SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK P. NERVO** **PART** 04

Justice

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DANCE ROBOTS DANCE, LLC

INDEX NO. 656068/2018

Plaintiff,

- v -

ASTRO WEST, LLC,

DECISION, ORDER AND JUDGMENT FOLLOWING INQUEST

Defendant.

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As discussed in the Court's July 6, 2022 Order, this matter was assigned to Part IV for trial (NYSCEF Doc. Nos. 38 & 47). In preparation for trial, the Court held a pre-trial conference where counsel for plaintiff advised that plaintiff had ceased operations and plaintiff's counsel was not authorized to oppose defendant's counterclaim (NYSCEF Doc. No. 42). Therefore, the Court, directed, and counsel consented, to proceed to inquest on paper submissions only (*id.*, *see also* NYSCEF Doc. No. 43). The Court received documents in support of defendant's counterclaim (NYSCEF Doc. Nos. 44 - 46); no documents were expected on behalf of plaintiff, and none were received. However, the evidentiary documents filed by defendant comprised a litany of receipts, schematics, diagrams, emails, and other communication without foundational support (*id.*). Notably absent from the filings was any affidavit by fact witnesses or an attorney affidavit setting forth the total amount of damages

DECISION FOLLOWING INQUEST

claimed. Consequently, no evidence could be admitted sufficient to establish the defendant's damages. While the failure to submit admissible proof of damages at inquest necessarily fails to establish a parties' damages and outright dismissal of such claims is reasonable (*see e.g. Wine Antiques, Inc. v. St. Paul Fire & Marine Ins. Co.*, 40 AD2d 657 [1st Dept 1972]; *In re Estate of Goldberg*, 31 Misc.3d 1217(A) [Surrogates Court, Bronx County 2011]) the Court, in its discretion, provided defendant a further opportunity to properly admit necessary evidence to establish its damages.

By further submissions (NYSCEF Doc. Nos. 48 -52), defendant submits an affidavit of its principal, and exhibits related thereto. Exhibits 50 and 51 contain typed annotations by an unknown author explaining various evidence contained therein. The Court cannot, and has not, considered these annotations as the author of same is unknown.

In a breach of contract action, damages are limited to "general damages which are the natural and probable consequence of the breach" (*Kenford Co. Inc., v. County of Erie*, 73 NY2d 312, 319 [1989]). Recovery of additional damages requires that these unusual or extraordinary damages were "within the contemplation of the parties as the probable result of a breach at the time of or

prior to contracting" (*id.*; *see also Brody Truck Rental., Inc., v. Country Wide Ins. Co.*, 277 AD2d 125 [1st Dept 2000]). "In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered" (*Kenford Co. Inc., v. County of Erie*, *supra* at 319).

Here, defendant has not provided the contract at issue, the rental agreement, as an exhibit to his affidavit. A search of the Court's record indicates only a single contract, which appears in the record at NYSCEF Doc. No. 22. Defendant's omission of the contract forming the entirety of its counterclaim for breach of contract is fatal.

Assuming that the contract at NYSCEF Doc. No. 22 is the contract referenced and relied upon by defendant, the Court notes that contract is undated and unsigned. Furthermore, that contract contains no reference to plaintiff's sound engineers operating the equipment at defendant's event (NYSCEF Doc. No. 22). Thus, the Court is unable to determine whether the contract at NYSCEF Doc. No. 22 is the December 1, 2017 contract forming the basis for defendant's breach of contract action alleging improperly supplied

equipment and unqualified sound engineers (*see* NYSCEF Doc. No. 48 at ¶ 3 & 4).

Assuming, *arguendo*, that the above contract was sufficient to permit the Court to reach the amount of damages due defendant, such damages would be limited to the $12,863.00 fee for equipment rental and sound engineers. Notwithstanding any knowledge that plaintiff had of defendant's intended use of the equipment at a music/art festival, it cannot be said that this knowledge or expectation that the event would be successful leads to the conclusion that plaintiff would assume liability for the festival's ancillary costs should the equipment or engineers fail to perform consistent with the contract (*see Kenford Co., Inc. v. County of Erie*, 73 NY3d at 319–320). Further supporting this conclusion is the absence of any default provisions in the agreement.

Under these circumstances, the Court cannot award any damages to defendant. The Court, having provided defendant a second opportunity to submit sufficient evidence to support its claim, will not provide a third. Indeed, the principles of due process, fundamental to the fair administration of justice by the courts, do not permit repetitive trials upon the initial failure to meet one's burden of proof.

Accordingly, it is

ORDERED and that defendant Astro West LLC has failed to establish the existence of a valid contract between it and plaintiff and therefore failed to meet its burden of proof of any damages resulting from a breach of contract; and it is further

ORDERED and ADJUDGED that plaintiff Dance Robots Dance, LLC shall have judgment dismissing all claims against it, and defendant Astro West, LLC's counterclaim is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in accordance with the above.

THIS CONSTITUTES THE DECISION, ORDER, AND JUDGMENT OF THE COURT.

DATE: 9/13/2022

HON. FRANK P. NERVO
J.S.C.

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify** _____ **)**