

United Elec. Power v QNCC Elec. Contr. Corp.

2009 NY Slip Op 32447(U)

October 14, 2009

Supreme Court, Nassau County

Docket Number: 012439-07

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
UNITED ELECTRIC POWER,

Plaintiff,

-against-

**TRIAL/IAS PART: 25
NASSAU COUNTY**

**Index No: 012439-07
Motion Seq. Nos: 1 & 2
Submission Date: 8/12/09**

**QNCC ELECTRICAL CONTRACTING CORP.
and ELECTRICAL CONTRACTING
SOLUTIONS CORP.,**

Defendants.

-----X

Papers Read on these Motions:

- Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....X**
- Amended Notice of Motion.....X**
- Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....X**
- Defendant's Memorandum of Law.....X**
- Defendant's Affirmation in Opposition and Exhibit.....X**
- Plaintiff's Reply Affirmation.....X**

This matter is before the court on 1) the motion filed by Plaintiff United Electric Power ("United") on July 21, 2009, and 2) the motion filed by Defendant Electrical Contraction Solutions Corp. ("ECS") on July 27, 2009, both of which were submitted on August 12, 2009. The Court grants Plaintiff's motion in part and denies it in part. The Court grants ECS' motion in its entirety. For the reasons set forth below, the Court 1) grants Plaintiff's motion for sanctions to the extent that the Court directs counsel for ECS to compensate Plaintiff for costs that Plaintiff incurred in attempting to depose Joseph Kashinsky after Plaintiff learned that ECS' counsel did not represent QNCC; and b) grants Plaintiff's motion for a default judgment against

Defendant QNCC Electrical Contracting Corp. and directs the Clerk to enter a default judgment, pursuant to CPLR § 3215(a), in favor of Plaintiff and against Defendant QNCC Electrical Contracting Corp. in the sum of \$77,024.89, with interest. The Court grants Defendant ECS' motion for summary judgment dismissing the verified complaint ("Complaint") and dismisses the Complaint as to Defendant ECS.

BACKGROUND

A. Relief Sought

United seeks an Order 1) directing the Clerk to sign a default judgment pursuant to CPLR § 3215(a), in favor of United, against Defendant QNCC Electrical Contracting Corp. ("QNCC") in the sum of \$77,024.89, plus interest; and 2) imposing sanctions against the law firm of Goetz Fitzpatrick LLP, which represents Defendant Electrical Contracting Solutions Corp. ("ECS") and may represent, or have represented in the past, QNCC. ECS has submitted an opposition in which, as outlined below, it denies any misrepresentations with respect to its representation of the Defendants, and affirms that QNCC is "de facto out of business."

ECS seeks an Order, pursuant to CPLR § 3212, granting summary judgment in favor of ECS and against United, and dismissing, with prejudice, all causes of action in the complaint ("Complaint") against ECS.

B. The Parties' History

In its Summons and Complaint ("Complaint"), filed on July 18, 2007, United asserts four (4) causes of action against QNCC and ECS, arising out of United's sale and delivery of electrical products to the Defendants. In count one, United seeks payment of \$77,024.89 for items that it sold and delivered to Defendants. Count two is based on the theory of account stated. Counts three and four allege unjust enrichment by Defendants.

In support of its motion, United provides an Affidavit of Donna Rosen ("Rosen") dated July 10, 2009. In that Affidavit, Rosen affirms that she is an "official of plaintiff," and is "fully familiar with this transaction." Rosen affirms, further, that 1) at QNCC's request, United furnished QNCC with electrical products, which are listed on appended invoices; 2) United sold these products to QNCC at the prices agreed upon by United and QNCC, which are reflected in the invoices; 3) QNCC never made any complaint regarding the products listed on the invoices; 4) the invoices include language providing that, in the event that United referred the sales order

to an attorney for collection, QNCC would pay all collection costs, including reasonable counsel fees; 5) United has agreed to pay its attorney one-third of the sum that counsel collects, which is \$19,241.77, representing 1/3 of the \$57,783.12 that QNCC owes to United; and 6) the delivery receipts and shipping tickets contain QNCC's signature, reflecting its acceptance of the goods and services sold and delivered. Thus, United submits, QNCC owes United a total of \$77,024.89.

