At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of January, 2012

HONORABLE FRANCOIS A. RIVERA

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ILONA SPIEGEL,

Plaintiff

Decision, Order and Judgment
After Trial To Enter Judgment
Index No. 18545/10

-against-

MARTIN J. AMSEL, as administrator of Garden of Eden, and GARDEN OF EDEN HOME, LLC

Defendants.

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Since 2001, plaintiff Ilona Spiegel, has been a resident at Garden of Eden Home for Adults located at 1608-120 Stillwell Avenue, Brooklyn, New York. Defendants Garden of Eden Home, LLC, and Martin J, Amsel, as administrator of Garden of Eden, operate the facility.

BACKGROUND

On July 27 2010, plaintiff commenced the instant action by filing a summons, complaint and a motion seeking permission, among other things, to proceed as a poor person pursuant to CPLR 1101. Defendants have not interposed an answer to the complaint.

By notice of motion filed on September 13, 2010, the defendants' had cross-moved

pursuant to CPLR 3211(a)(7) to dismiss the instant complaint for failure to state a cause of action. By decision and order dated October 1, 2010, the court denied the cross-motion for failure to annex a copy of the complaint to the motion papers as required by CPLR 2214(c).

By notice of motion filed on November 10, 2010, plaintiff had moved for an order granting a default judgment against the defendants pursuant to CPLR 3215(a). By decision and order dated January 7, 2011, the court denied the motion for failure to annex an affidavit of the plaintiff setting forth the merits of the underlying claim.

By notice of motion filed on January 14, 2011, plaintiff again moved for an order granting a default judgment against the defendants pursuant to CPLR 3215(a). This time the defendants did not oppose the motion.

By decision and order dated March 31, 2011, the court granted plaintiff's motion and entered a declaratory judgment that the $1,000.00 per season per room price set forth in the air conditioning contract between the plaintiff and the defendants was unconscionable. The court also granted plaintiff's application for reformation of the contract and scheduled an inquest on the issue of damages.

Plaintiff's complaint alleges thirty-eight allegations of fact in support of one cause of action for reformation of an unconscionable adhesion contract for air conditioning services.

A default in answering the complaint is deemed to be an admission of all factual

allegations contained in the complaint and all reasonable inferences that flow from them (*Woodson v. Mendon Leasing Corp.* 100 N.Y.2d 62 at 71 [2003]). While it is true that a defaulting defendant admits all traversable allegations in the complaint, including the basic issue of liability, an allegation of damage is not a traversable allegation, and, therefore a defaulting defendant does not admit the plaintiff's conclusion of damages (*Abbas v. Cole*, 44 A.D.3d 31, 33 [2d 2007]).

ADMITTED FACTS

The following facts are deemed admitted by defendants' default:

In approximately 2001, Ms. Spiegel became a resident of Garden of Eden Home for Adults, an adult care facility pursuant to an admission agreement. The Garden of Eden Home is an adult home licensed and supervised by the New York State Department of Health. The residence is operated by Garden of Eden Home LLC and managed by Martin J. Amsel. Amsel sets the price of providing air conditioning to the residents. Since 2001, defendants have charged Ms. Spiegel $1,000 each year for air conditioning for the summer season, running from approximately mid-May to mid-September. Ms. Spiegel suffers from asthma, chronic obstructive pulmonary disease (COPD), and episodes of severe broncho spasms. She also has a psychiatric disability that requires psychotropic medication. All of these conditions contribute to a medical need for air conditioning in the summertime.

Ms. Spiegel sole income is Supplemental Security Income (SSI) benefits. She

resides in a small room, approximately 16'9" by 9'4", that she has shared with a roommate. Air conditioning is considered a supplemental service and is not included in the facility rate for adult homes.

In June 2006, the New York State Department of Health issued a Dear Administrator Letter ("DAL"), designated DAL HCBC 06-07, regarding supplemental services provided by adult homes. The DAL provides that pursuant to the model admission agreement the operator must agree to provide these services and supplies to residents at a charge that is reasonably related to the cost of the services or supplies. Defendant Garden of Eden charges its residents $1,000 per room to provide air conditioning for the season which runs from mid-May to mid-September.

Ms. Spiegel has shared the cost with whomever is her roommate at the time, if the roommate can afford it. Since the summer of 2008, when Ms. Spiegel was assigned a roommate who would not share the cost of air conditioning, Ms. Spiegel has had to pay the entire $1,000 fee.

In a letter dated March 12, 2009, addressed to defendant Amsel, Ms. Spiegel made a formal request that Garden of Eden provide documentation explaining how the flat rate of $1,000 to air condition a resident's room was reasonably related to the cost of providing air conditioning for one room. In a letter dated May 12, 2009, defendant Garden of Eden replied. As set forth in the defendants' May 12, 2009 letter, Garden of Eden's electricity cost was $0.288 per kilowatt hour (kWh). According to the New York

State Energy Research and Development Authority, the average household in New York State, including single family, mobile homes, and multifamily housing units, uses 977 kWhs each year for electric air conditioning. Thus, the reasonable cost of providing air conditioning to an average household, i.e. one room, based on the rate paid by Garden of Eden in 2009, would have been approximately $222.77 ($0.288 x 977) for the air conditioning season.

Ms. Spiegel was charged and has paid the following amounts for air conditioning per season: in 2004, $375; in 2005, $500; in 2006, $500; in 2007, $500; in 2008, $1,000; in 2009, $1,000; and, in 2010, she was charged $1,000; and has paid $470 to date.

As an adult home resident, Ms. Spiegel must get her utility services through the defendants. As an adult home resident, Ms. Spiegel receives $178 per month for all her personal needs including air conditioning. Defendants are aware that the air-conditioning agreement is a contract for a medically-necessary service.

THE TRIAL

The issues in this action were tried before Part 52 of this Court without a jury on June 10 and July 5, 2011. For the case in chief plaintiff presented the testimony of energy and air conditioning expert William Beschner. Defendants presented the testimony of Eli Neumann, defendants' energy buyer; Alan Besler, defendants' maintenance contractor, and Martin J. Amsel, the administrator of Garden of Eden. Plaintiff testified in rebuttal.

Plaintiff admitted five exhibits and defendants admitted two exhibits into evidence.

Pursuant to CPLR 4213 the parties were afforded an opportunity to submit requests for findings of fact and did so. In addition to the facts deemed admitted by the defendants' default, the court also finds as follows.

William Beschner, plaintiff's expert has more than 40 years of experience in the electrical industry, including training and experience with air conditioning installation, operation and maintenance. He personally surveyed Ms. Spiegel's room and air conditioning unit on September 15, 2010. For 2010, he estimated that the energy costs to cool Ms. Spiegel's entire room were $61.59 monthly. This was based on the following factors:

- An electricity rate of $.228 per kilowatt hour (kwh) which Mr. Beschner found to be an accurate rate.
- A connected load or supply rate of 670 watts or .67 kilowatts. Mr. Beschner took this number from the name plate ratings off the air conditioner he inspected.
- A power factor of .7. Mr. Beschner testified that an air conditioner does not constantly run at full capacity because it has two electric consumption parts, the compressor and the fan. The compressor turns on and off while the fan runs steadily. Minus, a power factor of 70% or .7 is applied.
- A billing period of 720 hours. Thirty days is the standard billing period

and is multiplied by 24 hours per day for a total of 720 hours.

- A load factor of 80 percent. The load factor accounts for the fact that an air conditioner does not run 100 percent of the time, that outside temperatures impact the amount of cooling needed, and that, even if the air conditioner is on 24 hours per day, the compressor will not be running during cooler weather. The standard load factor ranges from 60 to 80 percent. Mr. Beschner applied the highest standard factor of 80 percent.

Mr. Beschner described the following calculation: Connected load of .67 kilowatts x .7 power factor x .8 load factor x 720 hours x $.228 energy rate = $61.59 monthly rate.

Mr. Beschner testified that if the connected load—the wattage listed on the air conditioner's name plate—were lower, the cost would be lower. Thus, if the air conditioner used 515 watts, it would be the same calculation, inserting the different wattage: .515 kilowatts x .7 power factor x .8 load factor x 720 hours x $.228. Spiegel testified that her current air conditioner uses 515 watts, which was the number she saw listed on the air conditioner. Mr. Beschner's calculation with the wattage confirmed by Ms. Spiegel establishes a monthly energy rate of $47.34. On cross examination, Mr. Beschner was presented the energy rate from defendant's energy provider of $.231 per kwh. The court credited the testimony of Mr. Beschner. The court then used the energy rate of $.231 per kwh in the same basic equation to reach an energy costs of $47.96

monthly.

Eli Neumann, defendants' witness, testified that the energy costs for a generic 5,000 BTU air conditioner would be $242 per month. Mr. Neumann is a consultant who arranges for Garden of Eden's current energy supply contract. His highest level of education is a bachelor's degree in finance and he has no expertise in air conditioning costs. Mr. Neumann did not inspect and did not know the wattage of plaintiff's air conditioner unit. Since his calculations were not based on any expertise in air conditioning or any personal knowledge of plaintiffs air conditioning unit, they were purely speculative and of no probative value. The court did not credit his testimony. The record adduced at trial proves that defendants have not incurred any non-energy costs for this supplemental service above and beyond expenses they ordinarily incurred in the course of doing business. Mr. Beschner testified that the only maintenance required for a unit like the one surveyed would be replacing the filter every 30 days, which would take about ten minutes.

The court did not credit the defendants' proffered testimony on non-energy costs. Defendants presented the testimony of two witnesses, Alan Bresler and Martin J. Amsel, in support of their argument that they paid $755 in costs for installation, maintenance, removal and storage of plaintiff's air conditioning unit. However, the testimony supporting this figure was not credible and these cost projections were rejected.

Mr. Bresler testified that his company, Altz Group ("Altz"), invoiced Garden of

Eden for $1,249.17 in maintenance, installation and purchase costs for plaintiff's 2011 air conditioning services. He testified that the charges for delivery, installation, maintenance, removal and storage of the unit were $755 ($180 charge for installation; $50 delivery charge; $200 for maintenance and $125 to remove the air conditioner; and $200 for storage.) Mr. Bresler claimed the cost of the unit installed in plaintiffs room was $380 with tax.

