SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** IAS MOTION 59EFM

Justice

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RUSSELL POLLACK, LYDIA POLLACK,

Plaintiffs,

- v -

46 EAST 82ND STREET LLC,NORFOLK STREET MANAGEMENT LLC,PENNY BRADLEY, RICHARD H. LEWIS ARCHITECT, RICHARD LEWIS, SILVER FOX ASSOCIATES, INC.,PAUL PETROV, TRI BOROUGH SCAFFOLDING, INC.,S&E BRIDGE & SCAFFOLD LLC, and COLM COEN,

Defendants.

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INDEX NO. 152227/2015

MOTION DATE 02/25/2020

MOTION SEQ. NO. 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375

were read on this motion to/for JUDGMENT - DEFAULT

ORDER

Upon the foregoing documents, it is

ORDERED that the motion (Motion Seq. 013) of plaintiffs Russell H. Pollack and Lydia I. Pollack (CPLR 3215) for a default judgment against defendants 46 East 82nd Street LLC and Norfolk Street Management LLC, is denied; and it is further

ORDERED that the cross motion by defendants 46 East 82nd Street LLC and Norfolk Street Management LLC (CPLR 2104) to enforce a global settlement agreement, is denied; and it is further

ORDERED that this action shall be restored by the Clerk of the General Clerk's Office to the calendar, upon service by plaintiffs of a copy of this order with notice of entry on such Clerk; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that no later than 20 days from the date of service of a copy of this order with notice entry, defendants 46 East 82nd Street LLC and Norfolk Street Management LLC, shall serve and file an Answer to plaintiffs Russell H. Pollack and Lydia I. Pollack's Third Amended Verified Complaint; and it is further

ORDERED that counsel are directed to submit to 59nyef@nycourts.gov and to file with NYSCEF a proposed discovery compliance conference order or counter proposed discovery compliance conference order(s) on or before November 11, 2020.

DECISION

In this property damage case, plaintiffs Russell H. Pollack and Lydia I. Pollack (collectively, Pollack) move by Motion Seq.

No. 013 (Doc No. 339) [1] for entry of a default judgment (CPLR 3215) against defendants 46 East 82nd Street LLC (46 LLC) and Norfolk Street Management LLC (Norfolk Management) (collectively, the Developers) for failure to answer to the Third Amended Verified Complaint (the Complaint) (Doc No. 343) and for an inquest hearing to determine the judgment amount to be awarded to Pollock against the Developers.

By cross motion (Doc. No. 347), the Developers seek an order[2] enforcing a global settlement of Pollack's claims in the total sum amount of $34,500.00.

Factual and Procedural Background

Pollack owns the townhome residence known as 44 East 82nd Street, New York, New York (the Premises). Pollack shares a common, undivided ownership interest in a wall (the party wall) that holds the loads of the Premises and another townhome residence known as 46 East 82nd Street, New York, New York (the Adjoining Premises) (see the Complaint at ¶¶ 33-36).

It is alleged in the Complaint at ¶¶ 37 and 38 that in or about May 2014, defendant 46 LLC acquired ownership of the Adjoining Premises and in the summer of that same year, the

[1] References to "Doc No." followed by a number refers to documents filed in NYSCEF.

[2] Cross movants failed to set forth the statutory reference upon which relief is sought. However, the substance of the motion papers refers to relief sought pursuant to CPLR 2104.

Developers "commenced substantial demolition and construction work" (the construction work) at the Adjoining Premises. The pleading further alleges that as a result of the construction work the following damages, inter alia, occurred: water infiltrated the Premises, resulting in a slip and fall accident of the Pollack tenant's nanny; loud noise and dust; concrete chunks and other debris and refuse from the construction work were thrown onto the terraces of the Premises creating a risk to the life and safety of persons at the Premises; removal of the flashing which caused rainwater to penetrate onto the Premises causing substantial property damage; construction of the party wall without Pollack's authorization, depriving plaintiffs of the use and enjoyment of the party wall; an installation of a wooden cantilevered platform structure overhanging the Premises airspace without Pollack's permission; repeated trespasses by defendants' workers onto the Premises; substantial damage to all flues at the Premises, including those of the fireplaces and the hot water heater; cracking of the chimney stack located on the Premises; absence of the installation of measures to protect the Premises and its occupants prior to commencing the construction work; failure to install vibration and/or crack monitors prior to performing the construction work; and failure to install proper protective measures around the glass skylight on the roof of the Premises; injury to the ground floor eastern wall of the

Premises; blockage of the storm sewer by construction refuse and debris thrown onto the Premises.

Pollack alleges that the Developers performed work without entering into the required license agreement(s) with plaintiffs and asserts that the construction work resulted in the loss of substantial income from tenants who vacated the Premises because of numerous infrastructure damages (the Complaint at ¶ ¶ 2 and 3). Pollack claims that they made a good faith effort to resolve these disputes with defendants to no avail and on or about March 5, 2015, Pollack filed the original Summons and Complaint (Doc No. 1).

This action proceeded against defendants, 46 LLC, Norfolk Management, Penny Bradley (Bradley),[3] Richard H. Lewis Architect (RLA), Richard H. Lewis (Lewis), Silver Fox Associates, Inc. (Silver Fox), Paul Petrov (Petrov),[4] Tri Borough Scaffolding, Inc. (TB Scaffolding), S&E Bridge & Scaffold LLC (S&E), and Colm Coen (Coen) for the "significant and material damage" to the Premises caused by the construction work at the Adjoining Premises. The Complaint alleges the following causes of action resulting: (1) trespass; (2) negligence; and (3) nuisance (the

[3] By stipulation dated September 12, 2016 (Doc No. 273), Pollack withdrew the claims against defendant Bradley, without prejudice.

[4] NYSCEF contains no recorded appearance in this action of defendants Silver Fox and Petrov.

Complaint at ¶¶ 78-128). In addition to monetary damages, Pollack seeks a permanent mandatory injunction and punitive damages (id. at ¶¶ 129-138).

Prior to joinder of issue, there was extensive motion practice and various applications to dismiss the Complaint, which were subsequently withdrawn and/or resolved by stipulations. Thereafter, the court scheduled this matter for a settlement conference on September 21, 2016 (the settlement conference) (Doc No. 350 at ¶ 6). A purported resolution was reached at the settlement conference, wherein the parties agreed that the Developers would pay $21,000.00; Mt. Hawley Insurance Company, a nonparty to this action and the Developer's insurance carrier, would pay $2,500.00; defendants RLA and Lewis would pay $5,000.00; nonparties, Atlantic Hoisting & Scaffolding, LLC, Safway Atlantic, LLC, Safeway Services, LLC, and Safway Group Holding LLC would pay $1,000.00; and $5,000.00 was to be paid on behalf of defendant TB Scaffolding by their insurance carrier, Sussex Insurance Company as the real party in interest with respect to State National Insurance Company (id. at ¶ 7), for a total global settlement amount of $34,500.00.

Several days after the settlement conference, on September 29, 2016, plaintiffs' counsel received an email correspondence (Doc No. 359) from the nonparty insurance carrier, Sussex

Insurance Company, for defendant TB Scaffolding. This email correspondence states, in pertinent part, as follows:

> "Please allow this letter to confirm that the parties have agreed to settle the above-referenced action for a global settlement amount of $34,500, with $5,000 contribution from my firm's client, Tri Borough Scaffolding, Inc.
>
> "Please note that defendants will begin drafting the settlement materials, including the release and stipulation of discontinuance to be executed by all parties. We will forward these materials for your review and approval as soon as they are ready. Please further note that, given the cross-claims asserted between the various parties, we will be releasing our client's funds only after we have received complete and fully executed stipulation and release.
>
> "In the interim, please forward us your firm's W-9 and advise us whether there are any applicable liens that could affect the settlement.
>
> "Finally, [in] order to allow sufficient time to finalize the settlement materials, we kindly ask that our client be granted a 90-day enlargement of time to respond to plaintiff's Third Amended Complaint. If you are in agreement, we will circulate a stipulation to that effect under a separate cover.
>
> "Please let me know if you have any questions or concerns."

Plaintiffs' attorney responded by asserting that he would review the draft once received (*see* the October 6, 2016 email entry, Doc No. 360). Weeks later, on October 25, 2016, plaintiffs' attorneys emailed the parties requesting the copy of the settlement; and by a follow-up email on October 31, 2016, again wrote to the parties stating, "Frankly, I'm concerned that this settlement is not going to happen because of everyone's

failure to get me a draft until now. Everyone is ignoring my emails" (id.). The defendants' "proposed settlement agreement in this matter" (Doc No. 363) was eventually forwarded to plaintiffs' counsel[5] (see Doc No. 350 at ¶ 9). As of May 2017, the settlement documents were still being reviewed (see email, Doc No. 361); and by June 19, 2017, plaintiffs forwarded the parties a revised proposed settlement agreement, which the Developers assert included a mutual release provision (Doc No. 350 at ¶¶ 11 and 12) which was subsequently rejected, resulting in an unexecuted stipulation of settlement.

Sometime after settlement discussion ceased, on or about October 4, 2017, defendants RLA and Lewis, as well as defendant TB Scaffolding, filed and served an answer to the Complaint (Doc Nos. 233 and 227, respectively). On or about November 14, 2017 (Doc No. 251), defendants S&E and Coen filed and served an answer to the Complaint.[6] Defendants 46 LLC and Norfolk Management have not filed or served an answer to the Complaint.

In 2017, the Developers and defendant TB Scaffolding moved in Motion Seq. No. 010 and No. 011, respectively (collectively, the prior pending motions) (Doc Nos. 234 and 262) to enforce the

[5] The parties did not specify the exact date plaintiffs' counsel received the propose settlement documents.

[6] On December 21, 2017 a stipulation (Doc No. 254) was entered into whereby defendants S&E and Coen discontinued their cross claims against Po Sheng J. Hsu.

settlement of Pollack's claims for the global total sum of $34,500.00. Pollack cross-moved (Doc No. 256) on the prior pending motions for entry of a default judgment against the Developers for failure to answer the Complaint. Soon after the prior pending motions were interposed, defendant 46 LLC filed a voluntary petition for relief under the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the Bankruptcy petition). The prior pending motions were accordingly stayed by order dated March 23, 2018 (Doc No. 328) and "any party [could] make an application by order to show cause [OSC] to vacate or modify the herein stay upon the final determination of, or vacatur of such stay issued by the Bankruptcy Court."

On or about October 25, 2018, the Bankruptcy petition was dismissed; and on November 13, 2018, Pollack interposed an application by OSC (Motion Seq. No. 012; Doc No. 332) to vacate the court's stay of this matter. The application to lift the stay was granted, without opposition, by order dated December 4, 2018 (Doc No. 337). Pursuant to such order, the action, along with the prior pending motions, was restored to the court's "oral argument calendar" and the parties were directed to appear in court on March 12, 2019 at 9:30 a.m., which was later adjourned by stipulation (Doc No. 338) to April 30, 2019.

When the parties appeared for the court ordered oral argument on the prior pending motions, the applications had not been calendared and the action remained "disposed" despite the court's directive and order lifting the Bankruptcy stay and restoring the action to the court's calendar. To resolve this procedural error, the parties were directed to refile the prior pending motions originally filed in 2017. Pollack's instant application (Motion Seq. 013) is the re-filing of their original cross motion to the prior pending motions and the Developer's prior application to enforce a settlement is the herein cross motion application before the court.

Arguments

Pollack contends that their application for a default judgment, pursuant to 3215 (a), must be granted because there is no dispute that the Developers failed to answer the Complaint, and an inquest hearing, pursuant to CPLR 3215 (b), must therefore be held to determine the amount of damages to be awarded to Pollack.

The Developers argue that Pollack's application for a default judgment must be denied because: (1) the motion is defective as it was not properly served upon all parties since movants did not submit an affidavit of service for defendants Silver Fox and Petrov who are not registered in the electronic filing system; (2) Pollack failed to submit an affidavit from a

person with knowledge establishing the merits of their claims, as required by CPLR 3215 (f); (3) the written proposed stipulation is enforceable as an oral stipulation made in open court pursuant to CPLR 2104, and the Developer's cross motion relief to enforce a settlement of this action, must be granted; and (4) if this court determines there was no settlement, the Complaint must be dismissed, pursuant to CPLR 3215 (c), on the grounds that Pollack failed to timely move for a default judgment against the Developers within a year after the purported default.

Pollack maintains that the parties did not settle this case in open court in accordance with CPLR 2104 as the terms were not "recorded" by a court reporter. Moreover, after the proposed settlement agreement was revised and rejected, all defendants, except for the Developers, served and filed answers to the Complaint, conclusively proving that the case had not settled.

Defendant TB Scaffolding did not refile its prior pending motion and instead submitted an attorney affirmation (Doc No. 370) supporting the Developers' argument for enforcing a global settlement of Pollack's claims for the total sum of $34,500.00. Included as an exhibit to the attorney affirmation is a copy of TB Scaffolding's prior pending motion papers (Doc No. 372). Defendant TB Scaffolding contends there is no prejudice to the court's consideration of its prior application because it had

been fully briefed by all counsel before the Bankruptcy petition was filed. TB Scaffolding further argues that if the court denies the application to enforce a settlement, the action against the Developers cannot be dismissed for plaintiffs' failure to seek a default judgment within a year because there was no intention to abandon the prosecution of this action and the Developers informally "appeared" by motion practice.

The Developers did not reply to Pollack's opposition to enforce a global settlement of this action. Nor did the Developers address TB Scaffolding's argument against dismissal of this action based on the failure of Pollack to timely seek a default judgment.

DISCUSSION

Application to Enforce Settlement

Stipulations between the parties made in open court are governed by CPLR 2104 and states as follows:

> "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk."

Email correspondence meets the writing requirement subscribed in CPLR 2104 (Williamson v Delsener, 59 AD3d 291 [1st Dept 2009]).

However, although the emails in this case acknowledged the existence of a settlement in principle, it did not incorporate all the material terms of the settlement and, therefore, was not an enforceable agreement (Bonnette v Long Is. Coll. Hosp., 3 NY3d 281, 285 [2004]). In fact, material terms were being negotiated and considered during the drafting stage of the proposed settlement agreement which occurred after the settlement conference. For instance, it was after the conference that the request of nonparties Atlantic Hoisting & Scaffolding, LLC, Safway Atlantic, LLC, Safway Services, LLC, Safway Group Holding LLLC, and Ace American Insurance Company to be held harmless and be included in the release to the propose settlement agreement (Doc No. 360, October 6, 2016 email entry) was honored (*see* proposed settlement agreement Doc No. 363, at page 1, ¶ 4 and § 1.0 entitled "RELEASES AND DISCHARGES"). Thus clearly, at the settlement conference, the terms of the agreement had not been ironed out between the parties.

The email correspondences between the parties further demonstrates that they were drafting an agreement that was subject to review and approval, as noted on numerous occasions by plaintiffs' counsel, without objection by any of the drafters to the agreement. This conduct was indicative of the fact that the parties merely had an "agreement to agree" and was merely tentative in nature (Sterling Fifth Assoc. v Carpentille Corp.,

Inc., 10 AD3d 282, 284 [1st Dept 2004]). Once settlement discussion ceased because of a disagreement as to releases attendant to plaintiffs, the parties were all aware that there was an impasse and a settlement would not be consummated, which is evidenced by the fact that the majority of defendants proceeded to file and serve answers to the Complaint thereby actively defending the claims asserted against them.

