

<b>Wider v Temp-Art Mech. Inc.</b>
2022 NY Slip Op 30794(U)
March 10, 2022
Supreme Court, New York County
Docket Number: Index No. 150964/2014
Judge: Sabrina B. Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SABRINA KRAUS PART 57TR**

*Justice*

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TODD WIDER, 266 WEAVE, LLC

Plaintiff,

- v -

TEMP-ART MECHANICAL INC.,

Defendant.

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INDEX NO. 150964/2014

MOTION DATE 12/03/2021

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 121 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

**BACKGROUND**

Plaintiff commenced this action seeking damages for the alleged negligent design, engineering and installation of an HVAC system in plaintiff's home. The summons and complaint were filed on January 31, 2014. Defendant appeared by counsel and filed an answer on June 6, 2014, asserting it was only responsible for the installation of the HVAC system, not the design or engineering of the same.

A Note of Issue was filed on March 31, 2016. The parties engaged in mediation and on July 26, 2018, entered into a settlement agreement (The Agreement), wherein defendant agreed to pay plaintiff \$275,000.00, in full settlement of any and all claims. The Agreement provided for an initial payment of \$30,000 to be paid within thirty days of the execution of The Agreement, and then installment payments of \$4,000.00, to be paid on the first of the month until paid in full. (NYSCEF Doc 101)

The Agreement also provided that in the event of default, if defendant failed to cure within five (5) business days, a judgment could be entered by the court. The Agreement provided, in pertinent part

Section 3.1. At the time of the execution of this Agreement, Temp-Art shall deliver to Wider and 266 Weave a Confession of Judgment and an Affidavit of Confession in the forms attached hereto as Exhibit A. Upon the occurrence of any Event of Default, Wider and 266 Weave shall have the right to exercise all of their rights and remedies, at law or in equity, including entering a JUDGMENT BY CONFESSION, pursuant to CPLR § 3218, against Temp-Art for two-times the Settlement Amount plus accrued interest at the rate of 6% per annuus less any payments Wider and 266 Weave have received or credits applied.

Defendant missed the April and May 2020 payments. On May 1, 2020, plaintiff sent defense council a default letter, via email. (NYCEF Doc 102) Defendant did not respond until September 2020. Plaintiff entered judgment against Defendant in June 2020.

### PENDING MOTION

On January 7, 2021, defendant move by Order to Show Cause to stay enforcement of the judgment, to vacate defendant's default in making the payments under The Agreement and to vacate the judgment. Plaintiff filed opposition. Defendant did not submit reply.

### DISCUSSION

In order to vacate a default under CPLR § 5015 (a), the moving party must establish an excusable default and a meritorious claim on which to proceed (*Abrams v. Abrams*, 56 AD2d775; *Eisenstein v. Rose*, 135 AD2d 369). “Whether an excuse is reasonable is a determination within the sound discretion of the Court (*Royal Leisure v. TLAM, Inc*, 107 AD 3d 721).”

Defendant admits it failed to make payments due under The Agreement for April 2020 through September 2020, but asserts that the failure to make payments was due to the Covid pandemic. Defendant maintains it's business was closed during this period, because of the

pandemic, and that because it was closed, they did not receive the default notice from plaintiff. Defendant asserts that once they learned of the default, in September 2020, they attempted to make payment in the full amount owed to date to attempt to remedy the default, but plaintiff rejected the payment.

Defendant relies on the Supreme Court's decision in *Louis Monteleone Fibres Ltd. v. Kejriwal Newsprint Mills LLC*, 2020 N.Y. Misc. LEXIS 9865 (2020), wherein the court vacated defendant's default in answering, relying on the Governor's executive orders tolling defendants time to answer. However, the circumstances here are different than in *Louis*. Defendant herein knowingly entered into a settlement agreement wherein they knew of the obligation to make payments every month and consented in advance to a judgment. Although the pandemic may have impacted the ability to continue to run its business, defendant cannot assert it did not know the payments were due.

Defendant maintains, "upon learning of the default, the Defendant sent a check for the full amount owed in an attempt to remedy the default and extend their good faith in continuing with the payment plan." Yet defendant fails to explain why it took over four months to "learn" of the default. Plaintiff sent a notice of default via email. The pandemic may have prevented defendant from operating its business, but it is illogical to say the pandemic prevented access to email. Nevertheless, without the notice of default, defendant cannot say it did not know that payments were due. Defendant made no effort to contact plaintiff in April or May of 2020 and ask for any stay or modification to The Agreement based upon the pandemic.

Further, as plaintiff argues in opposition, defendant did not move for this relief until such time as plaintiff sought enforcement of the judgment. Defendant offers no excuse for this delay. Defendant has failed to establish excusable default warranting vacatur of the default.

Given that the court is not vacating the default, there is no basis to grant a stay in the enforcement of the judgment.

**CONCLUSION**

Wherefore it is hereby,

ORDERED defendant's order to show cause to stay enforcement of the judgment and vacate the default is denied; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on all parties and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such filing with 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](http://www.nycourts.gov/supctmanh)).

ORDERED that any relief sought not expressly addresses herein has nonetheless been considered and is denied.

3/10/2022  
DATE

  
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SABRINA KRAUS, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: