

Isacowitz v Presidential Towers Residence, Inc.

2007 NY Slip Op 31349(U)

March 1, 2007

Supreme Court, New York County

Docket Number: 0600487/0487

Judge: Kibbie F. Payne

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

ALVIN ISACOWITZ D/B/A
EXCELLENCE IN PLUMBING,

INDEX NO. 600487/06

Plaintiff,

MOTION DATE _____

- v -

PRESIDENTIAL TOWERS RESIDENCE, INC., KG
PROPERTIES ASSOCIATES, INC., JEFFREY SRULOWITZ,
NURIT SRULOWITZ, AND JOHN DOES 1-10,

MOTION SEQ. NO. 002 *A*

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Pursuant to CPLR 5019 (a), the memorandum decision in this mortgage foreclosure action, dated November 30, 2006, is amended as follows. The paragraph, which reads "ORDERED that the cross-motion of Srulowitz and Presidential Towers for summary judgment against KG is granted and KG's cross-motions are hereby severed and dismissed as to Jeffrey Srulowitz, Nuri Srulowitz and Presidential Towers, and the clerk is directed to enter judgment in favor of said defendants" is deleted and substituted with the following language: "ORDERED that the cross-claim of Srulowitz and Presidential Towers for summary judgment against KG is granted and KG's cross-claims are hereby severed and dismissed as to Jeffrey Srulowitz, Nuri Srulowitz and Presidential Towers, and the clerk is directed to enter judgment in favor of said defendants." Further, the term "cross-motion" in line one of page seven is deleted and substituted with the term "cross-claim." The amended order is attached.

FILED
MAR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 1, 2007

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4

ALVIN ISACOWITZ D/B/A
EXCELLENCE IN PLUMBING,

Plaintiff,

- against -

Index No. 600487/06
Motion Seq. 002 & 003

Amended Order

PRESIDENTIAL TOWERS RESIDENCE, INC.,
KG PROPERTIES ASSOCIATES, INC., JEFFREY
SRULOWITZ, NURI SRULOWITZ and JOHN DOES
1-10,

Defendants.

KIBBIE F. PAYNE, J.:

In this action to foreclose on a mechanic's lien, motion sequence numbers one and two are consolidated for disposition. The facts as pleaded are as follows. Defendant Presidential Towers Residence, Inc. (Presidential Towers), a cooperative corporation, owns the building known as 315 West 70th Street, and defendants Jeffrey Srulowitz and Nurit Srulowitz (collectively Srulowitz) own shares in apartments 1C and 1D therein. Srulowitz entered into an oral contract with defendant general contractor KG Properties Associates, Inc. (KG) for the improvement of the apartments 1D and 1E. To help complete the project, KG hired plaintiff Alvin Isacowitz d/b/a Excellence in Plumbing as a subcontractor for the price of \$18,000.

On December 7, 2005, plaintiff filed a mechanic's lien against apartments 1C and 1D, alleging it received no payment for

its work. Thereafter, on January 4, 2006, KG filed a mechanic's lien against the same apartments in the amount of \$18,176.00. KG maintains that this amount represents the outstanding balance on its contract with Srulowitz.

Plaintiff commenced this action against defendants to foreclose on its mechanic's lien. KG counterclaimed against plaintiff for breach of contract and asserted a cross claim against the other defendants for its work on the subject apartments. In motion sequence one, KG moved unsuccessfully to dismiss the complaint upon the ground that the mechanic's lien plaintiff filed was void pursuant to Lien Law § 39.

In motion sequence two, plaintiff moves, among other things, for a default judgment against Presidential Towers for failure to answer and for \$18,000 judgment against defendants. Presidential Towers cross-moves for leave to file an answer and for dismissal of the complaint as against it. Srulowitz move to dismiss the complaint as against them and Presidential Towers, and to discharge and cancel plaintiff's mechanic's lien and notice of pendency. In the alternative, Srulowitz ask the court to discharge and cancel plaintiff's notice of mechanic's lien pursuant to Lien Law § 19, and vacate plaintiff's notice of pendency pursuant to CPLR §§ 6501 and 6515. In motion sequence three, Srulowitz cross-move for an order dismissing KG's cross-claim against them and Presidential Towers, and discharging and

* 4]
canceling KG's lien against the subject apartments. Presidential Towers joins in this application.

The court will first address plaintiff's motion for a default judgment against Presidential Towers (see CPLR 3215). The decision to grant such a motion is within the discretion of the trial court (see generally National Union Fire Ins. Co. v Davis, Wright, Todd, Reise & Jones, 157 AD2d 571, 571 [1st Dept 1990]). In deciding a motion for a default judgment, however, the court must consider whether "defendant presented a reasonable excuse for the default and a prima facie showing of a meritorious defense" (id., citing Fidelity & Deposit Co. v Andersen & Co., 60 NY2d 693, 695 [1983]).

Here, Presidential Towers essentially contends that it did not receive the summons and complaint as such papers were delivered to non-party "Tandy & Company," which has no affiliation to it. Presidential Towers provides no address for "Tandy & Company" or proof that service was made on such entity. Presidential Towers notes that it is "in the process of changing the papers on file with the Secretary of State so that it will send all future papers" to Presidential Towers's counsel. However, it does not contend that the address on file with the secretary has ever been incorrect. Presidential Towers otherwise makes no excuse for its failure to timely respond.

Plaintiff, on the other hand, submits proof of both service

on the Secretary of State pursuant to Business Corporation Law § 306 and compliance with CPLR 3215 (g) (4), which provides additional service requirements where a default judgment is sought against a corporation. It is statutory law that "[s]ervice of process on [a domestic] corporation shall be complete when the secretary of state is so served" (see Business Corporation Law § 306 [b] [1]). The address apparently on file with the secretary of state is "c/o Greenthal, 4th Park Avenue, 3rd Floor, New York, New York," which is the undisputed last known address of Presidential Towers.

In light of the record, the court finds Presidential Towers's proffered excuse for not responding incredible and unreasonable. Thus, while disposition on the merits is generally favored, the governing standard for deciding a motion for a default judgment dictates that the such judgment be granted here (see Dimitratos v The City of New York, 180 AD2d 414, 414 [1st Dept 1992]). However, non-defaulting parties Srulowitz have established, as a matter of law, that plaintiff is required to look only to KG for payment (see discussion below). In the absence of any balance due to plaintiff from the owners of the subject apartments, plaintiff is not entitled to a monetary judgment against Presidential Towers (see generally Blake Electric Contracting, Co. v Paschall, 222 AD2d 264, 265-266 [1st Dept 1995]; see also Siegal, Practice Commentaries, McKinney's

[* 6]
Consolidated Laws of NY, Book 7B, CPLR C3215:13A).

The court will next address Srulowitz's motion for summary judgment, dismissing the complaint as against them and discharging and cancelling plaintiff's notice of mechanic's lien. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tending sufficient evidence to eliminate any material issues of fact from the case" (Cox v Kingsboro Medical Group, 88 NY2d 904, 906 [1996], quotations and citation omitted). Once a prima facie showing has been made, the burden shifts "to plaintiff to produce evidence, in admissible form, demonstrating that material issues of fact exist[]" (Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124, 129 [2000]).

As relevant here, "[n]o person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor or salesperson from an owner without a license therefor" (Administrative Code of City of NY § 20-387 [a]). It follows that "[a]n unlicensed contractor may neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit" (Blake Electric Contracting, Co. v Paschall, 222 AD2d 264, 266 [1st Dept 1995]; see also Matilda Construction, Inc. v 420 East 72nd St. Tenants Corp., 259 AD2d 374, 375 [1st Dept 1999]). Further, where a contractor is so barred from seeking payment from the owner, any subcontractor working for

such contractor is also barred from recovering from the owner; the subcontractor must "look to the contractor that engaged its services" for any balance (Blake, 222 AD2d at 266-267).

Srulowitz provides the court with a letter from the Freedom of Information Desk of the New York City Department of Consumer Affairs. Such letter, dated September 18, 2006, provides: "a search of the records of the Department of Consumer Affairs of the City of New York has determined that . . . KG Property Associates Inc. has never had a home improvement contractor (HIC) license. . . ." KG neither disputes that it at no time had the requisite license nor that it is the entity referred to in the department's letter.¹

In response to this showing, plaintiff simply contends that KG "may have been exempt from the requirement to obtain an HIC license" (emphasis added). Plaintiff further provides that it is a licensed plumber exempt from the HIC licensing requirement. These assertions are insufficient to defeat Srulowitz's motion for summary judgment dismissing the complaint against it. Plaintiff fails to demonstrate that a material issue of fact exists as to whether KG is a licensed contractor.

Given that KG has never had an HIC license, the court will

¹ The records of the New York Department of State, Division of Corporations reflect KG Property Associates, Inc. as the registered name of KG, who is identified in the caption and pleadings as KG Properties Associates, Inc.

* 8]

also grant Srulowitz's cross-claim, joined by Presidential Towers, for summary judgment dismissing KG's cross-claims against them. KG's argument, that Srulowitz has "unclean hands" and acted in "bad faith" by not obtaining certain permits for construction, raises no issue of fact concerning its failure to hold the requisite license. Further, KG provides no authority for the proposition that an owner's failure to obtain certain construction permits creates an exception to the rule that "an unlicensed contractor may neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit" (Blake Electric, 222 AD2d 264, 266).

The parties remaining contentions are without merit. Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is granted and plaintiff is entitled to judgment against Presidential Towers in the amount of zero dollars and zero cents; it is further

ORDERED that the cross-motion of Srulowitz for summary judgment against plaintiff is granted and the complaint is hereby severed and dismissed as against Jeffrey Srulowitz and Nurit Srulowitz, and the Clerk is directed to enter judgment in favor of said defendants; it is further

ORDERED that the cross-claim of Srulowitz and Presidential Towers for summary judgment against KG is granted and KG's cross-

claims are hereby severed and dismissed as to Jeffrey Srulowitz, Nuri Srulowitz and Presidential Towers, and the clerk is directed to enter judgment in favor of said defendants; it is further

ORDERED that the remainder of the action shall continue; it is further

ORDERED that the mechanic's lien filed by Alvin Isacowitz d/b/a Excellence in Plumbing on December 7, 2005 against certain real property known as 315 West 70th Street, Apt. 1C and 1D, New York, New York is vacated and cancelled of record; it is further

ORDERED that, upon service of this order with notice of entry, the Clerk of the County of New York is directed to vacate and cancel the notice of such mechanic's lien, and enter upon the lien docket, or other record of liens, opposite the endorsement of said lien, a statement that it has been vacated and cancelled of record; it is further

ORDERED that the mechanic's lien filed by defendant KG Properties Associates, Inc. on January 4, 2006 against the subject property known as 315 West 70th Street, Apt. 1C and 1D, New York, New York is vacated and canceled of record; and it is further

ORDERED that, upon service of this order with notice of entry, the Clerk of the County of New York is directed to vacate and cancel the notice of such mechanic's lien, and enter upon the lien docket, or other record of liens, opposite the endorsement of said lien, a statement that it has been vacated and cancelled

of record.

The foregoing constitutes the decision and judgment of the court.

DATE: March 1, 2007



Kibbie F. Payne, JSC