NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
--X

INTEREBAR FABRICATORS LLC f/k/a JRC OPCO LLC, successor-in-interest to METAL PARTNERS REBAR LLC,

Plaintiffs,

- against -

U.S. SPECIALITY INSURANCE COMPANY, RAVE CONSTRUCTION, INC., TREMONT HOUSING DEVELOPMENT FUND CORPORATION, TREMONT OWNER, LLC; WHITE CAP, L.P.; 1KB & MS LLC; SUNBELT RENTALS, INC.; TITAN CONCRETE INC.; A EQUIPMENT, INC.; and JOHN DOES LIENORS 1-20,

Defendants.
--X

Index No. **807897/2021E**

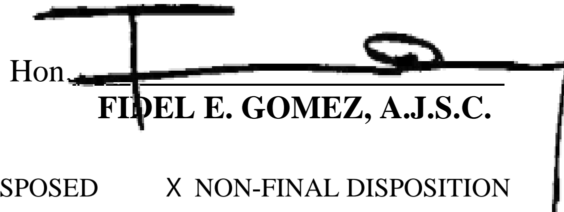
Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1, read on this motion, noticed on 7/1/2022, and duly submitted as no. 3 on the Motion Calendar of 7/1/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		

Plaintiff's motion is decided in accordance with the Order annexed hereto.

Dated: 8/17/22



Hon. ______________________
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE.. ☐ CASE DISPOSED X NON-FINAL DISPOSITION
2. MOTION IS.. ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.......................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT ☐ NEXT APPEARANCE DATE: ______________________

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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INTEREBAR FABRICATORS LLC f/k/a JRC OPCO LLC, successor-in-interest to METAL PARTNERS REBAR LLC,

Plaintiffs,

DECISION AND ORDER

- against -

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Defendants.
--X

Plaintiff InteRebar Fabricators LLC ("Plaintiff") moves for default judgment against Defendants Rave Construction, Inc. ("Rave"), Sunbelt Rentals, Inc. ("Sunbelt"), Titan Concrete Inc. ("Titan"), and A Equipment, Inc. ("A Equipment") (collectively, "Defendants") pursuant to CPLR § 3215. Defendants do not oppose.

For the reasons which follow, Plaintiff's motion is granted, in part, on default and without opposition.

BACKGROUND:

On June 8, 2021, Plaintiff commenced the instant action by filing a summons and verified complaint, alleging causes of action for breach of contract, quantum meruit, unjust enrichment, account stated, foreclosure of a mechanic's lien, and violation of Article 3A of the Lien Law. The complaint is verified by Joseph Tedesco, Plaintiff's Chief Financial Officer.

The complaint alleges that Metal Partners Rebar LLC ("Metal Partners") was an Illinois limited liability company engaged in the business of providing custom fabrication of rebar, epoxy rebar, wire mesh, dowl bars and epoxy dowel bars, and national distribution of steel products (Compl., ¶ 1).

Plaintiff alleges that it is the successor-in-interest to Metal Partners, as it is the assignee/owner of all assets of Metal Partners, pursuant to the Order Authorizing (A) the Sale of Substantially All of the Debtors' Assets Free and Clear of Claims, Liens, and Encumbrances, and (B) the Assumption and Assignment of Executory Contracts and Unexpired Leases, entered on October 14, 2020, by the United States Bankruptcy Court, District of Nevada, in the matter entitled *In re Metal Partners Rebar LLC*, Case No. BK-20-12878 (the "Bankruptcy Order") (Compl., ¶ 2). Plaintiff alleges that it was assigned and/or assumed all of Metal Partners' assets, including all contracts and all rights thereunder, including accounts receivables existing as of the Closing on September 30, 2020, pursuant to the Bankruptcy Order (Compl., ¶ 3).

The complaint alleges that on or around April 1, 2020, and at all relevant times hereto, Tremont Housing Development Fund ("Tremont Housing"), as the nominee of Tremont Owner LLC ("Tremont Owner") (collectively, the "Owners"), owned fee simple title to the property located at 913 East Tremont Avenue, Bronx, NY 10460 (the "Subject Property") (Compl., ¶ 6).

Plaintiff alleges that on or before April 21, 2020, the Owners and SD Builders and Construction LLC ("SD Builders") entered into a written contract pursuant to which SD Builders agreed to provide construction services for a housing development to be constructed on the Subject Property (the "Project") (Compl., ¶ 18).

Plaintiff alleges that Breaking Solutions, Inc. ("Breaking Solutions") was a contractor on the Project who had a contractual relationship with the Owners and/or SD Builders (Compl., ¶ 19). Plaintiff alleges that on or before April 21, 2020, SD Builders and/or Breaking Solutions entered into a written subcontract with Rave for the Project at the Subject Property (Compl., ¶ 20). Plaintiff alleges that on or around April 21, 2020, Rave entered into a written sub-subcontract with Metal Partners pursuant to which Metal Partners agreed to provide rebar shop drawings and rebar steel at the unit pricing specified in the sub-subcontract (the "Sub-Subcontract") (Compl., ¶ 21). Plaintiff alleges that it assumed and/or was assigned the Sub-Subcontract pursuant to the Bankruptcy Order (Compl., ¶ 22).

The complaint alleges that from April 22, 2020, through July 21, 2020, Metal Partners furnished steel materials on Rave's, SD Builders', Breaking Solutions' and/or the Owners' behalf at the Subject Property pursuant to the Sub-Subcontract (Compl., ¶ 23-25). Plaintiff alleges that Metal Partners issued invoices to Rave detailing the steel materials provided pursuant to the Sub-Subcontract, which were accepted by Rave (Compl., ¶ 26).

The complaint alleges that Metal Partners has substantially performed all obligations required under the Sub-Subcontract, except those obligations as to which Metal Partners has been relieved (Compl., ¶ 29).

The complaint alleges that all of the steel materials furnished by Metal Partners at the Subject Property were accepted by Rave, SD Builders, Breaking Solutions and/or the Owners, and enhanced the value of the Subject Property to the extent, or in excess of $314,165.10[1] (the "Outstanding Balance") (Compl., ¶ 30).

The complaint alleges that Rave has not paid Plaintiff the Outstanding Balance (Compl., ¶ 31). Plaintiff alleges that pursuant to paragraph 4 of the Sub-Subcontract, Rave agreed that in the event of its non-payment to Metal Partners, it would pay Metal Partners interest at the rate of either 1.5% per month or the maximum rate permitted by law and would pay Metal Partners' attorneys' fees and costs of collection (Compl., ¶ 40).

On or around March 19, 2021, Plaintiff filed with the Bronx County Clerk a lien upon the Subject Property in the sum of $314,165.10, plus contractual interest at the rate of either 1.5% per month or the maximum rate permitted by law, and contractual attorney's fees and costs (Compl., ¶ 32). Plaintiff alleges that it served a copy of the lien upon Rave, Breaking Solutions, and the Owners (Compl., ¶ 33).

The complaint alleges that on April 1, 2021, SD Builders, as the general contractor, in accordance with Section 19(4) of the New York Lien Law, filed a Bond Discharging the InteRebar Mechanics Lien. The bond is identified as Bond No. 1001072880 and has been issued by SD Builders as principal and by U.S. Specialty Insurance Company ("U.S. Specialty"), as surety, in the amount of $345,581.61 (the "Bond") (Compl., ¶ 34). Plaintiff alleges that the lien was discharged as a result of the filing of the Bond (Compl., ¶ 77). Plaintiff alleges that, as a result, U.S. Specialty must pay Plaintiff the Outstanding Balance, plus interest, costs, disbursements, and attorney's fees (Compl., ¶ 78).

Attached to the complaint is a contract between Metal Partners and Rave dated April 21, 2020; the mechanic's lien filed by Plaintiff on March 19, 2021; affidavit of service of the notice of lien; and a copy of the Bond Discharging Mechanic's Lien (Bond No. 1001072880) dated March 31, 2021.

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[1] The Court notes that Plaintiff states that the Outstanding Balance is $314,165.10 in paragraphs 30 through 35, but states that it is $314,165.19 in subsequent paragraphs. Presumably, the latter number includes a typo.

On June 16, 2022, Plaintiff filed the instant motion. On July 1, 2022, the motion was marked fully submitted.

DISCUSSION:

Service of Process:

Plaintiff asserts that Defendants were properly served with the summons and verified complaint. Plaintiff asserts that Defendants have not appeared, answered, or otherwise moved with respect to the complaint, and the time to do so has expired. Plaintiff also asserts that it complied with the additional mailing required by CPLR § 3215(g)(4)(i).

CPLR § 3215(a) provides in relevant part that: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against him."

CPLR § 3215(f) provides in relevant part that:

> On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. . . Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

(*See also Zelnik v Biedermann Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; *Stevens v Law Office of Blank & Star, PLLC*, 155 AD3d 917 [2d Dept 2017]). Thus, "[o]n a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default" (*Deutsche Bank National Trust Company v Hall*, 185 AD3d 1006, 1008 [2d Dept 2020]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2d Dept 2013]; *Pampalone v Giant Bldg. Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005]). "To demonstrate 'the facts constituting the claim' the movant need only submit sufficient proof to enable a court to determine that 'a viable cause of action exists'. CPLR 3215(f) expressly provides that a plaintiff may satisfy this requirement by submitting the verified complaint" (*Fried*, 110 AD3d 56 at 59-60).

In support of its motion, Plaintiff submitted, *inter alia*, the affirmation of its counsel; the verified complaint; affidavits of service of process on Rave, Sunbelt, Titan, and A Equipment; and an affidavit regarding additional service pursuant to CPLR § 3215(g)(4).

The affidavit of service dated June 21, 2021, states that Rave was served with the summons, verified complaint, and notice of pendency on June 11, 2021, by service upon the Secretary of State of the State of New York pursuant to Business Corporation Law § 306 (Plaintiff's Exhibit C).

BCL § 306(b)(1) states, in relevant part, that:

> Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served.

Service upon the Secretary of State as agent for a defendant corporation constitutes valid service (*Union Indem. Ins. Co. of New York v 10-01 50th Ave. Realty Corp.*, 102 AD2d 727, 728 [1st Dept 1984]; *Perkins v 686 Halsey Food Corp.*, 36 AD3d 881, 881 [2d Dept 2007]). Service of process is complete when plaintiff serves the Secretary of State, "irrespective of whether the process subsequently reache[s] the corporate defendant" (*Fisher v Lewis Construction NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020]).

Here, Rave was served with the summons and verified complaint on June 11, 2021, the date on which the Secretary of State was served with the summons and verified complaint (BCL § 306[b][1]). As such, it had until July 11, 2021, to serve an answer (CPLR 320[a]). Rave did not serve an answer by that date and is thus in default.

The affidavit of service dated June 17, 2021, states that Sunbelt was served with the summons, verified complaint, and notice of pendency on June 14, 2021, by personal delivery to Randal Umpierre, who is authorized to accept service on behalf of Sunbelt (Plaintiff's Exhibit D). Presumably, the service was effectuated pursuant to CPLR § 311(a).

CPLR § 311(a) provides, in relevant part, that:

> Personal service upon a corporation . . . shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law.

"A process server's affidavit stating that personal service was effected by delivering a copy of the summons with notice to an authorized agent, and providing a description of that person, constitutes prima face evidence of proper service pursuant to CPLR 311(a)(1)" (*Purzak v Long Island Housing Services, Inc.*, 149 AD3d 989, 991 [2d Dept 2017]; *Rosario v NES Medical Services of New York, P.C.*, 105 AD3d 831, 832 [2d Dept 2013]).

Here, Sunbelt was served with the summons and verified complaint on June 14, 2021, by personal delivery. As such, Sunbelt had until July 5, 2021, to answer (CPLR 320[a]). Sunbelt did not serve an answer by that date and is thus in default.

The affidavit of service dated June 21, 2021, states that Titan was served with the summons, verified complaint, and notice of pendency on June 11, 2021, by service upon the Secretary of State of the State of New York pursuant to Business Corporation Law § 306 (Plaintiff's Exhibit E).

Here, Titan was served with the summons and verified complaint on June 11, 2021, the date on which the Secretary of State was served with the summons and verified complaint (BCL § 306[b][1]). As such, it had until July 11, 2021, to serve an answer (CPLR 320[a]). Titan did not serve an answer by that date and is thus in default.

The affidavit of service dated June 21, 2021, states that A Equipment was served with the summons, verified complaint, and notice of pendency on June 11, 2021, by service upon the Secretary of State of the State of New York pursuant to Business Corporation Law § 306 (Plaintiff's Exhibit F).

Here, A Equipment was served with the summons and verified complaint on June 11, 2021, the date on which the Secretary of State was served with the summons and verified complaint (BCL § 306[b][1]). As such, it had until July 11, 2021, to serve an answer (CPLR 320[a]). A Equipment did not serve an answer by that date and is thus in default.

Plaintiff has demonstrated compliance with the additional mailings required by CPLR § 3215(g)(4) by submitting an affidavit regarding additional service pursuant to CPLR § 3215(g)(4), and affidavits of service of the additional mailing.

<u>First Cause of Action – Against Rave</u>:

Plaintiff seeks a default judgment on its first cause of action against Rave in the amount of $314,165.10, plus attorney's fees, costs and disbursements, and interest, based upon Rave's breach

of the Sub-Subcontract.

The elements of a cause of action for breach of contract are: (1) the existence of a contract, (2) the plaintiff's performance thereunder, (3) the defendant's breach thereof, and (4) resulting damages from the breach (*Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019]; *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Fuentes v LOMTO Federal Credit Union*, 200 AD3d 1032, 1033 [2d Dept 2021]; *East Ramapo Central School District v New York Schools Insurance Reciprocal*, 199 AD3d 881, 886 [2d Dept 2021]; *Plainview Properties SPE, LLC v County of Nassau*, 181 AD3d 731, 733 [2d Dept 2020]).

Plaintiff has demonstrated via its verified complaint that Rave entered into the Sub-Subcontract with Metal Partners, Plaintiff's predecessor-in-interest (Compl., ¶ 21, 22), that Metal Partners performed under the Sub-Subcontract (Compl., ¶ 23-25, 29), that Rave breached the Sub-Subcontract by not making required payments (Compl., ¶ 31, 39), and that Metal Partners, and Plaintiff, as it successor-in-interest, has been damaged in the sum of $314,165.10 (Compl., ¶ 41, 42).

As such, Plaintiff has demonstrated that it is entitled to default judgment on its cause of action for breach of contract against Rave.

Additionally, Plaintiff seeks attorney's fees and costs and disbursements of this action.

"Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Schwartz v Rosenberg*, 67 AD3d 770, 771 [2d Dept 2009]; *Luis Lopez & Son's, Inc. v Dannie's Auto Care*, 61 AD3d 643, 643 [2d Dept 2009]).

"An award of attorney's fees pursuant to [] a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered" (*Kamco Supply Corp. v Annex Contracting, Inc.*, 261 AD2d 363, 365 [2d Dept 1999]).

Here, Plaintiff has demonstrated that it is entitled to an award of attorney's fees and costs. The Sub-Subcontract provides for an award of attorney's fees and costs in favor of Plaintiff in the event of Rave's default. Paragraph 4 of the Sub-Subcontract states, in relevant part, that: "If Buyer fails to make payment to Seller as provided above: . . . (b) Buyer shall pay Seller interest at the rate of 1½% per month or the maximum rate permitted by law, whichever is less, and all costs of collection, including reasonable attorney's fees."

As such, Plaintiff's motion for costs and attorney's fees is granted. However, since Plaintiff has not submitted any information regarding the amount of reasonable attorney's fees and costs incurred in this action, this matter is scheduled for an inquest.

Accordingly, Plaintiff's motion for default judgment on its first cause of action against Rave is granted in the sum of $314,165.10, plus attorneys' fees and costs in an amount to be determined at an inquest, plus interest.

Sixth Cause of Action – Against Rave:

Plaintiff seeks a default judgment on its sixth cause of action against Rave, in the maximum sum permitted by law, based upon Rave's violation of Article 3A of the Lien Law.

"Article 3-A of the Lien Law creates 'trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction" (*Aspro Mech. Contr. v Fleet Bank*, 1 NY3d 324, 328 [2004]; *Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512 [1968]). "The primary purpose of article 3-A and its predecessors [is] to ensure that those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed" (*Aspro Mech. Contr.*, at 328 [internal quotation marks omitted]).

"[T]he Lien Law establishes that designated funds received by owners, contractors and subcontractors in connection with improvements of real property are trust assets and that a trust begins 'when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust" (*id.*). "The use of trust assets for a nontrust purpose – that is, a purpose outside the scope of the cost of improvement – is deemed 'a diversion of trust assets, whether or not there are trust claims in existence at the time of the transaction, and if the diversion occurs by the voluntary act of the trustee or by his consent such act or consent is a breach of trust" (*id.* at 329).

"A statutory trustee must maintain books and records of the trust including entries for trust assets receivable, trust accounts payable, trust funds received and trust payments made with trust assets, and make those records available for inspection by beneficiaries" (*id.*; Lien Law § 75, § 76).

Here, Plaintiff has demonstrated that it is a beneficiary of the trust created with respect to the work performed at the Project (Lien Law § 70, § 71). Plaintiff has also demonstrated that Rave is a trustee (Lien Law § 70(2)). Plaintiff alleges that Rave received monies from the Owners and that such monies were diverted to its own purposes. The allegation is unopposed. As such, pursuant to Lien Law § 77, it is entitled to an order compelling a full and complete accounting of all monies paid to Rave by the Owners and disbursed by Rave on the Project, and to the extent that trust assets have been used by Rave for any purpose other than those permitted by Lien Law Article 3A, an order that such trust funds be repaid from Rave and the recipients of those funds (Lien Law § 75, 76, 77[3]).

Accordingly, Plaintiff's motion for default judgment on its sixth cause of action against Rave is granted.

Fifth Cause of Action – Against All Defendants:

Plaintiff seeks a default judgment on its fifth cause of action: (1) determining that Plaintiff had a valid lien in the amount of $314,165.10 upon the interest of Tremont Owner in the Subject Property until the time of cancellation and discharge of Plaintiff's lien by the filing of the Bond of U.S. Specialty; (2) granting Plaintiff judgment for the enforcement of the lien against the Subject Property, in form only, for the purpose of satisfying the condition of the U.S. Specialty discharge Bond; and (3) determining that Plaintiff has first priority over Sunbelt, Titan and A Equipment's liens and claims against the Subject Property which may be or are recorded against the Subject Property.

Lien Law § 19 provides, in relevant part, that: "A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows: (4) Either before or after the beginning of an action by the owner or contractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien: a. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient . . ."

"Where a mechanic's lien on real property has been discharged by the filing of a security bond, a judgment in favor of the lienor in an action brought to enforce the lien, although not a judgment of foreclosure, is, nevertheless, a judgment against the property. Because the mechanic's

lien no longer attaches to the real property, 'the judgment is against the property only as a matter of form. The decree may adjudge that the plaintiff has a good and valid lien for a specified amount, and that but for the filing of the bond the plaintiff would be entitled to a judgment of foreclosure" (*Worlock Paving Corp. v Camperlino*, 222 AD2d 1097, 1098 [4th Dept 1995]; *Harlem Plumbing Supply Co., Inc. v Handelsman*, 40 AD2d 768, 768 [1st Dept 1972]; *Martirano Const. Corp. v Briar Contracting Corp.*, 104 AD2d 1028, 1031 [2d Dept 1984]; *Bernardo v Steelco, Div. of Metropolitan Steel Industries, Inc.*, 115 Misc2d 1020, 1022 [Sup Ct, Nassau County 1982] ["A mechanic's lien may be discharged and the encumbrance against the real property may be released without discharging the claim itself. The Lien Law provides a method by which a conditional discharge shall release the land from the claim and shift the encumbrance to a specific fund created by a bond"]).

"A valid mechanic's lien must be judicially established before a surety may be made to pay pursuant to its bond" (*G. Rama Const. Enterprises, Inc. v 80-82 Guernsey Street Associates, LLC*, 43 AD3d 863, 865 [2d Dept 2007]; *J. Castronovo, Inc. v Hillside Development Corp.*, 160 AD2d 763, 765 [2d Dept 1990]). A "surety is free to litigate the validity of the lien whenever the lienor seeks to enforce it" (*J. Castronovo, Inc.* at 765).

"Pursuant to Lien Law § 3, a contractor who performs labor or furnishes materials for the improvement of real property with the consent, or at the request of, the owner 'shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved and upon such improvement.' 'A lienor may seek amounts due from both written contracts and from change orders for extras, depending on whether the owner gave his consent for the extra work" (*DiSario v Rynston*, 138 AD3d 672, 673 [2d Dept 2016]). "The lienor's right to recover is limited by the contract price or the reasonable value of the labor and materials provided. The lienor has the burden of establishing the amount of the outstanding debt by proffering proof either of the price of the contract or the value of the labor and materials supplied" (*id.*).

Here, Plaintiff's motion for default judgment to determine that it had a valid lien and granting it enforcement of the lien must be denied. Plaintiff denoted its motion as one for default judgment against Defendants. However, the relief Plaintiff seeks under its fifth cause of action requires resolution of the claim against all defendants, including U.S. Specialty, the surety of the Bond. U.S. Specialty filed an answer on July 22, 2021, and an amended answer on September 3,

2021. As noted above, a surety is entitled to litigate the validity of the lien where a lienor seeks to enforce it (*J. Castranovo, Inc.* at 765). Thus, resolution of Plaintiff's claim cannot be obtained on a motion for default judgment. As such, this portion of Plaintiff's motion for default judgment on its fifth cause of action is denied.[2]

Additionally, Plaintiff has not demonstrated that it is entitled to a determination that it has first priority over Sunbelt, Titan, and A Equipment's liens and claims which may be or are recorded against the Subject Property.

Generally, mechanic's liens for private improvements have no priority amongst themselves, with a few exceptions (Lien Law § 13(1) ["Persons shall have no priority on account of the time of filing their respective notices of liens, but all liens shall be on a parity except as hereinafter in section fifty-six of this chapter provided; and except that in all cases laborers for daily or weekly wages shall have preference over all other claimants under this article"]; *Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 28 Misc3d 475, 482 [Sup Ct, Onondaga County 2010]; 11APT3 West's McKinney's Forms Real Property Practice § 7:37 [Feb. 2022 Update]).

Lien Law § 56 provides, in relevant part, that:

> When a laborer, subcontractor or material man shall perform labor or furnish materials for an improvement of real property or for a public improvement, for which he is entitled to a mechanic's lien, the amount due him shall be paid out of the proceeds of the sale of such property or out of the moneys of the state or public corporation applicable to the construction or demolition of the public improvement, under any judgment rendered pursuant to this article, before any part of such proceeds is paid to the person for whom he has performed such labor or furnished such materials.

Here, Plaintiff has not demonstrated that its mechanic's lien is superior to the mechanic's liens of Sunbelt, Titan and A Equipment. Plaintiff does not claim an exception from the general rule that mechanic's liens are on parity with one another. Plaintiff does not claim that its lien is for daily or weekly wages of laborers. Rather, its lien is based on steel materials provided to Rave (Compl., ¶ 21, 23-25, 26, 30).

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[2] The court notes that the Court (Gonzalez, J.) issued a Preliminary Conference Order in this matter on July 25, 2022, which provides for discovery deadlines.

Accordingly, Plaintiff's motion for default judgment on its fifth cause of action for a determination that its lien has first priority over the liens of Sunbelt, Titan, and A Equipment is denied.

It is hereby

ORDERED that the Clerk enter judgment in favor of Plaintiff and against Defendant Rave Construction, Inc. in the amount of $314,165.10, plus interest. It is further

ORDERED that when this matter proceeds to trial, the issue of the amount of attorney's fees due to Plaintiff from Defendant Rave Construction, Inc. proceed to inquest. It is further

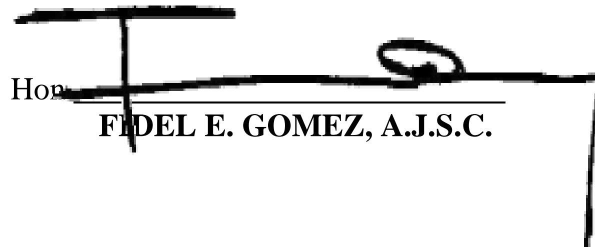
ORDERED that Defendant Rave Construction, Inc. provide a full and complete accounting of all monies paid to it by Tremont Housing Development Fund and/or Tremont Owner, LLC, and disbursed by it on the Project, within sixty (60) days of the date hereof. It is further

ORDERED that when this matter proceeds to trial, the issue of the amount of any trust funds to be repaid to the trust fund as a result of the use of the trust funds by Defendant Rave Construction, Inc. for any purpose other than those permitted by Lien Law Article 3A proceed to inquest. It is further

ORDERED that Plaintiff serve a copy of this Decision and Order upon Defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 8/17/22



Hon. **FIDEL E. GOMEZ, A.J.S.C.**