MRI Constr. of Nassau, Inc. v Envirochrome Interiors, Inc.
2018 NY Slip Op 33267(U)
December 12, 2018
Supreme Court, New York County
Docket Number: 655059/2017
Judge: Robert D. Kalish
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH *Justice* **PART 29**

MRI CONSTRUCTION OF NASSAU, INC.,

Plaintiff,

- v -

ENVIROCHROME INTERIORS, INC.,

Defendant.

(and a third-party action)

INDEX NO. 655059/2017

MOTION DATE 12/6/18

MOTION SEQ. NO. 001

DECISION AND ORDER

NYSCEF Doc Nos. 24–29 were read on this motion for an order directing the entry of a default judgment.

Motion by Third-Party Plaintiff Envirochrome Interiors, Inc. ("Envirochrome") pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Envirochrome and against Third-Party Defendant Syndicate Architecture, PLLC ("Syndicate") on the Third-Party Complaint is denied.

BACKGROUND

Plaintiff MRI Construction of Nassau, Inc. ("MRI") commenced the instant action on July 27, 2017, by e-filing a summons and verified complaint. The complaint alleges, in sum and substance, that MRI contracted with Envirochrome on or about August 2016 to perform certain construction work at premises located at 152 West 25th Street, New York, New York and that $44,220.00 remains due and owing to MRI from Envirochrome on the project.

On March 18, 2018, Envirochrome commenced a third-party action by e-filing a third-party summons and third-party complaint. The third-party complaint alleges that Envirochrome contracted with Syndicate on or about August 2016 to perform certain construction work at the Premises, which were allegedly owned by third-party defendant Dezer Properties, III LLC ("Dezer").[1] Envirochrome further alleges that it fully performed under the scope of its contract and became entitled to the price of $180,666.00, all of which is due and owing to Envirochrome from Syndicate, which was agreed upon between Envirochrome and Dezer and was the reasonable value of the work and materials furnished. As is relevant here, Envirochrome seeks foreclosure of a verified mechanic's lien (the "Lien"), filed March 17, 2017, and annexed to the third-party complaint, which indicates that Syndicate agreed to pay Envirochrome $180,666.00

[1] On October 29, 2018, Envirochrome and Dezer stipulated to discontinue the third-party action. (NYSCEF Doc No. 22.)

for work completed on October 18, 2016, and that the full amount remains unpaid as of the date of the filing.

This Court conferenced the matter regarding discovery, and on August 6, 2018, without leave from the Court, MRI filed a certificate of readiness and note of issue. At a conference the next day, on August 7, 2018, the Court issued an order vacating the note of issue and directing Syndicate, which appeared by its principal, Mr. Bryon Russell, not an attorney, to answer or move in response to the third-party complaint, and to appear in the action by counsel, all on or before September 6, 2018.

On October 30, 2018, after Envirochrome discontinued as against Dezer, and Syndicate having failed to answer, appear, or move as directed in the August 7, 2018 conference order, the Court issued a further conference order indicating that Envirochrome was to move for a default judgment as to Syndicate.

On November 13, 2018, Envirochrome filed the instant motion pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Envirochrome and against Syndicate. In support of its motion, Envirochrome submits: (1) its third-party complaint, including the annexed Lien; (2) an affirmation in support; (3) an affidavit of service of process upon Syndicate indicating that Syndicate was served with process on or about March 28, 2018, pursuant to Limited Liability Company Law § 303, and the Court's October 30, 2018 order.

Envirochrome argues, in effect, that the Court should grant its motion based upon Syndicate's default in answering or appearing in the action and upon the Lien. In addition to seeking a sum certain of $180,666.00, Envirochrome requests interest, costs, attorney's fees, and sanctions/penalties as against Syndicate.

DISCUSSION

CPLR 3215 (a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." On a motion for a default judgment pursuant to CPLR 3215 based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. (*See* CPLR 3215 [f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2d Dept 2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720 [2d Dept 2008]; *see also Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015].)

Lien Law § 10 (1) states, in relevant part, that

> "Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished;

> provided, however, that where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished . . . ."

"The reach of a mechanic's lien is completely controlled by statute. In order to effectuate it, the notice of lien must be filed within four [or eight] months after completion of the work (Lien Law § 10.)" (*Perrin v Stempinski Realty Corp.*, 15 AD2d 48, 49 [1st Dept 1961] [internal citation omitted].) It is appropriate for the Supreme Court to dismiss a complaint in an action to foreclose a mechanic's lien and to vacate a notice of mechanic's lien where a defendant establishes prima facie that the notice of mechanic's lien was not timely filed pursuant to Lien Law § 10. (*See Ren. Reh. Systems Co., Inc. v Faulkner*, 85 AD3d 752, 753 [2d Dept 2011].) Where a notice of lien encompasses a single condominium unit or cooperative apartment, such unit or apartment is a single-family dwelling under the Lien Law, regardless of whether the larger building or property constitutes a multiple dwelling, and the four-month limitations period applies. (*See Matter of City of Albany Indus. Dev. Agency v DeGraff-Moffly/Gen. Contrs.*, 164 AD2d 20, 22 [3d Dept 1990]; *In re Abbott*, 14 Misc3d 983, 985–986 [Sup Ct, NY County 2007]; *see also Premium Millwork, Inc. v Great Am. Ins. Co.*, 2018 NY Slip Op 31516[U] [Sup Ct, NY County, July 9, 2018, Kalish, J.])

Here, movant has failed to show prima facie that the Lien falls within the four-month or the eight-month limitations period of Lien Law § 10 (1). From the face of the document the property subject to the lien and where work was done is "Known as: 152 West 25th Street 'Syndicate Architecture – 5FL' New York, NY." As movant has indicated in its own papers, approximately five months passed from the end of work to the filing of the Lien—the last work was performed, and last item was furnished, on October 18, 2016, and the Lien was filed on March 17, 2017. It is unclear to the Court whether this refers to a single-family dwelling, such as a single condominium unit or cooperative apartment, as contemplated under Lien Law § 10 (1). As such, the Court cannot determine on the proof submitted whether the Lien is enforceable.

Movant might nevertheless have been entitled to the relief sought in its motion if it had submitted adequate proof of the facts constituting any of its other claims in the third-party complaint, such as breach of contract, quantum meruit, and account stated. As to those other causes of action in the third-party complaint, consideration of the merits of those causes of action is not properly before the Court because the third-party complaint, which contains no verification as to the pleading, is purely hearsay, devoid of evidentiary value, and insufficient to support the entry of a default judgment pursuant to CPLR 3215. (*See Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006].)

Movant's attorney's representations in the affirmation in support are similarly "utterly devoid of evidentiary value" and fail to provide "some firsthand confirmation of the facts." (*St. Paul Fire & Marine Ins. Co. v A.L. Eastmond & Sons, Inc.*, 244 Ad2d 294, 294 [1st Dept 1997].) An attorney's affirmation is insufficient to support the entry of a default judgment. (*See Feffer v*

Malpeso, 210 Ad2d 60, 61 [1st Dept 1994].) Indeed, "the affirmation of an attorney who has no personal knowledge lacks evidentiary value." (*Tower Ins. Co. of New York v Zaroom*, 145 AD3d 556, 557 [1st Dept 2016].)

Moreover, even if the Court found that the Lien was enforceable based upon the limitations period prescribed by Lien Law § 10 (1)—which it has not—the Lien stands merely for the proposition that the $180,666.00 allegedly due and owing to Envirochrome from Syndicate was unpaid as of March 17, 2017, the date of its filing. The Court has before it no affidavit or other proof in admissible form that the full amount remains outstanding. To the extent the affirmation in support argues that the monies remain due and owing to Envirochrome from Syndicate, as previously indicated, the bald assertions of an attorney without personal knowledge are devoid of evidentiary value, insufficient to support the entry of a default judgment, and ultimately unavailing in any respect.

Movant has failed to attach some proof of the underlying claims, such as an affidavit from the client or the contract between Envirochrome and Syndicate. Without such a showing, movant has failed to show its entitlement to the relief requested.

The Court notes that movant has also not provided proof of an additional mailing pursuant to CPLR 3215 (g) (4). However, under recent Appellate Division case law, it appears one is not required. As the Appellate Division, Second Department has unequivocally stated, a plaintiff need not notice a defendant LLC pursuant to CPLR 3215 (g) (4), as

> "[b]y its express terms, the notice requirement is limited to situations where a default judgment is sought against a domestic or authorized foreign corporation which has been served pursuant to Business Corporation Law § 306 (b), and does not pertain to a limited liability company."

(*Tan v AB Capstone Dev.*, LLC, 163 AD3d 937, 939 [2d Dept 2018].) While the Appellate Division, First Department appears to have indicated that the additional mailing requirement applied to LLCs similarly served pursuant to Limited Liability Company Law § 303 by means of the Secretary of State, as the Appellate Division, Second Department has spoken directly and clearly on this issue, this Court will follow the Appellate Division, Second Department rule. (*See, e.g., Crespo v A.D.A. Mgmt.*, 292 AD2d 5 [1st Dept 2002].)

Here, as movant has shown prima facie that Syndicate is a professional limited liability company that was served with process pursuant to Limited Liability Company Law § 303, no additional notice pursuant to CPLR 3215 (g) (4) is required to obtain the requested relief.

The Court notes further that there is no provision of the Lien Law that provides for an award of attorney's fees, costs, expenses, or disbursements, and the record is devoid of evidence of any contractual provision regarding attorney's fees. As such, the branch of the motion seeking attorney's fees, costs, expenses, or disbursements must be denied. Moreover, there is no evidence submitted that any failure on the part of Syndicate to answer was willful or otherwise sanctionable, so that branch of the motion must also be denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Third-Party Plaintiff Envirochrome Interiors, Inc. pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of Envirochrome and against Third-Party Defendant Syndicate Architecture, PLLC on the Third-Party Complaint is denied; and it is further

ORDERED that all parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, December 18, 2018, at 9:30 a.m., for a status conference.

The foregoing constitutes the decision and order of the Court.

Dated: December 12, 2018
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE