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NO. 22727-98

**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 23 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 8-5-03

Submission Date: 8-5--03

Motion Sequence No.: 002/MOT D

ROYAL INDEMNITY COMPANY,
Plaintiff,

COUNSEL FOR PLAINTIFF
Smith Carroad, Levy & Finkel, LLP
5036 Jericho Turnpike
Commack, New York 11725

- against -

**THERMO DYNAMICS HEATING, AIR
CONDITIONING & REFRIGERATION,
INC., a/k/a THERMO DYNAMICS
AND/OR TELEMAT SUPPLY CO., JOHN
COLELLA & MICHAEL FERRUGIO,**
Defendants.

COUNSEL FOR DEFENDANT
Melvin B. Berfond, Esq.
227 Broadway - Suite 810
New York, New York 10007

X

ORDER

The following papers were read on Plaintiff's motion for a default judgment pursuant to 3215 against Defendants Thermo Dynamics Heating, Air Conditioning & Refrigeration, Inc., John Colella & Michael Ferrugio:

Notice of Motion dated June 19, 2003
Affirmation of Matthew J. Sante, Esq. dated June 13, 2003.

Plaintiff Royal Indemnity Co. moves for a default judgment against Defendants Thermo Dynamics Heating, Air Conditioning & Refrigeration, Inc., John Colella and

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Michael Ferrugio, who failed to comply with a Stipulation of Settlement entered into between the parties.

BACKGROUND

In a previous Order dated May 28, 2003, a motion to enter a default judgment against Defendant John Colella was granted in this action. The application for a default judgment was denied against the other co-Defendants without prejudice and with leave to renew upon proof that notice was properly provided to the motion.

The terms of the Stipulation of Settlement provided that an outstanding sum of \$40,000 principal be paid in monthly installments of \$550.00. The first payment was due on October 15, 2000. In the event of a default, the sum of \$50,633.14 with interest from August 1, 1995, together with costs and disbursements would become payable. Any payment made prior to default would be credited as a reduction of the sum to be awarded. Other terms of the Stipulation were described in the previous Order of this Court. A default occurred in the payment due July 15, 2002 after a total of \$8,800.00 was paid by Defendants. Notice of the default to each of the Defendants was given on July 24, 2002. They have failed to cure their default.

DISCUSSION

CPLR 3215(i) governs the entry of a default judgment when a party has failed to comply with a Stipulation of Settlement. The statute allows for the Clerk to enter

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judgment on the Stipulation of Settlement without further notice to the defaulting party. CPLR 3215(i)(1). For judgment to be entered, three requirements must be satisfied. First, there must be a pending action. Here, an action was pending prior to the matter being settled by the Stipulation. Second, there must be an affidavit from one with direct knowledge of the other side's failure to comply with the terms of the Stipulation. Here, since payments were to be made to Plaintiff's attorney, it was proper for an attorney's affirmation to establish the default. Third, when a Stipulation of Settlement makes an award to a party it must set forth a specific sum stipulated and provide a clear basis for computation of interest. Here, the Stipulation of Settlement clearly sets forth that the amount to be owed in case of default would revert to the original sum owed, with credit given for payments made, and with costs, disbursements, and interest to be calculated from a set date.

Accordingly, it is,

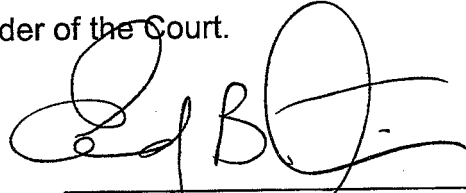
ORDERED, that Plaintiff's Motion for leave to enter default judgment is **granted** as to Defendants Thermo Dynamics Heating, Air Conditioning & Refrigeration, Inc. a/k/a Thermodynamics and/or Telemat Supply Co., and Michael Ferrugio; and it is further,

ORDERED, that upon proof of compliance with CPLR 3215 (g), the County Clerk of Nassau County is hereby directed to enter judgment in favor of Plaintiff and against

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Defendants in the sum of \$41,833.14 plus statutory interest from August 1, 1995,
together with costs and disbursements as taxed by the Clerk.

This constitutes the decision and Order of the Court.



Hon. LEONARD B. AUSTIN, J.S.C.

Dated: Mineola, NY
November 12, 2003

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ENTERED

NOV 18 2003

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**