

Clemente Latham Concrete v Integrity Masonry, Inc.
2013 NY Slip Op 32002(U)
August 28, 2013
Supreme Court, Albany County
Docket Number: 713/13
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CLEMENTE LATHAM CONCRETE,
A DIVISION OF CALLANAN INDUSTRIES, INC.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 713-13
RJI NO. 01-13-110472

INTEGRITY MASONRY, INC.
d/b/a M & R CONCRETE CONTRACTORS
d/b/a M & R CONC & MAS CONTRACTOR
MICHAEL DELGIACCO
a/k/a MICHAEL S. DELGIACCO, SR.
a/k/a MICHAEL KAREN DELGIACCO
a/k/a MICHAEL C. DELGIACCO and
a/k/a MICHAEL F. DELGIACCO, SR.

Defendants.

Supreme Court Albany County All Purpose Term, August 12, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Wilhelm & Norman, PLLC
Craig H. Norman, Esq.
Attorneys for Plaintiff
PO Box 869
Clifton Park, New York 12065

John T. Casey, Esq.
Attorney for Defendant
47 Second Street
Troy, New York 12180

TERESI, J.:

Plaintiff commenced this action to recover the outstanding balance it claims due for goods sold and delivered. In lieu of an answer, Michael DelGiacco (hereinafter "DelGiacco") moves to dismiss the complaint pursuant CPLR §3211(a)(1), (5), (7) and (8) or alternatively

pursuant to CPLR § 3211(c). Plaintiff opposes the motion, and cross-moves for both a default judgment against Integrity Masonry, Inc. (hereinafter “Integrity”) and to amend the summons and complaint to add James DelGiacco. On this record, while Defendant established his entitlement to dismissal, Plaintiff failed to demonstrate its entitlement to the relief it seeks.

Considering DelGiacco’s CPLR §3211(a)(1) motion first, such “motion to dismiss on the ground that the action is barred by documentary evidence... may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (State Farm Fire & Cas. Co. v Main Bros. Oil Co., 101 AD3d 1575, 1576-77 [3d Dept 2012], quoting Mason v First proprietorship. Natl. Life Ins. Co. of N.Y., 86 AD3d 854 [3d Dept 2011]).

Here, documentary evidence establishes DelGiacco’s defense to this action as a matter of law. Plaintiff seeks to impose liability on DelGiacco due to his guarantee of the underlying debt. Its complaint specifically states that “[p]ursuant to the annexed written instrument, the defendant Michael DelGiacco personally guaranteed payment in full to the plaintiff of the obligations of the defendant Integrity.” Such annexed written instrument was titled “Credit Application and Personal Guaranty” (hereinafter “Guaranty”), and DelGiacco executed it as its “Individual Guarantor.” Contrary to the complaint’s construal of the Guaranty, it obligated DelGiacco to guarantee not the obligations of Integrity but only those of “M & R Conc. Mas Contractor.” Importantly, the Guaranty specifically notes that such entity, M & R Conc. Mas Contractor, is a “sole proprietorship.” Plaintiff offered no proof rebutting the Guaranty’s language that M & R Conc. Mas Contractor was DelGiacco’s sole proprietorship.

In general “[u]nder suretyship principles, a guarantor relationship arises when one party

becomes bound to satisfy an obligation owed by another. ‘The principal debtor, of course, is not a party to the guaranty, and the guarantor is not a party to the principal obligation, with the result that a suretyship or other contract is not a guaranty unless there is a primary or principal obligation to which the surety’s agreement is collateral.’ (57 NY Jur, Suretyship and Guaranty §15, pp. 206-207.)” (Anti-Hydro Co., Inc. v Castiglia, 92 AD2d 741 [4th Dept 1983]).

Applying such general principle here, because DelGiacco remained personally liable for the business debts of his sole proprietorship, the Guaranty “was nothing more than a promise by [DelGiacco] that he would pay debts which he personally incurred.” (Id.). As such, no guarantor relationship ever arose and the purported Guaranty is invalid. It provides no basis for Plaintiff’s claims against DelGiacco.

Accordingly, Plaintiff’s claim against DelGiacco based upon the Guaranty is dismissed and the balance of DelGiacco’s motion is rendered moot.

Turning to Plaintiff’s motion for a default judgment against Integrity, it failed to establish its entitlement to such judgment.

On a default judgment motion, CPLR §3215(f) requires the movant to “file proof of service of the summons and the complaint... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party.” CPLR §3215(g)(4) also required Plaintiff to serve Integrity with an additional notice.

On this record, Plaintiff wholly failed to comply with CPLR §3215’s above requirements. Contrary to Plaintiff’s attorney’s allegation, no “[a]ffidavits of service and additional notice [were] annexed” to its motion. Nor did Plaintiff offer any “proof of the facts constituting its claim” against Integrity. (CPLR §3215[f]). While Plaintiff’s credit manager and attorney both

allege, in conclusory fashion, that Integrity is in default, they offered no factual proof of such default. Lastly, Plaintiff did not establish Integrity's claimed "amount due by affidavit made by the party." (CPLR §3215[f]).

Accordingly, Plaintiff's motion for a default judgment is denied.

Plaintiff's motion to amend is similarly defective.

CPLR 3025(b) specifically states that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Here, Plaintiff failed to submit a proposed amended complaint with its motion. Such defect requires denial. (Fernandez v HICO Corp., 24 AD3d 110 [1st Dept 2005]).

Accordingly, Plaintiff's motion to amend is denied.

This Decision and Order is being returned to the attorney for DelGiacco. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 28, 2013
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, undated; Affirmation of John Casey, dated June 19, 2013; Affidavit of Michael DelGiacco, dated June 14, 2013, with attached exhibits A-H.
2. Notice of Cross-Motion, dated August 2, 2013; Affidavit of Peter Skelos, dated August 2, 2013; Affirmation of Craig Norman, dated August 2, 2013.
3. Affirmation of John Casey, dated August 8, 2013; Affidavit of Michael DelGiacco, dated August 8, 2013.