

Ralko Contr. Inc. v 90th Realty, LLC

2009 NY Slip Op 31411(U)

June 16, 2009

Supreme Court, New York County

Docket Number: 602520/08

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART _____

Justice

Index Number : 602520/2008

RALKO CONTRACTING INC.,

VS.

90TH REALTY, LLC

SEQUENCE NUMBER : # 001

DEFAULT JUDGMENT

INDEX NO. 602520-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

_____ were read on this motion for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff for default judgment as against defendant TJ-104 Restaurant Corp., d/b/a Timmy's by the River Restaurant for failing to answer the Complaint is granted; damages as against said defendant shall be determined at the trial or other disposition of this action; and it is further

ORDERED that the motion by plaintiff for default judgment as against defendant 90th Realty, LLC is denied; and it is further

ORDERED that the cross-motion by 90th Realty, LLC for an order granting it leave to serve the answer in the form attached to its cross-motion is granted; said Answer shall be deemed served as of the date of this Order; and it is further

ORDERED that the parties shall appear at a Preliminary Conference on August 4, 2009, 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/16/09

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

FILED
PAPERS NUMBERED _____
JUN 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
RALKO CONTRACTING INC.,

Index No. 602520/08

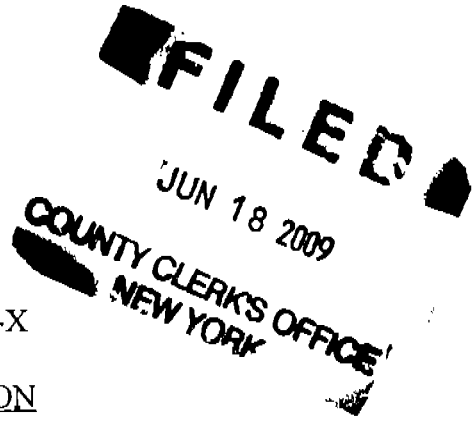
Plaintiff,

-against-

90TH REALTY, LLC, TJ-104 RESTAURANT CORP.,
d/b/a TIMMY'S BY THE RIVER RESTAURANT and
"JOHN DOE ONE THROUGH JOHN DOE TEN",

Defendants.

-----X



MEMORANDUM DECISION

In this action to foreclose on a certain Mechanic's Lien, plaintiff Ralko Contracting Inc. ("plaintiff") moves for a default judgment against defendants 90th Realty, LLC ("90th Realty") and TJ-104 Restaurant Corp., d/b/a Timmy's by the River Restaurant ("Timmy's") for their failure to answer the Complaint in this case.

90th Realty is the owner of a building located at 1737 York Avenue, New York, New York (the "Premises"). Timmy's is a tenant of 90th Realty and occupies a portion of the ground floor in the Building (the "Premises") pursuant to a written lease (the "Lease").

Motion

According to the affidavit of Konstantinos Rallis, the President of the plaintiff, at the specific insistence and request of Timmy's, as tenant, and with the knowledge and consent of 90th Realty, as owner, between June 1, 2007 and October 1, 2007, plaintiff provided labor and materials necessary to construct a restaurant at the Premises, which included installing drywall, partitions, ceiling, floor, tiles, doors, and other interior installations on the first floor and basement. At the specific insistence of Timmy's, plaintiff also performed additional work or

agreed to change orders at an agreed upon additional cost. The agreed price and value of the labor and work performed and the materials furnished under the original contract and for the additional work and/or change orders to date is \$225,000.00, of which \$86,000.00 remains unpaid, although duly demanded.

On February 27, 2008, and within eight (8) months after providing the last item of labor and materials, plaintiff filed in the Office of the Clerk of the County of New York a Notice of Mechanic's Lien against the Premises in the amount of \$86,000. The Mechanic's Lien was personally served upon the defendants pursuant to Section 11 of the Lien Law and proof of service was filed with the Office of the County Clerk of the County of New York on March 13, 2008. The Mechanic's Lien has not been paid, canceled, or discharged, and no other action or proceeding at law or in equity has been brought by plaintiff for foreclosure, or for the recovery of money thereby secured or any part thereof.

