SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART 42**

Justice

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NAVATAR GROUP, INC.

Plaintiff,

- v -

SEALE & ASSOCIATES, INC,

Defendant.

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INDEX NO. 653643/2018

MOTION DATE 09/01/2021

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for DEFAULT JUDGMENT.

The plaintiff, Navatar Group, Inc., filed this action to recover the principal sum of $50,348.00 for an alleged breach of a professional services contract by the defendant, Seale & Associates, Inc. The defendant asserted counterclaims based on the plaintiff's alleged breach of the same agreement. Discovery was commenced.

By order dated December 11, 2020, the court granted the defendant's motion pursuant to CPLR 3126 to strike the complaint to the extent that the plaintiff's complaint and answer to the defendant's counterclaims would be stricken unless the plaintiff provided all outstanding discovery within 20 days (MOT SEQ 004). The plaintiff failed to do so. The defendant then moved, in effect, pursuant to CPLR 3215 for leave to enter a default judgment against the plaintiff on the counterclaims (MOT SEQ 005). By order dated January 20, 2021, the court denied the motion without prejudice to renewal on proper papers, finding that the defendant failed to submit sufficient proof of the facts constituting its claims. The court noted that the plaintiff's complaint and answer to the defendant's counterclaims were automatically stricken upon the plaintiff's failure to timely comply with the court's December 11, 2020, order (see AWL Indus., Inc. v QBE Ins. Corp., 65 AD3d 904 [1st Dept. 2009]), and thus denied the plaintiff's motion seeking an extension of time to comply with the court's prior order (MOT SEQ 006).

The defendant now moves pursuant to CPLR 3215 for leave to enter a default judgment against the plaintiff, seeking (1) judgment on its counterclaims, (2) an award of attorney's fees and costs, and (3) judgment in its favor on the plaintiff's complaint. The plaintiff opposes the motion. The motion is granted in part.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting . . . some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983).

In support of its motion, the defendant submits, *inter alia*, the pleadings, an attorney's affirmation, the subject professional services contract, email exchanges between counsel, and the affidavits of James Seale, the president of the defendant, and Robert Whitney, a managing director of the defendant. Initially, the court notes that Seale's affidavit and Whitney's affidavit were executed and notarized in the States of Virginia and California, respectively, and do not include certificates of conformity as required by CPLR 2309(c). However, these defects do not require the denial of the motion and may be cured by the submission of the proper certificates *nunc pro tunc*. See Bank of New York v Singh, 139 AD3d 486 (1st Dept. 2016).

The proof submitted by the defendant establishes that in May 2015, the parties entered into a professional services contract whereby the plaintiff agreed to provide the defendant with certain software and services for three years in exchange for the defendant's payment a license fee of $59,500.00 plus a concierge fee of $9,180.00. Unless affirmatively cancelled, the contract was to automatically renew for one-year periods. Any price increases for the fourth and fifth years would be capped at 15 percent, such that the maximum product fees in year 4 would be $22,808.00, and the maximum in year 5 would be $23,949.00.

According to Whitney, in April 2018, the plaintiff informed the defendant that the contract had automatically renewed and demanded $31,988.00 for year four, rather than the $22,808.00

agreed to. Whitney states that the plaintiff refused to renew the contract in accordance with its terms. Whitney asserts that the plaintiff threatened that the failure to pay the $31,988.00 it demanded would result in a service disruption, *i.e.*, the defendant would be unable to use the software that was the subject of the parties' contract. Therefore, the defendant claims, it was forced to engage another vendor. Whitey explains that after more than six hours of research, he found an alternative vendor and ultimately spent 40 hours migrating from the plaintiff's platform to the new vendor's platform. He states that his minimum hourly rate is $1,000.00 per hour, but offers no *curriculum vitae* or other explanation to support his minimum rate. Nor does he state the nature of his employment relationship with the defendant. That is, he does not indicate whether he is, for example, an independent contractor who is paid hourly, or a salaried employee.

Seale states that the defendant engaged Saasinct Solutions, LLC (Saasinct), to assist with carrying out the migration to the new platform. The defendant submits three invoices from Saasinct dated June 1, 2018, June 12, 2018, and July 14, 2018, for the sums of $4,500.00, $1,218.75, and $562.50, respectively, and a total sum of $6,281.25, for the assistance it provided the to the defendant.

By this evidence, the plaintiff has submitted sufficient proof of the facts constituting its first counterclaim sounding in breach of contract. The plaintiff has established that a valid contract existed, the plaintiff performed thereunder, the defendant failed to perform, and resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept. 2010) (citing Morris v 702 E. Fifth St. HDFC, 46 AD3d 478 [1st Dept. 2007]); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009), aff'd, 14 NY3d 901 (2010). Indeed, the plaintiff's answer to the defendant's counterclaims having been stricken, the plaintiff is "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70–71 (2003). The court has considered the plaintiff's arguments in opposition and finds them to be without merit.

However, the defendant does not demonstrate entitlement to the principal sum of $52,281.25 it seeks in connection with the first counterclaim. That principal sum allegedly accounts for the 46 hours of time Whitney purportedly spent engaging another vendor and migrating to a new platform, and payments to Saasinct for assistance in the migration. Although

Whitney avers that his rate is $1,000.00 per hour and that the plaintiff's breach caused him to spend 46 hours in the efforts described, the defendant submits no proof that it actually incurred $46,000.00 in damages for Whitney's efforts. Indeed, Whitney, who avers he is the managing director of the plaintiff, does not reveal whether he is a salaried employee that the defendant was not actually required to pay on an hourly basis for his time. For these reasons, the defendant is only entitled to the $6,281.25 it paid to Saasinct as damages on its breach of contract counterclaim.

The defendant has not established its entitlement to judgment on its counterclaim sounding in breach of the duty of good faith and fair dealing. "New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." Harris v Provident Life and Acc. Ins. Co., 310 F3d 73, 81 (2nd Cir 2002); see Berkeley Research Group, LLC v FTI Consulting, Inc., 157 AD3d 486 (1st Dept. 2018); Deadco Petroleum v Trafigura AG, 151 AD3d 547 (1st Dept. 2017); Cambridge Capital Real Estate Investments, LLC v Archstone Enterprise LP, 137 AD3d 593 (1st Dept. 2016); Amcam Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423 (1st Dept. 2010). Given that the defendant's counterclaims for breach of contract and breach of the implied duty of good faith and fair dealing are both based upon the plaintiff's failure to honor the renewal pricing it contractually agreed to, the second counterclaim for breach of the implied duty of good faith and fair dealing is duplicative of the defendant's counterclaim for breach of contract. As such, the branch of the defendant's motion seeking judgment on the second counterclaim is denied.

With respect to the defendant's request for contractual attorney's fees pursuant to Paragraph 16.10 of the parties' contract, the defendant establishes its entitlement to judgment on the issue of liability. See generally Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). The defendant may, if so advised, submit an attorney's affirmation, billing records or invoices, and any other supporting proof of the amount of reasonable attorney's fees to which it is entitled within 30 days of the date of this order and shall notify the Part 42 Clerk of any such filing.

The branch of the defendant's motion seeking judgment in its favor on the plaintiff's complaint is denied as academic. See Cronin v Jamaica Hosp. Med. Ctr., 60 AD3d 803 (2nd Dept. 2009); Psomas v Kehoe, 253 A.D.2d 456 (2nd Dept. 1998); Cioffi v Fishman, 220 AD2d

479 (2nd Dept. 1995). Having been stricken, there is no operative complaint and thus there is no instrument upon which to grant the defendant the relief sought.

Accordingly, and upon the foregoing papers, it is

ORDERED that the defendant's motion pursuant to CPLR 3215 for leave to enter a default judgment against the plaintiff is granted to the extent that the Clerk shall enter judgment in favor the defendant and against the plaintiff on the defendant's first counterclaim, sounding in breach of contract, in the sum of $6,281.25, plus costs and statutory interest from June 1, 2018; and it is further

ORDERED that the defendant may submit as supplemental papers an attorney's affirmation, billing records or invoices, and any other supporting proof of the sum of contractual reasonable attorney's fees to which it is entitled within 30 days of the date of this order and shall notify the Part 42 Clerk (jnoriega@nycourts.gov) of any such filing; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

01/06/2021
DATE

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