

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

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THREE STAR CONSTRUCTION CO., INC.

Plaintiff, Index No.: 14666/06

- against - Motion Date: 8/29/07

ELOIS A. DOBSON, HARRY J. DOBSON, AND Motion No.: 30

DANIELE DOBSON, HSBC BANK, NA f/k/a Motion Seq. No. 1

HSBC BANK, THE PEOPLE OF THE STATE OF

NEW YORK, STATE TAX COMMISSION, THE

CITY OF NEW YORK AND "JOHN DOE," a

fictitious name intended to be the

person/tenant in possession,

Defendants.

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The following papers numbered 1 to 20 on this motion:

	<u>Papers Numbered</u>
Plaintiff's Notice of Motion- & Memorandum of Law- Affirmation & Affidavit(s)-Service-Exhibit(s)	1-5
Defendants Dobson's Notice of Cross-Motion- Affirmation-Affidavit-Service-Exhibits	6-10
Plaintiff's Memorandum of Law in Opposition- Affidavit(s)-Exhibit(s)	11-13
Defendants Dobson's Memorandum of Law & Affirmation in Reply	14-17
Plaintiff's Reply Affirmation-Exhibit(s)	18-20

By notice of motion, plaintiff seeks an order of the Court, granting them leave to proceed to inquest and an assessment of damages against defendants, Elois A. Dobson, Harry J. Dobson, and Daniele Dobson for defendants' failure to appear and answer.

Defendants Dobson oppose and cross-move, pursuant to CPLR § 5015(a)(1), for an order vacating defendants' default on the grounds of excusable neglect; dismissing plaintiff's summons and

complaint and vacating and canceling the mechanic's lien; and, alternatively granting defendant's leave to interpose their answer.

Plaintiff files a reply to defendants' opposition and an opposition to defendants' cross-motion. Defendants file a reply to plaintiff's opposition.

In the underlying action, plaintiff seeks to foreclose on a mechanic's lien for the sum of twenty-five thousand (\$25,000) dollars alleged to be the amount due and owing under a contract between the parties executed on November 14, 2004.

Plaintiff is a corporation engaged in the construction business, particularly including home renovations. The defendants Dobson, Elois and Harry are the homeowners of the property located at 146-02 184th Street, Springfield Gardens, Queens, New York. Daniele Dobson is their daughter who resides with them. Prior to executing the contract on November 14, 2004, the parties executed a contract on September 4, 2004, for home improvement for the same property. Defendants' intent in conducting said improvements was, among other things, to convert the residence from a legal one family unit to a legal two family unit. The initial contract called for payment by defendants to plaintiff in the sum of \$98,000. The second contract called for payment of the sum of \$47,000, later changed to the sum of \$35,000.

Defendants maintain that a complaint was filed by them on July 8, 2006, with the New York City Department of Consumer Affairs, alleging numerous violations by plaintiff of the New York City Administrative Code regarding home improvement contractors. Plaintiff claims that the complaint was dismissed. In response, however, defendants attach to their reply papers a Notice of Hearing directing plaintiff, Three Star Construction Co., Inc., to appear on June 28, 2007 at the Adjudication Division of the Department of Consumer Affairs, and show why their home improvement licensing privileges should not be suspended for the violations alleged by defendants Dobson.

Finally, defendants Dobson maintain that the mechanic's lien filed by plaintiff should be vacated as untimely, pursuant to Lien Law § 10, while plaintiff maintains that the premises are a two family residence and the mechanic's lien is therefore timely filed.

The mechanic's lien (plaintiff's Exh. C), indicates that the last item of work was performed or furnished on September 1,

2005; the lien is date stamped as received by the Queens County Clerk's office on two dates, April 6, 2006 and May 2, 2006.

Before the Court for consideration, among other requests, are plaintiff's motion for an order granting them a default judgment, which is governed by CPLR § 3215, and defendants' motion for an order "vacating" the judgment, which is yet to be granted, and excusing said default governed by CPLR § 5015.

Plaintiff provides proof that the summons and complaint were served on defendants Elois and Harry Dobson, and "John Doe" but not Daniele Dobson, on July 23, 2006. Plaintiff's motion for a default judgment was served on January 22, 2007, within one year of defendants' default.

"A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when opposing a motion for leave to enter judgment upon its failure to appear or answer and moving to extend the time to answer or compel the acceptance of an untimely answer. See Juseinoski v. Board of Educ. of City of N.Y., 15 AD3d 353, 356, 790 NYS2d 162 (2d Dep't 2005); Ennis v. Lema 305 AD2d 632, 633 (2003)." Lipp v. Port. Auth. of NY & NJ, 34 AD3d 649, 824 NYS2d 671 (2d Dep't 2006). This is true in the Second Department as opposed to the First Department, "...even if a default judgment has not yet been entered." Juseinoski v. Board of Educ. of City of N.Y., supra at 357. (See also, Guzetti v. City of New York, 32 AD3d 234, 238, 820 NYS2d 29 (1st Dep't 2006)).

"[T]he determination as to whether a party has established a reasonable excuse for a default lies within the sound discretion of the Court..." Flexro v. Korn, 9 AD3d 445, 446, 780 NYS2d 184 (2d Dep't 2004).

The Court accepts, in this instance, defendants' excuse for failing to promptly answer the complaint in this action. Moreover, as required, defendants have established a meritorious defense based both on the substantive claim that plaintiff breached the contract by failing to perform the renovation in a professional and workmanlike manner and on the grounds that the filing of the lien was untimely.

Lien Law § 10 provides in pertinent part:

"...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..."

In light of defendants' claim, as substantiated by the lengthy complaint filed with the New York City Department of Consumer Affairs, that plaintiff failed to complete the work intended to transform their premises from a one family dwelling to a two family, it is hardly appropriate for plaintiff to avail themselves of the longer statutory period for filing a lien notice.

Moreover, the lien notice itself is facially defective in that plaintiff seeks to place a lien on property clearly owned by defendants Harry and Elois Dobson (see plaintiff's Exh. D, plaintiff complaint, deed copy attached as exhibit "A" to complaint) and not Daniele Dobson. The notice of lien lists Daniele Dobson as "employer" of the lien holder; persons with whom the contract was made, and for whom labor and materials were furnished. The agreed price listed is \$47,000, while the actual contract sum was reduced to \$35,000. Finally, the deed relied on by plaintiff clearly identifies the property as a single family unit.

Accordingly, upon all of the foregoing, plaintiff's motion for an order granting them a default judgment is denied, and the Court grants defendants' application to interpose an answer to the complaint.

As a first affirmative defense, defendants maintain that plaintiff's complaint should be dismissed on the grounds the lien notice was filed outside the four (4) month statutory period. Lien Law § 10.

Based on all of the foregoing, that branch of defendants' cross-motion seeking dismissal of plaintiff's complaint is granted; and, it is further

ORDERED, that the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: Jamaica, New York
October 16, 2007

JOSEPH P. DORSA
J.S.C.