Each of the defendants claims to have an interest in, claim or lien, if any, subsequent or subordinate to the Mechanic's Lien.

Consequently, plaintiff commenced this action for the following: (1) to foreclose the mechanic's lien against both defendants, (2) for breach of contract against Timmy's, (3) for *quantum meruit* against both defendants, and (4) for an account stated against Timmy's. Plaintiff also filed and served a Notice of Pendency dated August 21, 2008.

The summons, verified complaint and notice of pendency were served on 90th Realty on September 24, 2008, at its principal office for the transaction of business at 1200 Union Turnpike, New Hyde Park, New York, by delivering thereat a true copy of each to Mary M. Leonardi, who is the Commercial Leasing Coordinator at said company and authorized to accept

service. The summons, verified complaint and notice of pendency were also served on Timmy's on September 29, 2008, at its principal place of business at 1737 York Avenue, New York, New York, by delivering thereat a true copy of each to Timoleon Hristoforatos a/k/a Timmy, who is president of said corporation.

The affidavits of service upon said defendants were filed with the Clerk of this Court on October 6, 2008. Both the service of the summons and verified complaint and notice of pendency on the defendants and the filing of the proof of service thereof were made within 120 days from the commencement of the action.

Both defendants appeared by separate counsel who both sought an extension of time to answer the complaint. Plaintiff executed a stipulation which extended defendants' time to answer or respond to the summons and complaint to November 24, 2008. The stipulation also provided that the defendants waived any jurisdictional defenses. However, defendants have not answered the complaint or sought an extension, and their time to do so has expired.

On December 16, 2008, plaintiff mailed to 90th Realty and Timmy's a notice pursuant CPLR 3215(g)(4)(i) and a copy of the summons and complaint by first class mail. Both mailings bore the legend "Personal and Confidential" and did not indicate on the outside thereof, by return address or otherwise, that the communication was from an attorney or concerns an action against the person to be served. The defendants are now in default, and this application has been made within one year from the date of the default.

Opposition

In opposition to the motion, Timmy's submits its Answer. In its Answer, Timmy's seeks dismissal of the Complaint and Mechanics Lien plus costs and disbursements based on the

following six affirmative defenses: that the Mechanic's Lien must be declared a nullity as wilfully exaggerated (First); plaintiff performed "extra work" without approval from defendant (second), performed its work in a negligent and incomplete manner necessitating corrective work at considerable expense to defendant, "Timmy's" (third), payment in full for all work properly approved and performed (fourth), breach of contract by plaintiff (fifth), and the Mechanic's Lien is void as to form and failure to meet requisite elements (sixth).

90th Realty's Cross-Motion

90th Realty cross moves for an order granting it leave to serve the answer in the form attached to its cross-motion. 90th Realty argues that it has a reasonable excuse for its failure to serve an answer in a timely manner. According to the affidavit of Mary Leonardi ("Ms. Leonardi"), the Commercial Leasing Coordinator for Glenwood Management Corp., which is the leasing agent for, and the manager of, the Building, 90th Realty relied on Timmy's to respond to the Complaint for two reasons. First, Timmy's, as the Tenant, is obligated under its Lease to defend, indemnify and hold harmless 90th Realty in this action. Pursuant to Article 13.05 of the Lease, Timmy's is obligated, at its sole expense, to "satisfy, cancel or discharge [any mechanic's lien], and remove same from the record, within thirty (30) days after Landlord makes written demand therefor...." Second, Paul Petras, Esq. ("Mr. Petras"), Timmy's attorney, acknowledged that Timmy's was obligated to assume the defense of this case and he represented to Ms. Leonardi that he was going to serve a "general denial" in response to the complaint in this action and, thereafter, he told Ms. Leonardi that he had done so. The first notice that 90th Realty had that Timmy's failed to respond to the Complaint was the instant motion. Soon thereafter, 90th Realty promptly retained counsel to defend it in this action. It has been held that a reasonable

excuse for failure to answer exists where the client believed that the matter was being handled by its attorney. 90th Realty relied on Timmy's to protect its rights in this action, as Timmy's was obligated to do pursuant to the Lease, and as Mr. Petras represented to Ms. Leonardi that Timmy's would.

90th Realty also contends that it has a meritorious defense to this action. 90th Realty points out that only the first and third causes of action are asserted against it. As to the first cause of action to foreclose on the Mechanic's Lien, 90th Realty argues that the Complaint does not sufficiently state that 90th Realty, as owner of the Building, was an "affirmative factor in procuring the improvement" or that as the owner "having possession and control of the Premises assent[ed] to the improvement in the expectation that [it would] reap the benefit of it." The Complaint does not allege any facts to support the claim that 90th Realty had knowledge of, or consented to, the work. Moreover, even if such allegations were made in the complaint, they would be insufficient, as a matter of law, to permit plaintiff to file a mechanic's lien against the Building. Pursuant to the Lease, Timmy's had the right to perform certain alterations to the Premises to suit them to the Tenant's use of the Premises as a restaurant. 90th Realty did not contract with the plaintiff for the work, did not agree to pay the plaintiff for the work, and did not consent to have the work performed for its benefit. Although 90th Realty gave Timmy consent to have the work performed, the construction contract at issue was between the plaintiff and Timmy's, 90th Realty was not a party to that contract, and the work the plaintiff performed was not done for 90th Realty's benefit. Also, the Mechanic's Lien states that the lien arises because the plaintiff provided materials and labor to Timmy's, who did not pay for such materials and labor. The Mechanic's Lien does not state that any work was performed for, or services rendered to,

90th Realty. Accordingly, 90th Realty cannot be held liable to the plaintiff and the plaintiff cannot obtain foreclosure of the Mechanic's Lien.

Further, since plaintiff alleges that it had a written contract with Timmy's, the claim sounding in *quantum meruit* is not well founded and, thus, 90th Realty has a meritorious defense against this claim. In any event, this claim is pled in a conclusory manner and is devoid of any factual detail. The Complaint does not identify any representative of 90th Realty who allegedly "knew of the plaintiffs labor and materials and that the plaintiff expected payment thereof." Nor does the Complaint state how 90th Realty "received the benefit of the plaintiffs labor and materials." Further, as 90th Realty did not contract with plaintiff for the work, 90th Realty did not know, or have any reason to believe, that plaintiff would look to 90th Realty for payment. Finally, 90th Realty did not receive the benefit of the plaintiffs work - Timmy's did.

Public policy favors the resolution of lawsuits on the merits. Plaintiff has not suffered any prejudice, and will not suffer any prejudice, if 90th Realty is permitted to serve an answer and defend this action on the merits.

Reply and Opposition to Cross-Motion

90th Realty's alleged reliance on the representations of Timmy's counsel is no different from those claiming a delay by an insurance carrier in answering a complaint, which courts have routinely held is insufficient to establish a reasonable excuse for a default. Even in those cases where the defaulted defendant is engaged in settlement negotiations itself, such reliance by that party does not constitute a reasonable excuse for the default. The Mechanic's Lien was served on 90th Realty on March 3, 2008, and the summons and complaint was served on October 3, 2008. 90th Realty and its attorney had knowledge of the claim and this proceeding for almost one year

and did not do anything other than allegedly rely on the representations of Timmy's counsel that the parties were engaged in settlement negotiations. The submissions by 90th Realty show no conversations or attempts to contact plaintiff's counsel in order to confirm the alleged statements made by Timmy's counsel. If 90th Realty contacted plaintiff, plaintiff would have informed said defendant that Timmy's did not engage in any substantial settlement negotiations until after plaintiff served the instant motion; in fact, no serious settlement negotiations have taken place to this day and Timmy's is simply seeking to buy time and delay this proceeding further to the detriment of plaintiff. Further, Timmy's has not even responded to the instant motion, although its attorney sought and plaintiff's counsel consented to a very generous adjournment of this motion. Thus, 90th Realty's reliance is unjustified.

Moreover, 90th Realty failed to establish a meritorious defense. 90th Realty improperly alleges through its attorney, a person without personal knowledge of the facts of this case, that the work performed and materials furnished were not done with the consent or request of owner as required under Section 3 of the Lien Law. 90th Realty did not attach a complete copy of the Lease, which shows that the work performed by plaintiff was with the knowledge and consent of the owner of the building and that the improvements would remain the property of the owner and inure to its benefit. Courts have defined "consent" in this context to include situations where as here, the improvements were made with the express consent of the landlord and where the improvements made were to remain a part of the premises and inure to the benefit of the owner.

It was also held that it was immaterial that the owner had no contractual privity with the lien holder. Consent of an owner out of possession may be implied in situations in which such owner receives direct benefits from the work performed. Further, consent is established from the

written words of the lease itself where a lease gives approval to certain specified alterations but required that no further alterations should be made without the owner's consent. It is undisputed 90th Realty controlled the type, quality, and manner of work performed at the Premises and that same would inure to its benefit at the end of the lease term. The excerpt of the Lease also makes reference to Tenant's Work and Tenant's Work built out schedule.

90th Realty's Reply to Cross-Motion

90th Realty does not claim, as the plaintiff asserts, that "it relied on the alleged representation by its tenant's counsel that the case would be settled." 90th Realty relied on representations by Timmy's attorney that he would, and did, file an answer on behalf of 90th Realty, which is completely different from a claim that a party failed to file an answer because of alleged settlement discussions. Further, the cases cited by plaintiff are either inapplicable, or do not stand for the imputable rule that a party cannot reasonably rely on its insurance carrier to submit an answer on his behalf. And, since it was Mrs. Leonardi who had the conversations, and exchanged the emails, on which 90th Realty relied, 90th Realty did not submit an affidavit from Charles Dorego, the attorney who signed the Stipulation extending 90th Realty's time to serve an answer, because it is not relying his testimony. Mrs. Leonardi's statements constitute competent, unrefuted evidence. Additionally, excerpts from the Lease, rather than the entire Lease, were submitted in order to conserve resources and so as to not burden the Court with irrelevant portions of the Lease. Nothing in the Lease supports plaintiff's claim that the improvements plaintiff performed for Timmy's were done with the consent of 90th Realty as that term is used in the Lien Law. Nor does the Lease demonstrate that 90th Realty required that Timmy's perform work.

Further, argues 90th Realty, plaintiff's reliance on the Lease provision indicating that the work it performed for Timmy's will inure to the benefit of 90th is misplaced. The Lease does not provide that all work done by the Tenant must remain part of the leased premises. More importantly, the Lease does not require that Timmy's perform any work, let alone the work the plaintiff claims to have performed. A landlord's property cannot be subjected to a mechanic's lien based on work performed for a tenant based on mere knowledge that the work is being performed. Instead, the law requires that the landlord actually participated in procuring the work to be done or that the landlord required the tenant to perform the work for the landlord's benefit. Since the Lease does not require Timmy's to perform work - let alone the work the plaintiff claims to have done - the provisions in the Lease do not constitute consent to the work within the meaning of the Lien Law.

Moreover, argues 90th Realty, plaintiff conveniently omitted important language from the Lease. The Lease actually provides that improvements built into the Premises during the term of the Lease shall be deemed the property of the Landlord and not removed by Tenant, "except as hereinafter in this Article expressly provided." And, Article 14.02 of the Lease identifies specific items which Timmy's is permitted to remove from the leased premises. Plaintiff has not alleged, and has not shown, that the work it performed must remain a part of the leased premises, which is irrelevant in any case because the Lease did not require Timmy's to perform the work. Further, contrary to plaintiff's claim that the "Landlord reserves the right to improve the entire restaurant layout . . .," the Lease actually says is that the "Landlord reserves the right to approve the entire restaurant"

Analysis

To vacate a judgment entered on a defendant's failure to answer the action, the defendant must establish both a reasonable excuse for the default and a potentially meritorious defense (*JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362, 869 NYS2d 451 [1st Dept 2008] citing *Stillman v City of New York*, 39 AD3d 301, 834 NYS2d 115 [2007]; *Mutual Marine Office, Inc. v Joy Const. Corp.*, 39 AD3d 417, 835 NYS2d 88 [1st Dept 2007]).

