

**C McCormack Inc. v 6 St. Nicholas LLC**

2011 NY Slip Op 33369(U)

December 7, 2011

Supreme Court, Nassau County

Docket Number: 011841-10

Judge: Timothy S. Driscoll

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*GCW*

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**C McCORMACK INC.,**

**Plaintiff,**

**-against-**

**6 ST NICHOLAS LLC,**

**Defendant.**  
-----x

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 011841-10**

**Motion Seq. No: 3  
Submission Date: 10/17/11**

**Papers Read on this Motion:**

- Order to Show Cause, Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x**

This matter is before the court on the Order to Show Cause by Defendant filed September 7, 2011 and submitted October 17, 2011. For the reasons set forth below, the Court denies Defendant's motion.

**BACKGROUND**

**A. Relief Sought**

Defendant 6 St Nicholas Terrace, LLC moves for an Order vacating the default judgment entered against Defendant.

Plaintiff opposes Defendant's motion.

**B. The Parties' History**

By decision dated June 1, 2011 ("Prior Decision"), a copy of which is annexed to Defendant's Order to Show Cause, the Court granted Plaintiff's motion for a default judgment ("Prior Motion"), awarded Plaintiff judgment against Defendant for the relief demanded in the Verified Complaint, and referred the matter to an inquest for the determination of damages. The Prior Decision is incorporated herein by reference.

As noted in the Prior Decision, the Complaint alleges that in or about August of 2004, Plaintiff entered into an agreement with Defendant to furnish all labor and materials necessary to convert and rehabilitate an existing eleven unit residential walk-up apartment building located at 6 St. Nicholas Terrace, New York, New York ("Premises") to fifteen units, for the estimated sum of \$1,000,000.00. Defendant performed certain tasks, including roof and boiler installations, that were originally contemplated to be performed by Plaintiff. Accordingly, the parties agreed to reduce the contract price to \$900,000.00. Plaintiff satisfied its obligations under the agreement by performing the necessary construction work at the Premises, which led to the issuance of a certificate of occupancy allowing the occupancy of fifteen residential units at the Premises. Defendant acknowledged Plaintiff's performance on the work under the agreement by making payments to Plaintiff during the construction process. Defendant has made payments to Plaintiff in the sum of \$721,341.00 and, therefore, owes Plaintiff an additional \$178,659.00.

In the Prior Decision, the Court held that Plaintiff had demonstrated its right to judgment against Defendant by presenting proof of service of the summons and complaint, and presenting an affidavit which set forth the facts constituting the claim and Defendant's default. The Court concluded that Plaintiff had made out a *prima facie* showing of a cause of action against Defendant by providing proof of the parties' agreement, Plaintiff's performance, and Defendant's breach of the agreement. The Court awarded Plaintiff judgment against Defendant and referred the matter to an inquest for the determination of damages. The Court also directed Plaintiff to serve Defendant with a copy of the Prior Decision, with Notice of Entry and a Notice of Inquest or a Note of Issue.

In support of the instant motion, Maurice Enbar ("Enbar"), managing member of Defendant, affirms that on or about August of 2004, Plaintiff entered into an agreement with Flatiron Real Estate for work at the Premises, not with Defendant as alleged in the Complaint.. Enbar affirms further that this agreement was never executed by Plaintiff and Flatiron.

Enbar also affirms, *inter alia*, that 1) Defendant did not receive Plaintiff's notice of motion dated in March of 2011; 2) Defendant was never served with the Notice of Inquest as directed in the Prior Decision; 3) even if Plaintiff did serve Defendant, Defendant would not have received the documents served because the entity "St Nicholas LLC" is a "non-existent entity" (Enbar Aff. in Supp. at ¶ 9) and 4) Defendant has a meritorious defense.

In opposition, Joseph McCormack ("McCormack"), the President of Plaintiff

Corporation, submits that Enbar is attempting to avoid Defendant's liability for work contracted by Defendant to be performed, and in fact performed by Plaintiff, at the Premises. McCormack affirms that 6 St. Nicholas Terrace is located on St. Nicholas Terrace at 127<sup>th</sup> Street in the County of New York. McCormack provides a copy of a deed (Ex. E to McCormack Aff. in Opp.) which confirms that Defendant is the owner of the Premises.

McCormack reaffirms his affirmations in support of the Prior Motion regarding the parties' agreement and provides copies of the Work Permits and Renewals (McCormack Aff. in Opp. at Ex. F) issued to Plaintiff in connection with work it performed at the Premises. McCormack notes that Enbar has not denied that Plaintiff performed the work at issue but rather has "trie[d] to insinuate that work was performed at 127 St. Nicholas Terrace" (*id.* at ¶ 7). McCormack provides documentation from the New York City Department of Buildings website which confirms that 127 St. Nicholas Terrace does not exist as a valid address.

McCormack provides a copy of a Construction Loan Gap Mortgage and Security Agreement for the Premises taken out by 6 St. Nicholas Terrace, LLC in March of 2004 (Ex. H to McCormack Aff. in Opp.). The first page of that document lists Enbar as a Guarantor. The mortgage was given by Hudson Valley Bank ("Bank") which required an inspection of the Premises before it would release funds to Defendant. McCormack provides copies of field reports (*id.* at Exs. I, J, K and L) issued by the Bank's inspector and forwarded to the Bank as well as the parties. Those field reports confirmed the work completed at the Premises and authorized distribution of funds. McCormack directs the Court's attention to Exhibits J and K which contain McCormack's signature on a Waiver of Lien required by the Bank before the Bank would make payments to Plaintiff for work performed at the Premises.

McCormack affirms that the payments authorized in the field reports are reflected in Exhibit M to his affidavit, which is a summary of all payments for which Defendant was given credit. Plaintiff provided the summary to Defendant at a meeting, prior to the filing of this action, in an effort to resolve the parties' dispute short of litigation. The summary was introduced at the damages inquest ("Inquest") ordered by the Court in the Prior Decision. Plaintiff also introduced checks at the Inquest (Ex. N to McCormack Aff. in Opp.), several of which were written on the account of "6 St. Nicholas Terrace, LLC." Those checks are signed by Enbar and relate to the work that is the subject of this litigation.

McCormack submits that Defendant "is attempting to throw up a smokescreen" (McCormack Aff. in Opp. at ¶ 13) to avoid making payments for work performed by Plaintiff at

Defendant's request. McCormack contends, further, that Defendant has failed to provide an excuse for its default or meritorious defense, and failed to rebut Plaintiff's claim of damages as presented at the Inquest.

Counsel for Plaintiff affirms that the Summons and Complaint were served on Defendant pursuant to Limited Liability Company Law § 303, by delivery of duplicate copies to the Secretary State along with payment of the appropriate filing fee, and provides an affidavit of service in support (Graber Aff. in Opp. at Ex. B). Plaintiff's counsel notes that Defendant, in his affidavit in support, does not deny receiving the Summons and Complaint. Moreover, Defendant does not contend that the address on file with the Secretary of State is incorrect. In addition, Defendant does not provide an explanation for its failure to file a timely answer to the Complaint, and does not establish a meritorious defense. Finally, Plaintiff's counsel notes that Defendant makes no mention of the fact that Defendant appeared at the Inquest and defended the damages portion of Plaintiff's claim before the Special Referee.

#### C. The Parties' Positions

Defendant submits that the Court should vacate the Prior Decision, which awarded Plaintiff a default judgment against Defendant, on the grounds, *inter alia*, that 1) Defendant did not receive the Prior Motion; 2) Defendant was not served with the Notice of Inquest; 3) the entity named as Defendant does not exist; and 4) Defendant has a meritorious defense.

Plaintiff opposes Defendant's motion, submitting that Plaintiff has demonstrated its right to judgment, and Defendant has failed to provide an excuse for its default or a meritorious defense.

### RULING OF THE COURT

#### A. Vacatur of Default Judgment

A party seeking to vacate an order entered upon his default is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. *White v. Incorp. Village of Hempstead*, 41 A.D.3d 709, 710 (2d Dept. 2007).

#### B. Service of Process

In *Trini Realty Corp. v. Fulton Center LLC*, 53 A.D.3d 479 (2d Dept. 2008), which involved plaintiff's motion for a default judgment pursuant to CPLR § 3215, the Second Department held that plaintiff's presentation of a process server's affidavit was sufficient to create a presumption that service on the defendant was effected by delivery of the summons and

complaint to the Secretary of State. *Id.*, citing, *inter alia*, CPLR § 311-a(a); Limited Liability Law § 303(a); *Engel v. Lichterman*, 62 N.Y.2d 943, 944-945 (1984); *Commissioners of State Ins. Fund v. Nobre, Inc.*, 29 A.D.3d 511 (2d Dept. 2006). The defendant opposed plaintiff's motion, contending that it did not receive notice of the summons in time to defend, and that it had a meritorious defense. *Id.* The Second Department affirmed the trial court's Order granting plaintiff's motion, noting that the defendant did not contend that the address on file with the Secretary of State was incorrect, and reaffirming the principle that mere denial of receipt of the summons and complaint was insufficient to rebut the presumption of proper service created by the affidavit of service. *Id.* at 479-480.

C. Application of these Principles to the Instant Action

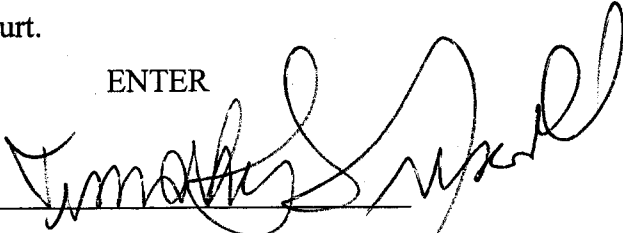
The Court denies Defendant's motion, based on the Court's conclusion that Defendant has not provided a reasonable excuse for its default or a meritorious defense. In the Prior Decision, the Court held that Plaintiff had demonstrated its right to judgment against Defendant by presenting proof of service of the summons and complaint, and presenting the McCormack affidavit which set forth the facts constituting the claim and Defendant's default. Defendant has provided no explanation for its failure to answer the Complaint or respond to the Prior Motion. Moreover, Defendant's conclusory assertion that it has a meritorious defense is insufficient to warrant a vacatur of the Prior Decision.

In light of the foregoing, the Court denies Defendant's motion and grants Plaintiff's application to submit to the Special Referee a proposed judgment on notice, as directed by the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY  
December 7, 2011

ENTER  
  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
DEC 13 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE