave its Protection Work on plaintiff’s premises following termination of its license to do so would result in an absurdity which could not possibly reflect the contractual intent of the parties. “Contracts must be read as a whole and all terms of a contract must be harmonized whenever reasonably possible” (*Teliman Holding Corp. v VCW Assoc.*, 211 AD3d 499, 500 [1st Dept 2022] [internal quotation marks and citations omitted]). “An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation” (*Perlbinder v. Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 986-87 [1st Dept 2009]). “The standard is necessarily flexible, varying for example with the subject of the agreement, its complexity, the purpose for which the contract was made, the circumstances under which it was made, and the relation of the parties (*Cobble Hill Nursing Home, Inc. v Henry and Warren Corp.*, 74 NY2d 475, 482-83 [1989], *rearg denied* 75 NY2d 863, *cert denied* 498 US 816 [1990]).

Here, the court interprets the obligation to remove all debris, tools, materials, and equipment upon termination of the agreement to include removal of the Protection Work itself. Such an interpretation harmonizes the provisions indicating what each party gives up upon termination of the agreement. Specifically, plaintiff, by terminating the agreement, gives up her right to continue receiving monthly payments, and in exchange for no longer having to pay

plaintiff, defendant is required to remove everything that it placed on plaintiff's property. To do otherwise would lead to plaintiff giving up her right to monthly payments while allowing defendant to leave the Protection Work on the adjoining premises indefinitely, for free. A court should not interpret a contract in a way that produces an absurd result (*Rubin v Baumann*, 148 AD3d 556, 556 [1st Dept 2017]).

Accordingly, it is hereby

ORDERED that the motion is granted in part to the extent set forth herein; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the principal amount of \$16,000.00, with interest thereon at the statutory rate from September 9, 2021, through entry of judgment, as calculated by the Clerk, and continuing to so accrue thereafter through satisfaction of judgment, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ADJUDGED and DECLARED that the license agreement has been terminated as of September 9, 2021;² and it is further

ORDERED that defendant shall remove the Protection Work, as that term is defined in the license agreement (NYSCEF Doc. No. 9), from the adjoining premises (338 West 72nd Street, New York, New York), within 60 days of the date of filing hereof.

² Ten days after plaintiff's August 31, 2021, termination letter, in accord with the license agreement (NYSCEF Doc. No. 9 ¶ 2).

This constitutes the decision and order of the court.



<u>5/10/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	