United affirms that it served Defendants with the Complaint on July 24, 2007, via service on the Secretary of State, and provides copies of Affidavits of Service in support. Plaintiff affirms that it also mailed the Complaint to Defendants on July 30, 2007 and provides, in support, copies of two letters addressed to 1) ECS, c/o John McCarron, Esq., and 2) QNCC, advising Defendants that the Complaint had been served upon the Secretary of State, and enclosing a copy of the Complaint.

United affirms that both Defendants failed to appear or answer, and United submitted a proposed judgment which was entered against both Defendants on September 22, 2007. United provides a copy of that Judgment By Default on Verified Complaint ("Judgment") which is in the sum of \$112,978.15, representing principal and counsel fees totaling \$77,024.89, interest of \$35,643.26 and costs of \$310.00.

United affirms that, in early October 2007, Defendants contacted United and advised United that ECS' counsel represented both Defendants. ECS' counsel requested an extension of time to answer the Complaint on behalf of both Defendants, and United acceded to that request. United received a letter from ECS' counsel dated October 16, 2007, confirming that ECS' counsel represented both Defendants and referring to the proposed stipulation regarding the extension of time to answer. That letter reads as follows:

This office represents the defendants [QNCC] and [ECS] in connection with the above-referenced action. Pursuant to our conversation last week, whereby plaintiff agreed to vacate its default against the defendants and permit defendants to serve and file their Answer in this action, it is my understanding that no default has been entered with the [Clerk]. Can you confirm this for me. In the meantime, in case there is no default, I have drafted a Stipulation to extend the time for defendants to serve their Answer to November 15, 2007. The second draft Stipulation is in case a default has been entered, which requires the date of the default and the amount of the default. Please review and contact me. In the meantime, I received the documentation which you faxed today. I am forwarding

the documents on to the surety.

United affirms that, with its consent, the Judgment was vacated and Defendants received an extension of time to answer the Complaint. Defendants then served United with their verified answer (“Answer”) dated November 14, 2007. In the Answer, Defendants assert several affirmative defenses, including the defense that United had no privity of contract with ECS.

During the discovery process, United served Defendants with deposition notices (“Notices”) for Evelyn Kashinsky (“Evelyn”) of ECS, Joseph (“Joseph”) Kashinsky of QNCC, and Sonia Walters (“Sonia”), who, United believed, was an employee of both Defendants, and provides copies of those Notices. The Notices for Joseph and Sonia are dated April 23, 2009, and provide for a deposition date of May 7, 2009 at 9:30 a.m. The notice for Evelyn is dated June 3, 2009 and provides for a deposition date of June 19, 2009 at 9:30 a.m.

United affirms that, after serving these Notices, United received communications from ECS’ counsel advising United that ECS’ counsel did not represent QNCC. United provides a copy of an e-mail that United sent to ECS’ counsel on June 2, 2009 at 1:00 p.m. regarding the scheduling of depositions. That e-mail includes the following language:

In addition, please confirm that your firm does not represent ECS. The answer served by your firm states that it is on behalf of both defendants. However, you have repeatedly stated that you do not represent ECS. If you DO represent ECS, then you must produce [Joseph]. If you do NOT represent ECS, then we will move for a default judgment for its failure to answer.

(emphasis in original)

ECS’ counsel responded via an e-mail dated June 2, 2009 at 1:59 p.m. which responded to United’s inquiry regarding the scheduling of certain depositions. That e-mail includes the following language:

Also, it is our position that we do not represent QNCC. Therefore, we will not be producing [Joseph] which is why I provided you with his last known address.

United affirms that, after ECS’ counsel notified United that it did not represent QNCC, United served Joseph with a Notice to Take Deposition Upon Oral Examination with Judicial Subpoena *Duces Tecum*, and Joseph did not appear for his subpoenaed deposition.

ECS affirms that, prior to the e-mails to which United refers, counsel for ECS spoke with United's counsel and advised her that QNCC was "de facto out of business." ECS affirms, further, that it advised ECS' counsel that 1) ECS was improperly named in the lawsuit; and 2) United could move for a default judgment against QNCC at any time. ECS affirms, further, that ECS' counsel attended status conferences at which she explained both to the Special Referee and the assigned judge that "there were no grounds for ECS to be named in the lawsuit and that the company QNCC was de facto out of business and United Electric is free to move for a default judgment."

ECS submits that United ignored those statements, and instead pursued this litigation in the hopes of establishing an "alter-ego" relationship between ECS and QNCC which it, apparently, could not do as the Complaint contains no such allegations. ECS notes, further, that United never moved to compel discovery from QNCC, or noted its objections at court conferences regarding QNCC's alleged failure to comply with discovery. ECS submits that United followed this course because it knew that QNCC had no assets. With respect to the e-mails discussed *supra*, counsel for ECS admits to an "unfortunate choice of words" in stating that counsel "[did] not represent QNCC," but affirms that United knew that QNCC was out of business before commencing this action.

In its Reply Affirmation, United strongly disputes the explanation that ECS has proffered, and submits that the record supports United's contention that counsel for ECS acted intentionally, in an attempt to prevent United from deposing Joseph, a principal of QNCC. Specifically, United argues, the conduct of ECS' counsel in interposing the Answer on behalf of both Defendants, and requesting United's consent in vacating the default judgment against QNCC, belies ECS' claim that it was forthright in its dealings with United.

With respect to its motion for summary judgment, ECS provides deposition testimony of Rosen ("Rosen"), the Account Manager for United Electric, who testified on March 23 and June 19, 2009, which includes stipulations by United's counsel.

The relevant testimony and stipulations are the following: At the March 23, 2009 deposition, 1) Rosen testified that ECS' name does not appear on any of the invoice paperwork; and 2) counsel for United agreed to "stipulate that all of the invoices that [Rosen] has just reviewed and that you are showing her does [sic] not contain the name of [ECS] and only

contains the name of [QNCC].” At the June 19, 2009 deposition, Rosen testified that none of the relevant purchase orders were directed to ECS. ECS’ counsel then asked Rosen to “refer to Defendant’s Exhibits A through U and...Exhibit V and show me where on any of these documents that ECS’s name appears as QNCC Electrical Contracting Corp./ECS?” Counsel for the parties then engaged in the following colloquy:

[United’s Counsel]: That was definitely asked in the prior deposition. I remember stipulating that no documentation named ECS as a party.

[ECS’ Counsel]: I understand that, but I never asked the question because today she’s claiming that QNCC/ECS is an entity. She never stated that in the previous deposition, so I want to clarify in this deposition where exactly in these documents does an entity QNCC/ECS appear.

[United’s Counsel]: It doesn’t.

[ECS’ Counsel]: Okay.

[United’s Counsel]: All right. We stipulate it doesn’t appear on any of those documents.

United’s counsel also placed on the record on the June 19th deposition that “[W]e’ve already said we have no documentation with ECS, no purchase orders, no invoices, no delivery receipts.”

C. The Parties’ Positions

United submits that opposing counsel’s “unilateral and improper representation that it does not now represent QNCC was an obvious and highly unethical litigation strategy designed to prevent plaintiff from deposing [Joseph], the principal of QNCC.” United contends that opposing counsel’s allegedly improper conduct has delayed this litigation and cost United money by, *inter alia*, 1) delaying the enforcement of United’s judgment against QNCC; and 2) obligating United to serve Joseph with a separate deposition notice, after learning that opposing counsel did not represent Joseph and, therefore, would not make him available for a deposition. United also submits that it has established its right to a default judgment against QNCC.

ECS opposes United’s application, submitting that ECS’ counsel) never misrepresented its status as counsel; 2) never hindered the discovery process; and 3) did not prolong or frustrate

this litigation. ECS also moves for summary judgment and the dismissal of the Complaint against ECS. ECS submits that there is no evidence that United contracted with ECS, or provided goods to ECS and, therefore, ECS is entitled to judgement as a matter of law.

RULING OF THE COURT

A. Plaintiff is Entitled to a Default Judgment against QNCC

CPLR §§ 3215(a) and (f) provide in pertinent part:

(a) When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest.

(f) On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party... Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney.

The term “sum certain” in the context of CPLR § 3215(a) contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments. Under those circumstances, the clerk functions in a purely ministerial capacity. *Reynolds Securities, Inc. v. Underwriters Bank*, 44 N.Y.2d 568, 572 (2d Dept. 1978). Here, where the invoices and other documentary evidence establish: 1) that United delivered designated products to QNCC; 2) that QNCC accepted those products; 3) that QNCC agreed to pay a designated price for those products; and 4) that QNCC agreed to pay United’s reasonable counsel fees incurred in collecting sums that QNCC owed to United, it was proper for the Clerk to issue the default judgment against QNCC.

In light of the concession of counsel for ECS that it never represented QNCC, the Court holds that counsel for ECS had no authority to submit a Verified Answer on behalf of QNCC, and strikes the Verified Answer as to QNCC only. Because there is now no responsive pleading from QNCC, United Electric is entitled to a Judgment of Default against QNCC. Thus, the

Court directs the Clerk to enter a default judgment, pursuant to CPLR § 3215(a), in favor of Plaintiff and against Defendant QNCC Electrical Contracting Corp. in the sum of \$77,024.89, with interest.

B. ECS' Counsel Must Compensate Plaintiff's Counsel for the Costs Incurred in Attempting to Depose Joseph Kashinsky

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. Section 130-1.1(c) provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

Under the circumstances, the Court concludes that United reasonably concluded that ECS' counsel represented both Defendants and would make Joseph Kashinsky available for a deposition. That conclusion is based on several facts, including 1) ECS' counsel's submission of an Answer on behalf of both Defendants, and 2) the failure of ECS counsel to advise United, immediately after United served Joseph with a notice to be deposed, that ECS' counsel did not represent Joseph and, therefore, would not make him available for a deposition. It thus appears that ECS' counsel either acted in a manner to delay or prolong this case, or asserted a false and material factual statement, thereby violating either of the latter two prongs of Section 130-1.1(c). The Court, therefore, directs counsel for ECS to compensate Plaintiff for costs that Plaintiff incurred in attempting to depose Joseph Kashinsky after Plaintiff learned that ECS' counsel did not represent QNCC and, therefore, would not make Joseph Kashinsky available for a deposition. If counsel are unable to resolve the amount of that compensation between themselves, the Court will schedule a hearing to determine the sum that ECS' counsel owes to Plaintiff.

C. ECS is Entitled to Summary Judgment and Dismissal of the Complaint

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986).

Here, United has failed to establish that there was a contractual relationship between United and ECS, that United provided goods to ECS, and/or that ECS promised to make payment to United. Accordingly, the Court concludes that ECS is entitled to summary judgment, and dismisses the Complaint against ECS.

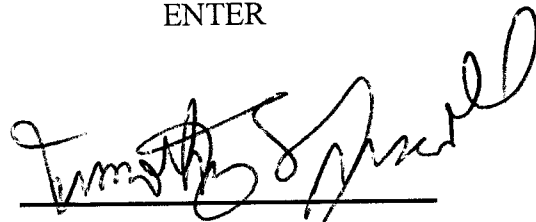
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are directed to appear before the Court for a conference on December 3, 2009 at 9:30 a.m., at which time the Court will, if necessary, schedule a hearing to determine the sum that counsel for ECS owes to United in connection with the costs that United expended for Joseph Kashinsky's deposition.

ENTER

DATED: Mineola, NY
October 14, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C. **ENTERED**

OCT 19 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**