JSignal LLC v Artisan Constr. Partners LLC
2017 NY Slip Op 31348(U)
June 21, 2017
Supreme Court, New York County
Docket Number: 654768/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JSIGNAL LLC, Index No.: 654768/2016

Plaintiffs, **DECISION & ORDER**

-against-

ARTISAN CONSTRUCTION PARTNERS LLC et al.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff JSignal LLC (JSignal) moves, pursuant to CPLR 3215, for a default judgment against defendants Artisan Construction Partners, LLC (Artisan) and James Galvin. The motion is unopposed. For the reasons that follow, plaintiff's motion is granted as to liability on its first cause of action for breach of contract and denied as to its unjust enrichment and lien law causes of action.

This case arises from a construction contract (Dkt. 3, Agreement)[1] between JSignal, a New York LLC that owns a mixed use building located at 76 North 4th Street in Brooklyn (Property), and Artisan, a New York LLC and general contractor. The purpose of the Agreement, dated November 30, 2015, was to renovate the retail component of the Property. James Galvin is the managing member of Artisan. The complaint alleges that JSignal paid Artisan $1.1 million under the Agreement, (Dkt. 2, Compl. ¶¶ 12-13) and that Artisan breached the Agreement by

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to those of the e-filed PDF file. As plaintiff neglected to separate the summons, complaint, and Agreement in its filings for this motion, *see* Dkt. 18, this opinion refers to the Complaint at Dkt. 2 and the Agreement at Dkt. 3.

failing to: (1) pay several subcontractors, at least one of which, Master Cooling, stopped work as a result, (*id.* ¶¶ 16-27); (2) maintain a sufficient labor force to complete the construction project within the scheduled time, (*id.* ¶¶ 28-30); and (3) continually use essential personnel, (*id.* ¶¶ 31-33). The complaint further alleges that plaintiff advanced $26,000 to subcontractor Everest Scaffolding (Everest), a sum owed by Artisan, in order to mitigate plaintiff's damages (*id.* ¶¶ 25-27), and that plaintiff lost an additional $262,500 in retail rent as a result of the breach, (*id.* ¶ 38). Finally, the complaint alleges that Artisan, Galvin, and unnamed principals, officers, and members of Artisan misappropriated funds intended for work, labor, and materials for the Property in violation of Article 3-A of the Lien Law. *Id.* ¶¶ 52-69.

Plaintiff submits an affidavit by Jacob Toll, manager of JSignal, based upon his personal knowledge and review of business records. Dkt. 24 (Toll Affidavit) at 1. The Toll Affidavit attests, in mostly conclusory fashion, that JSignal and Artisan entered into the Agreement, that JSignal paid $1.1 million to Artisan, that Artisan breached the Agreement, and that JSignal was required to pay additional money for labor and materials that Artisan owed to JSignal under the agreement. *Id.* ¶¶ 4-10. The Toll Affidavit repeats the Lien Law claim against Artisan and Galvin. *Id.* ¶¶ 11-13.

Plaintiff's complaint and motion seek monetary relief upon the following causes of action, numbered here as in the complaint: (1) breach of contract against Artisan, (Compl. ¶¶ 40-44); (2) unjust enrichment against Artisan (Compl. ¶¶ 45-51); and (3) diversion of funds held in trust by Artisan under Lien Law Article 3-A against Galvin and Artisan[2] (Compl. ¶¶ 52-69). *See*

[2] As discussed above, the complaint (but not the motion for a default judgment) also asserts the Third Cause of Action against unnamed principals, officers, and members of Artisan (referred to as "John Doe" numbered one through five).

also Toll Aff. ¶ 3. The instant motion seeks $1,388,500 from Artisan and Galvin. Dkt. 24 (Toll Aff.) at 3; Dkt. 17 (Bernstein Aff.) at 3-4.

Plaintiff served Artisan with the summons and complaint by delivery to the Secretary of State of New York. Dkt. 19 (Artisan Service Aff.). On January 6, 2017, plaintiff moved for an extension of time for service of process on Galvin. Seq. 001. Plaintiff served Galvin with the summons and complaint by hand-delivery to Galvin's daughter (on January 17, 2017), and by first-class mail (within twenty days), at his actual place of business pursuant to CPLR 308(2). Dkt. 14 (Galvin Service Aff.). In an order dated February 17, 2017 (Dkt. 15), the court extended plaintiff's time to serve Galvin to May 10, 2017. Plaintiff mailed a copy of the summons and complaint to Artisan's last known address on March 20, 2017 pursuant to CPLR 3215(g)(4). Dkt. 22 (Artisan Mailing Aff.).[3] Defendants never appeared, and plaintiff filed the instant motion for a default judgment on April 26, 2017.

