

**Jean v Csencsits**

2017 NY Slip Op 33237(U)

November 28, 2017

Supreme Court, Orange County

Docket Number: 02154/2016

Judge: Sandra B. Sciortino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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 THE STATE OF NEW YORK  
COUNTY OF ORANGE

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**MICHAEL JEAN,**  
Plaintiff,

**DECISION AND ORDER**

**INDEX NO.: 02154/2016**  
**Motion Date: 9/29/17**  
Sequence No. 1

-against-

**WILLIAM AUGUST CSENSITS a/k/a**  
**WILLIAM A. CSENSITS,**  
Defendant.

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**SCIORTINO, J.**

**ORIGINAL**

The following papers numbered 1 to 10 were read on this unopposed motion by plaintiff for default judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Bramante)/Plaintiff's Affidavit/ Affidavit (Smith)/Exhibits 1-6	1 - 10

This is a motion for default judgment arising out of an action to compel defendant to perform a contract for sale of real estate located at 34 Furnace Trail, Greenwood Lake (Town of Warwick), New York (the premises). The parties entered into a contract (Exhibit 1) for the purchase and sale of the premises on or about February 17, 2015. Plaintiff, the purchaser, paid a deposit of \$6,300, currently held by defendant's then-attorney, Martin Goldberg. Closing was scheduled "on or about February 16, 2015 or later up to May 1, 2015".

On March 10, 2016, plaintiff's counsel sent a "time of the essence letter" to defendant's attorney notifying defendant of plaintiff's intention to appear at his office on April 12, 2016, with

[\* 2]

certified funds for the balance of the purchase price, including all adjustments. (Exhibit 1) By letter dated March 15, 2016 (Exhibit 1), counsel for defendant purported to declare the contract null and void, and issued a check representing the down payment, asserting that clear title could not be transferred, as required by paragraph 21 thereof.<sup>1</sup> That letter was rejected by plaintiff, who returned the check and reiterated his intent to close on the April 12, 2016 date.

On April 12, 2016, plaintiff appeared at the office of defendant's counsel with his attorney and a title closer. No one appeared on behalf of defendant. (Affidavit of Jean, Affidavit of Smith)

On or about March 31, 2016, plaintiff filed a Summons and Verified Complaint with the Clerk of Orange County, seeking, *inter alia*, specific performance and consequential damages, including attorneys' fees. (Exhibit 1) On or about August 26, 2016, this Court granted plaintiff's application for substituted service, extending to October 28, 2016 the time for service, and permitting plaintiff to serve defendant by email and "leave and mail" at defendant's address in San Diego, California. (Exhibit 2) Service was effectuated on defendant by those means on September 27, 2016 and September 19, 2016, respectively. (Exhibits 3 and 4)

On July 27, 2017, this Court entered an Order providing for *nunc pro tunc* filing of the Affidavit of Service, to September 29, 2017 (which date should have read September 29, 2016). (Exhibit 5)

Defendant has not answered or appeared, and no extension of time has been requested or granted.

By Notice of Motion timely filed on September 20, 2017, plaintiff seeks: (a) default judgment

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<sup>1</sup>A title issue required production of a file from the Surrogate's Court of Queens County. Counsel for defendant claimed he could not retrieve the file; however, counsel for plaintiff did so, and the title exception was cleared.

against defendant; (b) amendment of the July 27, 2017 Order for *nunc pro tunc* filing of the Affidavit of Service; (c) specific performance of the Contract of Sale; (d) appointment of a receiver for the purpose of tendering a Deed and performing a closing; (e) directing the transfer of the down payment of \$6,300 from Martin Goldberg, Esq. to the receiver; (f) directing payment of the Receiver's fee from the purchase price; (g) a determination of damages due to plaintiff be made by affidavit or affirmation.

In support of his motion, plaintiff asserts that the checks he prepared for the closing (Exhibit 6) evidence his ability and readiness to close pursuant to the time of the essence letter, on April 12, 2016. As defendant has failed to appear, answer or move, plaintiff claims entitlement to specific performance of the contract; damages for loss of use of the property for the summers of 2015, 2016 and 2017, and legal fees and costs. He asks that the same be determined without necessity of an inquest.

Defendant has not submitted any opposition to the motion.

## DISCUSSION

### Default Judgment

Where a defendant has failed to appear, plead or proceed to trial, plaintiff may seek a default judgment against him. Civ. Prac. Law & Rules §3215(a) Plaintiff has established entitlement to default judgment by submitting proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's default. (*Jing Shan Chen v. R&K 51 Realty, Inc.*, 148 AD3d 689 [2d Dept 2017]) In view of that fact, and the fact that all title objections have been removed, plaintiff's motion for default judgment granting specific performance is granted. (*Cohn v. Mezzacappa Bros., Inc.*, 155 AD2d 506 [2d Dept 1989])

## Receiver

The appointment of a receiver is addressed to the discretion of the Court. (*Fuegel v. Fuegel*, 232 AD2d 608 [2d Dept 1996], citing *Adinolfi v. Adinolfi*, 168 AD2d 401 [2d Dept 1990])

Where, as here, defendant refused to appear for closing after being served with a “time of the essence” letter, and where defendant has failed to appear in this action or to oppose this motion, the Court finds that appointment of a receiver to execute the deed is both necessary and appropriate. On the basis of the foregoing, that portion of plaintiff’s application is granted.

Randall V. Coffill, Esq., 15 Jersey Avenue, PO Box 3158, Port Jervis, NY 12771 is hereby appointed as receiver, with the usual powers and directions for the purpose of execution of a deed conveying the property herein in accordance with the provisions of this Decision and Order.

Before entering upon his duties, said Receiver shall be sworn to fairly and faithfully discharge the duties committed to him. The filing of a bond is dispensed with, in the discretion of the Court, by reason of the limited and temporary nature of the said appointment. The Receiver shall comply with Section 35a of the Judiciary Law, Sections 6401-6401 of the Civil Practice Law & Rules and Section 1325 of the Real Property Actions and Proceedings Law.

The Receiver shall and is hereby directed to execute all papers necessary or advisable in order to complete the conveyance of the subject premises.

The attorney for the Seller, Martin R. Goldberg, Esq., is hereby directed to transfer and convey to the Receiver the deposit of \$6,300 held by him, within fourteen days of the date hereof. The Receiver shall deposit all sums in his own name as Receiver in any non-party FDIC-insured domestic banking institution. The Receiver may, at any time with proper notice to all parties who may have appeared in this action, apply to this Court for further or other instructions or powers

necessary to enable him to properly fulfill his duties.

Upon completion of his duties, the Receiver shall apply to the Court for a calculation of his fee, which shall be paid from the proceeds of the sale of the property, as herein provided.

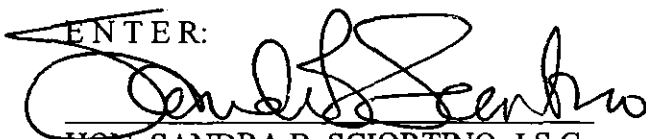
Damages and Attorneys Fees

Plaintiff's application for determination of damages and attorneys' fees by submission of affidavits and affirmations is granted in part and denied in part. "[W]ith specific performance having been granted, the contract is being performed, and the purchaser has not lost the value of the bargain." (*Cohn*, 155 AD2d at 507) However, equity "will, so far as possible, place the parties in the same situation as they would have been in if the contract had been performed according to its terms." (*Id.*, quoting *Worrall v. Munn*, 38 NY 137, 142 [1868]) Thus, the court may award to purchaser, in addition to specific performance, "such items of damage as naturally flow from the breach, are within the contemplation of the parties, and can be proven to a reasonable degree of certainty." (*Cohn*, 155 AD2d at 507) (granting plaintiff the rental value of the property, but not profits which might have been realized from its development)

To the extent that plaintiff is able to prove such damages, the Court is empowered to award the same. However, in the absence of any specification in the papers of the nature of the damages to be sought, or how they would be valued, the Court finds that the necessary proofs cannot be submitted by affidavit, but must be adduced upon competent evidence. Accordingly, this matter shall be scheduled for an inquest on damages, to be held January 26, 2018 at 10:00 a.m.

The foregoing constitutes the decision and order of the court.

Dated: November 28, 2017  
Goshen, New York

ENTER:  
  
HON. SANDRA B. SCIORTINO, J.S.C.