Troy Contr., LLC v Colorado Assoc., L.L.C.
2026 NY Slip Op 31107(U)
March 19, 2026
Supreme Court, New York County
Docket Number: Index No. 654705/2023
Judge: Kathleen Waterman-Marshall
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **31**

Justice

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TROY CONTRACTOR, LLC,

Plaintiff,

- v -

COLORADO ASSOCIATES, L.L.C., BETTER RETAIL 1, LLC,BETTER MANAGEMENT HOLDINGS, LLC,SIMPLE DENTAL, PLLC D/B/A DNTL BAR, NEDAL SHAMI, BEN ELCHAMI

Defendant.

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INDEX NO. 654705/2023

MOTION DATE 11/12/2024

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 77, 79, 80, 81, 82, 83, 84, 87, 88

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

This matter was administratively transferred to Part 31 after the instant motion was filed.

Upon the foregoing documents, it is ordered that the motion by Troy Contractor LLC ("Troy") for a default judgment against Better Retail 1, LLC ("Better Retail") and Better Management Holdings, LLC ("Better Management"),[1] and summary judgment against Colorado Associates, LLC ("Colorado"), is granted.[2]

Background

Colorado is the landlord-owner of the commercial premises at 2169 Broadway in the County, City, and State of New York, leased by Better Retail, and intended to be used as a dental office by Simple Dental, PLLC d/b/a DNTL Bar ("Simple Dental"). Better Retail engaged Troy to perform construction work at the commercial premises pursuant to a contract. It is undisputed that Troy performed the construction work.

However, Troy contends that it did not receive full payment for its construction work. It contends that defendants Nedal Shami and Ben Elchami, officers of Better Retail and Better Management, used the corporate forms of Better Retail, Better Management, and Simple Dental

[1] That portion of Troy's motion seeking default judgment is unopposed by Better Retail and Better Management.

[2] The issue of whether Troy has a valid lien against Colorado's property is separate from whether Colorado's co-defendants may share, or be wholly responsible, for the judgment against Colorado. Stated differently, the denial of the motion by Simple Dental, Nedal Shami, and Ben Elchami to dismiss Colorado's crossclaims in motion sequence 003 does not require denial of Troy's summary judgment motion against Colorado.

interchangeably, and that Better Management made a partial payment of $560,000 on behalf of Better Retail. Troy alleges it is still owed approximately $342,000 under the contract.

After Troy completed the construction work, Simple Dental briefly used the space as a dental office, but then closed. Colorado contends that it never received any rental payments from any of the co-defendants. Troy then filed a mechanic's lien against Colorado's property for the allegedly unpaid work. Thereafter, it commenced this action seeking to foreclose on its mechanic's lien against Colorado and for breach of contract, unjust enrichment, and account stated against Better Retail, Better Management, Simple Dental, Nedal Shami, and Ben Elchami.

By the instant motion, Troy moves for default judgment against Better Retail and Better Management, and for partial summary judgment on its foreclosure claim against Colorado. Neither Better Retail nor Better Management have appeared in this action or on this motion. Colorado, however, has appeared and opposes summary judgment; it contends that it did not consent to the construction work performed by Troy and, thus, Troy may not assert a lien under Lien Law § 3. Colorado further argues that summary judgment is premature, and that the lien may be inflated or otherwise assert an incorrect amount. Colorado urges the Court to search the record and award it summary judgment invalidating the lien and dismissing the action against it.

Discussion

I. Default

CPLR § 3215(a) provides that a plaintiff may obtain a default judgment when a defendant has failed to appear or plead. The plaintiff must provide proof of service of the summons and complaint, proof of the underlying facts constituting the claim, and proof of default (CPLR § 3215[f]; *see also Bigio v Gooding,* 213 AD3d 480 [1st Dept 2023]; *SRMOF II 2012-I Trust v Tella,* 139 AD3d 599 [1st Dept 2016]; *Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 692 [2d Dept 2013]). Where a default judgment is sought against a corporation served with the summons and complaint via the Secretary of State pursuant to BCL § 306(b), the plaintiff must also demonstrate service on the corporate defendant via mail at its last known address at least 20 days prior to entry of the default judgment (CPLR § 3215[g][4]). A defendant who has failed to appear in an action is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp*., 100 NY2d 62, 71 [2003]).

Troy served the summons and complaint on Better Retail and Better Management via the Secretary of State on October 11, 2023, and served the supplemental notice pursuant to CPLR § 3215(g)(4) on December 18, 2023. Troy filed the instant motion for summary judgment within the one-year deadline to do so under CPLR § 3215(c).[3] Despite service and additional notice, neither Better Retail nor Better Management have appeared in this action. Troy has also provided proof of the underlying facts supporting its claim for breach of contract, account stated, and unjust enrichment against Better Retail and Better Management, to wit: the construction agreement, uncontested invoices for outstanding construction work of $341,500, and communication and partial payment by Better Management on behalf of Better Retail without

[3] Defendants' answers were due on November 10, 2023, 30 days after service of the summons and complaint. One year from November 10, 2024 was a Sunday, and the following day was Veterans Day. The motion was filed on the following business day, November 12, 2024, and is therefore timely (General Construction Law § 20).

regard to corporate form. Accordingly, Troy has established service of this action upon Better Retail and Better Management, as well as their default. Interest is properly calculated from September 26, 2022, pursuant to the construction agreement (Construction Contract § 7.4). Accordingly, default judgment in the amount of $341,500 is granted as against Better Retail and Better Management, together with pre-judgment interest at the statutory rate from September 26, 2022.

II. Summary Judgment

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v Congress Financial Corp*., 4 NY3d 373 [2005]).

Colorado contends that Troy's motion for summary judgment must be denied as premature, having been made before discovery. However, contradictorily, Colorado also requests the Court to search the record and grant Colorado summary judgment upon the same pre-discovery record. The Court is mindful that the instant litigation is at an early pre-discovery stage. Generally, parties should be "afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" (*Amico v Melville Vol. Fire Co., Inc.*, 39 AD3d 784 [2d Dept 2007]; CPLR § 3212[f]). In that regard, CPLR § 3212(f) provides:

> [s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

However, the mere hope that additional discovery will uncover evidence in opposition to summary judgment is insufficient to deny summary judgment as premature (*see Kent v 534 E. 11th St.*, 80 AD3d 106, 114 [1st Dept 2010]). Notwithstanding, where admissible evidence has been submitted on a pre-discovery motion for summary judgment, and such evidence establishes a party's entitlement to judgment as a matter of law, summary judgment is appropriate (*Griffin v Pennoyer*, 49 AD3d 341 [1st Dept 2008]).

Troy's motion for summary judgment is not premature; the lease agreement between Better Retail and Colorado, unpaid invoices, and the Department of Building permit and Landmark approval, make out a prima facie case to foreclose on Troy's lien under Lien Law § 3. Lien Law § 3 provides, in relevant part:

> A contractor, subcontractor, laborer, materialman… who performs labor or furnishes materials for the improvement of real property *with the consent* or at the request of the owner thereof… shall have a lien for the principal and interest … (emphasis supplied).

Consent of the owner may be inferred for the purposes of Lien Law § 3, as the Court of Appeals held in *Ferrara v Peaches Café LLC*, (32 NY3d 348, 353 [2018] [Wilson, J.]):

> To enforce a lien under Lien Law § 3, a contractor performing work for a tenant need not have any direct relationship with the property owner. Instead, "[t]o fall within that provision, the owner must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent to the improvement in the expectation that he will reap the benefit of it" (*Rice v Culver*, 172 NY60, 65-66 [1902]).

Passive knowledge that a tenant intends to perform construction upon a leased premises is, standing alone, insufficient to demonstrate the owner consented to the construction (*Rice*, 172 NY at 65, 66). However, where the lease requires an improvement to be made or the landlord benefits from the improvement – either by collecting rent from its use or by the reversion of the improvement to the landlord upon the lease's expiration – consent is established (*id*. at 66-67; *Ferrar*, 32 NY3d at 354). Troy established Colorado's consent via the lease agreement, which required Better Retail to construct a dental office and expected that Colorado would collect rent as a result of the construction, once it was complete.

Article 3.01 of the lease agreement between Better Retail and Colorado requires Better Retail to construct the dental office, ("[T]enant *shall*, at its own cost and expense, commence and thereafter diligently complete the work necessary to put the Lease Premises in the condition desired by Tenant for the Permitted Use. … Notwithstanding the *Tenant's obligation to construct* the dental walk-in clinic… " [emphasis supplied]). Article 3.01 also provides Colorado with review and approval authority over Better Retail's architectural plans ("Prior to commencement of [Better Retail's] work, [Better Retail] shall provide architectural plans reasonably satisfactory to Colorado confirming the alterations… reasonably satisfactory"). Article 28 likewise requires Better Retail to construct the dental office ("[Better Retail] *shall construct* and *make other improvements* which encompass the Lease Premises for the operation of its walk-in dental clinic" [emphasis supplied]). Thus, the lease required Better Retail to construct the dental office, and Colorado was involved in the approval of the construction plans.

Moreover, Better Retail's payment of rent was predicated upon the completion of this construction work and excused for "Violation Delays" defined as, *inter alia*, permitting delays and other violations arising out of the construction work (Lease at 2). Article 28 of the lease agreement also demonstrates that Colorado benefited from the improvements, as Colorado agreed to reimburse Better Retail for the improvements ("In consideration of the said improvements to the Leased Premises made by Tenant, Landlord shall reimburse tenant"), and this benefit further demonstrates Colorado's inferred consent to the improvements. That Colorado did not ultimately receive rent from Better Retail, does not negate the anticipated

benefit, and the law does not require an owner to receive rent from a tenant as a condition precedent to a contractor's mechanic's lien.

Finally, Colorado does not dispute that it accepted Better Retail's plans and specifications for the construction layout and signed off on a Department of Building's permit and Landmarks Preservation Commission approval related to Troy's construction. Taken together, these lease provisions and Colorado's approval of building permits and architectural plans establishes Colorado consented to the improvements by Troy, and Colorado is liable under Lien Law § 3 (*Ferrara*, 32 NY3d at 354 [gathering cases]; *see also Rice v Culver*, 172 NY 60, 65-66 [1902]; *Jones v Menke*, 168 NY 61, 64 [1901]; *Burkitt v Harper*, 79 NY 273 [1879]).

Colorado's argument that the lease permits, but not does not require, Better Retail to make improvements, and that absent such a requirement or its direct authorization for the improvement, it is not liable under Lien Law § 3 is without merit. In support of this direct involvement argument, Colorado relies on authority which has been, either expressly or implicitly, overruled by the Court of Appeals in *Ferrara* (32 NY3d at 357 ["To the extent that certain Appellate Division decisions relying on *Paul Mock* suggest that Lien Law § 3 requires a direct relationship between the landlord and the contractor to establish consent, they are contrary to our precedents and should not be followed"]). Accordingly, there is no direct relationship or direct authorization requirement between a landlord and a contractor; the cases cited by Colorado for such proposition are not good law (*see e.g. Paul Mock, Inc v 118 East 25th Street Realty Co.*, 87 AD2d 756 [1st Dept 1982]; *Tri-North Builders v DiDonna*, 217 AD2d 886 [3d Dept 1995] *Matell Contr. Co., Inc. v Fleetwood Food Corp.*, 2014 NY Misc. LEXIS 5847 [Sup. Ct. Westchester Cty, 2014]; *William Somerville, Inc v A.J. Grp. Inc.*, 2005 NY Misc Lexis 8612 [Sup. Ct. 2005] [Edmead, J.]).

Additionally, as discussed above, Article 3 and Article 28 of the lease agreement provide that Better Retail will construct or build out a dental office in the leased space for the premises' intended use and leases' purpose – subject to Colorado's review and approval. This is analogous to *Ferrara* where the lease obligated the tenant to, *inter alia*, install electrical improvements to effectuate the lease's purpose, and the Court of Appeals upheld the lien under Lien Law § 3 (32 NY3d at 354). Accordingly, Colorado consented to the improvements and Troy's lien under Lien Law § 3 is proper.

Nor is there merit to Colorado's argument that the work performed by Troy is transitory or impermanent and therefore not subject to a lien under Lien Law § 3. The Lien Law is construed liberally (*Rigano v Vibar Constr. Inc.*, 24 NY3d 415 [2014]). It is undisputed that Troy removed walls separating three commercial spaces to create a single commercial space, installed a bathroom in the middle of the premises, and erected several patient rooms within the space, among other things. These are in the nature of permanent improvements under the Lien Law (Lien Law § 2[4] [improvement includes demolition, erection, alteration or repair of structure]; *see e.g. Dura-Bilt Corp. v Polimeni*, 87 AD2d 661 [3d Dept 1982] [doors and sink permanent improvements]; *Wahle-Phillips Co. v Fitzgerald*, 225 NY137 [1919] [electric light fixtures permanent improvements]; compare *Negvesky v United Interior Resource, Inc.*, 32 AD3d 530 [2d Dept 2006] [installation of modular work stations without demolishing, erecting, or altering structure not permanent improvement under Lien Law]). Colorado's related claim that the Troy's

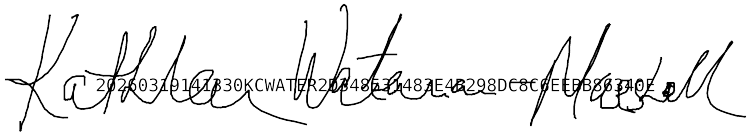
work constitutes Better Retail's property, which the lease requires Better Retail to remove at the end of the lease and are therefore not improvements, conflates "tenant's property" and "tenant's work" as defined by the lease. Tenant's property refers to, *inter alia*, movable furniture and dental equipment (Article 3.05); whereas tenant's work refers to, *inter alia*, improvements and alterations (Article 3.01). Thus, contrary to Colorado's argument, Troy's work installing walls, plumbing, and lighting constitutes permanent improvements, not a tenant's property. That Colorado's claims it was forced to spend $70,000 to undo Troy's work further supports that the work was a permanent improvement.

Finally, Colorado's claims that the lien is inflated, or otherwise incorrect, amounts to mere hope that additional discovery will uncover evidence in opposition to summary judgment and is insufficient to deny summary judgment as premature (*Kent*, 80 AD3d at 114). Although Colorado contends that summary judgment is premature, it has not identified any evidence which would create an issue of fact as to its responsibility for the lien or error in the lien's amount. Therefore, documentary evidence submitted on this motion establishes Troy's entitlement to judgment as a matter of law (*Griffin*, 49 AD3d 341).

Accordingly, it is

ORDERED, ADJUDGED, and DECLARED that Troy Contractor LLC shall have judgment and does recover as against Better Retail Better Retail 1, LLC and Better Management Holdings, LLC, jointly and severally, the sum of $341,500 together with interest at the statutory rate from September 26, 2022, as calculated by the Clerk of the Court; and it is further

ORDERED, that Troy Contractor LLC shall have summary judgment on its second cause of action foreclosing its mechanic's lien against the premises at 2169 Broadway, New York, NY 10024 (Block 01168 Lot 0010) owned by Colorado Associates, LLC and shall, within 10-days of notice of entry of this Decision and Order, submit, on notice to defendants, a proposed judgment and order and Colorado Associates, LLC may, by that same date, submit a counter judgment.



3/19/2026
DATE

KATHLEEN WATERMAN-MARSHALL, J.S.C.

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