

Ionescu v Italia
2013 NY Slip Op 31399(U)
June 24, 2013
Supreme Court, Queens County
Docket Number: 703293/2012
Judge: Sidney F. Strauss
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MEMORANDUM

SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS IA PART 11

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DAN IONESCU,

Plaintiff,

-against-

FORTE ITALIA, ET. AL.

Defendants.

BY: STRAUSS, J.

Index No.: 703293/2012

Motion Date: May 17, 2013

Seq. No.: 1

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The following papers numbered 1 to 7 were read on the motion of the plaintiff, seeking, an order pursuant to CPLR 3215, granting a default judgment as against the defendants, a money judgment and the foreclosure of the mechanics lien affecting the subject property located in Long Island City, New York; awarding liquidated damages as demanded in the complaint; granting a judgment of foreclosure on plaintiff's mechanic's liens on said real property; and consolidating the instant action, pursuant to CPLR 602(b), with Action No. 2, New York County Supreme Court Action, Index No. 651365/2012, *MGE Engineering, PC v. Daniel Ionescu d/b/a Dan Ionescu Architects*. Also read was the cross-motion of the defendants Forte Italia and Anthony Pecora, seeking an order granting leave to file and serve a late answer upon the plaintiff, and to compel plaintiff to accept same.

***FOR A MORE FORMAL MARKING OF THE PAPERS READ ON THIS
MOTION AND CROSS-MOTION, CONSULT E-FILING.**

	PAPERS <u>NUMBERED</u>
Notice of Motion - Affirmation - Exhibits.....	1 - 3
Opposition Affirmation/Cross-Motion - Exhibits.....	4 - 5
Reply Affirmation - Exhibits.....	6 - 7

At the outset, plaintiff seeks to consolidate for purposes of joint trial, Action No. 2, a New York County Supreme Court Action, Index No. 651365/2012, *MGE Engineering, PC v. Daniel Ionescu d/b/a Dan Ionescu Architects*, with the underlying action. Plaintiff, a licensed architect, was retained by the defendants Forte Italia and Anthony Pecora (hereinafter “Forte”), to provide architectural services and arrange engineering services in connection with a real estate development project in Long Island City. Plaintiff alleges that defendants failed to make payments in accordance with an agreement in the underlying action, and after plaintiff was unable to make payments to the engineer in the New York County action, the engineering firm in that action brought suit as against him. Plaintiff submits the stipulation agreement entered into by himself as plaintiff in the underlying action and as defendant in the New York County Action with the plaintiff in that action, to consolidate for purposes of joint trial, on the ground that the two actions involve common issues of law and fact.

Accordingly, to the extent the request to consolidated is unopposed, same is granted. The title of the actions joined for trial shall be as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS

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DAN IONESCU, Action No. 1

Plaintiff,

Index No.: 703293/2012

-against-

FORTE ITALIA, ET. AL.

Defendants.

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MGE ENGINEERING, PC, Action No. 2

Plaintiff,

Index No.: To Be Assigned

-against-

DANIEL IONESCU d/b/a DAN
IONESCU ARCHITECTS,

Defendants.

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and it is further

ORDERED, that a copy of this Order with Notice of Entry be served on all parties to the actions combined, and filed with the Clerk of Queens County at the time of the filing of the Note of Issue.

As to the remaining branches of plaintiff's motion seeking a default judgment and directing that the mechanics liens be enforced against the subject real property and that same be

sold under the Lien Law, the court determines as follows:

Plaintiff commenced the underlying action November 30, 2012, after the completion of performance of 75% of the services retained. Further, he had invoiced the defendants the sum of \$496,500.00 of which Forte paid approximately \$270,000.00. A balance of \$226,500.00 remains due and payable. Non-party engineers to the instant action assert that as of March, 2011, they had completed performance of 75% of the engineering services, with an unpaid balance remaining in the sum of \$187,500.00.

Plaintiff contends that the defendants have failed and refused to make any further payments for the remaining balances owed to plaintiff and the engineers in the action to be consolidated with the underlying action. Plaintiff submits proof that he served and filed Notices of Mechanics Liens on July 19, 2012, and on November 15, 2012. The instant action was then commenced to obtain a money judgment as against Forte Italia in the sum of \$361,571.00, for services rendered, and based upon an account stated; on the account stated for the invoices delivered in the amount of \$226,500.00; under the Lien Law, to foreclose on the mechanics liens securing payment of outstanding balances; against Anthony Pecora, for his personal liability on the contract in the sum of \$361,571.00; under Article 3-A and Section 13 of the Lien Law, against Forte for the diversion of trust funds loaned by a banking institution for Project improvements, in the amount of \$361,570.00; a declaratory judgment that if plaintiff is found liable to MGE Engineers in the action to be consolidated, then plaintiff will be entitled to judgment as against Forte for said amount.

On a motion for leave to enter judgment against a defendant for the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint,

proof of the facts constituting its claim, and proof of the defendant's default. (see CPLR 3215; *see Mercury Cas. Co. v Surgical Ctr. at Milburn, LLC*, 65 AD3d 1102 [2d Dept 2009]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008].) Plaintiff submits a copy of the summons and complaint as well as plaintiff's verification and proof of service of process to the defendants Forte, along with additional notice as required pursuant to CPLR 3215(g)(3). Also submitted is a copy of the Stipulation signed by defendants' counsel, wherein defendants were given an extension of time to answer. However, defendants failed to serve an answer pursuant to said stipulation.

Defendants oppose the instant motion and cross-move seeking leave to file and serve a late answer, and compel plaintiff to accept same. Counsel for defendants alleges that although she had executed the Stipulation Extending Defendants' time to Answer the Complaint, she nevertheless failed to follow through with sending her draft to the defendants for them to timely review and verify. She further claims that she had believed she had transmitted the draft to plaintiff's counsel, and that until she received the default motion, she had had no idea that in actuality, she had not done so.

It is within the discretion of the trial court "in the interests of justice to excuse delay or default resulting from law office failure" (CPLR 2005). Default may be excused upon a showing of a meritorious defense and a justifiable excuse. (see, *Korea Exch. Bank v Attilio*, 186 AD2d 634 [2d Dept. 1992]; *Vierya v Briggs & Stratton Corp.*, 166 AD2d 645 [2d Dept. 1990].) While the court may consider law office failure as an excuse, the movant must set forth "[d]etailed factual allegations which explain the reason for such failure." (*Grezinsky v Mount Hebron Cemetery*, 305 AD2d 542 [2d Dept 2003], citing to *Morris v Metropolitan Transp. Auth.*, 191

AD2d 682 [2d Dept 1993].) In this case, defendants' counsel proffers nothing more than her own self-serving and vague explanations of non-compliance with an agreed upon stipulation benefitting the defendants with an extension of time.

Even if the Court were to accept counsel's explanation of law office failure, the opposition and cross-motion must fail because neither contains an affidavit setting forth a meritorious defense to defeat a default judgment. The defendants are required to set forth sufficient factual allegations in support of their claimed defenses, and recite more than conclusory allegations or vague assertions. (See, *Facsimile Communications Indus. v NYU Hosp. Corp.*, 28 AD3d 391 [2d Dept. 2006]; *Lopez v Trucking & Stratford, Inc.*, 299 AD2d 187 [2d Dept. 2002]; *Peacock v Kalikow*, 239 AD2d 188 [2d Dept. 1997].) Here, the proposed answer contains no such factual detail or evidence to support their claims. The proposed answer contains only general denials and sheds no light on the merits of a defense to the underlying action.

Accordingly, plaintiff's motion is granted and defendants' cross-motion is denied.

As to plaintiff's request for the first time in reply to the instant motion, for an order pursuant to Lien Law 76(5) served upon defendants on January 23, 2013, to the extent plaintiff seeks to compel defendants to comply with a detailed answer to a Demand for Verified Statement, same is granted.

Settle Order.

Dated: June 24, 2013

Enter,

SIDNEY F. STRAUSS, J.S.C.