The merits of defendant TB Scaffolding's prior pending motion application (Motion Seq. No. 011) presented as an exhibit herein to its affirmation in support of the Developer's cross motion and in partial opposition to plaintiffs' notice of motion, will not be considered by the court as TB Scaffolding failed to properly notice all parties, pursuant to CPLR 2214. Nonetheless, were the application to have been properly noticed, to the extent a relief was sought to enforce the tentative stipulation, the application would have been denied for the reasons stated herein.

Application for a Default Judgment

On a motion for leave to enter a default judgment pursuant to CPLR 3215, plaintiff is required to submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default in answering or appearing (*see* CPLR 3215 [f]). Here, plaintiffs submitted the requisite proof of service, but submitted neither

proof of the facts constituting the causes of action alleged in the Complaint, nor of the Developers' default in serving and filing a responsive pleading thereto.

"Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney" (see CPLR 3215 [f]). A verified complaint "must allege enough facts to enable a court to determine that a viable cause of action exists [and] ... must contain evidentiary facts from one with personal knowledge since a pleading verified by an attorney pursuant to CPLR 3020 (d) (3) is insufficient to establish its merits" (Triangle Props. #2, LLC v Narang, 73 AD3d 1030, 1032 [2d Dept 2010] [internal quotation marks and citation omitted]; see also Mohamed v Mohamed, 176 AD3d 567, 567-568 [1st Dept 2019]). Here, the Complaint was verified by an attorney only and no affidavit of merit in support of the instant application for a default judgment against a party defendant by someone with personal knowledge was presented.

Furthermore, it is not clear, based upon the procedural posture of this matter after the parties' settlement discussion, that the Developers were in default. In the email correspondences attendant to the settlement negotiations, plaintiffs' attorneys received a request to extend the time to

answer the Complaint to "90 days" and plaintiffs' attorneys responded that "Extensions fine till then" (see Doc No. 360, email entries dated September 29, 2016 and October 6, 2016, respectively). The date upon which the parties were to file an answer was not specified as the email correspondence does not set forth when the 90-day extension was to commence.

Some defendants filed answers to the Complaint nearly a year after this email correspondence between the parties. Although the Developers failed to serve and file a responsive pleading to the Complaint by stipulations setting for the deadline of September 12, 2016 (the Stipulations; Doc Nos. 222 and 223) and by the subsequently extended deadline of October 21, 2016 (Doc No. 247), none of the parties filed and served an answer by that date. At some point, it is apparent to this court, the parties agreed to a further extension of time to file an answer, albeit such agreement was not formally recorded with the court. Defendants who served and filed an answer, did so sometime at the end of 2017, after the settlement discussions broke down.

Given the lack of court order and/or subsequent stipulation extending the time to file an answer, the court cannot enter a default judgment against the Developers based upon a claim that they failed to meet an unspecified filing date deadline and/or an October 21, 2016 deadline, which was waived/tolled for all

parties during the settlement negotiations. Were the court to accept plaintiff's proposition that the deadline upon which to file and serve an answer to the Complaint was October 21, 2016, there is no explanation for plaintiffs' acceptance of the remaining defendants' late filing of their answer; nor would the instant application for a default judgment have been timely.

CPLR 3215 provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215 [c]). Here, it is evident that between the Bankruptcy petition stay and the parties' nearly six-month settlement discussion, any and all deadlines to file an answer were summarily extended. Moreover, even if the application for a default judgment were deemed untimely, plaintiffs continued to prosecute this action with no indicia of an intent to abandon their claims against defendants. Therefore, plaintiffs have demonstrated sufficient cause.

9/23/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:		GRANTED	X DENIED		GRANTED IN PART		OTHER
		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE