

**Professional Sec. Bureau, Ltd. v Johnson Sec.
Bureau, Inc.**

2005 NY Slip Op 30509(U)

June 3, 2005

Sup Ct, NY County

Docket Number: 604389/2002

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 40m

Professional Security

INDEX NO. 604389/02

MOTION DATE 6/28/04

MOTION SEQ. NO. 003

- v -

Johnson Security Bureau

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE.

2005

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/3/05

A. Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
PROFESSIONAL SECURITY BUREAU, LTD.,
Plaintiff,

-against-

Index No.
604389/2002

JOHNSON SECURITY BUREAU, INC.,
Defendant.

-----X
CAHN, J.

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence number 003, defendant Johnson Security Bureau, Inc. moves to confirm the November 19, 2003 report of the Special Referee recommending that plaintiff be permitted to recover a money judgment for damages of \$18,000.00, CPLR 4403.

In motion sequence number 004, plaintiff Professional Security Bureau, Ltd. moves to reject the November 19, 2003 report of the Special Referee and to enter a money judgment against defendant in the amount of \$253,501.00, plus prejudgment interest. Plaintiff additionally moves for reargument of this court's March 17, 2004 order, which held defendant's motion to vacate the default judgment in abeyance and referred the issue of jurisdiction to a referee to hear and report; upon reargument, plaintiff seeks an order denying defendant's motion to vacate, CPLR 2221 (d).

BACKGROUND

In December 2001, plaintiff was the successful bidder on a contract to provide uniformed armed security guard services at

various MTA/New York City Transit Authority--(NYCTA)-locations. To meet NYCTA's requirement that plaintiff utilize minority business enterprises for 2.5% of its contract, plaintiff had contacted defendant, a certified "Minority Business Enterprise," in late November 2001. Shortly thereafter, on November 29, 2001, defendant executed a Form 15A.4, "Intent to Perform as Subcontractor/Subconsultant," indicating its intent to enter into a subcontract with plaintiff to provide armed security guards for use at MTA locations (see Goodman Affirm., Exh. F:1). The Form 15A.4 stated that defendant would "provide armed security guard coverage at MTA location pursuant to attached scope of work" at a total cost of \$650,000 (id.). It appears, however, that no formal subcontract with plaintiff was ever signed.

Performance of the NYCTA prime contract began in early April 2002. Defendant was given responsibility for providing uniformed armed security guards at an NYCTA facility known as the Carlton Avenue Bus Storage in Brooklyn, New York. Apparently, defendant was unable to provide a sufficient number of armed guards for this facility, and beginning in April 2002, and continuing into October 2002, it provided mostly unarmed guards.

Sometime in late October 2002, plaintiff received a call from NYCTA complaining of defendant's use of unarmed guards at the Carlton Avenue facility. As a result, plaintiff suspended, and eventually terminated, defendant's subcontract. Up to that

time, plaintiff had paid defendant just over \$181,000.00 for defendant's services.

NYCTA subsequently demanded that plaintiff reimburse NYCTA the amount of \$214,075.00, for failing to provide armed guards at the Carlton Avenue facility. After some negotiation, plaintiff agreed to provide NYCTA with a credit of \$208,450.00. Plaintiff then commenced the instant action against defendant, asserting four causes of action alleging (1) breach of contract, (2) unjust enrichment, (3) fraud, and (4) tortious interference with contractual relations.

Plaintiff initially served defendant by delivering two copies of the summons and complaint to the Secretary of State on December 5, 2002 (see Business Corporation Law § 306). Sometime later, on February 14, 2003, plaintiff mailed a notice of service to defendant at its business address; plaintiff also mailed a copy of plaintiff's notice of motion for a default judgment to the same address, on the same date.

On May 6, 2003, in a decision dictated on the record, this court granted plaintiff's motion for a default judgment and referred the issue of damages to a Special Referee to hear and report. On June 4, 2003, plaintiff mailed a copy of the court's May 6, 2003 order, with notice of entry, to defendant. On September 3, 2003, plaintiff mailed defendant a notice of the inquest on damages, which was to be heard before a Special

* 5]
Referee on September 25, 2003.

On October 29, 2003, defendant moved to vacate the default judgment, CPLR 317 and 5015(a)(1), and, pursuant to CPLR 6311 (1), to stay the hearing on damages pending determination of this motion. Oral argument on the application to stay the hearing on damages was heard on October 30, 2003. Following oral argument, this Court denied the application, and an inquest on damages was held before Special Referee Dershowitz beginning on October 30, 2003, and concluding on November 5, 2003.

A short time thereafter, this court heard oral argument on defendant's motion to vacate the default judgment. In support of the motion, defendant proffered an affidavit from Charles R. Johnson, its Chief Operating Officer, who stated that the September 3, 2003 letter was defendant's first notice of the action (see Goodman Aff., Exh. A). Additionally, defendant proffered an affidavit from Dutchelle Woods, its Officer Manager, and the individual responsible for ensuring that all communications be promptly directed to the appropriate person, who stated that "to the best of [her] knowledge," defendant never received any communication from plaintiff's law firm or the Secretary of State relating to this law suit (id.).

The Special Referee issued her report on November 19, 2003. The report recommended that plaintiff be permitted to recover a money judgment of \$18,000.000, the difference between the cost of

providing armed guards and the cost of providing unarmed guards. She also found that the testimony and evidence demonstrated that plaintiff had paid defendant \$180,000.00 to supply armed guards, but that, during the period between April and October 2002, defendant had supplied mostly unarmed guards. However, the Special Referee credited defendant's evidence and testimony that plaintiff had regularly inspected the Carlton Avenue facility and checked the sign-in logs, and thus was aware that the guards were not carrying guns. The Special Referee noted that plaintiff had never complained or attempted to cancel the contract until MTA complained about the lack of armed guards.

Based on what the Special Referee found to be credible evidence of plaintiff's knowledge that defendant's performance had not been in conformity with the contract, and that plaintiff had, nevertheless, permitted defendant to continue its performance with unarmed guards, she found that defendant had performed reasonably and in good faith, and with the full knowledge of the plaintiff as to the nature of the performance; thus, the Special Referee found no basis to award out of pocket damages based on fraud.

The Special Referee further found that where, as here, plaintiff had received a benefit, and the performance that the plaintiff did receive did not vary so substantially from the performance for which it had contracted, a finding of a complete

breach was not warranted; thus, the proper measure of damages for defendant's partial breach of the contract was the difference between the cost of that which was paid for, i.e., armed guards, and that which plaintiff received, i.e., unarmed guards. The Special Referee found that the fact that plaintiff had returned to MTA virtually the entire amount that it had received from MTA for armed guards did not entitle plaintiff to recover that amount from defendant.

Due to an apparent misfiling, neither of the parties in this action received the report and recommendations of the Special Referee until late March 2004. The parties allegedly became aware of the Special Referee's report and recommendations after they received notice of this court's March 17, 2004 order, holding defendant's motion to vacate the default judgment in abeyance and referring the issue of whether the court had obtained jurisdiction over defendant to a Special Referee.

Defendant now moves to confirm the report and recommendations of the Special Referee. Plaintiff moves to reject the report and recommendations, and for an order granting it a money judgment of \$253,501, representing the \$208,450 it was required to credit the NYCTA, plus lost profits of \$45,051. Plaintiff also moves to reargue this court's March 17, 2004 order referring the issue of jurisdiction to a Special Referee.

DISCUSSION

Defendant's motion to confirm the report and recommendations of the Special Referee is denied. Plaintiff's motion to reject the Special Referee's report and recommendations and to enter judgment in the amount of \$253,501.00, plus prejudgment interest, is granted to the extent of rejecting the Special Referee's report and recommendations, and is otherwise denied.

It is well-settled that a defaulting defendant admits "all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusions as to damages" (see Rokina Opt. Co. v Camera King, Inc., 63 NY2d 728, 730 [1984] [citation omitted]). Accordingly, at an inquest for damages following a default, a defendant is allowed to present evidence "involving circumstances intrinsic to the transactions at issue that, if proven, will be determinative of the plaintiff's real damages, which cannot be established by the mere fact of the defendant's default" (id., at 731).

However, "the defendant will not be allowed to introduce evidence tending to defeat the plaintiff's cause of action" (id., at 730).

Here, the Special Referee based her findings that defendant had substantially performed the contract, and that plaintiff had accepted defendant's performance with full knowledge of its nonconformance, on evidence tending to defeat plaintiff's causes of action, and not just on evidence that might be determinative

of plaintiff's real damages. Such evidence was not properly considered at an inquest following a default. As the Special Referee's recommendations as to the measure of damages were based on findings of fault and liability arising out of that evidence, plaintiff's motion to reject the report of the Special Referee will be granted, and defendant's motion to confirm the report will be denied.

However, plaintiffs request for entry of a money judgment in the amount of \$253,501.00 is denied. It is not clear, on this record, whether plaintiff's lost profits on its prime contract were within the contemplation of the parties at the time the contract was made, as it appears that no formal agreement was ever executed. However, the court notes that it does agree with plaintiff that the difference between the cost of unarmed and armed guards does not appear to be the appropriate measure of damages for the instant breach. Even if, as defendant contends, plaintiff was aware of defendant's failure to provide armed guards, it does not necessarily follow that plaintiff thereby "accepted and ratified [defendant's] substantial performance by failing to protest or demand full performance" (Defendant's Memorandum of Law, at 1), and is thereby precluded from recovering the damages it incurred as a result of defendant's breach. The exact amount of these damages, however, must yet be determined.

Plaintiff's motion for leave to reargue this court's March 17, 2004 order, referring the issue of whether the court obtained jurisdiction over defendant to a Special Referee to hear and report, is also denied. A motion for leave to reargue is addressed to the sound discretion of the court and may be granted upon a showing that matters of fact or law were overlooked or misapprehended by the court in determining the prior motion (CPLR 2221 [d][2]). Plaintiff argues that the court overlooked the fact that defendant's mere denial failed to rebut the presumption that defendant received the notice of service of the summons mailed by plaintiff's attorney. Here, however, defendant proffered two affidavits in support of its motion to vacate, and thus presented more than a mere denial of receipt. As plaintiff has not shown that the two affidavits, taken together, were so insufficient as to require that this court determine that it obtained jurisdiction over defendant, without the benefit of a traverse hearing, the motion is denied.

Accordingly, it is

ORDERED that defendant's motion to confirm the report and recommendations of the Special Referee is denied; and it is further

ORDERED that plaintiff's motion to reject the report and recommendations of the Special Referee and to enter a money judgment against defendant in the amount of \$253,501.00, plus

prejudgment interest, is granted to the extent of rejecting the report, and is otherwise denied; and it is further

ORDERED that plaintiff's motion for an order granting reargument of this court's March 17, 2004 order is denied; and it is further

ORDERED that a copy of this court's March 17, 2004 order with notice of entry, shall be served on the Clerk of the Judicial Support Office to arrange a date for the reference to a Special Referee.

Dated: June 3, 2005

ENTER: *Her Cole*
J.S.C.

FILED
JUN 3 2005
CLERK OF COURT