DNT Enters. Inc. v Chatsworth Realty Corp.,
2020 NY Slip Op 32289(U)
July 3, 2020
Supreme Court, New York County
Docket Number: 154094/2019
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

---X **INDEX NO.** 154094/2019

DNT ENTERPRISES INC.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

CHATSWORTH REALTY CORPORATION, H F Z CAPITAL GROUP LLC, ALLIANCE MECHANICAL GROUP, INC., JOHN DOE 1 THROUGH JOHN DOE 10, XYZ CORP. 1 THROUGH XYZ CORP. 10, XYZ LLC 1 THROUGH XYZ LLC 10,

Defendants.

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for JUDGMENT - DEFAULT.

In this action to foreclose on a mechanic's lien, plaintiff DNT Enterprises Inc. moves, pursuant to CPLR 3215, for a default judgment against defendant Alliance Mechanical Group, Inc. ("Alliance") for the sum of $85,002.90. Defendants Chatsworth Realty Corporation ("Chatsworth") and HFZ Capital Group LLC ("HFZ") oppose the motion in part and cross-move: 1) for an order "finding that [plaintiff's] motion for default and severance [ ] shall not preclude [Chatsworth's and HFZ's] claims for monetary damages and shall not constitute or be deemed a waiver of their rights, claims, or defenses" (Doc. 35) and 2) for a default judgment against Alliance pursuant to CPLR 3215 and an order of severance pursuant to CPLR

603. Plaintiff opposes the cross motion in part. After a review of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff represented manufacturers of Heating, Ventilation and Air-Conditioning ("HVAC") equipment. Chatsworth owned a building located at 344 West 72nd Street, New York, New York ("the building"). HFZ served as general contractor during a project in which certain improvements were made to the building. The improvements were made by Alliance, which was hired by HFZ. In 2018, plaintiff and Alliance entered into a contract ("the contract") pursuant to which plaintiff sold to Alliance, and delivered to the building, certain HVAC equipment to be used for the improvements, for the amount of $85,002.90. Although plaintiff performed its obligations pursuant to the contract, Alliance has not paid it the sum of $85,002.90 for the equipment provided. This led plaintiff to file a mechanic's lien in the said amount in March 2019. Doc. 10.

On April 19, 2019, plaintiff commenced the captioned action against Chatsworth, HFZ, and Alliance and served those entities with process. Docs. 1-6. Plaintiff subsequently filed an amended complaint verified by its President, Neil

Thakker, and served the defendants with that pleading. Docs. 8, 11, 27. An additional copy of the amended complaint was served on July 23, 2019. Doc. 29.

As a first cause of action against all of the defendants, plaintiff sought to foreclose on the mechanic's lien. As a second cause of action, plaintiff alleged that Chatsworth and/or HFZ made payments to Alliance in connection with the improvements, that such payments constituted trust funds within the meaning of Lien Law Article 3-A, and that Alliance intentionally diverted trust fund assets to itself in violation of said statute. As a third cause of action, plaintiff alleged that Alliance breached its obligations under the contract and thus owed it $85,002.90. As a fourth cause of action, plaintiff alleged that Alliance owed it $85,002.90 under an account stated theory. As fifth and sixth causes of action, plaintiff alleged that it was owed $85,002.90 on an unjust enrichment theory.

Chatsworth and HFZ joined issue by their answer to the amended verified complaint, which was filed on July 12, 2019. Doc. 13. In their answer, Chatsworth and HFZ denied all allegations of wrongdoing and asserted cross claims against Alliance for common-law and contractual indemnification, as well as contribution. However, Alliance has not answered or appeared in this action. Doc. 17 at par. 12.

Plaintiff now moves, pursuant to CPLR 3215(a), for a default judgment against Alliance on its third and fourth causes of action (breach of contract and account stated, respectively) in the amount of $85,002.90. Docs. 16-33.

Additionally, plaintiff seeks an order, pursuant to CPLR 603, severing the claims against Chatsworth and HFZ. In support of the motion, plaintiff submits, inter alia, an attorney affirmation; the verified amended complaint and proof of service and additional service thereof; and the notice of lien reflecting that a lien was filed against the building in the amount of $85,002.90 due to Alliance's failure to pay that amount.

Chatsworth and HFZ oppose plaintiff's motion "to the extent it seeks any money judgments with preclusion language [against them]" (Doc. 36 at 1)[1] and cross-move for an order: 1) determining that plaintiff's motion for a default and for severance "shall not preclude [their] claims for monetary damages and shall not constitute or be deemed a waiver of their rights, claims or defenses"; and 2) granting their cross motion against Alliance for a default judgment pursuant to CPLR 3215 and for severance pursuant to CPLR 603. Plaintiff represents that it opposes the motion by Chatsworth and HFZ only to preserve its claims, rights and defenses against them. Doc. 41 at 2. In support of their cross motion, Chatsworth and HFZ argue that they are entitled to a default judgment on their claims against Alliance. Doc. 41 at 3-4.

[1] In the wherefore clause of the cross motion, Chatsworth and HFZ demand that plaintiff's motion for default should be denied "to the extent it precludes to [Chatsworth and HFZ the ability to assert any] rights, remedies and defenses." Doc. 36 at 2.

In reply, plaintiff argues that, if the branch of its motion seeking severance of its claims against Chatsworth and HFZ is granted, then said defendants' rights, claims, and/or defenses will not be adversely impacted. Doc. 42.

LEGAL CONCLUSIONS:

Plaintiff's Motion for Default and Severance

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." It is well settled that a party moving for a default judgment pursuant to CPLR 3215 must establish proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default in answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016).

Although plaintiff has established service of process, compliance with the additional service requirement set forth in CPLR 3215(g), and Alliance's failure to answer, it has failed to submit sufficient "proof of the facts constituting the claim" (CPLR 3215 [f]; *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 202 [2013]) despite submitting the amended complaint verified by Thakker. As noted above, plaintiff seeks a default judgment only on its third and fourth causes of action (breach of contract and account stated, respectively). Doc. 17 at 4-5.

The elements of a claim for breach of contract are the existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of its obligations under the contract, and damages resulting from the breach. *See Meyer v New York-Presbyterian Hosp. Queens*, 167 AD3d 996 (2d Dept 2018). Here, although plaintiff alleges that Alliance breached the contract between the said parties, no contract is annexed to the motion. Additionally, although the notice of lien reflects that Alliance owes plaintiff $85,002.90, there are no bills, invoices, or receipts substantiating this claim.

Similarly, plaintiff fails to set forth the facts giving rise to the account stated claim.

> It is well-settled that the receipt and retention of an invoice without objection within a reasonable period of time may give rise to an account stated claim. *Werner v. Nelkin*, 206 AD2d 422 (2d Dept 1994); *Rockefeller Group, Inc. v. Edwards & Hjorth*, 164 AD2d 830 (1st Dept 1990). However, "[a] key element of a *prima facie* account stated claim is evidence that [the plaintiff] delivered one or more invoices for the amount claimed to defendant, so that he received them." *Commissioners of State Insurance Fund v. Kassas*, 5 Misc 3d 1012(A) (NYC Civ Ct 2004). Where a plaintiff's evidence fails to establish that the invoices were properly addressed and mailed, there should be no presumption of receipt, and . . . an account stated claim is inappropriate. *Morrison Cohen Singer & Weinstein, LLP v. Brophy,* 19 AD3d 161 (1st Dept 2005); *Citibank (S.D.), N.A. v. Martin,* 11 Misc. 3d 219 (NYC Civ Ct 2005) (the plaintiff on an account stated claim must show mailing of the account or alternate proof showing the account was received).

Morgan, Lewis & Bockius, LLP v IBuyDigital.com, Inc., 14 Misc3d 1224(A) (Sup Ct, NY County 2007).

Here, plaintiff has not annexed any invoices to its motion and has not submitted any proof that such invoices were sent to Alliance (or that they even existed). Thus, plaintiff has failed to set forth the facts giving rise to the account stated claim.

The motion is thus denied with leave to renew upon proper papers. Given that plaintiff is not being awarded a default judgment, that branch of the motion seeking severance is denied as well since it ostensibly sought such relief so that a trial could proceed against Chatsworth and HFZ.

Cross Motion By Chatsworth and HFZ For Default And Severance

The cross motion must also be denied. Initially, Chatsworth and HFZ have not established that their answer, containing the cross claims against Alliance, was ever served on the latter. Although counsel for those defendants, citing to Exhibit 4 to the cross motion (Doc. 40), represents that the answer was served, no affidavit of service is annexed to the motion. The NYSCEF confirmation notice even notes that Alliance did not consent to service via NYSCEF. Since the answer was not properly served on Alliance, counsel's representation that Alliance failed to answer the cross claims is clearly without merit.

Additionally, although counsel for Chatsworth and HFZ argues that the cross claims are meritorious (Doc. 41), her representations are "purely hearsay, devoid of

evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR 3215." *Martinez v Reiner*, 103 AD3d 477, 478 (1st Dept 2013) (internal quotation marks and citation omitted). Even where a pleading is verified by counsel, this Court may not rely on it as proof of any of the facts alleged. *See Martinez v Reiner*, 103 AD3d at 478. Here, the answer is not verified by the cross movants *or* their attorney. Doc. 40. Since it is error to issue a default judgment "without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim" (*Beltre v Babu*, 32 AD3d 722, 723 [1st Dept 2006]; *see Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d at 202; *Mejia-Ortiz v Inoa*, 71 AD3d 517 [1st Dept 2010]), this Court cannot grant the branch of the cross motion seeking a default judgment against Alliance.

Finally, since the branch of the cross motion seeking a default judgment is denied, there is no reason to grant that branch of the application seeking severance.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff DNT Enterprises Inc. seeking a default judgment against defendant Alliance Mechanical Group, Inc. is denied with leave to renew upon proper papers within 30 days after entry of this

order, upon penalty of dismissal of plaintiff's claims against said defendant, and the motion is otherwise denied; and it is further

ORDERED that the branch of the cross motion by defendants Chatsworth Realty Corporation and HFZ Capital Group LLC seeking a default judgment against defendant Alliance Mechanical Group, Inc. is denied with leave to renew upon proper papers, and the cross motion is otherwise denied; and it is further

ORDERED that, within 10 days of entry of this order, plaintiff is to serve a copy of this order, with notice of entry, on all parties to this action; and it is further

ORDERED that this constitutes the decision and order of the court.

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7/3/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE