

Ideal Supply Co., Inc. v B & D Installation Corp.
2009 NY Slip Op 32794(U)
November 20, 2009
Supreme Court, New York County
Docket Number: 600254/09
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

The Ideal Supply Co. Inc.

INDEX NO. 600254/2009

- v -

MOTION DATE _____

B+A Installation Corp.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Upon the foregoing papers, it is ordered that this motion *is decided*
accordance with the attached memorandum opinion.

FILED

DEC 01 2009

NEW YORK
COUNTY CLERK'S OFFICE

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NOV 25 2009

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

MDAL

Dated: 11/20/09

[Signature]
WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
THE IDEAL SUPPLY CO., INC.,

Plaintiff,

-against-

Index № 600254/09

B & D INSTALLATION CORP., KABACK ENTERPRISES,
INC., 229 WEST 36TH STREET PARTNERSHIP,
LP, PPF OFF 2 PARK AVENUE OWNERS, LLC, and
MARLIN MECHANICAL, INC.,

Defendants.

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WALTER B. TOLUB, J.:

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Plaintiff The Ideal Supply Co., Inc. (Ideal Supply) moves for an order, pursuant to CPLR 3215 (f), granting a default judgment against defendant B & D Installation Corp. (B&D). Defendant Marlin Mechanical, Inc. (Marlin) cross-moves for an order vacating a Notice of Mechanic's Lien, and dismissing the complaint as against Marlin.

Facts

This is a lien foreclosure action stemming from plaintiff's claims that it contracted with B&D, on or about June 2, 2008, to supply materials, goods and supplies (together, materials) to various New York City job sites, for which it did not receive full payment. The job sites include sites owned by defendants 229 West 36th Street Partnership (West 36th Street) and PPF OFF 2 Park Avenue Owners, LLC (2 Park Avenue), and located at 229 West 36th Street, and 2 Park Avenue, respectively.

The allegations, as relevant to the motion and cross motion, are that pursuant to contract and subcontract arrangements, plaintiff supplied materials to B&D who supplied materials to Marlin for work at the 2 Park Avenue location, and to Kaback Enterprises, Inc. (Kaback) for

work at the West 36th Street location. As of July 24, 2008, despite due demand and after crediting payments made, there remained an unpaid balance in the amount of \$74,031.98, prompting plaintiff to file the mechanic's lien at the center of this action.

The first cause of action, sounding in breach of contract, demands recovery in the amount of \$74,031.98, plus interest from July 24, 2008. Plaintiff's second cause of action is for an account stated in the amount of \$74,031.98, plus interest from July 24, 2008. In its third cause of action, plaintiff seeks to foreclose on the mechanics lien which it filed on or about January 9, 2009 in the Office of the Clerk of the County of New York. That cause of action asserts that the lien has not been paid, cancelled, or discharged, entitling it to the recovery demanded.

Ideal Supply commenced this action in February 2009, by serving and filing a copy of the summons and amended complaint with the office of the New York County Clerk. Plaintiff effected service on defendants by serving the Department of State for the State of New York on or about February 17, 2009, in compliance with CPLR 311 (a) and Business Corporation Law (BCL) § 306.

CPLR 311 (a) provides, in pertinent part:

Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

(1) upon any domestic or foreign corporation, to an officer, director, managing or general agent . . . or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law.

BCL § 306, provides, at subsection (b) (1):

[s]ervice of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of a state or a deputy, or with any person authorized by the secretary of

state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee . . . Service of process on such corporation shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose.

It is well settled that service of process on a corporation is complete, and jurisdiction is obtained, when service is made on the secretary of state, “irrespective of whether the process subsequently reached defendant” (*Spearman v Atreet Corp.*, 238 AD2d 194 [1st Dept 1997]).

In support of its motion for a default judgment against B&D, plaintiff submits copies of the affidavit of service and the Receipt for Service from the State of New York - Department of State confirming that B&D was served on February 17, 2009. Ideal Supply also submits an affidavit of service along with documentary proof (a copy of the envelope) evidencing that additional service on B&D, by certified mail, was attempted on February 25, 2009, and returned to Ideal Supply marked “unclaimed.” A certified mailing “returned as ‘unclaimed,’ . . . for purposes of the Postal Service means that the addressee abandoned or failed to call for the mail” (*Matter of Harner v County of Tioga*, 5 NY3d 136, 140 - 141 [2005] [internal quotation marks and citations omitted]).