Reasonable Excuse for the Default

Courts have held that a reasonable excuse for a defendant's failure to answer exists where the party believed that its defense was being handled by an attorney (*Sanford v 27-29 W. 181st Street Ass'n, Inc.*, 300 AD2d 250, 753 NYS2d 49 [1st Dept 2002])[finding a reasonable excuse for the default where defendants gave timely notice of the claim to their insurance carriers, which indicated that they would undertake to defend the action]; see also *Price v Polisner*, 172 AD2d 422, 568 NYS2d 796 [1st Dept 1991] [reasonable excuse for delay found where defendant forwarded pleadings to his insurance carrier promptly upon receipt, and carrier determined to defend the action on defendant's behalf, and the employee handling defendant's action ceased to be employed by the carrier and the matter was "lost in the shuffle" by the insurance carrier; correspondence from the insurers and organizations investigating the claim, reflected an intent to interpose a defense]; see also *Valtech Research, Inc. v Meridian Abstract Corp.*, 2009 WL 242312, 2009 N.Y. Slip Op. 29040 [N.Y. City Civ.Ct. February 3, 2009] [finding reasonable excuse for default where defendant states that the matter was referred to an attorney, but the attorney failed to properly defend the action]).

Under the circumstances herein, the Lease and affidavit of Ms. Leonardi provides

sufficient factual support for the claim that Timmy's was obligated to defend and indemnify 90th Realty, and that counsel for Timmy's agreed to protect the interests of 90th Realty.

The Lease provides that:

Tenant shall defend, indemnify and save Landlord [90th Realty] harmless from and against (a) all mechanic's and other liens filed. . . .in connection with or arising from, or otherwise connected with, any Alterations (including Tenant's Work) or any other work claimed to have been done for, or materials furnished to, Tenant

Further, the record indicates that Ms. Leonardi contacted Timmy's counsel on several occasions on behalf of 90th Realty and Timmy's counsel would represent the interests of 90th Realty. When 90th Realty tendered the defense of this action to Timmy's, Timmy's counsel advised Ms. Leonardi that Timmy's understood that it was obligated to defend, indemnify, and hold harmless 90th Realty from and against plaintiff's claims. Timmy's counsel also advised Ms. Leonardi that Timmy's was continuing its settlement discussions with plaintiff. The record indicates that Ms. Leonardi inquired of Timmy's counsel to ascertain whether he was going to file an answer on behalf of 90th Realty, to which Timmy's counsel indicated the matter had not been settled and that he would file a "general denial" on behalf of the defendants. This communication was confirmed with an email to Timmy's counsel, dated November 26, 2008. Timmy's counsel responded on December 1, 2008, stating that he was working on a settlement and would send Ms. Leonardi "everything later."

Based on the above, it cannot be said that 90th Realty's reliance on the representations of counsel for Timmy to either settle the matter or serve an answer on behalf of 90th Realty was unreasonable.

Contrary to plaintiff's contention, 90th Realty's reliance on the representations of

Timmy's counsel *is* different from those claiming a delay by an insurance carrier in answering a complaint or due to settlement negotiations, which courts have found insufficient to establish a reasonable excuse for a default (*cf. Juseinoski v Board of Educ. of City of New York*, 15 AD3d 353, 790 NYS2d 162 [2d Dept] [stating that an "insurance carrier's delay is insufficient to establish a reasonable excuse for a default"] *citing Campbell v Ghafoor*, 8 AD3d 316, 777 NYS2d 718 [2d Dept 2004] [finding that "bare allegation by the defendants' attorney" that the delay was caused by the defendants' insurance carrier was insufficient]; *American Shoring Inc. v D.C.A. Construction Ltd.*, 15 AD3d 431, 789 NYS2d 722 [2d Dept 2005] [stating that reliance by the defendant on the parties' settlement negotiations did not constitute a reasonable excuse for the default, since defendant was aware during those negotiations that the plaintiff had already obtained a default judgment; *DeRisi v Santoro*, 262 AD2d 270, 691 NYS2d 111 [2d Dept 1999] [purported reliance on alleged settlement negotiations in connection with the lawsuit does not constitute a reasonable excuse for their failure to oppose the plaintiff's motion for summary judgment])). Here, the excuse proffered is not based on a "bare allegation" and 90th Realty relied upon the representation that an answer would be served on its behalf.

Therefore, 90th Realty has established a reasonable excuse for its default.

However, the same cannot be said of Timmy's. In opposition to plaintiff's motion, Timmy's submitted an Answer, without any explanation for its delay. Therefore, default judgment against Timmy's is warranted.

Meritorious Defense

Further, 90th Realty has established a meritorious defense against the first cause of action to foreclose the Mechanic's Lien against the Building. Lien Law § 3 provides as follows:

A contractor, subcontractor, laborer . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . from the time of filing a notice of such lien as prescribed in this chapter.

Lien Law § 3 permits the filing of a mechanic's lien against the owner of real property only if the work was done “with the consent or at the request of the owner” (*Paul Mock, Inc. v 118 East 2&h Street Realty Co.*, 87 AD2d 756, 448 NYS2d 693 [1st Dept 1982]). Indeed, the word ‘consent’ as used in section 3 of the Lien Law has a limited application (*Bedford Lake Park Corp. v Twelve Linden Corp.*, 8 AD2d 818, 190 NYS2d 143 [2d Dept 1959]). 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” (emphasis added) (*Paul Mock, Inc. v 118 East 2&h Street Realty Co.*, 87 AD2d 756, *supra*; *Dash Contracting Corp. v Slater*, 142 Misc 2d 512, 537 NYS2d 736 [Sup Ct New York County 1989]). “There is a marked distinction between the passive acquiescence of an owner in that he knows the improvements are being made, improvements which in many cases he has no right to prevent, and his actual and express consent or requirement that the improvement shall be made” (*Bedford Lake Park Corp. v Twelve Linden Corp.*, 8 AD2d 818, *supra*). It is the latter that constitutes the consent mentioned in the statute (*id.*, citing *Rice v Culver*, 172 NY 60).

The consent by an owner can be found where the owner, by contract with the lessee, has required or specifically consented to the making of certain improvements (*M & B Plumbing & Heating Co., Inc. v Cammarota*, 103 AD2d 879, 477 NYS2d 901 [3d Dept 1984]; *see also In re City of New York*, 292 AD2d 176, 738 NYS2d 202 [1st Dept 2002] [the law requires that the

landlord actually participated in procuring the work to be done or that the landlord required the tenant to perform the work for the landlord's benefit; consent found since lease required the tenant to effect the installations performed by the lien holder and the installations became part of the demised premises and ultimately inured to the owner's benefit; also owner dealt directly with lien holder in connection with the subject work performed upon its premises]). "Of critical significance is the requirement that '[t]he consent contemplated by the statute is not a consent given to the tenant, but a consent given to the materialman'" (*Beaudet v Saleh*, 149 AD2d 772, 539 NYS2d 567 [3d Dept 1989] citing *Paul Mock, Inc. v 118 East 25th St. Realty Co.*, 87 AD2d 756, *supra*, quoting *Sager v Renwick Park & Traffic Assn.*, 172 AD 359, 368, 159 NYS 4).

Here, there is no indication that 90th Realty performed any "affirmative act" which can be construed as "consent" required by Lien Law § 3 (*see Beaudet v Saleh*, 149 AD2d 772, 539 N.Y.S.2d 567 [3d Dept 1989]).

Section 13.02 of the Lease pertaining to "Alterations" provides that:

- (a) Alterations shall be performed only in accordance with and subject to, this Article and the other applicable provisions of this Lease.
- (b) Tenant shall make no Alterations of any nature, including any Alterations outside the Premises, without Landlord's prior written consent in each instance, except as otherwise expressly permitted in this Article.
- (c) All Structural Alterations shall be subject to Landlord's prior written consent in each instance, which approval may be withheld or granted in Landlord's sole and absolute discretion

Contrary to the plaintiff's contention, there is no indication that the Lease requires Timmy's to perform any work at the Premises, and that such work must remain part of the leased premises. 90th Realty expressly reserved its right to withhold consent to any work requested by Timmy's to be performed. Nor is there any indication that Timmy's was given an

unconditional right to perform alterations at the Premises.

Further, with respect to improvements made to the Premises, section 14.01 under

“Tenant’s Property” provides:

- 14.1 All fixtures, equipment, improvements and appurtenances attached to or built into the Premises at the commencement of or during the Term, whether or not by or at the expense of Tenant, shall be and remain a part of the Premises, shall be deemed the property of Landlord and shall not be removed by Tenant, *except as hereinafter in this Article expressly provided.* (Emphasis added).
- 14.2 All paneling, movable partitions, lighting fixtures, special cabinet work, other business and trade fixtures, machinery and equipment, and communications equipment, whether or not attached to or built into the Premises, which are Installed In the Premises by or for the account of Tenant, without expense to Landlord, and can be removed without permanent structural damage to the Building, and all furniture, furnishings and other articles of movable personal property owned by Tenant and located in the Premises, (all of which are sometimes referred to as "Tenant's Property") shall be and shall remain the property of Tenant and may be removed by it at any time during the Term;
- 14.3 At or before the Expiration Date, or the date of any earlier termination of this Lease, or as promptly as practicable after such an earlier termination date, Tenant at its expense, shall remove from the Premises all of Tenant's Property, which Tenant elects in its sole discretion.

Plaintiff’s Mechanic’s Lien states that plaintiff performed labor and provided materials including partitions, doors, other “interior installations” and “additional work at the demised premises. To the extent that such installations constitute the “Tenant’s Property” as defined under Article 14, Timmy’s has the right to remove such property at the end of the Lease term. Thus, such property would *not* remain part of the Premises and inure to the benefit of 90th Realty.

Thus, 90th Realty submitted sufficient evidence to support its defense that the provisions in the Lease do not constitute consent to the work within the meaning of the Lien Law (*see Paul Mock, Inc. v 118 East 25th Street Realty Co.*, 87 AD2d 756, *supra*; *see also, Backstatter v Berry*

Hill Building Corp., 56 Misc 2d 351, 288 NYS2d 850 [Sup Ct Nassau Co 1968]).

In addition, 90th Realty established a meritorious defense to plaintiff's *quantum meruit* claim. To state a cause of action to recover in *quantum meruit*, the plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*Martin H. Bauman Assocs., Inc. v H & M Intern. Transport, Inc.*, 171 AD2d 479, 567 NYS2d 404 [1st Dept 1991]; *Capital Heat, Inc. v Buchheit*, 46 AD3d 1419, 848 NYS2d 481 [4th Dept 2007]). Since plaintiff had a written contract with Timmy's, but not with 90th Realty, it cannot be said that plaintiff's *quantum meruit* claim is precluded against 90th Realty on the basis that a valid contract governing the issues exist (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [*quantum meruit* claim is precluded if a valid and enforceable contract governs the relationship between the parties and the improvements made to the building]). However, based on the Lease provisions concerning the Tenant's right to remove "paneling, movable partitions, lighting fixtures, special cabinet work, other business and trade fixtures, machinery and equipment . . . which are installed . . . for the account of Tenant, without expense to Landlord," 90th Realty sufficiently raised the defense as to whether it "received the benefit of the plaintiffs labor and materials."

In light of the above, and the principle that the law favors disposition of cases on the merits (*Arred Enterprises Corp. v Indemnity Ins. Co. of North America*, 108 AD2d 624, 485 NYS2d 80 [1st Dept 1985]), the motion by plaintiff for a default judgment against 90th Realty is denied, and 90th Realty's cross-motion for leave to serve its Answer, is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff for default judgment as against defendant TJ-104 Restaurant Corp., d/b/a Timmy's by the River Restaurant for failing to answer the Complaint is granted; damages as against said defendant shall be determined at the trial or other disposition of this action; and it is further

ORDERED that the motion by plaintiff for default judgment as against defendant 90th Realty, LLC is denied; and it is further

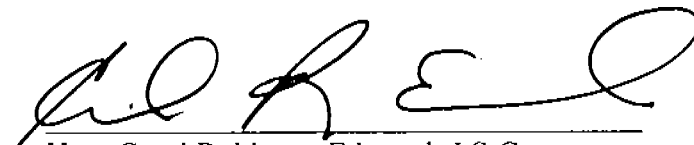
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This constitutes the decision and order of the Court.

Dated: June 16, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
JUN 18 2009
COUNTY CLERK'S OFFICE
NEW YORK