To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. CPLR 3215(a). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts." *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994); *see Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014). A defaulting defendant "admits all traversable allegations in the complaint, including the basic allegation of liability." *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984); *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003)

[3] On the same date, March 20, 2017, plaintiff also mailed a copy of the summons and complaint to Galvin's "last known place of business." Dkt. 23 (Galvin Mailing Aff.); *but see* CPLR 3215(g)(3) (requiring mailing of the summons to defendant's "place of residence," "place of employment if known," or "last known residence"). Fortunately for plaintiff, the attempted additional notice to Galvin was unnecessary, as the sole claim against Galvin (the Third Cause of Action, regarding misappropriation of Lien Law trust funds) was not "based upon nonpayment of a contractual obligation." CPLR 3215(g)(3).

("[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them."). However, the defaulting defendant does not admit the plaintiff's conclusion as to damages, and unless for a sum certain or a sum which can be "made certain" by computation, damages are determined in a separate proceeding requiring additional notice to the defaulting party. *See Rokina*, 63 NY2d at 730, quoting CPLR 3215.

In the instant motion, plaintiff requested monetary relief in the total amount of $1,388,500, without itemizing what that sum reflected. For the purposes of this motion, the requested relief is assumed to consist of three distinct components: (1) $1.1 million representing the amount JSignal paid Artisan under the Agreement; (2) $26,000 representing the amount advanced to Everest Scaffolding on the lien for which Artisan was liable for payment under the Agreement; and (3) $262,500 representing the lost retail rent for the Property on account of Artisan's breach of the Agreement.[4]

While the complaint states a claim for breach of contract against Artisan, and the Toll Affidavit (the sole fact witness affidavit provided in this action) provides supporting factual testimony as to that claim, plaintiff fails to provide sworn affidavits sufficient to support its damages claims. To begin, plaintiff has not shown that it is entitled to a refund of the entire $1.1 million paid by JSignal to Artisan,[5] since plaintiff has failed to allege that Artisan completely failed to provide the construction services required by the Agreement. *See Goodstein Const.*

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[4] To the extent that the requested relief reflects some other amount, the issue of damages has been referred to the special referee to hear and determine, as ordered below.

[5] The sum of $1.1 million appears to reflect "progress payments" disbursed out of the total contract price of $1,232,500.00. Article 3.7 of the Agreement states that "the Owner shall make progress payments on account of the Contract Price (equal to ninety (90%) percent of the value of Work properly performed during such month)." Agreement at 3. Ninety percent of the total contract price of $1,232,500.00 is $1,109,250.00.

Corp. v City of N.Y., 80 NY2d 366, 373 (1992) ("Contract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed."); *see also Bellizzi v Huntley Estates, Inc.*, 3 NY2d 112, 115 (1957) (describing "general rule" for "the measure of damage [in construction contracts] is the market price of completing or correcting the performance," quotation omitted); *Lyon v Belosky Const. Inc.*, 247 AD2d 730, 731 (3d Dept 1998) ("As a general rule, the proper measure of damages in cases involving the breach of a construction contract is 'the difference between the amount due on the contract and the amount necessary to properly complete the job or to replace the defective construction, whichever is appropriate.'"), quoting *Sherman v Hanu*, 195 AD2d 810, 810 (3d Dept 1993).

Second, the Toll Affidavit omits any discussion of the $26,000 allegedly advanced to Everest. Absent firsthand confirmation, plaintiff cannot receive a default judgment for the alleged payment to Everest. *See Feffer*, 210 AD2d at 61. And finally, plaintiff cannot receive a default judgment for $262,500 in lost retail rent in the absence of an affidavit attesting to the underlying facts.

In relevant part the Agreement provides:

> TIME IS OF THE ESSENCE IN THE PERFORMANCE *BY CONTRACTOR* OF THIS AGREEMENT. The Owner may sustain financial loss if the whole Project or any part thereof is delayed because the Contractor fails to perform any part of the Work in accordance with the Contract Documents .... Contractor shall be liable for ***all damages*** arising out of any failure to perform the Work in accordance with the terms and provisions of the Agreement. ... The Contractor shall complete the Work not later than eighty-four calendar days from the date of commencement.

