

**R.C. Baas Constr. Corp. v FM Kelly Constr. Group  
Inc.**

2017 NY Slip Op 30844(U)

April 21, 2017

Supreme Court, New York County

Docket Number: 650738/2016

Judge: Ellen M. Coin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 63

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R.C. Baas Construction Corp.,

Plaintiff,

Index Number: 650738/2016

-against-

(Action #1)

FM Kelly Construction Group Inc.,  
Fredrick M. Kelly, Joseph F. Barbera,  
63 Madison Owner, LLC,  
CBS Interactive Inc., and  
Bank of China, New York Branch,

Defendants.

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R.C. Baas Construction Corp.,

Plaintiff,

Index Number: 650739/2016

-against-

(Action #2)

FM Kelly Construction Group Inc.,  
Fredrick M. Kelly, Joseph F. Barbera,  
63 Madison Owner, LLC, Birchbox, Inc.,  
Atlantic Specialty Insurance Company  
and Bank of China, New York Branch,

Defendants.

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**Ellen Coin, J.:**

Plaintiff has moved for default judgments in Action #1 in the amount of \$185,260 against Fredrick M. Kelly (Kelly) and Joseph F. Barbera (Barbera), and for default judgments in Action #2 in the amount of \$82,300 against Kelly and Barbera. The motions are consolidated for disposition and decided as noted below.

### Underlying Allegations and Procedural Background

Plaintiff is a supplier of construction material and labor. On June 10, 2014, it entered into a written subcontract (the Agreement) with FM Kelly Construction Group Inc. (FMK) for work in a building (the Building) located at 28 East 28th Street, New York, New York. FMK was the general contractor and plaintiff was to perform drywall, carpentry and ceiling work on the 10th (Action #1) and 11th (Action #2) floors of the Building. The Agreement included a provision requiring arbitration of "[a]ll claims and disputes between the parties . . . arising out or relating to this Agreement, the Project, the Work, . . . or the breach thereof" (Exhibit B to Affirmation of C. Zachary Rosenberg, dated October 7, 2016, [the Agreement], ¶ 20).

Plaintiff asserts that it supplied the labor and materials, but that it was not paid the full amount due. On or about February 12, 2016, it commenced the actions against FMK, Kelly, Barbera and various other entities. It has presented affidavits showing that Kelly was served on February 26, 2016 and that Barbera was served on February 23, 2016. It states that it has settled and discontinued its claims in Action #1 against CBS Interactive Inc., 63 Madison Owner LLC and Bank of China, New York Branch on June 13, 2016 for the sum of \$15,000. It settled and discontinued its claims in Action #2 against Birchbox, Inc.,

63 Madison Owner LLC, Atlantic Specialty Insurance Company and Bank of China, New York Branch, on June 13, 2016 for the sum of \$7,000.

Plaintiff also presented proof that it sent Kelly and Barbera the additional mailings required by CPLR 3215(g)(3)(i) on September 9, 2016. On September 13, 2016, Barbera served an answer to plaintiff's complaints in the two actions. On September 19, 2016, plaintiff moved for default judgments in each of the two actions. On September 29, 2016, Kelly served an answer to plaintiff's complaints in the two actions.

Barbera and Kelly have presented evidence that plaintiff extended their time to answer, initially until April 1, 2016, then until April 13, 2016 and finally until May 16, 2016. They have also presented evidence that during this period, they advised plaintiff that they were electing to enforce the arbitration provision of the Agreement. They note that on May 12, 2016, FMK filed for bankruptcy. Finally, after submission of this motion, the Court's records indicate that on March 16, 2017, Kelly filed for bankruptcy under Chapter 13 of the Bankruptcy Code. Although neither of the two actions are listed in the section for pending proceedings, plaintiff is listed as an unsecured creditor in the bankruptcy action (item 36).

### Discussion

Successfully opposing a motion for leave to enter a default judgment based on the failure to appear or timely serve an answer entails satisfaction of the same elements as on a motion to vacate a default judgment pursuant to CPLR 5015(a)(1), i.e., a reasonable excuse for the delay and the existence of a potentially meritorious defense " (*Wassertheil v Elburg, LLC*, 94 AD3d 753, 753 [2d Dept 2012], citing *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]).

Initially, as noted above, Kelly has filed for bankruptcy and therefore the action against him must be stayed, pending resolution of the bankruptcy proceeding.

Here, although plaintiff has not presented evidence that it would be prejudiced in this matter by the minor delay in appearance, Barbera has not proffered even a possibly meritorious defense to the action (see *Panchookian v Huculiak*, 257 AD2d 460, 460 [1st Dept 1999]). Here, none of the defenses that Barbera offers has any sound legal underpinning.

The filing of a bankruptcy petition by FMK does not result in an automatic stay pursuant to 11 U.S.C. § 362(a)(1) of legal proceedings or claims asserted against individual shareholders of the corporate debtor (*Branham v Loews Orpheum Theatre, Inc.*, 291 AD2d 356 [1st Dept 2002], citing *A.H. Robins Co., Inc. v*

*Piccinin*, 788 F.2d 994, 999 [4th Cir 1986]). The narrow *Branham* exception<sup>1</sup> that inures the benefits of an automatic stay to any party that the bankrupt is undisputedly obligated to indemnify does not apply here. To establish FMK's indemnity obligation, Barbera relies on paragraph seven of FMK's Certificate of Incorporation, which states in the second sentence, "The corporation is authorized to indemnify its directors and officers to the fullest extent permissible under New York law" (Rosenberg Aff., Ex. F). Barbera offers no further support for the proverbial leap from the authority to indemnify to the mandatory obligation to do so.

Nor has Barbera offered any legal support for his argument that the principal/agent relationship between FMK and its shareholders spreads the benefit of a bankruptcy stay beyond the ambit of the corporation.

Further, an informal arbitration demand made on behalf of FMK does not bar a plenary action against its shareholders. The arbitration clause contained in Paragraph 20 of the Agreement by

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<sup>1</sup> "The automatic stay can apply to non-debtors, but normally does so only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate. Examples are a claim to establish an obligation of which the debtor is a guarantor, *McCartney v. Integra National Bank North*, 106 F.3d 506, 510-11 (3d Cir.1997), a claim against the debtor's insurer, *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 26 B.R. 420, 435-36 (Bankr.S.D.N.Y.1983) (on rehearing), and actions where 'there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant ...,' *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.1986)." (*Queenie, Ltd. v Nygard Intl.*, 321 F.3d 282, 287-88 [2d Cir 2003]).

its express terms binds only the parties to the Agreement and may not be imputed to non-signatories, except in narrow circumstances not applicable here (e.g., *Matter of Rural Media Group, Inc. v Yraola*, 137 AD3d 489, 490 [1st Dept 2016]).

Finally, Barbera's reliance on the failure of the fifth cause of action in Action #1 and the sixth cause of action (mistakenly designated as the second fifth cause of action) in Action #2, both identically asserted under Lien Law Article 3-A, Section 77, to be brought as a class action, is belied by the common language in paragraphs 44 and 56 of the respective complaints. Class certification and an inquest on damages may follow separately and will not be hampered by entry of a default judgment on liability on these claims as against Barbera.

Accordingly, it is hereby

ORDERED that the actions are severed and stayed as to defendants FM Kelly Construction Group Inc. and Fredrick M. Kelly, except for an application to vacate or modify said stay, and are continued as to the remaining defendant Joseph F. Barbera; and it is further

ORDERED that any party may make an application by order to show cause to vacate or modify this stay upon the final determination of, or vacatur of the stay in the proceedings brought by FM Kelly Construction Group Inc. and Fredrick M.

Kelly before the United States Bankruptcy Court for the Eastern District of New York, Case Numbers 8-16-72143 and 8-17-71528 respectively; and it is further

ORDERED that the movant is directed to serve a copy of this order with notice of entry on the Trial Support Office (Room 158); and it is further

ORDERED that plaintiff's motions for default judgments are granted on the issue of liability only as against defendant Joseph F. Barbera on the Fifth Cause of Action in Action #1 and the Sixth Cause of Action (mistakenly designated as the second fifth cause of action) in Action # 2 pursuant to Lien Law Article 3-A, Section 77, and the motions are otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: April 21, 2017

ENTER:



Ellen M. Coin, A.J.S.C.