

D & I Glass & Metals, Inc. v BMDC Constr. Ltd.

2021 NY Slip Op 31605(U)

May 12, 2021

Supreme Court, New York County

Docket Number: 161493/2019

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA M. EDWARDS PART 11

Justice

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D & I GLASS AND METALS, INC. individually and on behalf
of all those persons who are trust fund beneficiaries under
New York Lien Law Article 3-A,

Plaintiff,

INDEX NO. 161493/2019

MOTION DATE 06/29/2020,
01/28/2021

MOTION SEQ. NO. 001, 002

- v -

BMDC CONSTRUCTION LIMITED, BEN MULLEN and THE
GUARANTEE COMPANY OF NORTH AMERICA USA,

Defendants.

DECISION + ORDER ON
MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23,
24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40,
41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, the court grants Plaintiff D & I Glass and Metals, Inc.'s
("Plaintiff") second amended motion for default judgment against Defendants BMDC
Construction Limited ("BMDC") and Ben Mullen ("Mullen"), filed under motion sequence 001.¹

The court permits Plaintiff to withdraw the second amended motion for default judgment
mistakenly filed under motion sequence 002, as it was intended to be filed under motion
sequence 001 (see Plaintiff's counsel's letter correspondence, dated January 29, 2021, filed as
NYSCEF Document No. 50).

In this action, Plaintiff originally sought a money judgment in the amount of \$31,900.00,
plus statutory interest from the date of Plaintiff's unpaid invoices, together with costs and

¹ Plaintiff previously voluntarily discontinued the action against Defendant The Guarantee Company of North
America USA on or about September 3, 2020, after partial payment was made.

disbursements, including attorney's fees. Plaintiff's second amended motion reduced the principal to \$21,603.00, as partial payment was rendered. Plaintiff alleges in substance that Defendants failed to pay Plaintiff for services and materials for Plaintiff's installation of aluminum doors and frames at a job site. Plaintiff alleges that Defendant BMDC was the general contractor and it hired Plaintiff to perform the work on the premises. Plaintiff's claims in its summons with notice are for breach of contract, unjust enrichment, quantum meruit and account stated against Defendant BMDC and for diversion of lien law Article 3A trust funds against Defendants BMDC and Mullen, individually and in his capacity as Chief Executive Officer of BMDC.

Plaintiff now moves for default judgments against Defendants BMDC and Mullen.

Plaintiff commenced this action by filing a summons with notice on or about November 26, 2019, pursuant to CPLR 305(b). Plaintiff provided proof of service of the summons with notice on Defendant BMDC at its place of business and through the Secretary of State on December 2, 2019 and December 3, 2019, respectively. Plaintiff served an additional copy of the summons with notice on BMDC on December 26, 2019. Plaintiff provided proof of personal service on Defendant Ben Mullen on December 19, 2019, pursuant to CPLR 306 and 308(2). Plaintiff served another copy of the summons with notice on Defendant Mullen on January 3, 2020.

To date, Defendants BMDC and Mullen failed to serve a notice of appearance, a demand for a complaint, or otherwise appear in this action, and the time for them to do so has long since passed.

To obtain a default judgment, Plaintiff must establish four elements (1) service of the summons with notice; 2) Defendants' default; 3) the amount due; and 4) the facts constituting Plaintiff's claim (CPLR 3215[f]).

Plaintiff's Affidavit from its president, Irina Krymsky, submitted in support of the motion adequately verified the facts of its claims, thus providing the court with non-hearsay confirmation of the factual basis constituting a prima facie case and a sufficient jurisdictional basis (CPLR 3215[f]; *Zelnik v Bidermann Indus. U.S.A.*, 242 AD2d 227, 228 [1st Dept 1997]).

Therefore, the court finds that Plaintiff demonstrated that Defendants BMDC and Mullen were properly served with Plaintiff's summons with notice and that the additional mailings required by CPLR 3215(g) were satisfied. Additionally, Plaintiff demonstrated that both Defendants failed to serve a notice of appearance, a demand for a complaint, or otherwise appear in this action and the statutory time for them to do so has long since passed. Finally, Plaintiff demonstrated that its claims against Defendants are meritorious. The invoice, dated November 12, 2018, was in the amount of \$31,900.00, after Defendant BMDC made a partial payment of \$15,000.00, and the principal amount was further reduced to \$21,603.00, after former Defendant The Guarantee Company of North America USA made a partial payment of \$10,297.00.

As such, it is hereby


ORDERED that the court grants in part Plaintiff D & I Glass and Metals, Inc.'s second amended motion for default judgment against Defendants BMDC Construction Limited and Ben Mullen, filed under motion sequence 001, without opposition, and permits Plaintiff D & I Glass and Metals, Inc. to withdraw its second amended motion for default judgment which was mistakenly filed under motion sequence 002; and it is further

ADJUDGED that the Clerk shall enter judgment by default in favor of Plaintiff D & I Glass and Metals, Inc., with a principal place of business located at 204 24th Street, Brooklyn, New York 11232, as against Defendants BMDC Construction Limited, whose principal place of business is located at 417 Fifth Avenue, 8th Floor, New York, New York 10018, and Ben Mullen, whose residence is located at 6 Jackson Road, Bedford, New York 10506, jointly and severally, in the principal amount of \$21,603.00, together with statutory interest at the rate of nine percent (9%) per annum from November 12, 2018 (see attached invoice, dated November 12, 2018 and Plaintiff's Schedule A), until the payment of judgment as calculated by the Clerk of the Court, plus costs and disbursements as taxed by the Clerk of the Court upon the submission of a proper bill of costs and Plaintiff shall have execution thereon; and it is further

ORDERED that Plaintiff D & I Glass and Metals, Inc. shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon Defendants BMDC Construction Limited and Ben Mullen.

This constitutes the decision and order of the court.

5/12/2021
DATE


ERIKA M. EDWARDS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN			