Commercial Combustion Service & Inst Alla Tl on Corp v Winn Companies
2021 NY Slip Op 30384(U)
February 8, 2021
Supreme Court, New York County
Docket Number: 162417/2019
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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INDEX NO. 162417/2019

COMMERCIAL COMBUSTION SERVICE & INSTALLATION CORP.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

WINN COMPANIES, GENESIS COMPANIES, LLC, HP GENESIS Y15 HOUSING DEVELOPMENT FUND CO., INC., GENESIS Y15 OWNERS LLC, GARDEN OF EDEN ASSOCIATES, L.P., MACOMBS MANOR HOUSING DEVELOPMENT FUND CORPORATION, and CHARLES INNISS HOUSING DEVELOPMENT FUND CORPORATION,

DECISION + ORDER ON MOTION

Defendants.

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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, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for DISMISSAL.

In this action by Commercial Combustion Service & Installation Corp. ("CCS") to foreclose on certain mechanic's liens, defendants Winn Companies ("Winn"), Genesis Companies, LLC ("GC"), HP Genesis Y15 Housing Development Fund Co., Inc. ("HPG"), Genesis Y15 Owners LLC ("GY15"), Garden of Eden Associates, L.P. ("GEA"), Macombs Manor Housing Development Fund Corporation ("MMH"), and Charles Inniss Housing Development Fund Corporation ("CIH") move: 1) pursuant to CPLR 3211(a)(7), seeking to dismiss the complaint as against Winn for failure to state a cause of action; 2) in effect, pursuant to CPLR 3211(a)(2), dismissing the claims against GC, HPG, and GY15 based on lack of subject matter jurisdiction; 3) alternatively, pursuant to CPLR 3012, seeking to compel plaintiff to

accept defendants' untimely answer; and 4) for such other relief as this Court deems proper. CCS opposes the motion and cross-moves, in effect, pursuant to CPLR 3215, for a default judgment against Winn, GC, HPG, and/or GY15 on its causes of action against them. It further seeks summary judgment as against GEA, MMH, and CIH. Id. Defendants oppose the cross motion. After consideration 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

In its complaint filed December 24, 2019, CCS, a heating contractor, alleged that it was hired by certain of the defendants to perform work at various locations, had filed mechanic's liens on 103 West 137th Street, New York, New York (Block 2006, Lot 28); 145 West 127th Street, New York, New York (Block 1912, Lot 8); and 2467-2469 8th Avenue, New York, New York (Block 1958, Lot 26) because it had not been paid for its work at those sites (Docs. 35-37)[1], and that it sought to foreclose on said liens.[2] Doc. 1. In addition, CCS alleged that it was entitled to damages for breach of contract as well as attorneys' fees. Id.

CCS subsequently served defendants with the summons, as well as a complaint verified by its attorney, as follows: GC, GY15, and HPG on December 31, 2019 (Docs. 5, 6, 7); Winn on January 8, 2020 (Doc. 9); and CIH, GEA and MMH on June 5, 2020 (Docs. 13-15). Defendants purported to join issue by their verified answer filed May 13, 2020. Doc. 10.[3] In a notice of rejection filed the same day, plaintiff's counsel represented that he had warned defendants'

[1] CCS also filed notices of pendency on the addresses set forth above. Docs. 2-4.
[2] For the sake of brevity, this Court refers the reader to the complaint (Doc. 1) for details regarding each of the 33 causes of action alleged.
[3] Thus, defendants CIH, GEA and MMH attempted to answer before they were even formally served with process. With respect to the remainder of the defendants, the answer was clearly untimely.

attorney on April 14, 2020 that, if defendants did not answer by April 28, 2020, he would move for a default judgment against them. Doc. 11.[4]

Defendants now move for the relief set forth above. In support of the motion, defendants argue that the complaint fails to state a cause of action against Winn because it acted as a disclosed agent of each of the other defendants, as established by a management agreement between GY15 and Winn WB Management Company LLC; invoices sent by CCS to Winn, "Winn Company", and "Winn Residential"; deeds to the properties in question; as well as property registration documents naming "Winn WB Management Co[.]" as managing agent of the properties. Docs. 18-20, 25-26. The management agreement was signed by Winn WB Management Company LLC by WinnResidential (NY) LLC, its managing member, WinnResidential Limited Partnership, its sole member, WinnCompanies LLC, its general partner, and WinnResidential Manager Corp., its manager. Doc. 19.

The other defendants assert, in effect, that the complaint must be dismissed because there is no subject matter jurisdiction over them. Id. Specifically, they assert that they are not related to one another and that CCS improperly bundled the claims against them into a single action so that its claims could exceed the monetary threshold for jurisdiction in this Court ($25,000). Id.

Alternatively, defendants assert that, if the complaint is not dismissed, then plaintiff must be compelled to accept their untimely answer pursuant to CPLR 3012. Id. In support of this prayer for alternative relief, defendants maintain that, on February 6, 2020, within their time to answer, plaintiff agreed to extend their time to answer and that, on February 10, 2020, still within the time to answer, defendants' attorney advised CCS' attorney that defendants were interested

[4] CCS's counsel thus threatened to move for a default judgment against CIH, GEA and MMH in April 2020, and filed a notice of default against all defendants in May 2020, despite the fact that said entities would not be served with process until June 2020. Docs. 12-15.

in settling, although a stipulation extending defendants' time to answer was not executed. Id. The parties continued to negotiate until May 2020[5], when negotiations failed, and, promptly thereafter, on May 13, 2020, defendants filed an answer (Doc. 10) and plaintiff rejected it as untimely. Id. Defendants further assert that, from March 21 through mid-June of 2020, they were unable to move for the relief sought herein due to the Covid-19 pandemic. Id. Defendants urge that, since CCS has sustained no prejudice as a result of their actions, it must be compelled to accept their answer. Id.

Brian Leverone, Winn's Divisional Vice President, submits an affidavit in support of the motion representing that Winn is the managing agent "for each of the [d]efendant Macombs Manor Associates LP and [MMH], who are in turn the owners of the properties/premises wherein [CCS] alleges to have performed [its] services . . ." Doc. 17. Leverone further represents that the invoices annexed to the motion were issued by CCS to Winn for the work to be performed at the said properties, and that they establish that CCS knew that Winn was acting as agent for the owners of the properties. Id.

In opposition to defendants' motion, CCS argues, in summary fashion, that Winn's time to assert its defense that it was a disclosed agent has passed. Doc. 33. CCS further maintains, in effect, that defendants' motion to compel CCS to accept their answer must be denied since they cannot demonstrate a meritorious defense and excusable default for their failure to answer. Id.

Additionally, CCS cross-moves, in effect, pursuant to CPLR 3215, for default judgments against GC, HPG, and GY15. Doc. 32. Further, CCS cross-moves for summary judgment against GEA, MMH, and CIH. Id.

[5] As noted above, CCS's attorney claims that he advised defendants' attorney on April 14, 2020 that he would move for a default in an answer was not served by April 28, 2020.

In reply, defendants reiterate their initial arguments in support of the motion. They further assert that CCS's motion for a default judgment must be denied since the motion was not filed until after they moved to dismiss. Doc. 87.

In a reply affirmation in further support of the cross motion, CCS argues that the branch of defendants' motion seeking it to compel the acceptance of their answer must be denied since they failed to establish a meritorious defense and because the motion was made after they defaulted. Doc. 88.

LEGAL CONCLUSIONS

Defendants' Motion To Dismiss

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (internal citations omitted). A pleading will be dismissed if it fails to state a cause of action. *See* CPLR 3211 (a)(7).

Winn's argument that it is entitled to dismissal of the complaint is without merit. Although Winn argues that the claims against it must be dismissed on the ground that it was an agent of disclosed principals, i.e., the other defendants, this is by no means clear. As noted previously, Winn bases this contention on the management agreement between GY15 and Winn WB Management Company LLC. However, given that defendants' motion papers do not address the relationship, if any, between Winn and Winn WB Management Company LLC, this Court cannot reach any conclusion regarding whether Winn was in fact such an agent. Nor do

the invoices submitted by defendants resolve this issue. Since the invoices were sent by CCS to Winn, "Winn Company", and "Winn Residential", it is unclear whether Winn and/or another entity managed the properties in question.

Moreover, since this case is in its nascent stage, the scope of the contractual duties that Winn owed to CCS, if any, has not been established (*Regini v Bd. of Mgrs. of Loft Space Condominium*, 107 AD3d 496, 497 [1st Dept 2013]).

