Bab v Garcia
2018 NY Slip Op 30895(U)
May 9, 2018
Supreme Court, New York County
Docket Number: 655381/2016
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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ANDREW BAB and JENNIFER BAB,

Plaintiffs

Index No. 655381/2016

v

DECISION AND ORDER

CARLOS GARCIA and ALBERTO GARCIA,

Defendants.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for breach of contract, fraudulent inducement, and negligence, Andrew Bab and Jennifer Bab (the "plaintiffs") move for leave to enter a default judgment against the defendants Carlos Garcia ("Carlos") and Alberto Garcia ("Alberto") on their claims for breach of contract and fraudulent inducement in the amount of $38,423.04, plus pre and post judgment interest and attorneys' fees. No opposition is submitted. The motion is granted as to the breach of contract cause of action against Carlos, and is otherwise denied. See CPLR 3215(f); Atlantic Cas. Ins. Co. v RJNJ Services, Inc., 89 AD3d 649 (2nd Dept. 2011).

II. DISCUSSION

A. Proof of Service

Where a plaintiff moves for leave to enter a default judgment, he or she must submit proof of the facts constituting the claim, proof of service of the summons and complaint upon the defendant, and proof of the defendant's default (see CPLR 3215 [f]; Rivera v Correction Officer L. Banks, 135 AD3d 621 [1st Dept 2016]).

Although the plaintiffs submit an affidavit of service referable to service of the summons and complaint upon Carlos, they submit no such proof as to service upon Alberto. Accordingly, the plaintiffs' motion is denied as against Alberto.

As to service upon Carlos, the affidavit of service submitted indicates that service pursuant to CPLR 308(4) was effectuated on October 21, 2016, ten days after the filing of the summons and complaint. However, proof of such service must be filed with the clerk of court within twenty days of the affixing or mailing of the summons and complaint, and "service shall be complete ten days after such filing." CPLR 308(4). Here, proof of service was not submitted until October 25, 2017. Nonetheless, the court may permit a mistake, omission, defect or irregularity at any stage of an action to be corrected, upon such terms as may be just (CPLR 2001), provided that such mistake, omission, defect or irregularity is merely a "technical

infirmity" (Ruffin v Lion Corp., 15 NY3d 578 [2010]). A delay in filing proof of service pursuant to CPLR 308(4) is "merely a procedural irregularity, not jurisdictional, and may be corrected nunc pro tunc by the court." Lancaster v Kindor, 98 AD2d 300 (1st Dept. 1984); see also Koslowski v Koslowski, 251 AD2d 294 (2nd Dept. 1998); Reporter Co. v Tomicki, 60 AD2d 947, 947 (3rd Dept. 1978); Discover Bank v Eschwege, 71 AD3d 1413 (4th Dept. 2010). Moreover, a court may exercise its discretion and sua sponte cure such an irregularity. See Lancaster v Kindor, supra; Reporter Co. v Tomicki, supra.

In this matter, the plaintiffs have submitted correspondence with Carlos suggesting that he was well aware of the lawsuit against him and was interested in discussing settlement with the plaintiffs. The plaintiff Andrew Bab, in his affidavit, avers that Carlos confirmed receipt of both the summons and the complaint prior to the parties' written correspondence. Inasmuch as Carlos has defaulted, he has proffered no argument denying that he received the summons and complaint. See Lancaster v Kindor, supra. Accordingly, the court deems the plaintiffs' filing of proof of service upon Carlos on October 25, 2017, timely. The court further notes that Carlos's time to appear was thus extended 40 days therefrom (see CPLR 320; CPLR 308[4]), and has expired as of the date of this order.

B. Breach of Contract

In this case, the plaintiffs' proof must establish the necessary elements of a breach of contract claim: (1) the existence of a contract, (2) the plaintiffs' performance under the contract, (3) Carlos' breach of that contract, and (4) resulting damages. See Flomenbaum v New York University, 71 AD3d 80 (1st Dept. 2009).

Accordingly, the plaintiffs provide in support of their motion the verified complaint, an affidavit of Andrew Bab, an email agreement dated May 4, 2016, detailing home renovation work to be performed by Carlos, with an email response from Carlos agreeing to the timelines for all work completion and instructing the plaintiffs' to mail checks to him in accordance with the agreement, copies of cancelled checks written out to Carlos as deposit payments totaling $31,425. The affidavit of Andrew Bab contains detailed allegations that none of the promised work was completed and that what little was done was done incorrectly, incompletely, unprofessionally and unsafely. The plaintiffs also submit a series of emails showing attempted communication with Carlos throughout the course of the parties' relationship when Carlos would repeatedly fail to show up at scheduled times to perform work, and ignore the plaintiffs' requests for a response or explanation. Ultimately, as evidenced by the affidavit of Andrew Bab and numerous emails, Carlos stopped showing up at the

site altogether and was increasingly unresponsive to calls, texts or emails.

C. Fraudulent Inducement

The court does not reach the plaintiffs' cause of action for fraudulent inducement as it is duplicative of the breach of contract claim. See Triad Intern. Corp. v Cameron Industries, Inc., 122 AD3d 531 (1st Dept. 2014).

D. Damages

As to the plaintiffs' damages, "[i]t has long been recognized that the theory underlying damages is to make good or replace the loss caused by the breach of contract." Brushton-Moira Cent. School Dist. v Thomas Assoc., 91 NY2d 256, 261 (1998). In other words, damages are intended to "place the nonbreaching party in as good a position as it would have been had the contract been performed." Id; see also Children's Corner Learning Center v A. Miranda Contracting Corp., 64 AD3d 314 (1st Dept. 2009). Accordingly, in a breach of contract case involving defective or incomplete construction, "the appropriate measure of damages is the cost to repair the defects" if the defects are reparable. Brushton-Moira Cent. School Dist. v Thomas Assoc., supra at 261-62; see also Kleinberg Electric, Inc. v E-J Electric Installation Co., 111 AD3d 410 (1st Dept. 2013); Hodges v

Cusanno, 94 AD3d 1168 (3rd Dept. 2012); Cagianelli v Sontheimer, 46 AD3d 1206 (3rd Dept. 2007); Marino v Lewis, 17 AD3d 325 (2nd Dept. 2005). The plaintiffs have provided sufficient proof of the costs that they incurred to fix the defective work that Carlos had completed and to replace the work which Carlos had contracted to complete but never completed in the amount of $38,423.04.

Attorneys' fees incurred in prosecuting a lawsuit are generally not recoverable as damages absent a specific contractual provision or statutory authority authorizing such a recovery. See Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). This is true in both actions for breach of contract and in common-law actions based on tort, in the absence of malice. See Coopers & Lybrand v Levitt, supra; see also Lurman v Jarvie, 82 App. Div. 37 (1st Dept. 1903). Nonetheless, the plaintiffs request attorneys' fees based on the "defendants' fraudulent misconduct" and on the "defendants' plain and stated intent to default and refusal to engage with plaintiffs in any effort to resolve this dispute," which, the plaintiffs argue, is "egregiously disingenuous conduct designed to harass and defraud the plaintiffs and must be punished." The plaintiffs do not point to any contractual or statutory provision authorizing the relief

they seek. Furthermore, even if the court were to address the cause of action to recover for fraudulent inducement and find for the plaintiffs, attorneys' fees are not ordinarily included in fraudulent inducement claims (see Myers Industries, Inc. v Schoeller Arca Systems, Inc., 171 F. Supp. 3d 107 [S.D.N.Y. 2016]) and there has been no showing that the defendants committed tortious acts characterized by malice sufficient to warrant an exception to that general principle in this case.

E. Interest

The plaintiffs are entitled to recover prejudgment interest from the date that Carlos breached the contract. An award of statutory interest from June 12, 2016, which is approximately halfway between the deadline specified in the contract for the completion of bathroom and tile work (June 8, 2016) and the deadline for the completion of all millwork (June 16, 2016), is appropriate, as that date constitutes a reasonable intermediate date from which statutory prejudgment interest should be calculated. See CPLR 5001 (a), (b); Wolf v American Tech. Ceramics Corp., 84 AD3d 1224 (2nd Dept. 2011).

III. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiffs' motion pursuant to CPLR 3215

for leave to enter a default judgment is granted to the extent that they are granted leave to enter judgment on the breach of contract cause of action against Carlos Garcia, and the motion is otherwise denied, without opposition; and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiffs, Andrew Bab and Jennifer Bab, and against the defendant, Carlos Garcia, in the sum of $38,423.04, with statutory interest from June 12, 2016.

This constitutes the Decision and Order of the court.

Dated: May 9, 2018

ENTER:

J.S.C.

HON. NANCY M. BANNON