Kolodziejski v Jen-Mar Elec. Serv. Corp.
2017 NY Slip Op 31088(U)
May 17, 2017
Supreme Court, New York County
Docket Number: 105627/2011
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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ROMAN KOLODZIEJSKI, et al.,

Plaintiffs,

-against-

JEN-MAR ELECTRIC SERVICE CORP., et al.,

Defendants.

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DECISION AND ORDER

Index No. 105627/2011

HON. ANIL C. SINGH, J.:

Plaintiffs move for an order pursuant to CPLR 4403: 1) confirming so much of Special Referee Ira Gammerman's recommendation that the granting of the motion to vacate defendants' default be conditioned on the posting of an undertaking; and 2) requiring that defendants post a bond in the amount of $1,030,252.13 as a condition of this Court vacating the default. Defendants oppose the motion insofar as plaintiffs ask the Court to withhold defendants' funds.

Plaintiffs commenced this action by filing a summons and complaint on May 12, 2011.

Defendants Jen-Mar Electric Service Corp., and GMD Shipyard Corp., (collectively "Jen-Mar") are construction companies. Beginning in 2005, Jen-Mar

entered into a number of contracts to perform construction work with the City and State of New York, at public libraries and dry docking and shipping facilities in New York City and New Jersey.

Plaintiffs, and other members of the putative class, are individuals who worked for Jen-Mar as carpenters, bricklayers, and masons. Section 220 of the New York State Labor Law provides that the wages to be paid to laborers, workers and mechanics upon public work shall not be less than the "prevailing rate of wages." The complaint contains a single cause of action alleging that Jen-Mar breached the public works contracts by willfully failing to pay plaintiffs the prevailing rates of wages and supplemental benefits.

In order dated February 26, 2013, as amended by order dated January 30, 2014, a default judgment was entered against defendants, and the matter was referred to a special referee for an inquest on damages. Subsequently, the Court issued an order dated May 30, 2014, confirming the referee's report as to the amount of damages. Judgment was entered on August 4, 2015.

On October 30, 2015, defendants moved by order to show cause to vacate and set aside the default judgment. Defendants contend that they did not know about this lawsuit until the end of August 2015, when they received an e-mail from their bank notifying them that their account was frozen due to an attachment

in the amount of $2,000,000.

At a hearing on December 14, 2015, the Court found that defendants had stated a meritorious defense (NYSCEF Doc. No. 72, p. 15, lines 16-17). In an order dated December 14, 2015, the Court referred the matter to a special referee on the issue of whether defendants had excusable default under CPLR 5015(a)(1), or whether defendants received notice in a timely manner to defend the lawsuit pursuant to CPLR 317.

A hearing was held before Special Referee Ira Gammerman on April 7, 2016, who recommended that defendants be permitted to answer the complaint (Transcript dated Apr. 7, 2016, p. 31, lines 10-13). Further, the referee recommended vacatur of the attachment, "or, perhaps, have some sort of attachment" (id., p. 32, lines 4-5). Finally, the referee suggested that defendants be required to place funds in an escrow account as a condition of the vacatur of the default (id., p. 33, lines 6-24).

Discussion

CPLR 4403 provides that this Court has the power to confirm, in whole or in part, the report of a referee. A referee's report is not binding, but is intended "merely to inform the conscience of the court" (Matter of Gehr v. Board of Education of City of Yonkers, 304 N.Y. 436, 440 [1952] (internal quotation marks

and citation omitted)). However, "[i]t is well settled that a special referee's findings of fact and credibility will generally not be disturbed where substantially supported by the record" (RC 27th Avenue Realty Corporation v. New York City Housing Authority, 305 A.D.2d 135, 135 [1st Dep't 2003; see also Namer v. 152-54-56 W. 15th St Realty Corp., 108 A.D.2d 705, 706 [1st Dept., 1985]; Spodek v. Feibusch, 55 A.D.3d 903, 903 [2d Dept., 2008]; Sichel v. Polak, 36 A.D.3d 416 [1st Dept., 2007]; Kardanis v. Velis, 90 A.D.2d 727 [1st Dept., 1982]).

Here, the Court adopts the referee's recommendation to vacate the default. However, we decline to order the attachment of defendants' bank accounts, an undertaking or the escrow of funds.

The sole issue submitted to the referee by the order of reference was whether defendants had excusable default under CPLR 5015(a)(1), or whether defendants received notice in a timely manner to defend the lawsuit pursuant to CPLR 317 (NYSCEF Doc. No. 69). Accordingly, the referee exceeded the scope of the order of reference in recommending an undertaking, escrow, or attachment.

Relying on Harp v. Tednick Corp., 256 A.D.2d 904 [3rd Dept., 1998], and Big Apple Industrial Buildings, Inc. v. George A. Fuller Co., 161 A.D.2d 553 [1st Depty., 1990], plaintiffs now urge the Court in its discretion to order un undertaking as the defendant failed to notify the Department of State with respect

to the change of location of the mailing address (Harp, 256 A.D.2d at 905 (imposing an undertaking appropriate where defendant "used numerous addresses")). Plaintiffs assert that an undertaking is particularly appropriate where, as here, a defendant may be unable to pay a later potential judgment on the merits (A.G. Service Co. v. Interboro Contractors, Inc., 64 A.D.2d 880 [2nd Dept., 1978]; Astrocom/Marlux, Inc. v. Lafayette Radio Electronics Corp., 61 A.D.2d 1064 [3rd Dept., 1978]).

In short, plaintiffs' application for an order of attachment must be denied as untimely. Special Referee Gammerman's recommendation was made on April 4, 2016. Plaintiffs waited until February 10, 2017, to seek an order of attachment, when they filed their motion to confirm the recommendation of the referee. Furthermore, even if timely, the Court declines to grant a prejudgment attachment. The default was excusable as there was no attempt to evade service so as to granting the application conditionally (H.H. Mink Co., Inc. v. G & T Terminal Packaging Co., Inc., 89 A.D.2d 821 [4th Dept., 1982]; Ricci v. W.T. Grant Co., 29 A.D.2d 961 [2nd Dept., 1968]).

Accordingly, it is

ORDERED that plaintiffs' motion to confirm the referee's report is granted in part only to the extent that the default judgment is vacated; and it is further

ORDERED that defendants are directed to file an answer to the complaint, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on the County Clerk (Room 141B) and upon the Trial Support Office (Room 158).

The foregoing constitutes the decision and order of the court.

Date: May 17, 2017
New York, New York

Anil C. Singh