

Demartino v Empire Lien Serv. Inc.

2007 NY Slip Op 33172(U)

September 26, 2007

Supreme Court, Nassau County

Docket Number: 7668-06/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____x

MICHELLE DEMARTINO and FEDERICO
DEMARTINO,

Plaintiff(s),

Index No. 007668/06

-against-

Motion Seq. No.: 001
Motion Submitted: 7/30/07

EMPIRE LIEN SERVICE INC. and BAYSIDE
MARINA AT LOCUST POINT, INC.,

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's Respondent's.....

The plaintiff moves the court for a default judgment pursuant to CPLR § 3215 against defendant Empire Lien Service Inc. (hereinafter "Empire"), based upon its failure to answer the summons and complaint in the present action and for summary judgement pursuant to CPLR 3212 against defendant Bayside

Marina at Locust Point (hereinafter "Bayside Marina").

The instant matter is an action for conversion of the plaintiff's property by defendants. This action was commenced by the filing of a summons and complaint on May 10, 2006. Defendant, Bayside Marina was served with a summons and complaint and has served an answer. Defendant Empire was served with the summons and complaint via service on the Secretary of State pursuant to section 306 of the Business Corporation Law on May 11, 2006. Defendant Empire did not interpose an answer.

The plaintiff's in the present matter were the owners of a 1994 23 foot Four Winns boat, Hull Number 4WNCR153E494, purchased for \$43,000.00 in June of 1999. Between June of 1999 and fall of 2003, the plaintiffs (hereinafter Demartinos) kept their boat at the Blue Water Yacht Club, Merrick, New York. During that period, in 2001, the Demartinos moved from 3548 Locust Avenue, Wantagh, to 62 Hyacinth Road, Levittown. Plaintiffs claim the Blue Water Yacht Club was notified of the change and that they were billed at the new address for docking and storage fees from 2001 to the present. In fall of 2003, the plaintiffs needed repairs on their boat, and they requested Blue Water Yacht Club make the repairs to the boat over the winter. Plaintiff states the mechanics at Blue Water Yacht Club were unable to perform the work and that the boat was

transported to Bayside Marina at Locust Point. It appears to the court that the arrangements to bring the boat to Bayside Marina were made by Blue Water Yacht Club although it is not entirely clear to the court after reading both sets of papers. The defendant Bayside Marina through an affirmation of an officer, Theresa Dambinskas,, does however, allege that the boat was transported from Blue Water Yacht Club and according to her affirmation, "We were told that the owners of the boat would come into the marina to fill out an authorization to make the necessary repairs as well as a contract for storage." Plaintiffs claim they heard nothing from either the Blue Water Yacht Club or Bayside Marina during the fall 2003 through winter 2004, and that they began to make phone inquiries in early 2004. After contacting the Bayside Marina, plaintiffs allege no one knew anything about the boat, and they left messages but still, no one could tell them anything about the boat. The Demartinos retained an attorney to look into the matter and ultimately found that their boat had been sold at a public auction on November 22, 2004 by defendant Empire.

Defendant Empire conducted a Lien Sale of plaintiff's boat on behalf of defendant Bayside Marina pursuant to the Lien Law of the State of New York. However, the plaintiffs allege that Empire failed to abide by Lien Law § 201, which sets forth the requirements for a Notice of Sale.

Lien Law § 201 requires the following:

Before such sale is held the lienor shall serve a notice upon the owner with due diligence within such county, if such owner can be found where such lien arose, if not then to the person for whose account the same is then held personally, provided such service can be made with due diligence within the county where such lien arose, but if such owner or person cannot with due diligence be found within such county, or if the property affected, other than a security, is of a value of less than one hundred dollars, then such notice shall be served by mailing it to the owner at his last known place of residence, or to his last known post-office address or if the owner's place of residence or post-office address is not known, then to the last known place of residence or last known post-office address of the person for whose account the same is then held personally. Any notice permitted herein to be served by mail shall be sent by certified mail, or by first-class mail if the lienor has obtained from the United States post office department a certificate of mailing. A like notice shall be served in the same way upon any person who shall have given to the lienor notice of an interest in the property subject to the lien and upon any person who has perfected a security interest in the property by filing a financing statement pursuant to the provisions of the uniform commercial code or who is listed as lienholder upon the certificate of title of the property pursuant to the provisions of the vehicle and traffic law. Such notice shall contain a statement of the following facts:

1. The nature of the debt or the agreement under which the lien arose, with an itemized statement of the claim and the time when due;

2. A brief description of the personal property against which the lien exists;
3. The estimated value of such property;
4. The amount of such lien, at the date of the notice.

Although Defendant Empire did not put in an answer in the present case, they did file a Notice of Lien and Sale on which they indicated that they notified Michelle Demartino of the pending sale at 3548 Locust Avenue, Wantagh. Plaintiffs submit that this was not their current address and that they had not lived there since 2001. In addition, they claim that at the time the boat was transported to Bayside Marina from Blue Water Yacht Club, the plaintiffs were residing at 62 Hyacinth Road, Levittown, New York and that Blue Water Yacht club had been billing them at that address for two years. Plaintiffs have provided documentation to support the position that they had notified Blue Water Yacht club of their new address and, in fact, Blue Water Yacht Club's invoice for the Load/Offload of the boat to take it to Bayside Marina (Attached as Plaintiff's Exhibit "H") was addressed to the plaintiff at the new address. According to the

invoice the boat was being picked up by "Rogers" transport on June 24, 2003.

Defendant Empire has been notified in accordance with the requirements of CPLR § 3215(g)(4) and has failed to appear, plead or answer in this action. Thus pursuant to CPLR § 3215(a), the plaintiff's motion for default judgement against Empire is granted.

As for defendant Bayside, significant questions of fact have been raised which would preclude granting summary judgment in favor of the plaintiff. Specifically, there are a constellation of issues regarding, what if any paperwork was signed or completed authorizing Blue Water Yacht Club to perform work on the boat or to transport the boat to the Bayside Marina and if any paperwork was provided to Bayside by Blue Water at the time the boat was delivered. In addition, there are questions of fact regarding what Blue Water told the plaintiff and defendant Bayside Marina at the time the boat was brought to the Bayside Marina and whether or not Blue Water provided adequate information to Bayside Marina regarding who the owner of the boat was and what, if any, contact information was provided regarding the boat owners. Although Blue Water is not a named party, the questions surrounding their role in delivering the boat and informing both sides as to what was to happen next seems to be at the very center of this controversy and with so many questions left unanswered and

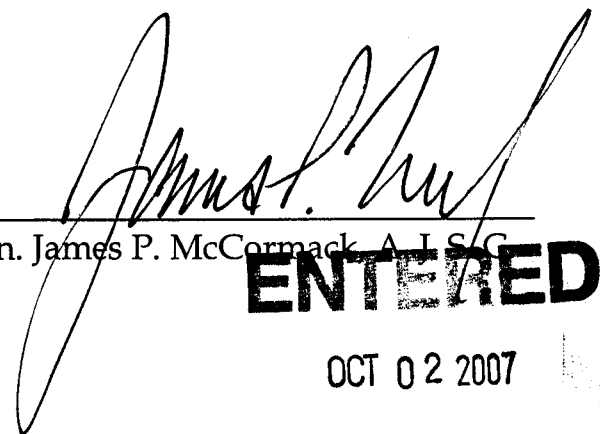
unexplained this court cannot grant summary judgement.

Assessment of damages shall be held during the trial of the action against the answering defendant Bayside Marina (*Viera v. Briggs & Stratton Corp.*, 184 Ad2d 766). Defaulting defendant Empire may participate in the damages phase only (*see, Rokina Optical, Inc. v. Camera King, Inc.*, NY2d 728). If, however, answering defendant settles with plaintiff or answering defendant successfully defends against the liability phase of plaintiff's claim, an inquest shall be held against defaulting defendant before the trial Justice assigned to this action; if none an inquest shall be scheduled through the Calendar Control Part following the filing of a Note of Issue.

It is indicated in the Notice of Motion that defendant Empire Lien Service Inc. is a corporation. Plaintiff shall therefore serve a copy of this order upon defendant Empire, pursuant to Business Corporation Law § 306 and upon defendant's place of business by certified mail return receipt requested, and upon answering defendant by ordinary mail forthwith.

The foregoing constitutes the decision and order of this court.

Dated: September 26, 2007
Mineola, N. Y.



Hon. James P. McCormack, A. J. S. C.

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