Under CPLR 3215 (a), when a defendant has failed to answer or appear, a plaintiff may move for the entry of a default judgment. To this end, Ideal Supply has made the instant motion and has demonstrated that it effected proper service on B&D. Ideal Supply also submits, as it must under CPLR 3215 (g) (4) (i), an attorney’s affirmation confirming the failure of B&D, who had 30 days to appear in this action by serving an answer, seeking an extension of time to appear, or by opposing the instant default motion.

Ideal Supply also submits a series of invoices itemizing the materials purchased by B&D which it shipped to B&D at either its Valley Stream, New York location or directly to a work site location. Among the documents annexed to the motion is a series of signed and dated receipts acknowledging delivery of the itemized materials, plus a sworn affidavit from a person with knowledge proving the claim. The sworn affidavit is from Ideal Supply's collections manager, Manny Velez, who avers, in relevant part:

at the commencement of this action there was a justly due and owing balance from [B&D] . . . A total due of \$74,031.98, together with interest thereon from July 24th, 2008.

* * *

That subsequent to the commencement of this action the plaintiff directly received the sum of \$35,000.00 from defendant 229 WEST 36th STREET PARTNERSHIP LP that has been applied to the account of the defendant B&D, leaving a remaining balance due of \$39,031.98 for the materials and supplies charged herein as due. Plaintiff has not received any additional security or satisfaction for which credit has not already been given.

That the plaintiff keeps regular books of account and that the keeping of said books is in the charge or under supervision of your affirmant. The entries in said books of account are made in the ordinary course of business and said entries show that [B&D] remains indebted to plaintiff in the manner and in the amount of \$39,031.98, as herein set forth.

Based on the above submissions, which include proof of service, proof of the default, and proof of the claim, and B&D's wholesale failure to appear or to oppose the motion, Ideal Supply is entitled to a default judgment against B&D in the amount of \$39,031.98.

Turning to the cross motion, Marlin seeks an order granting summary judgment vacating the Notice of Mechanic's Lien filed against the 2 Park Avenue location, and dismissing the lien foreclosure action and all remaining causes of action as against it. Ideal Supply does not meaningfully dispute Marlin's arguments, sworn affidavits, and evidentiary documents proffered

in support of the demanded relief. Additionally, by written stipulation of discontinuance dated April 1, 2009 and filed April 16, 2009, Ideal Supply discontinued the action against defendant PPF OFF 2 Park Avenue Owners, LLC, and by partially executed stipulation of discontinuance (signed only by counsel for plaintiff), dated February 5, 2009 and filed February 20, 2009, the action as against defendants Kaback Enterprises, Inc., and 229 West 36th Street Partnership LP was also discontinued.

Discussion

As stated above, Marlin was hired to perform work at 2 Park Avenue and Marlin contracted with B&D for the supply of certain materials with respect to that worksite. It is also undisputed that the following purchase orders: A6339, A6415, and A6418, in the amounts of \$39,950.00, \$1,000.00, and \$1,800.00, respectively, were paid in full by checks from Marlin to B&D. B&D acknowledged receipt of the checks and that payment had been made in full, and it issued three separate final waivers of lien, each signed and dated September 24, 2008. The acknowledgment and waivers of lien were issued more than three months prior to plaintiff's filing of the mechanic's lien. Finally, the record further reveals that: (1) there was no contract or other evidence of a direct relationship between Ideal Supply and Marlin; and (2) Marlin was involved in work at the worksite located at 2 Park Avenue and was not, in any way, involved with the worksite located at West 36th Street. Marlin has satisfactorily established that there is no money due on any subcontract purchase order between itself and B&D with respect to 2 Park Avenue, and B&D has conceded as much.

Accordingly, it is

ORDERED that the motion by plaintiff is granted to the extent that defendant B & D

Installation Corp. is found to be in default of this action and judgment is granted as against it in the amount of \$39,031.98, together with interest as prayed for allowable by law from the date of July 24, 2008, until entry of judgment as calculated by the Clerk of the Court at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion by Marlin Mechanical, Inc. for summary judgment is granted, and:

(a) the mechanic's lien, filed and docketed in the Office of the Clerk of the County of New York on or about January 9, 2009 by Ideal Supply Co. Inc., against Marlin Mechanical, Inc., for labor and materials supplied to the worksite at 2 Park Avenue, New York, New York, is vacated, discharged and cancelled as against Marlin Mechanical, Inc.; and

(b) the complaint is severed and dismissed as against Marlin Mechanical, Inc., and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk.

Dated: 11/20/09

FILED
NOV 24 2009
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