Nor are the remaining defendants entitled to dismissal of the complaint. Despite their contention that they are not related to one another and that there is no subject matter jurisdiction over them because CCS improperly aggregated its claims against them to meet the statutory minimum monetary jurisdiction required by this Court, they also concede that they were each managed by Winn. Doc. 18 at par. 17. Thus, there is no basis upon which this Court can conclude, based on the motion papers, that CCS' claims against all defendants cannot be brought in one action.

Defendants' Motion To Compel Acceptance Of Their Answer

CPLR 3012(d) provides that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." The Appellate Division, First Department has held that, in considering whether to grant a motion under this section, the following factors "must . . . be considered and balanced": "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense." (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472-473 [1st Dept 2017] [citation omitted]).

Here, the settlement negotiations between counsel, the existence of which CCS' attorney does not deny (Doc. 33), constitutes a reasonable excuse for defendants' delay in answering (*See Pena-Vazquez v Beharry*, 82 AD3d 649 [1st Dept 2011]). Additionally, since CCS' attorney concedes that he allowed defendants until April 28, 2020 to answer, defendants' filing of their answer on May 13, 2020 resulted in only a brief delay of about two weeks. Nor has CCS established that defendants acted in a willful manner or that it would be prejudiced in any way if it were compelled to accept defendants' answer at this time. Further, "the strong public policy in favor of resolving cases on the merits" militates in favor of compelling CCS to accept defendants' answer (*Artcorp Inc. v Citirich Realty Corp*., 140 AD3d 417, 418 [1st Dept 2016] [citation omitted]). Finally, "[a]lthough the affidavit of merit provided by [defendants] lacked any detail concerning their potential defenses to [CCS'] claims for payment for work performed . . . an affidavit of merit is 'not essential to the relief sought' by defendants before the entry of a default order or judgment" *(Naber Elec. v Triton Structural Concrete, Inc.*, 160 AD3d 507, 508 [1st Dept 2018] [citations omitted]).

CCS's Cross Motion For A Default Judgment

Given that defendants' motion to compel CCS to accept their answer is granted, CCS' motion for a default judgment against Winn, GC, HPG, and GY15 is denied as moot.

CCS' Cross Motion For Summary Judgment

The branch of CCS' motion seeking summary judgment against GEA, MMH, and CIH is denied as procedurally improper insofar as the said application was filed prior to the joinder of issue (See CPLR 3212[a]).

Accordingly, it is hereby:

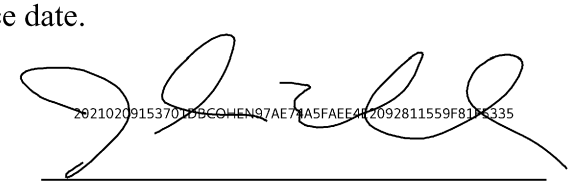
ORDERED that the branch of the motion by defendants Winn Companies, Genesis Companies, LLC, HP Genesis Y15 Housing Development Fund Co., Inc., Genesis Y15 Owners LLC, Garden of Eden Associates, L.P., Macombs Manor Housing Development Fund Corporation, and Charles Inniss Housing Development Fund Corporation seeking to dismiss the complaint pursuant to CPLR 3211(a)(7) is denied; and it is further

ORDERED that the branch of defendants' motion, pursuant to CPLR 3012(d), seeking to compel plaintiff Commercial Combustion Service & Installation Corp. to accept their answer filed May 13, 2020 (Doc. 10) is granted; and it is further

ORDERED that the branch of plaintiff's cross motion seeking a default judgment against defendants Winn Companies, Genesis Companies, LLC, HP Genesis Y15 Housing Development Fund Co., Inc., and Genesis Y15 Owners LLC is denied as moot; and it is further

ORDERED that the branch of plaintiff's cross motion seeking summary judgment against defendants Garden of Eden Associates, L.P., Macombs Manor Housing Development Fund Corporation, and Charles Inniss Housing Development Fund Corporation pursuant to CPLR 3212 is denied; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on March 22, 2021 at 3:00 p.m. unless they first complete a bar coded preliminary conference form (to be provided by the Part 58 Clerk), which form must be completed and emailed to chambers (at jjudd@nycourts.gov) prior to the scheduled conference date.



2/8/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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