Mission Energy Founders LLC v 64 Solar LLC
2024 NY Slip Op 35502(U)
September 19, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61484/2024
Judge: Gretchen Walsh
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

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MISSION ENERGY FOUNDERS LLC
f/k/a MISSION ENERGY LLC,
Plaintiff,

- against -

64 SOLAR LLC,
Defendant.

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Index No. 61484/2024
Motion Seq. No. 1
Motion Date: 7/26/24

WALSH, J.

The following e-filed documents listed in NYSCEF under document numbers 4-25 and 27 were read on this motion ("Motion Seq. No. 1") by Mission Energy Founders LLC f/k/a Mission Energy LLC ("Mission" or "Plaintiff") for an order pursuant to CPLR 3215 granting a default judgment against 64 Solar LLC ("64 Solar" or "Defendant").

Defendant has failed to submit opposition to the motion despite having been served with same. Upon the foregoing papers and for the reasons stated herein, Plaintiff's motion shall be granted.

FACTS AND PROCEDURAL HISTORY

The following facts are taken from Plaintiff's Verified Complaint, which was verified by Dan Last ("Last"), in his position as Plaintiff's co-chief executive officer (NYSCEF Doc. No. 1 [the "Complaint"]). Plaintiff explains that it is a limited liability company, organized and existing under the laws of the State of Delaware which is authorized to do business in New York and maintains its offices at 42020 Village Center Plaza, Suite 120, #650, Stone Ridge, Virginia 20105 (Complaint at ¶ 2). Plaintiff asserts that Defendant is a corporation, organized and existing under the laws of the State of New York, with a principal place of business at 181 Westchester Avenue, Suite 407c, Port Chester, Westchester County, New York 10573 (*id.* at ¶ 3).

This action arises from Plaintiff's claims of breach of contract based on Defendant's alleged breach of: (1) an Engineering, Procurement and Construction Agreement dated March 3, 2022 entered into between Plaintiff and Defendant for the design, installation, operation and maintenance of a solar photovoltaic system at 174 Filers Lane, Stony Point, New York (the "Stony Point Site") (*see* NYSCEF Doc. No. 12 [the "Stony Brook EPCA"]); and (2) an Engineering, Procurement and Construction Agreement between Plaintiff and Defendant dated March 3, 2022 entered into between Plaintiff and Defendant for the design, installation, operation and maintenance of a solar photovoltaic system at 148 Main Street, New Rochelle, New York (the "New Rochelle Site") (*see* NYSCEF Doc. No. 18 [the "New Rochelle EPCA"]) (*id.* at ¶¶ 6, 27). The Complaint asserts: (1) a First Cause of Action for breach of contract, regarding the Stony Brook EPCA; and (2) a Second Cause of Action for breach of contract, regarding the New Rochelle EPCA (*id.* at ¶¶ 46-57). To date, Defendant has not filed an answer to the Complaint, or otherwise appeared in this action.

A. The Stony Point Project

Plaintiff alleges that CE Solar NSRP ("CE Solar") and Salesian Society ("Salesian") entered into a solar power purchase agreement on or about December 15, 2021, "pursuant to which CE Solar promised to design, install, own, operate and maintain a solar photovoltaic system" at the Stony Point Site, owned by Salesian (*id.* at ¶ 4). Plaintiff states that it and "CE Solar entered into an Engineering, Procurement and Construction Agreement for the Stony Point Project [on February 17, 2022] pursuant to which Plaintiff promised to deliver a complete and operating solar photovoltaic system" (*id.* at ¶ 5). Plaintiff states that it entered into the Stony Point EPCA with Defendant on March 3, 2022, and that

> Section 1.1.1 of the Stony Point EPCA provides among other things that 64 Solar shall obtain and pay "the expense for all necessary Host Utility and other required permits and authorizations regardless of the name of the entity under which such authorizations or permits must be obtained;" "apply for and fulfill requirements for the System to qualify for any rebate, incentive or SREC programs," and be responsible for "all other acts necessary to deliver a complete and operating System." ("System" as defined in Stony Point EPCA shall mean a complete and operating solar photovoltaic system (which may be comprised of a series of Sub-Systems if set forth as such in the Recitals) that meets all of the terms and conditions of the Agreement. (*id.* at ¶¶ 6-7 [*quoting* the Stony Point EPCA]).

Plaintiff explains that "Section 1.3.1 of the Stony Point EPA provides among other things that 64 Solar 'shall obtain all necessary permits and authorizations that may be required by the federal, state, county, municipal or other governing entity with jurisdiction concerning the installation of the System'" and the section further requires "64 Solar to 'supply [Plaintiff] with a list of permits and authorizations to be obtained and the corresponding dates when submittals for such permits and authorizations shall be submitted to the governing entity having jurisdiction thereof' immediately upon installation of the system and to 'simultaneously submit to [Plaintiff] copies of the submittals made by [64 Solar] to the governing entity, and of the final permits and authorizations issued by the governing entity'" (*id.* at ¶ 9, *quoting* the Stony Point EPCA). Plaintiff states the section further provides that "'[a]ll expenses and fees associated with the permits and authorizations shall be the responsibility of [64 Solar]'" (*id., quoting* the Stony Point EPCA). Section 3.3 "requires 64 Solar to prepare, maintain, and perform the tasks necessary to comply with the schedule for execution of the contracted for services," while Section 11.1 "requires 64

Solar to provide notice to Plaintiff of any sub-contractor it hires to perform the contracted for services together with proof of insurance for such subcontractors" (*id.* at ¶¶ 10-11).

According to Plaintiff, Section 10.1.3 of the Stony Point EPCA states:

> If [64 Solar] a) should be adjudged bankrupt, or if [64 Solar] should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of [64 Solar's] insolvency; b) disregards any applicable law including federal, commonwealth, municipal law, by-law, ordinance, permit, regulation, order or decree in executing the Agreement; c) disregards the material instructions of [Plaintiff] under the Agreement; or, d) violates any material provision of the Agreement, then [Plaintiff] may, subject to the provisions of Agreement Section 10.1.4 below and without prejudice to any other right or remedy may have under the Agreement and/or the law, and after giving [64 Solar] seven (7) calendar days written notice: (1) terminate [64 Solar]'s right to proceed with the remaining Services; (2) take possession of the Site and all materials and equipment that will comprise the System ; and (3) finish the remaining Services by whatever method [Plaintiff] may reasonably deem expedient. In such case, [64 Solar] agrees to assign to [Plaintiff] all material contracts, all Second-Tier Contractor contracts to the extent requested by [Plaintiff] and to assign to System Owner all Second-Tier Contractors and manufacturer warranties related to the Services and the System, and [64 Solar] shall not be entitled to receive any further payment under the Agreement. [64 Solar] shall pay [Plaintiff] (i) all costs and expenses expended by [Plaintiff] (inclusive of the additional reasonable cost of [Plaintiff]'s employees and consultants) to obtain and mobilize a replacement contractor to complete the Services; (ii) all costs incurred by [Plaintiff] to complete the terminated Services, less the amount [Plaintiff] would have paid [64 Solar] to complete such terminated Services in accordance with the Agreement; (iii) liquidated damages pursuant to Agreement Section 8.1 if the date of Beneficial Use achieved by the replacement contractor occurs after the Beneficial Use Target Date; and, (iv) liquidated damages pursuant to Agreement Section 8.2 (*id.* at ¶ 12 *quoting* the Stony Point EPCA).

Plaintiff states that Section 10.1.4 of the Stony Point EPCA states:

> If [Plaintiff] believes that [64 Solar] is in default of the Agreement pursuant to Agreement Section 10.1.3 b), c), or d) above, then [Plaintiff], before being entitled to terminate [64 Solar]'s right to provide Services, will provide [64 Solar] with a written notice giving [64 Solar] a thirty (30) calendar day period from the receipt of the written notice to correct such default condition or such longer cure period as [Plaintiff] reasonably determines. If [64 Solar] fails to correct the default condition within such time period, then [Plaintiff] shall be entitled to terminate [64 Solar]'s right to proceed with the Services as specified in Agreement Section 10.1.3 above (*id.* at ¶ 13, *quoting* the Stony Point EPCA).

Plaintiff asserts that Defendant breached the Stony Point EPCA in several ways: (1) Defendant "breached Section 1.1 . . . by failing to deliver a complete and operating System to Plaintiff and failing to obtain all required permits and authorizations in connection with the System"; (2) Defendant breached "Section 1.3.1 of the Stony Point EPCA because its unofficially designated project manager has failed to properly use available resources in connection with the contracted for services, and it failed to replace its project manager after being notified by Plaintiff that its designated project manager was not competent"; (3) Defendant breached "Section 1.4 of the Stony Point EPCA by failing to supply Plaintiff with a list of permits and authorizations to be obtained and the corresponding dates when submittals for such permits and authorizations shall be submitted to the governing entity having jurisdiction thereof"; (4) Defendant breached "Section 3.3 of the Stony Point EPCA by failing to properly track and obtain permits in a timely manner; and otherwise failed to maintain the schedule in accordance with Section 3.3 and 3.4 of the Stony Point EPCA"; (5) Defendant "breached Section 11.1 of the Stony Point EPCA by engaging Second-Tier Contractors who have been in direct contact with the engineer and failing to provide Plaintiff with the applicable prior written notice required for such contractors"; and (6) Defendant generally breached the Stony Point EPCA "by failing to meet equipment ordering dates, or permit filing dates, as set forth in the Agreement; and by further providing Plaintiff with proof of purchase or refusing to purchase the equipment, set forth in Exhibit A to the Stony Point EPCA" (*id.* at ¶¶ 14-20). Plaintiff asserts that Defendant's breaches of the Stony Point EPCA "are material and continuing" and that "[o]n October 14, 2022, Plaintiff provided [Defendant] with a notice of default pursuant to the terms of Section 10.1 of the Stony Point EPCA ('Notice of Default')" (*id.* at ¶ 21). Plaintiff states this Notice of Default "clearly set forth the nature and extent of [Defendant's] defaults under the Stony Point EPCA and further itemized the actions [Defendant] needed to perform to cure the defaults," and that Plaintiff, through the Notice of Default, gave Defendant the requisite 30 day period to cure the default, and "advised that if the cure period expired without the defaults being cured, Plaintiff would terminate the Stony Point EPCA" (*id.* at ¶ 22). Plaintiff asserts that, by way of the Notice of Default, it advised Defendant that, following termination of the Stony Point EPCA, Defendant "would be obligated to pay Plaintiff: (i) all costs and expenses expended by Plaintiff (inclusive of the additional reasonable cost of Plaintiff's employees and consultants) to obtain and mobilize a replacement contractor to complete the Services; (ii) all costs incurred by Plaintiff to complete the terminated Services, less the amount Plaintiff would have paid 64 Solar to complete such terminated Services in accordance with the Stony Point EPCA; (iii) liquidated damages pursuant to Sections 8.1 and 8.2 of the EPCA" (*id.* at ¶ 23). Plaintiff asserts that this cure period expired without any curation by Defendant, and thus, "on November 16, 2022, Plaintiff sent 64 Solar a notice of termination ('Notice of Termination')" (*id.* at ¶ 24).

B. The New Rochelle Project

Plaintiff alleges that CE Solar and Salesian entered into a solar power purchase agreement on or about December 15, 2021 wherein CE Solar "promised to design, install, own, operate and maintain a solar photovoltaic system at a site owned by Salesian ('New Rochelle Project') and located at 148 Main Street, New Rochelle, New York ('New Rochelle Site')" (*id.* at ¶ 25). Plaintiff states that it entered into an Engineering, Procurement and Construction Agreement with CE Solar for the New Rochelle Project, "pursuant to which Plaintiff promised to deliver a complete and operating solar photovoltaic system to CE Solar" (*id.* at ¶ 26). Plaintiff states that it entered into the New Rochelle EPCA with 64 Solar on March 3, 2022, and that

> Section 1.1.1 of the New Rochelle EPCA provides that 64 Solar shall obtain and pay "the expense for all necessary Host Utility and other required permits and authorizations regardless of the name of the entity under which such authorizations or permits must be obtained," "apply for and fulfill requirements for the System to qualify for any rebate, incentive or SREC programs," and be responsible for "all other acts necessary to deliver a complete and operating System." ("System" as defined in the New Rochelle EPCA shall mean a complete and operating solar photovoltaic system (which may be comprised of a series of Sub-Systems if set forth as such in the Recitals) that meets all of the terms and conditions of the Agreement. See, Art. 2 "Definitions.") (*id.* at ¶¶ 27-28, *quoting* the New Rochelle EPCA).

Plaintiff explains that "Section 1.3.1 of the New Rochelle EPCA provides that 64 Solar 'shall designate a competent project manager . . . satisfactory to [Plaintiff].' Such project manager is required 'to possess the expertise and employ whatever resources necessary to efficiently and professionally perform' the contracted for services" (*id.* at ¶ 29, *quoting* the New Rochelle EPCA). Plaintiff explains that

> Section 1.4 of the New Rochelle EPCA provides that 64 Solar "shall obtain all necessary permits and authorizations that may be required by the federal, state, county, municipal or other governing entity with jurisdiction concerning the installation of the System." It also requires 64 Solar to "supply [Plaintiff] with a list of permits and authorizations to be obtained and the corresponding dates when submittals for such permits and authorizations shall be submitted to the governing entity having jurisdiction thereof" immediately upon installation of the System and to "simultaneously submit to [Plaintiff] copies of the submittals made by [64 Solar] to the governing entity, and of the final permits and authorizations issued by the governing entity." It also provides that "[a]ll expenses and fees associated with the permits and authorizations shall be the responsibility of [64 Solar]" (*id.* at ¶ 30, *quoting* the New Rochelle EPCA)

Plaintiff states that "Section 3.3 of the New Rochelle EPCA requires 64 Solar to prepare, maintain and perform the tasks necessary to comply with the schedule for execution of the contracted for services" while "Section 11.1. . . requires 64 Solar to provide notice to Plaintiff of any sub-contractor it hires to perform the contracted for services together with proof of insurance for such subcontractors" (*id.* at ¶¶ 31-32, *quoting* the New Rochelle EPCA). Section 10.1.3 states, in pertinent part:

> If [64 Solar] a) should be adjudged bankrupt, or if [64 Solar] should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of [64 Solar's] insolvency; b) disregards any applicable law including

> federal, commonwealth, municipal law, by-law, ordinance, permit, regulation, order or decree in executing the Agreement; c) disregards the material instructions of [Plaintiff] under the Agreement; or, d) violates any material provision of the Agreement, then [Plaintiff] may, subject to the provisions of Agreement Section 10.1.4 below and without prejudice to any other right or remedy may have under the Agreement and/or the law, and after giving [64 Solar] seven (7) calendar days written notice: (1) terminate [64 Solar]'s right to proceed with the remaining Services; (2) take possession of the Site and all materials and equipment that will comprise the System ; and (3) finish the remaining Services by whatever method [Plaintiff] may reasonably deem expedient. In such case, [64 Solar] agrees to assign to [Plaintiff] all material contracts, all Second-Tier Contractor contracts to the extent requested by [Plaintiff] and to assign to System Owner all Second-Tier Contractors and manufacturer warranties related to the Services and the System, and [64 Solar] shall not be entitled to receive any further payment under the Agreement. [64 Solar] shall pay [Plaintiff] (i) all costs and expenses expended by [Plaintiff] (inclusive of the additional reasonable cost of [Plaintiff]'s employees and consultants) to obtain and mobilize a replacement contractor to complete the Services; (ii) all costs incurred by [Plaintiff] to complete the terminated Services, less the amount [Plaintiff] would have paid [64 Solar] to complete such terminated Services in accordance with the Agreement; (iii) liquidated damages pursuant to Agreement Section 8.1 if the date of Beneficial Use achieved by the replacement contractor occurs after the Beneficial Use Target Date; and, (iv) liquidated damages pursuant to Agreement Section 8.2. (*id.* at ¶ 33, *quoting* the New Rochelle EPCA).

Section 10.1.4 states, in pertinent part:

> If [Plaintiff] believes that [64 Solar] is in default of the Agreement pursuant to Agreement Section 10.1.3 b), c), or d) above, then [Plaintiff], before being entitled to terminate [64 Solar]'s right to provide Services, will provide [64 Solar] with a written notice giving [64 Solar] a thirty (30) calendar day period from the receipt of the written notice to correct such default condition or such longer cure period as [Plaintiff] reasonably determines. If [64 Solar] fails to correct the default condition within such time period, then [Plaintiff] shall be entitled to terminate [64 Solar]'s right to proceed with the Services as specified in Agreement Section 10.1.3 above. (*id.* at ¶ 34, *quoting* the New Rochelle EPCA).

Plaintiff states that "64 Solar breached the New Rochelle EPCA in many ways", including: (1) breaching Section 1.1 "by failing to deliver a complete and operating System to Plaintiff and failing to obtain all required permits and authorizations in connection with the System"; (2) breaching 1.3.1 of the New Rochelle EPCA through the failure of its unofficially designated project manager "to properly use available resources in connection with the contracted for services, and it failed to replace its project manager after being notified by Plaintiff that its designated project manager was not competent"; (3) breaching Section 1.4 of the New Rochelle EPCA "by failing to supply Plaintiff with a list of permits and authorizations to be obtained and the corresponding dates when submittals for such permits and authorizations shall be submitted to the governing entity having jurisdiction thereof"; (4) breaching Section 3.3 of the New Rochelle EPCA "by failing to properly track and obtain permits in a timely manner; failed to provide an updated schedule identifying all key contractual dates and permit and grant program requirements, and otherwise failed to maintain the schedule in accordance with Section 3.3 and 3.4 of the New Rochelle EPCA"; (5) breaching Section 11.1 of the New Rochelle EPCA "by engaging Second-Tier Contractors who have been in direct contact with the engineer, and failing to provide Plaintiff with the applicable prior written notice required for such contractors"; and (6) breaching the New Rochelle EPCA "by failing to meet equipment ordering dates, or permit filing dates, as set forth in the Agreement; and by further providing Plaintiff with proof of purchase or refusing to purchase the equipment, set forth in Exhibit A to the New Rochelle EPCA" (*id.* at ¶¶ 35-41). Plaintiff asserts that Defendant's breaches "are material and continuing" and that "Plaintiff provided 64 Solar with a notice of default pursuant to the terms of Section 10.1 of the New Rochelle EPCA" (the "NR Notice of Default") on October 14, 2022 (*id.* at ¶ 42). Plaintiff states that, through the NR Notice of Default, it "clearly set forth the nature and extent of 64 Solar's defaults under the New Rochelle EPCA and further itemized the actions that 64 Solar needed to perform in order to cure the defaults" and that it gave Defendant thirty days to cure the default, and advised Defendant that should the defaults remain uncured, it would terminate the New Rochelle EPCA (*id.* at ¶ 43). Plaintiff states that, through the NR Notice of Default, it further advised Plaintiff that, should it elect to terminate the New Rochelle EPCA, Defendant would be obligated to pay Plaintiff: "(i) all costs and expenses expended by Plaintiff (inclusive of the additional reasonable cost of Plaintiff's employees and consultants) to obtain and mobilize a replacement contractor to complete the Services; (ii) all costs incurred by Plaintiff to complete the terminated Services, less the amount Plaintiff would have paid 64 Solar to complete such terminated Services in accordance with the New Rochelle EPCA; and (iii) liquidated damages pursuant to Sections 8.1 and 8.2 of the New Rochelle EPCA" (*id.* at ¶ 44). Plaintiff asserts that the cure period has expired without Defendant curing any of the aforementioned defaults, and thus, "Plaintiff sent 64 Solar a notice of termination of the New Rochelle EPCA ('NR Notice of Termination')" on November 16, 2022 (*id.* at ¶ 45).

C. Plaintiff's Causes of Action

Plaintiff ends its Complaint asserting two causes of action. The First Cause of Action is for Breach of the Stony Point ECPA, and the Second Cause of Action is for Breach of the New Rochelle EPCA. Plaintiff states that it fully performed its obligations under both the Stony Point EPCA and the New Rochelle EPCA, which require "64 Solar to, among other things, to deliver a complete and operating System, to manage the schedule for completion effectively, to obtain and provide all approvals and permits in connection with the System installation and maintenance, obtain all equipment to be used in connection with the System and notify Plaintiff of its use of any subcontractors in connection with the [Stony Point Project and New Rochelle Project]" (*id.* at ¶¶ 47-48, 53-54). Plaintiff states that Defendant "has willfully, and in bad faith failed to do any of the above, despite being given notice and opportunity to cure as required by the [Stony Point ECPA and New Rochelle ECPA], and accordingly has repeatedly and materially breached the [Stony Point EPCA and New Rochelle ECPA]" (*id.* at ¶¶ 49, 55). Plaintiff states it was forced to hire a new contractor to complete the services Defendant was obligated, and failed, to perform, as a direct and proximate result of Defendant's breaches of the EPCAs, and, "[m]oreover, [Defendant's] numerous material breaches of the [Stony Point EPCA and New Rochelle EPCA] caused delays and put Plaintiff in jeopardy of being in breach of its obligations to CE Solar" (*id.* at ¶¶ 50, 56). Plaintiff asserts that, "[a]ccordingly, Plaintiff is entitled to compensatory and liquidated damages in an amount to be determined at trial, but not less than $100,000, together with pre-judgment interest" (*id.* at ¶¶ 51, 57).

PLAINTIFF'S CONENTIONS IN SUPPORT OF ITS MOTION

In support of its motion, Plaintiff submits: (1) an affirmation of James K. Landau, Esq. dated June 25, 2024 (NYSCEF Doc. No. 5 [the "Landau Aff."]), and attached exhibits (NYSCEF Doc. Nos. 6-10; (2) an affidavit of Dan Last, sworn to on June 24, 2024 (NYSCEF Doc. No 11 ["Last Aff."]; and (3) a memorandum of law (NYSCEF Doc. No 24 ["Plf's Mem."]).

In his affirmation, Landau asserts that Plaintiff commenced this action by filing its Summons and Complaint on May 1, 2024 (Laundau Aff. at ¶ 2). Landau states that Plaintiff served the Summons and Complaint, through personal delivery to the office of New York's Secretary of State pursuant to New York's Limited Liability Company Law ("LLCL") § 303, and that, accordingly, "the deadline for Defendant's time to respond to the summons and complaint was June 7, 2024" (*id.* at ¶¶ 3-4). Landau states that deadline has since passed "and Defendant has not responded in any way to the summons and complaint, nor has it requested any additional time to respond. Accordingly, Defendant is in default in this action" (*id.* at ¶ 5). Landau states that "[o]n June 11, 2024, [P]laintiff served additional notice of the action on Defendant in the manner prescribed by CPLR § 3215(g)(4)" (*id.* at ¶ 6).

In his affidavit, Dan Last asserts that he is Plaintiff's co-chief executive officer and has personal knowledge of the facts set forth therein (Last Aff. at ¶ 1). Last explains the factual background of the Stony Point Project as set forth in the Complaint (Last Aff. at ¶¶ 2-23). Last asserts that, following the Notice of Termination effective November 25, 2022, "Plaintiff was forced to hire and pay another contractor to complete the Services that 64 Solar had contracted to perform in connection with the Stony Point Project. Plaintiff's costs and expenses incurred to obtain and mobilize a replacement contract to complete the Services is $17,250. Plaintiff paid an additional $332,041.98 to complete the Services on the Stony Point Project" (*id.* at ¶¶ 23-24). Last states, with regard to the Stony Point project, that Plaintiff achieved the Beneficial Use milestone on August 29, 2023 and achieved the Final Completion milestone on November 9, 2023 (*id.* at ¶¶ 25-26). Last asserts that, due to the Defendant's defaults, failure to cure those defaults after notice, Plaintiff terminated the Stony Point EPCA before Beneficial Use and Final Completion were reached, and "[t]hus under the Stony Point EPCA, Plaintiff is entitled to: (i) all costs and expenses expended by Plaintiff (inclusive of the additional reasonable cost of Plaintiff's employees and consultants) to obtain and mobilize a replacement contractor to complete the Services; (ii) all costs incurred by Plaintiff to complete the terminated Services, less the amount Plaintiff would have paid 64 Solar to complete such terminated Services in accordance with the Agreement; (iii) liquidated damages pursuant to Agreement Section 8.1 of the Stony Point EPCA" (*id.* at ¶¶ 27-28). Last asserts that "Plaintiff is entitled to $357,253.58 in damages pursuant to Stony Point EPCA, Section 10.1.3, and pre-judgment interest of an additional $34,917.73 through and including July 1, 2024, for a total due of $392,225.31 as of July 1, 2024", and he attaches a copy of his damage and pre-interest calculations for the Stony Point EPCA as Exhibit F (*id.* at ¶ 29).

Last next explains the factual background of the New Rochelle Project as set forth in the Complaint (Last Aff. at ¶¶ 30-50). Last asserts that, following the Notice of Termination effective November 25, 2022, "Plaintiff was forced to hire and pay another contractor to complete the Services that 64 Solar had contracted to perform in connection with the New Rochelle Project. Plaintiff's costs and expenses incurred to obtain and mobilize a replacement contract to complete the Services is $17,250. Plaintiff paid an additional $ 499,921.23 to complete the Services on the New Rochelle Project" (*id.* at ¶¶ 50-51). Last states, with regard to the New Rochelle project, that Plaintiff achieved the Beneficial Use milestone on September 27, 2023 and achieved the Final Completion milestone on December 8, 2023 (*id.* at ¶¶ 52-53). Last asserts that, due to the Defendant's defaults, and their failure to cure those defaults after notice, Plaintiff terminated the New Rochelle EPCA before Beneficial Use and Final Completion were reached, and "[t]hus under the New Rochelle EPCA, Plaintiff is entitled to: (i) all costs and expenses expended by [Plaintiff] (inclusive of the additional reasonable cost of [Plaintiff]'s employees and consultants) to obtain and mobilize a replacement contractor to complete the Services; (ii) all costs incurred by [Plaintiff] to complete the terminated Services, less the amount [Plaintiff] would have paid [64 Solar] to complete such terminated Services in accordance with the Agreement; (iii) liquidated damages pursuant to Agreement Section 8.1 of the Stony Point EPCA" (*id.* at ¶¶ 54-55). Last asserts that "Plaintiff is entitled to $509,547.23 in damages pursuant to New Rochelle EPCA, Section 10.1.3, and pre-judgment interest of an additional $49,879.08 through and including July 1, 2024, for a total due of $559,426.31 as of July 1, 2024", and he attaches a copy of his damage and pre-interest calculations for the New Rochelle EPCA as Exhibit L (*id.* at ¶ 56).

Based on the foregoing, Last requests "that this Court enter judgment in favor of Plaintiff and against 64 Solar in the total amount of $392,225.31 (through July 1, 2024) as a direct result of 64 Solar's defaults and failures to cure such defaults under the Stony Point EPCA and it is further requested that this Court enter judgment in favor of Plaintiff and against 64 Solar in the total amount of $559,426.31 (through July 1, 2024) as a direct result of 64 Solar's defaults and failures to cure such defaults under the New Rochelle EPCA" (*id.* at ¶ 57).

In its memorandum of law, Plaintiff asserts that "under the Stony Point EPCA, Plaintiff is entitled to: (i) all costs and expenses expended by [Plaintiff] (inclusive of the additional reasonable cost of [Plaintiff]'s employees and consultants) to obtain and mobilize a replacement contractor to complete the Services; (ii) all costs incurred by [Plaintiff] to complete the terminated Services, less the amount [Plaintiff] would have paid [64 Solar] to complete such terminated Services in accordance with the Agreement; (iii) liquidated damages pursuant to Agreement Section 8.1 of the Stony Point EPCA . . . Plaintiff is entitled to $357,253.58 in damages pursuant to Stony Point EPCA, Section 10.1.3, and pre-judgment interest of an additional $34,917.73 through and including July 1, 2024, for a total due of $392,225.31 as of July 1, 2024" (*id.* at 7). Plaintiff asserts that "[u]nder the New Rochelle EPCA, Plaintiff is entitled to: (i) all costs and expenses expended by [Plaintiff] (inclusive of the additional reasonable cost of [Plaintiff]'s employees and consultants) to obtain and mobilize a replacement contractor to complete the Services; (ii) all costs incurred by [Plaintiff] to complete the terminated Services, less the amount [Plaintiff] would have paid [64 Solar] to complete such terminated Services in accordance with the Agreement; (iii) liquidated damages pursuant to Agreement Section 8.1 of the New Rochelle EPCA . . . Plaintiff is entitled to $509,547.23 in damages pursuant to New Rochelle EPCA, Section 10.1.3, and pre-judgment interest of an additional $49,879.08 through and including July 1, 2024, for a total due of $559,426.31 as of July 1, 2024" (*id.* at 12-13). Plaintiff asserts that "[a]ccordingly, [it] is entitled to judgment against 64 Solar in the amount of $392,225.31 (through July 1, 2024) as a direct result of 64 Solar's defaults and failures to cure such defaults under the Stony Point EPCA and in the amount of $559,426.31 (through July 1, 2024) as a direct result of 64 Solar's defaults and failures to cure such defaults under the New Rochelle EPCA" (*id.* at 13).

Plaintiff states that it commenced the action through purchasing an index number and filing the summons and complaint on May 1, 2024, and that it served the summons and complaint in this action, through personal delivery of such to the office of the Secretary of State, State of New York, pursuant to LLCL § 303 on May 8, 2024 (*id.*). Accordingly, Plaintiff asserts that "the deadline for Defendant time to respond to the summons and complaint was June 7, 2024," but that Defendant has not appeared in this action in any manner, nor requested additional time to respond, and as such is in default (*id.*). Plaintiff asserts it served the additional notice of the action, pursuant to CPLR 3215(g)(4), on June 11, 2024 (*id.*).

For its legal argument, following a recap of the relevant procedural and factual history of this case, Plaintiff explains that CPLR 3215 "provides that '[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, the plaintiff may seek a default judgment against him'" and that "[i]n order to prevail on a motion for the entry of a default judgment, a plaintiff must "'submit proof of service of the summons and complaint, proof of the facts constituting [his] claim, and proof of [Defendants'] default in answering or appearing'" (*id.* at 14, *quoting* CPLR 3215[f]). Plaintiff asserts it has demonstrated service of the Summons and Complaint on Defendant and submitted proof of such service, as well as the additional notice of the action, and that Defendant's time to respond to the Complaint has expired (*id.* at 15). Plaintiff asserts it has demonstrated the requisite showing to prevail on a cause of action for breach of contract for both the First and Second Causes of action, namely "(1) formation of a contract between plaintiff and defendant (2) performance by plaintiff, (3) defendant's failure to perform and (4) resulting damage" (*id.* at 14-15). Plaintiff states it has: (1) demonstrated the contracts (the Stony Point EPCA and New Rochelle EPCA), entered into between it and Defendant; (2) its performance under the Stony Point EPCA and New Rochelle EPCA; (3) Defendant's "numerous breaches" of the Stony Point EPCA and New Rochelle EPCA; and (4) the damages and prejudgment interest it is entitled to recover from Defendant as a result of its breaches (*id.*).

DISCUSSION

A. Standard of Review Pursuant to CPLR 3215

Pursuant to CPLR 3215(f), "'[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear'" (*Lancer Ins. Co. v Fishkin*, 211 AD3d 719, 720 [2d Dept 2022], *quoting Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 806 [2d Dept 2020]; *see also Atlantic Cas. Ins. Co. v RJNJ Serv. Inc.*, 89 AD3d 649 [2d Dept 2011]). "To demonstrate the facts constituting the claim, the movant need only submit sufficient proof to enable a court to determine if the claim is viable" (*Lancer Ins. Co.*, 211 AD3d at 721).

However, default judgments are not to be rubber-stamped once jurisdiction and failure to appear are shown. Proof must still be submitted to satisfy the Court, at least prima facie, as to the viability of the uncontested cause of action (*Joosten v Gale*, 129 AD2d 531 [1st Dept 1987]; *see* CPLR 3215[b], [f]). Even if there appears to be no opposition, the Court should not exercise its power, whether statutory or inherent, in a manner or under such circumstances where that power could work an injustice to litigants or to non-parties (*Rivera v Laporte*, 120 Misc 2d 733, 735 [Sup Ct, New York County 1983]).

To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for the default and a meritorious defense to the action (*Grinage v City of N.Y.*, 45 AD3d 729 [2d Dept 2007]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521 [2d Dept 2005]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556 [2d Dept 2005]; *Ennis v Lema*, 305 AD2d 632 [2d Dept 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court (*Grinage*, 45 AD3d 729; *Ennis*, 305 AD2d 632).

B. Service of Process and Merits of the Claim

Plaintiff has established its entitlement to a default judgment against Defendant based on its submission of evidence of its service of the Summons and Complaint on Defendant and its compliance with the additional notice requirement under CPLR 3215(g)(4) and Defendant's default in failing to timely respond to the Complaint (*see TCIF REO GCM, LLC v Walker*, 139 AD3d 704 [2d Dept 2016]; *U.S. Bank Nat. Assn. v Poku*, 118 AD3d 980 [2d Dept 2014]). It has also established the merits of its claim through the Last Affidavit (*see* CPLR 3215[f]; *HSBC Bank USA, N.A. v Thorne*, 189 AD3d 1193 [2d Dept 2020] [affirming a default judgment where the plaintiff submitted an "affidavit of merit" based upon personal knowledge in compliance with CPLR 3215(f)]; *Deutsche Bank Natl. Trust Co. v Silverman*, 178 AD3d 898, 900 [2d Dept 2019] [holding that "[t]he affidavit of merit from a representative of the plaintiff's . . . was competent evidence to establish the plaintiff's entitlement to a default judgment against [the defendant]"]). Thus, Plaintiff established entitlement to default judgment "by providing proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendants' failure to . . . appear" (*Deutsche Bank Nat. Tr. Co. v Otano*, 129 AD3d 770, 771 [2d Dept 2015]).

Plaintiff has also established prima facie, the merits of its claims for breach of contract. "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Tudor Ins. Co. v Unithree Inv. Corp.*, 137 AD3d 1259, 1260 [2d Dept 2016]). "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Kowalchuk v. Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). Here, Plaintiff has submitted evidence establishing, prima facie, the parties' entry into the Stony Point

EPCA and the New Rochelle EPCA, Defendant's breach of those agreements and that it has sustained damages (*IPFS Corp. v Manetta Enterprises, Inc*., 160 AD3d 706, 707 [2d Dept 2018]).

However, Plaintiff has not submitted evidence substantiating various damage figures set forth in the Last Affidavit, such as the costs Plaintiff incurred to complete the projects and whether such costs were reasonable (*Ben Ciccone, Inc. v Naber Elec. Corp*., 214 AD3d 936 [2d Dept 2023]; *Caggianelli v Sontheimer*, 46 AD3d 1206 [3d Dept 2007]; *RBS Citizens, N.A. v Dynamic Biz, Inc*., 80 AD3d 868 [3d Dept 2011]; *Wamco XVII v Chestnut Estates Dev, Corp.*, 251 AD2d 888 [3d Dept 1998]). A party in default only admits liability and does not admit to the damages alleged in the complaint (*see McClelland v Climax Hosiery Mills*, 252 NY 347 [1930]; *Commonwealth Land Title Ins. Co. v Islam,* 220 AD3d 739 [2d Dept 2023]; *Boorman v Deutsch*, 152 AD2d 48 [1st Dept 1989], *lv dismissed* 76 NY2d 889 [1990]; *Paulson v Kotsilimbas*, 124 AD2d 513 [1st Dept 1986];). Where a party has defaulted and the amount of damages to award is unclear, the court may order the parties to appear at an inquest to determine the amount to be awarded for damages (*see Paulson*, 124 AD2d 513; *Cervino*, 91 AD2d 249). Moreover, courts may exercise wide discretion when assessing the merits of damages alleged in default judgments, in order to avoid excessive penalties (*see* CPLR 3215[b]; *Neuman v Greenblatt*, 260 AD2d 616, 617 [2d Dept 1999] ["'[i]t has long been held that courts have inherent power beyond that which is contained in the CPLR . . . to open defaults . . . and where the amount awarded on a default judgment has been perceived as excessive the courts have exercised their inherent power to modify or reduce the amount'"]). "An unwarranted and excessive award after inquest will not be sustained, as to do otherwise 'would be tantamount to granting the plaintiffs an "open season" at the expense of a defaulting defendant'" (*Neuman*, 260 AD2d at 617, *quoting Brosnan v Behette*, 186 AD2d 165, 167 [2d Dept 1992], *lv denied* 81 NY2d 706 [1993]). Accordingly, while the Court shall award Plaintiff a default judgment against Defendant as to its liability, the amount to be awarded as damages shall be determined following an inquest.

CONCLUSION

Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by Plaintiff Mission Energy Founders LLC f/k/a Mission Energy LLC seeking a default judgment against Defendant 64 Solar LLC on its First and Second Causes of Action as to liability only is granted; and it is further

ORDERED that the matter is set down for an inquest to determine damages on October 21, 2024 at 2:00 p.m.; and it is further

ORDERED that Plaintiff shall, pursuant to the provisions of 22 N.Y.C.R.R §202.48, submit a proposed judgment, and a bill of costs, on notice to Defendants, to the Court for settlement on October 21, 2024 at 2:00 p.m., with the amount to be awarded for damages and interest and costs being left blank so that the Court may insert the amounts awarded, if any, at the conclusion of the inquest ordered herein; and it is further

ORDERED that Plaintiff's counsel shall serve upon the Defendant by certified mail, return receipt requested and by overnight delivery (next day delivery) and file in NYSCEF, a copy of this Decision and Order with Notice of Entry, a Notice of Inquest on or before September 23, 2024.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 19, 2024

ENTER:

HON. GRETCHEN WALSH, J.S.C.

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