

North E. Precast v Rainbow Dev., LLC
2013 NY Slip Op 34247(U)
May 20, 2013
Supreme Court, Bronx County
Docket Number: 22817/12
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10E

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North Eastern Precast,

Plaintiff,

DECISION and ORDER
Index No 22817/12

-against-

Rainbow Development, LLC,

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 \$100,000.00 for labor and materials. The plaintiff commenced the underlying action on breach of contract grounds and to foreclose on a mechanics lien. The plaintiff subsequently filed a notice of pendency against property located at 1660 Boston Road, Bronx, New York and identified as Block 2978 - Lot 175. Defendant Rainbow moves to cancel the notice of pendency on the ground that the plaintiff failed to effect service of the summons and complaint upon the defendant pursuant to CPLR § 6512 and 312-a. Plaintiff North Eastern opposes the defendant’s motion.

DISCUSSION

CPLR § 6512 provides in pertinent part that “a notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant or first publication of the summons

against the defendant is made pursuant to an order and publication is subsequently completed.”

Here, since the notice of pendency was filed on 11/20/12, service must have been effected no later than 12/20/12.

CPLR 312-a provides that mailing the summons and complaint to the person or entity to be served by first class mail with prepaid postage, together with two copies of a statement of service and acknowledgment of receipt form with a return prepaid postage envelope addressed to the sender is an alternative to personal service as authorized by CPLR §§ 307, 308, 310, 311 or 312.

Defendant Rainbow contends that the notice of pendency is ineffective and warrants cancellation because the plaintiff filed the notice of pendency on 11/20/12 but failed to serve the summons and complaint upon the defendant within 30 days thereof pursuant to CPLR § 6512. In support of its position, the defendant proffers a copy of the summons and complaint retrieved from the New York State Electronic Filing System (“NYSCEF”), an unsigned copy of an acknowledgment of receipt by mail form and the affidavit of its member, Robert Yakobuv. In his 2/15/13 affidavit, Mr. Yakobuv states that neither he nor anyone else on behalf of the defendant has “accepted service pursuant to CPLR 312-a.”

In opposition to the defendant’s motion, plaintiff North Eastern submits that it properly served the defendant pursuant to CPLR § 6512. The summons and complaint were filed on 11/15/12, the notice of pendency was filed on 11/20/12 and all documents were served upon the defendant on 12/5/12 in accordance with CPLR 312-a. Plaintiff’s counsel, Jonathan W. Greenbaum, states in his affirmation that the summons, complaint and acknowledgment of receipt by mail form were mailed by regular mail on 12/5/12 to Pinkhasov & Aminov, PLLC, 95-20 63rd Road, Suite B, Rego Park, NY 11374, the defendant’s registered agent filed with the NYS Department of State

(copy annexed) to receive service on the defendant's behalf. Mr. Greenbaum states that the acknowledgment form was not returned whereupon his office called Pinkhasov & Aminov's office. Mr. Greenbaum claims that his office spoke and left detailed messages with the agent's receptionist/secretary and she said someone would return the call but that never occurred. In addition, the documents were not returned as "undelivered" to the plaintiff.

The plaintiff informed Mr. Greenbaum that Mr. Yakobuv, the defendant's member, works from Empire Wireless located at 650 Manhattan Avenue, Brooklyn, New York. By affidavit dated 3/7/13, Randy Barona, the plaintiff's process server, states that he attempted service upon Mr. Yakubov on behalf of the defendant at the Brooklyn address. Since Mr. Barona omits the date and time of his attempted service, his affidavit is not dispositive.

The plaintiff claims that it concluded that Mr. Yakubov was evading service and therefore effected service upon the Secretary of State. By affidavit dated 1/22/13, Mary Bonville states that she personally served two copies of the summons, complaint and requisite notices for electronic filing upon Chad Matice at the NYS Secretary of State at 99 Washington Avenue, 6th Floor, Albany, NY on 1/22/13.

The plaintiff also notes that the defendant annexes a copy of the acknowledgment of receipt by mail form to its motion. The plaintiff contends that since it did not file the form with the Court, the defendant could have only received it by the plaintiff's mailing to the defendant's agent.

CONCLUSION

Defendant Rainbow moves to cancel the notice of pendency on lack of service grounds. The defendant submits the affidavit of Mr. Yakubov, its member, who states that neither he nor anyone else "accepted" service of the summons, complaint and notice of pendency. He does not, however,

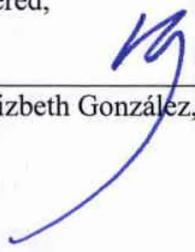
outright deny receipt of the documents. The summons, complaint and notice mailed to the defendant's registered agent were not returned to the plaintiff as "undelivered." The plaintiff contends that since the acknowledgment form was not filed with the Court, the defendant received and gained possession of that document via the plaintiff's 12/5/12 mailing to the defendant's registered agent. The Court notes that the statement of service and the acknowledgment of receipt by mail form proffered by the defendant do not contain the NYSEF stamp which establishes that the defendant received the document through the Court's electronic filing system. The defendant does not submit a reply to thus identify the source of its acknowledgment form.

After review and consideration of the proffered evidence, the Court finds that the plaintiff's opposition is un rebutted. Defendant Rainbow fails to establish lack of proper service of the summons and complaint upon its registered agent, Pinkhasov & Aminov, PLLC. The defendant's motion is accordingly denied. The plaintiff shall serve the defendant with a copy of this Decision and Order with notice of entry within 20 days.

This is the Decision and Order of the Court.

Date: May 20, 2013

So ordered,



Hon. Lizbeth González, JSC