(Agreement at 7-8.) Under New York law, lost profits are recoverable for a breach of contract only if: 1) it is certain that the loss was caused by the breach; 2) the amount of loss is established with reasonable certainty; and 3) the particular damages were fairly within the contemplation of the parties at the time of entering the agreement. *Kenford Co., Inc. v Erie Cty.*, 67 NY2d 257, 261 (1986). Plaintiff alleges that "[t]he parties contemplated the potential loss of retail rent" when the agreement was executed, (Compl. ¶ 39), which is a fair inference based upon the purpose of the Agreement (renovating a retail space) combined with the broad phrasing of the "Time is of the Essence" clause in the Agreement. However, plaintiff has not provided an affidavit regarding causation or the amount lost.

As to plaintiff's Second Cause of Action, the court cannot issue a default judgment on the unjust enrichment claim. "[A] party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter." *See Cox v NAP Const. Co.*, 10 NY3d 592, 607 (2008), citing *Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). Indeed, "damages for unjust enrichment may not be sought 'where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties.'" *Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 (1st Dept 2014), quoting *Clark–Fitzpatrick,* 70 NY2d at 389. As plaintiff has asserted a breach of contract in this action, admitted that it "fully performed all of its obligations" under the Agreement, and has not requested rescission, unjust enrichment cannot form the basis for a default judgment.

Nor can the court issue a default judgment on plaintiff's Lien Law claim, the Third Cause of Action. Plaintiff does not have standing to sue Artisan or Galvin under the Lien Law. *See* Lien Law § 77(1) ("A trust arising under this article may be enforced by the holder of any trust claim

.... An action to enforce the trust may also be maintained by the trustee"). Plaintiffs are not beneficiaries of any trust funds under the Lien Law, which are payable to subcontractors, suppliers and the like. *See* Lien Law § 71(2), (3). [6] Nor does plaintiff have trustee standing as a property owner. "Although Lien Law § 77(1) provides that a trustee may maintain an action to enforce a trust, Lien Law § 70(5) provides that '[t]he assets of the trust of which [an] owner [of real property] is trustee are the funds ***received*** by him.'" *See Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 479 (1st Dept 2015) (emphasis added, brackets in original), quoting Lien Law § 70(5). Plaintiff does not allege having ***received*** trust funds, but instead that it ***provided*** funds to defendants to be held in trust. *See* Compl. ¶¶ 53-60; *see also* Agreement at 4, § 3.11 (stating that "funds paid to Contractor hereunder are hereby declared to constitute trust funds in the hands of Contractor" for labor, materials, utilities, and indemnity obligations). Accordingly, default judgment is denied on plaintiff's Third Cause of Action. *See Resnick v Lebovitz*, 28 AD3d 533, 534 (2d Dept 2006) (holding that the party moving for a default judgment must demonstrate a viable cause of action); *see also Guzetti v City of New York*, 32 AD3d 234, 235 (1st Dept 2006) (McGuire, J., concurring) (stating that the court must be satisfied "as to the prima facie validity of the uncontested cause of action" before issuing a default judgment, quoting *Joosten v Gale*, 129 AD2d 531, 535 (1st Dept 1987)). Accordingly, it is

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[6] In a distinguishable case, the Second Department held that a homeowner may assert a cause of action pursuant to Lien Law Article 3-A against a defendant contractor hired to perform home improvements. *See Ippolito v TJC Dev., LLC*, 83 AD3d 57, 67-71 (2011). In *Ippolito*, the Second Department relied on Lien Law § 71–a[4] for that holding, which solely concerns "a home improvement contract," and describes that the relevant funds "remained the property of the owners, ... until the proper payment of such funds by the contractor to the purposes of the home improvement contract." 83 AD3d at 67. The present action involves the improvement of retail space rather than a home.

ORDERED that plaintiff's motion for a default judgment is granted as to liability on its breach of contract cause of action against defendant Artisan and denied as to its unjust enrichment and lien law causes of action; and it is further

ORDERED that the issue of the damages caused to plaintiff by defendant Artisan's breach of contract is referred to a Special Referee to hear and determine, and within twenty days of the date of this decision and order, plaintiff shall serve a copy of it with notice of entry, as well as a completed information sheet,[7] on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date, and notify the parties of the time and date of the hearing; and it is further

ORDERED that within 10 days of the entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendants by overnight mail.

Dated: June 21, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[7] Copies of the Information Sheet are available at: http://www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/SRP-InfoSheet.pdf