SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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LEMBERG FOUNDATION, INC., LEMBERG SYNDICATE, and NEWBURY STREET PARTNERS,

Plaintiffs

Index No. 651734/2021

- against -

DECISION AND ORDER

SHUTTLEWORTH ARTISTS LTD., BOARD OF DIRECTORS OF SHUTTLEWORTH ARTISTS LTD., A.J. AGARWAL, INDIVIDUALLY AND AS AN OFFICER OF SHUTTLEWORTH ARTISTS LTD., HERBERT HENRYSON, INDIVIDUALLY AND AS AN OFFICER OF SHUTTLEWORTH ARTISTS LTD., DARREN KEITH, INDIVIDUALLY AND AS AN OFFICER OF SHUTTLEWORTH ARTISTS LTD., DAVID SCHANOES, INDIVIDUALLY AND AS AN OFFICER OF SHUTTLEWORTH ARTISTS LTD., REBECCA TADIKONDA, INDIVIDUALLY AND AS AN OFFICER OF SHUTTLEWORTH ARTISTS LTD., SCOTT THODE, INDIVIDUALLY AND AS AN OFFICER OF SHUTTLEWORTH ARTISTS LTD.,

Defendants

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APPEARANCES:

For Plaintiffs
Andrea L. Roschelle Esq.
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For Defendants
Gary S. Ehrlich Esq.
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs entered a proprietary lease with defendant Shuttleworth Artists Ltd. December 31, 1996, for Apartment 1A and Basement A at 478 West Broadway, New York County. Plaintiffs move for a default judgment against all defendants, seeking an injunction akin to specific performance of the proprietary lease to allow plaintiffs to install their heating, ventilation, and air conditioning (HVAC) equipment on the roof or the facade of defendants' building. C.P.L.R. § 3215. Defendants cross-move for an extension of time to answer the complaint. C.P.L.R. § 3012(d). The court grants plaintiffs' motion against defendants Shuttleworth Artists and its Board of Directors, denies plaintiffs' motion against the Board's officers individually, and denies defendants' cross-motion as follows.

II. LEGAL STANDARDS

To obtain a default judgment, plaintiffs must show they timely served the summons and complaint on defendants and establish a prima facie claim through admissible evidence. C.P.L.R. § 3215(f); PV Holding Corp. v. AB Quality Health Supply Corp., 189 A.D.3d 645, 646 (1st Dep't 2020); 154 E. 62 LLC v. 156 E 62nd St. LLC, 159 A.D.3d 498, 498 (1st Dep't 2018). For defendants to succeed on their motion to extend their time to answer the complaint, which would avoid a default judgment against them, they must present a reasonable excuse for their

default. C.P.L.R. § 3012(d).

III. DEFENDANTS' OPPOSITION ON PROCEDURAL GROUNDS

Defendants maintain that plaintiffs' failure to file an affidavit of service for defendants Shuttleworth Artists, Board of Directors of Shuttleworth Artists Ltd., and Tadikonda within 10 days after service warrants denial of plaintiffs' motion. Plaintiffs insist that service on Shuttleworth Artists did not require filing proof of service with the court because they served the corporation via the Secretary of State and that, regardless, plaintiffs remedied any such failure through their recently filed affidavit of service.

Plaintiffs commenced this action March 16, 2021; timely served the summons and complaint on defendants Agarwal, Henryson, Keith, Schanoes, and Thod; and filed an affidavit of service for each of those defendants within 20 days after service. Defendants do not dispute that plaintiffs served all those defendants, but plaintiffs acknowledge that they did not file an affidavit of service for defendants Shuttleworth Artists, Board of Directors, and Tadikonda within 20 days of service. On January 24, 2022, plaintiffs filed an affidavit of service March 25, 2021, on Shuttleworth Artists. NYSCEF No. 42. Plaintiffs also mailed the summons and complaint to each defendant December 8, 2021, pursuant to C.P.L.R. § 3215(g), and filed corresponding affidavits of service December 10, 2021. NYSCEF Nos. 7-15.

Although plaintiffs did not timely file an affidavit of service on Shuttleworth Artists, nor file any affidavit of service of the summons and complaint on the Board of Directors and Tadikonda, defendants do not otherwise dispute plaintiffs' service of the summons and complaint. Defendants neither challenge plaintiffs' method of service nor deny receipt of the pleadings. In fact, defendants' attorney informed plaintiffs by an email dated March 31, 2021, that he represented all defendants, without raising plaintiff's failure to timely file affidavits of service for Shuttleworth Artists, the Board of Directors, and Tadikonda. Since defendants claim plaintiffs' motion is deficient only to the extent that plaintiffs did not timely file affidavits of service for Shuttleworth Artists, the Board of Directors, and Tadikonda, and because defendants suffered no prejudice, the missing affidavits of service amount at most to a procedural irregularity, which plaintiffs may remedy even now. C.P.L.R. § 2001; Reem Contr. v. Altschul & Altschul, 117 A.D.3d 583, 584 (1st Dep't 2014). See Sebrow v. Sebrow, 205 A.D.3d 563, 564 (1st Dep't 2022).

IV. DEFENDANTS' EXCUSE

Defendants ask that their default in answering, C.P.L.R. § 3215(a), be excused because they engaged in settlement negotiations before defaulting, but active settlement negotiations alone do not excuse defendants from their default.

Neely v. Felicetti, 177 A.D.3d 484, 484 (1st Dep't 2019); Bank of N.Y. Mellon v. Daniels, 180 A.D.3d 738, 739 (2d Dep't 2020). Defendants' position is undermined further by their own abrupt conclusion of the settlement negotiations, utterly ignoring plaintiffs' communications after November 1, 2021, until plaintiffs filed this motion.

Defendants also ask that their default be excused due to law office failure, because their attorney scheduled nine depositions throughout November 2021 and contracted COVID-19 in December 2021. At oral argument, defendants' attorney revealed he also dealt with a personal crisis that distracted him from this action. Yet an "overbooking of cases and inability to keep track of his appearances" does not excuse defendants' default, Pichardo-Garcia v. Josephine's Spa Corp., 91 A.D.3d 413, 414 (1st Dep't 2012); Perez v. New York City Hous. Auth., 47 A.D.3d 505, 505 (1st Dep't 2008), particularly since their attorney "did not state that he took any steps to resolve or alleviate the conflict" between his scheduled depositions, his illness, or his personal crisis and his obligations to deal with this action. Pichardo-Garcia v. Josephine's Spa Corp., 91 A.D.3d at 414. Defendants' attorney is not a sole practitioner, so he could have sought assistance from other attorneys in his law firm to cover the depositions, which likely were scheduled in advance, or to continue negotiations in this action on defendants' behalf while

he was unavailable due to the depositions, his illness, or his personal crisis.

Nor did defendants' attorney bother to inform plaintiffs of his unavailability or explain his absence until plaintiffs filed this motion. Whittemore v. Yeo, 99 A.D.3d 496, 496 (1st Dep't 2012); Pichardo-Garcia v. Josephine's Spa Corp., 91 A.D.3d at 414. At the very least, other attorneys in the firm could have explained to plaintiffs why their inquiries went unanswered, particularly after defendants' primary attorney contracted COVID-19. Consequently, the court denies defendants' cross-motion.

V. PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT

A. Breach of the Proprietary Lease

Plaintiffs claim defendants breached their proprietary lease with plaintiffs and seek an injunction requiring performance in compliance with the lease. Section 21(a) of the Proprietary Lease provides:

> The Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld, make in the apartment or building, or on any roof,* penthouse, terrace or balcony appurtenant thereto, any alteration, enclosure or addition or any alteration of or addition to the water, gas, or steam risers or pipes, heating or air conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm system, or any other installation or facility in the apartment or building. The performance by Lessee of any work in the apartment shall be in accordance with any applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof. The Lessee shall not in any case install any appliances which will overload the existing wires or equipment tn the building.

> *each 5th floor unit may erect 150 square feet of skylights at the sole cost and expense of lessee . . . .

Aff. of John Usdan Ex. A, at 13-14 (emphasis added). Proprietary Lease § 21(a) does not entitle defendants to withhold consent without a valid reason. DMF Gramercy Enters., Inc. v. Lillian Troy 1999 Trust, 123 A.D.3d 210, 215-16 (1st Dep't 2014).

Plaintiffs insist that defendants have withheld their consent unreasonably, preventing plaintiffs from installing their HVAC anywhere on the building's roof or facade, and in direct violation of their Proprietary Lease. Id. at 213. Plaintiffs have attempted to obtain defendants' consent since 2016, through hiring architects, presenting design plans, and purchasing a high-grade HVAC unit specifically designed to reduce noise emissions. Usdan Aff. Exs. C, G; Usdan Reply Aff. Ex. C.

Yet defendants repeatedly refused to grant permission to plaintiffs and gave no reasoned explanation. Even in an affidavit in opposition to plaintiffs' motion and in support of defendants' cross-motion, defendant Henryson does not explain why Shuttleworth Artists and its Board of Directors have denied plaintiffs' requests. Nor have defendants identified any tenant who objects to the placement of another HVAC unit on the building's roof or facade. They thus fail to demonstrate a basis to withhold consent to plaintiffs' relocation of their HVAC unit. DMF Gramercy Enters., Inc. v. Lillian Troy 1999 Trust, 123 A.D.3d

at 216.

Defendants instead contend that plaintiffs are not entitled to "appurtenant rights" under Proprietary Lease § 7, Henryson Aff. ¶ 7, because that section limits the "use of the roof of the premises . . . exclusively for the tenants-stockholders of the top floor units." Usdan Aff. Ex. A § 7. This section, however, expressly provides Shuttleworth Artists "the right to erect equipment on the roof . . . for its use and the use of the lessees in the building." Id. Thus the lease does not preclude defendants from allowing plaintiffs to install their HVAC equipment on the roof. Nor do defendants point to any section of the Proprietary Lease that prohibits an HVAC unit on the building's facade.

Defendants next insist that plaintiffs have not suffered an irreparable injury, as required for a preliminary injunction, because they are not restricted from the use or enjoyment of their premises, even if the current location of their HVAC unit may be unlawful. Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005); 106 & 108 Charles LLC v. Hohn, 96 A.D.3d 511, 512 (1st Dep't 2012); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 264 (1st Dep't 2009). Plaintiffs do not seek a preliminary mandatory injunction, however, but seek final equitable relief in the form of a permanent mandatory injunction akin to specific performance of

Proprietary Lease § 21(a) that defendants breached. Silverman v. Park Towers Tenants Corp., ___ A.D.3d ___, 169 N.Y.S.3d 61, 63 (1st Dep't 2022); Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research, 174 A.D.3d 473, 476 (1st Dep't 2019); DMF Gramercy Enters., Inc. v. Lillian Troy 1999 Trust, 123 A.D.3d at 217; Shapiro v. 350 E. 78th St. Tenants Corp., 85 A.D.3d 601, 602-603 (1st Dep't 2011). See People v. Greenberg, 27 N.Y.3d 490, 497 (2016). Moreover, even if plaintiffs still may use their premises, if plaintiffs are prohibited from maintaining an HVAC unit because its current location is unlawful and defendants refuse to consent to another location, plaintiffs will harmed in their use and enjoyment of the premises in a way that damages will not adequately redress and, thus, irreparably. Silverman v. Park Towers Tenants Corp., ___ A.D.3d ___, 169 N.Y.S.3d at 63; Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Research, 174 A.D.3d at 476.

By showing that damages are an inadequate remedy, plaintiffs may obtain the equitable remedy of specific performance of the contract breached. Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 415 (2001); Cho v. 401-403 57th St. Realty Corp., 300 A.D.2d 174, 175 (1st Dep't 2002). Specific performance is the better remedy if "the subject matter of the particular contract is unique and has no established market value." Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d at 415; Van Wagner Adv.

Corp. v. S & M Enters., 67 N.Y.2d 186, 193 (1986). See Cho v. 401-403 57th St. Realty Corp., 300 A.D.2d at 175. The court must consider "the difficulty of proving damages with reasonable certainty," Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d at 415; Cho v. 401-403 57th St. Realty Corp., 300 A.D.2d at 175; the consequent "risk of undercompensation," Van Wagner Adv. Corp. v. S & M Enters., 67 N.Y.2d at 193; and plaintiffs' inability to procure the environment they seek with a monetary award. Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d at 415; Cho v. 401-403 57th St. Realty Corp., 300 A.D.2d at 175.

If damages for defendants' breach are conjectural and may not be calculated with reasonable certainty, defendants must be compelled to perform their contractual obligations. Van Wagner Adv. Corp. v. S & M Enters., 67 N.Y.2d at 195. On the other side of the equation, to balance the equities of this equitable remedy, the court also must consider the burden that specific performance would impose on defendants and weigh the benefit to plaintiffs against the harm to defendants. Van Wagner Adv. Corp. v. S & M Enters., 67 N.Y.2d at 195; Cho v. 401-403 57th St. Realty Corp., 300 A.D.2d at 175.

Damages are an inadequate remedy for plaintiffs because they seek a specific course of action: that defendants allow plaintiffs to install their HVAC unit on the roof or facade of defendants' building and that defendants apply for the permits

necessary for that work. As set forth above, defendants do not claim that plaintiffs' HVAC unit would cause a burden either to defendants or to other tenants in the building. Finally, plaintiffs have demonstrated the value and importance of moving their HVAC unit to the outside of the building, to avoid violations of law, which is unique to plaintiffs and without established market value.

Consequently, the court grants plaintiff an injunction against Shuttleworth Artists and its Board of Directors requiring them to (1) consent to at least one of the proposals plaintiffs have submitted to these defendants for installation of plaintiffs' HVAC unit on a roof or facade of defendants' building (Usdan Aff. Ex. C or G or Usdan Reply Aff. Ex. C) and (2) apply for the work permits necessary for that work. DMF Gramercy Enters., Inc. v. Lillian Troy 1999 Trust, 123 A.D.3d at 213; Shapiro v. 350 E. 78th St. Tenants Corp., 85 A.D.3d at 602-603. The court conditions relief against the Board of Directors on plaintiffs filing an affidavit of service of the summons and complaint on this defendant. C.P.L.R. § 2001.

B. Damages Incurred

Plaintiffs also are entitled to reimbursement of any necessary and reasonable expenses incurred after September 25, 2019, when plaintiffs' attorney confronted Shuttleworth Artists and its Board of Directors about their failure to comply with the

Proprietary Lease, Roschelle Aff. Ex. D, defendants continued to withhold their consent without explanation, and their withholding of consent became unreasonable. Damages will compensate plaintiffs for their wasted efforts in pursuing defendants' unobtainable consent, which plaintiffs pursued in good faith, but the withholding of which defendants failed to justify. These damages, which compensate for plaintiffs' expenses already incurred from Shuttleworth Artists' and its Board of Directors' breach of the Proprietary Lease, are distinct from the award of specific performance, which prevents plaintiffs' future harm from defendants' breach.

Consequently, the court grants a default judgment against defendants Shuttleworth Artists and Board of Directors on liability for plaintiffs' incurred expenses. Again, the court conditions this relief against the Board of Directors on plaintiffs filing an affidavit or service as set forth above. Although the Proprietary Lease does not provide attorneys' fees for defendants' breach, plaintiffs may recover any attorneys' fees as part of plaintiffs' damages incurred after September 25, 2019, to the extent that plaintiffs show their attorneys' services were the necessary and reasonable consequence of defendants' violation of plaintiffs' rights under the Proprietary Lease.

V. VIOLATION OF NEW YORK BUSINESS CORPORATION LAW § 501(c)

Plaintiffs allege that defendants violated New York Business Corporation Law § 501(c) because they permitted other tenants to install HVAC units on the roof, but "this is not the type of differential treatment Business Corporation Law § 501(c) was designed to address." Moltisanti v. E. Riv. Hous. Corp., 149 A.D.3d 530, 532 (1st Dep't 2017). Business Corporation Law § 501(c) may support a claim for disparate treatment under defendants' bylaws or plaintiffs' Proprietary Lease if either contract denied plaintiffs parity of rights, Pilipovic v. Laight Co-op Corp., 137 A.D.3d 710, 711 (1st Dep't 2016), but not if defendants refused to grant plaintiffs permission, Moltisanti v. E. Riv. Hous. Corp., 149 A.D.3d at 532, even if defendants' conduct was patently unreasonable.

VI. THE INDIVIDUAL BOARD MEMBERS

Plaintiffs fail to demonstrate a basis for relief against defendants Agarwal, Henryson, Keith, Schanoes, Thod, and Tadikona as individual members of Shuttleworth Artists' Board. Although the complaint alleges a breach of fiduciary duties, plaintiffs present no evidence to substantiate their claim through this motion.

VII. CONCLUSION

For the reasons and on the condition explained above, the court grants plaintiffs' motion for a default judgment to the

following extent. C.P.L.R. § 3215. The court enjoins defendants Shuttleworth Artists and its Board of Directors to (1) consent to at least one of the proposals plaintiffs have submitted to these defendants for installation of plaintiffs' HVAC unit on a roof or facade of defendants' building (Usdan Aff. Ex. C or G or Usdan Reply Aff. Ex. C) and (2) apply for the work permits necessary for that work. The court also grants plaintiffs a default judgment on defendants' liability for plaintiffs' damages due to defendants' breach of the Proprietary Lease. The court refers the issue of the damages to be awarded to plaintiffs to the Special Referee Clerk for placement at the earliest possible date on the calendar of the Special Referees' Part, which at the initial appearance shall assign this issue to an available Judicial Hearing Officer or Special Referee to hear and determine. C.P.L.R. § 4317(b). The court otherwise denies plaintiff's motion and also denies defendants' cross-motion for an extension of time to answer the complaint. C.P.L.R. § 3012(d).

DATED: July 22, 2022

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.