The $755 in other costs and $380 did not add up to the total invoice amount of $1,249.17 and the basis for the remaining $114.17 in charges is unclear. The 8,000 BTU air conditioner referenced in Altz's invoice and supposedly purchased for Garden of Eden was not the unit installed in Ms. Spiegel's room and Mr. Bresler conceded he had no personal knowledge of the BTU rating of the unit that was actually installed. He conceded that Altz installed an extra unit kept in storage, thus undermining defendants' claim that they needed to purchase a new unit for installation in plaintiff's room. Mr. Bresler further admitted that Garden of Eden would not pay the $200 storage fee the extra units in storage. The invoice by Bresler was not admitted into evidence, because it was a document prepared in anticipation of litigation and, therefore, unreliable. The Court rejected the testimony of Bresler in determining the reasonable cost of providing air conditioning service to the plaintiff.

Mr. Amsel, the administrator of Garden of Eden, testified that, until 2011, the installation and maintenance of the air conditioning units was performed by a person on

staff, the air conditioners were stored onsite at Garden of Eden, and that there was no costs above and beyond the costs that he would pay the salaried maintenance people.

To the extent that the testimony of Bresler and Amsel is credible, it supports the finding that maintenance of plaintiff s air conditioner is part of Mr. Bresler's general maintenance contract with Garden of Eden. Replacement costs for an air conditioning unit should figure minimally in determining a reasonable rate for air conditioning services because, as Mr. Beschner testified, a unit like the one he surveyed in Ms. Spiegel's room, if maintained properly, should have a life span of "at least ten years," and this would be the case even if it ran 24 hours per day during the air conditioning season. Mr. Bresler testified that he did not really know the life span of an air conditioning unit.

In her complaint, plaintiff sought restitution for the unjust enrichment of the defendants through this unconscionable contract. In light of this Court's broad power to award equitable relief, plaintiff is entitled to restitution of the difference between the reasonable rate established at trial and the amounts she paid for years 2004 through 2010 (*see*, *State by Lefkowitz v. Bel Fior Hotel*, 95 Misc.2d 901, (Sup. Ct. 1978) (finding plaintiffs had lacked meaningful choice in housing and awarding restitution of the entire amount plaintiffs had paid pursuant to an unconscionable damages clause in a residential agreement).

Thus, based on the reasonable rate established by plaintiff of $50 per month or $200 for the four-month season and the past amounts defendants admitted plaintiff has

already paid, plaintiff is entitled to restitution in the total amount of $2,945.00 computed as follows:

a) For 2004: Restitution of $175 ($375 - $200)

b) For 2005: Restitution of $300 ($500 - $200)

c) For 2006: Restitution of $300 ($500 - $200)

d) For 2007: Restitution of $300 ($500 - $200)

e)For 2008: Restitution of $800 ($1,000 - $200)

f)For 2009: Restitution of $800 ($1,000 - $200)

g) For 2010: Restitution of $270 ($470-$200).

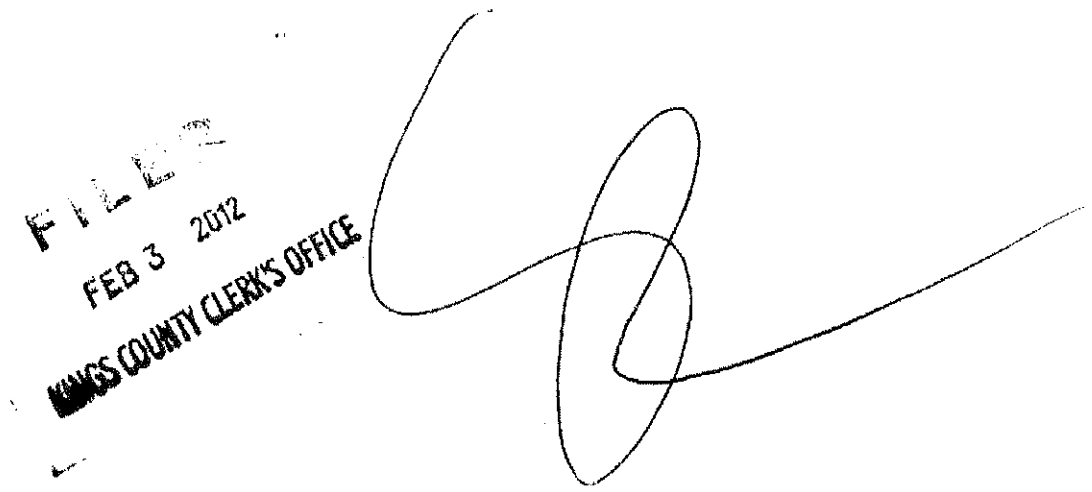
The foregoing constitutes the decision, order and judgment of this court.

This decision, order and judgment is limited to the facts of this particular case and is not to be used or cited as authority for any other litigation.

Enter:

J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.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