

North E. Precast v Rainbow Dev.

2013 NY Slip Op 34246(U)

September 3, 2013

Supreme Court, Bronx County

Docket Number: 22817/2012E

Judge: Lizbeth Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)

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North Eastern Precast,

Plaintiff,

DECISION and ORDER
Index No 22817/2012E

-against-

Rainbow Development,

Defendant.

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Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibits.....	2

Plaintiff North Eastern Precast (“North Eastern”) claims that defendant Rainbow Development, LLC (“Rainbow”) owes it \$100,000 for labor and materials involving property located at 1660 Boston Road, Bronx, New York (“subject property”). The plaintiff consequently filed a mechanics lien against the subject property for \$100,000. The defendant then moved to cancel the notice of pendency on lack of service grounds pursuant to CPLR § 6512 and 312-a. By Order dated 5/20/13, this Court denied the defendant’s motion. Plaintiff North Eastern served the defendant with a copy of the Order with notice of entry and now moves for a default judgment pursuant to CPLR 3215 against the defendant for its failure to file an answer. Defendant Rainbow opposes the plaintiff’s motion¹ and seeks the Court’s acceptance of its answer on law office failure grounds and because it has meritorious defenses to the plaintiff’s complaint.

DISCUSSION

CPLR 3215(a) states the following in pertinent part:

¹ The Court notes that the defendant’s opposition papers are untabbed as required by its part rules. (See <http://www.nycourts.gov/COURTS/12JD/BRONX/Civil/pdfs/IA-10.pdf>.)

Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.

CPLR 5015(a)(1) permits a defaulting defendant to answer and contest the action on the merits where failure to appear is the result of a lack of service or other valid excuse. (*Zelnik v Bidermann Industries USA, Inc.* [1st Dept 1997].)

In support of its motion, plaintiff North Eastern proffers the complaint, the notice of mechanic's lien, the affidavits of service and the affirmation of its counsel, Jonathan W. Greenbaum.

Both the complaint and the notice state that the parties entered into a contract, although not provided, wherein defendant Rainbow allegedly agreed to pay plaintiff North Eastern \$165,000 for services and labor associated with the subject property.

By affirmation dated 6/26/13, Mr. Greenbaum references the complaint and states that the "defendant is liable to Plaintiff in the amount of \$100,000.00, plus interest and cost" and requests a default judgment against the defendant. Significantly, Mr. Greenbaum does not reference the contract.

In opposition to the plaintiff's motion, Kathleen R. Bradshaw, defendant Rainbow's counsel, states in her 7/25/13 affirmation that she prepared an answer to the plaintiff's complaint after she received this Court's 5/20/13 Order but it was misfiled by her "short-lived paralegal." Ms. Bradshaw accordingly requests that the defendant's answer be accepted and not decided on default because the defendant has meritorious defenses to the plaintiff's complaint. The defendant asserts that the parties entered into a contract wherein the defendant agreed to render services and labor for \$150,000 and not for \$165,000 as purported by the plaintiff and that the plaintiff has been paid in full.

In support of its position, defendant Rainbow proffers its 6/20/13 answer, poor xerox pictures of planks, engineer inspection reports, a text message, notes, copies of checks and the affidavit of Robert Yakubov.

By affidavit dated 7/22/13, Mr. Yakubov states that he is the defendant's principal. He personally dealt with the plaintiff and Sal Herrera whom he calls "Plank Sal Many." Mr. Yakubov, like the plaintiff, fails to proffer the contract but states that the parties agreed to the defendant rendering services and labor for \$150,000. Mr. Yakubov maintains that he made check and cash payments to Mr. Herrera; the final payment of \$10,000 was made by check (#149) on 11/22/11 which is consistent with a text he received from Mr. Herrera. Mr. Yakubov asserts that he does not know why the plaintiff filed a false Notice of Mechanics Lien since he paid Mr. Herrera in full despite the problems with and untimeliness of his work; his work was not performed in a "workman like manner."

The dates and amounts of the defendant's checks, each made payable to North Eastern Precast, "for" 1660 Boston Rd, Bronx, NY and signed by Dmitry Yakubov, are as follows:

Dated: 8/2/11 - Amount: \$20,000.00
Dated: 10/24/11 - Amount: \$30,000.00
Dated: 11/10/11 - Amount: \$10,000.00
Dated: 11/22/11 - Amount: \$10,000.00
TOTAL: \$70,000.00

The defendant does not submit a formal contract but proffers a note dated 8/1/11 that states the following:

I Sal Herrera has received \$20,000 00/100 as a deposit towards 1660 Boston Rd, Bronx, NY for a total of \$150,000.00 with leaving of \$130,000.00 as a balance. The total price includes full labor and material by North Eastern Precast. Also includes (illegible), crane permits; grout.

The text message dated 11/21 at 4:19PM appears to be from "Plank Sal Many" and states the following:

If u paying me tomorrow check should be for 20K leaving balance of 10K. If that is going to be a problem let me know.

The plaintiff submits no reply or rebuttal evidence.

CONCLUSION

Plaintiff North Eastern seeks the entry of a default judgment against defendant Rainbow for \$100,000 plus interest and costs for its failure to answer.

The Court has carefully reviewed and considered the motion and opposition papers and finds that the defendant submits a valid excuse for its failure to submit a timely answer.

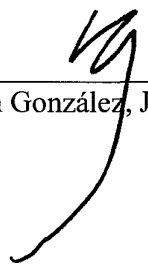
The defendant's checks establish that it has remitted payment to the plaintiff in the amount of \$70,000. Although the evidence fails to establish full payment pursuant to the alleged contract, the evidence warrants a decision on the merits particularly since the plaintiff submits no rebuttal evidence. The defendant's answer is deemed accepted and the plaintiff's motion for a default judgment against the defendant is accordingly denied.

The defendant shall serve the plaintiff with a copy of this Decision and Order with notice of entry within 20 days.

This is the Decision and Order of the Court.

Dated: September 6, 2013

So ordered,



Hon. Lizbeth González, JSC