

40 CPS Assoc., LLC v Elnashar

2023 NY Slip Op 34149(U)

November 15, 2023

Supreme Court, New York County

Docket Number: Index No. 160078/2016

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12

Justice

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INDEX NO. 160078/2016

40 CPS ASSOCIATES, LLC,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 004

- v -

ASHRAF ELNASHAR, REEM RAOUDA

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for

STRIKE PLEADINGS

This action involves an alleged default by defendants Ashraf Elnashar and Reem Raouda (defendants) under a residential lease agreement dated April 14, 2015, between plaintiff-landlord 40 CPS Associates, LLC (plaintiff) and defendants-tenants, as amended by an agreement to renew dated March 17, 2016. Plaintiff seeks to recover money allegedly owed by defendants pursuant to the agreement in the amount of in the sum of \$26,400.00. The complaint pleads two causes of action: breach of contract and reimbursement of attorneys' fees.

Plaintiff now seeks an order striking defendants' answer pursuant to CPLR 3126; rendering a money judgment by default in favor of plaintiff against defendants; and awarding attorney's fees, costs and disbursements, or, alternatively, ordering a hearing to assess said relief. The motion to strike the answer is based on defendants' failure to comply with plaintiff's discovery demands and the directives contained in the Court's conditional order, dated July 18, 2022 (the order). See NYSCEF doc. no. 60.

Plaintiff submits a copy of the order, which provides the following, in part:

It is...ORDERED, that defendants appear in this action by entry into a discovery stipulation with plaintiff on or before September 28, 2022. If they fail to do so, their answer will be stricken upon an affirmation of non-compliance by defendants.

Plaintiff thereafter filed an affirmation of non-compliance on September 30, 2022, in which plaintiff's counsel affirms that defendants have not appeared in the action by entering into a discovery stipulation with plaintiff. *See* NYSCEF doc. no. 61. To date, defendants have not responded. Plaintiff contends that defendants' lack of a response is willful and deliberate, and plaintiff's motion must be granted. Defendants have not opposed or otherwise responded to this motion.

CPLR 3126 provides penalties for a party's refusal to comply with orders to disclose, which include issuing "an order striking out pleadings or parts thereof...or rendering a judgment by default against the disobedient party." Compliance with a disclosure order requires a timely response and a good faith effort to address the requests in a meaningful manner (*see Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

Plaintiff has submitted the order (by another judge), which expressly demanded defendants to act accordingly or face the striking of the answer. Plaintiff has also submitted the affirmation of non-compliance pursuant to the terms of the order. Plaintiff also sent a good faith notification to defendants regarding the failure to enter into the discovery stipulation. *See* NYSCEF doc. no. 62. Defendants have not responded to the notice or opposed plaintiff's motion in any way.

Upon its submission of an affirmation of non-compliance, plaintiff's motion is granted only to the extent of granting a default judgment against defendants and referring the matter for a hearing to determine attorneys' fees that may be due and owing. However, Court declines to exercise its discretion to grant the drastic remedy of striking defendants' answer, especially given the fact that defendants are currently self-represented. *See e.g. Hoi Wah Lai v Mack*, 89 AD3d 990, 991 (2d Dept 2011).¹

Accordingly, it is

ORDERED that default judgment is granted as against defendants Ashraf Elnashar and Reem Raouda; and it is further

¹ The Court notes that the judge previously assigned to this matter, Justice Barbara Jaffe, signed the order at issue.

ORDERED that with regard to the assessment of damages, the Court finds that the total amount of damages proved on plaintiff's papers is \$26,400.00, as of October 19, 2016, plus interest at the statutory rate of 9% from October 19, 2016; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, this matter having come before this Court on motion of the plaintiff for a default judgment, the court having on its own motion pursuant to CPLR 4317 determined to consider the appointment of a referee to determine as follows, and it appearing to the court that a reference to determine on consent is proper and appropriate pursuant to CPLR 4317 (a), it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of whether attorneys' fees are due under the governing contract and the amount of such attorneys' fees, if any; 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 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/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by 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

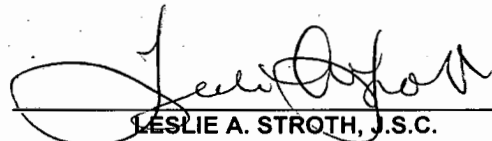
ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

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 movant shall serve a copy of this decision and order with Notice of Entry upon defendants by certified mail, return receipt requested, upon defendants at their last known address within 30 days of entry.

The foregoing constitutes the decision and order of the Court.

11/15/2023
DATE


LESLIE A. STROTH, 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