

**Ashlar Mech. Corp. v EMM Design & Constr. Servs.
LLC**

2005 NY Slip Op 30557(U)

November 30, 2005

Supreme Court, New York County

Docket Number: 107969/05

Judge: Judith J. Gische

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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ASHLAR MECHANICAL CORP.,

Plaintiff,

-against-

EMM DESIGN and CONSTRUCTION SERVICES LLC, EMPIRE STATE LAND ASSOCIATES LLC, EMPIRE STATE BREWING CORP. d/b/a HEARTLAND BREWERY & ROTISSERIE, and INTERNATIONAL FIDELITY INSURANCE COMPANY,

Defendants.

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's motion [dj] w/ME affirm, exhs

Def's SC affirm

DECISION/ORDER

Index No.: 107969/05

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED

DEC - 6 2005

Numbered

COUNTY CLERK'S OFFICE
NEW YORK

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Upon the foregoing papers, the decision and order of the court is as follows:

This is plaintiff's motion for entry of a default judgment against defendant EMM Design and Construction Services LLC ("EMM Design"). CPLR § 3215. The summons and complaint were served on EMM Design, on August 11, 2005. Service was effectuated through the Secretary of State as EMM Design is a domestic corporation. BCL § 306. EMM Design's time to appear or answer the complaint has expired. It has not sought or obtained an order from the court extending its time to do so. Plaintiff has complied with the additional notice requirements of CPLR § 3215 (g) (4).

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Notwithstanding such additional notice, and service of this motion for entry of a default judgment against it, EMM Design has not appeared or opposed the motion. It is therefore submitted on default.

Discussion

This is an action for a breach of contract. In September 2004 the defendants EMM Design and Empire State Brewery Corp. ("Empire State Brewery") d/b/a Heartland Brewery Rotisserie Inc. ("Heartland Brewery") entered into an agreement ["contract"] in which EMM Design, as general contractor, agreed to perform construction work on a premises located at 350 Fifth Avenue, New York, New York. EMM Design, in furtherance of the agreement, entered into a sub-contract ["sub-contract"] with plaintiff Ashlar Mechanical Corp. ("Ashlar"), in which Ashlar agreed to provide the labor and materials needed to complete a portion of the work called for in the general contract. Under the sub-contract, EMM Design agreed to pay Ashlar \$281,813.39. Ashlar claims that it fully performed under the terms of the sub-contract, but defendant failed to pay Ashlar after the final performance of the work and the final furnishing of the materials on November 23, 2004. It seeks a balance due of \$75,239.05.

As a result of EMM Design's failure to uphold its' part of the contract, plaintiff on or about March 08, 2005, filed a Mechanic's lien in the Office of the Clerk of the County of New York. The lien was filed against the premises owned by, Heartland Brewery, for the amount outstanding under the contract. Subsequent to the filing of plaintiff's lien, defendants EMM Design and Heartland paid one of plaintiff's subcontractors directly; thus, reducing the remaining sum owed under the contract from \$85,148.39 to

\$75,239.05.

In response to the lien filed by plaintiff, defendants Empire State Brewery as principal, and International Fidelity Company ("Fidelity Insurance"), as surety, entered into a lien discharge bond ("the bond") discharging plaintiff's Lien. The bond was filed with the County Clerk of New York County on or about May 27, 2005. Under the terms of the bond, Empire State Brewery and Fidelity Insurance are obligated in the sum of \$93, 663.23 "for the payment of any and all judgments which may be rendered against the Heartland Brewery in favor of the plaintiff."

Plaintiff now seeks a default judgment against EMM Design in the amount of \$75,239.05 plus interest on its first cause of action in the underlying complaint and for an order severing and continuing the second and third causes of action as to the remaining defendants Empire State Brewery and International Fidelity. Under the second cause of action, plaintiff seeks foreclosure of its Mechanic lien. The third cause of action against Heartland and EMM Design is for unjust enrichment in the amount of \$75,239.05, which plaintiff claims is the amount by which defendants Heartland and EMM Design has been unjustly enriched.

Defendants Empire State Brewery and Fidelity Insurance have filed a joint affirmation in response to plaintiff's motion. They do not oppose the motion for default judgment, but seek to reserve their rights to assert any defenses which EMM Design may have against plaintiff's claim. Additionally, defendants Empire State Brewery and Fidelity Insurance assert that a default judgment against EMM Design should not alter plaintiff's obligations to demonstrate the validity of its lien before plaintiff is entitled to any recovery.

In the sub-contract that was signed between Ashlar and EMM Design, EMM Design promised to pay Ashlar \$281,813.39 upon completion of the work on behalf of Heartland Brewery. Ashlar has fully performed under the contract, but there is still money owing to plaintiff. Plaintiff's motion for a default judgment against EMM Design pursuant to CPLR § 3215 is, therefore, granted on the issue of liability.

Upon consideration, plaintiff's motion for entry of default judgment against EMM Design is GRANTED on the issue of liability only. Defendants Empire State Brewery and Fidelity Insurance may assert on their own behalf, any defenses which EMM Design may have had against plaintiff's claim in this action. The second and third causes of action are severed and referred for hearing and report to a Special Referee. The Special Referee shall hear and make recommendations to the court on the second and third causes of action. Simultaneously, the Special Referee shall take testimony and report to the court on the issue of what amounts are due as for damages against EMM Design on the first cause of action.

It is hereby

ORDERED that plaintiff's motion for entry of a default judgment pursuant to CPLR § 3215 against defendant EMM Design is GRANTED on default as to liability on the first cause of action as set forth herein; and it is further

ORDERED that upon completion of discovery this matter will be referred to a Special Referee to hear and make recommendations on the issues framed, and it is further

ORDERED that conference between plaintiff and the remaining defendants is set for **February 02, 2006 at 9:30 a.m.**, at 80 Centre Street, Room 122.

Any relief not expressly addressed herein has been nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
November 30, 2005

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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