

<b>PERI Formwork Sys., Inc. v C. Cabrera Constr., LLC</b>
2009 NY Slip Op 32849(U)
December 1, 2009
Supreme Court, New York County
Docket Number: 603092/08
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**HON. CAROL EDMEAD**

PRESENT: \_\_\_\_\_

PART 35

Index Number : 603092/2008  
PERI FORMWORK SYSTEMS  
vs  
C. CABRERA CONSTRUCTION  
Sequence Number : 002  
MECHANICS LIEN

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

**FILED**

DEC 07 2009

\_\_\_\_\_ motion to/for \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits \_\_\_\_\_  
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 pursuant to CPLR §3215 for an order directing the entry  
of judgment in favor of the plaintiff and against defendant BCRE 15 Union Square West, LLC on the  
Third Cause of Action, is denied; and it is further

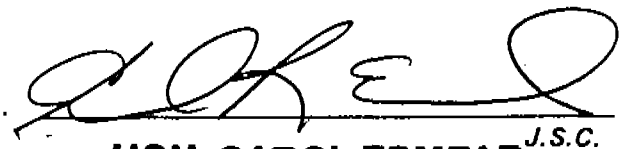
ORDERED that the cross-motion by defendant BCRE 15 Union Square West, LLC pursuant to  
CPLR §3012(d) for an order permitting it to interpose an answer and compelling the plaintiff to accept  
its Answer is granted, and the Answer submitted with BCRE 15 Union Square West, LLC's cross-  
motion is deemed served upon plaintiff effective May 28, 2009; and it is further

ORDERED that the parties appear for a Preliminary Conference on January 19, 2010, 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; and it is further

This constitutes the decision and order of the Court.

Dated: 12/1/09

  
\_\_\_\_\_

**HON. CAROL EDMEAD** 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: PART 35

-----X  
PERI FORM WORK SYSTEMS, INC., on behalf of  
itself and on behalf of all persons entitled to share in the  
funds received by C. CABRERA CONSTRUCTION, LLC  
in connection with a project identified as  
15 Union Square, Block 0842. Lot 26,  
parcel number 01-00842-26

Index No. 603092/08

Plaintiff,

- against -

C. CABRERA CONSTRUCTION, LLC, CARLOS  
CABRERA, and "JOHN DOE I" through "JOHN DOE 100  
the fictitious names being those unknown individuals  
and/or entities liable for the diversion of trust funds pursuant  
to Article 3-A of the Lien Law of the State of New York,  
in connection with a project identified as 15 Union Square,  
Block 0842. Lot 26, parcel number 01-00842-26 and BCRE  
15 Union Square West, LLC, and JANE DOE "1" through  
"JANE DOE 100", defendants being unknown to plaintiff  
and having or claiming an interest in or lien upon the real  
property known as 15 Union Square, Block 0842, Lot 26,  
parcel number 01-00842-26,

Defendants.

**FILED**  
DEC 07 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff, PERI Formwork Systems, Inc. ("Peri" or "plaintiff"), seeks to  
recover monies allegedly owed from defendant, BCRE 15 Union Square West, LLC ("BCRE" or  
the "Owner"), for labor, materials, equipment and services provided.

Plaintiff now moves pursuant to CPLR §3215 for a default judgment against BCRE on  
the Third Cause of Action, which seeks an order (a) adjudging that the plaintiff, by filing and  
causing the docketing of its mechanics' lien, acquired a good and valid lien upon the interests of

BCRE and defendant C. Cabrera Construction, LLC (“Cabrera Construction”), as contractor, in the subject premises, in the sum of \$59,176.23, with interest, costs and disbursements, and (b) adjudging that the defendants be forever foreclosed of all equity of redemption or other lien, claim or interest in and to the subject premises.

In response, BCRE cross moves for leave to interpose an answer, and to compel plaintiff to accept its Answer, dated May 28, 2009.<sup>1</sup>

*Plaintiff's Motion*

In support of plaintiff's motion for a default judgment against BCRE, John Porter, the Chief Financial Officer of plaintiff attests that BCRE owns the real property at issue, described as 15 Union Square, Block 0842, Lot 26 (the “Property”). The Property is in the process of being developed into a mixed use building (the “Project”). Plaintiff provides concrete formwork solutions and equipment and services to the construction industry.

BCRE entered into a contract with Cabrera Construction as the general contractor to furnish among other things, concrete materials and services to the Project (the “Cabrera Contract”). In connection with the Cabrera Contract, on or about May 25, 2007, Cabrera Construction contracted with Peri to provide concrete formwork and related materials and services to the Project (the “Peri Contract”). Under the Peri Contract, plaintiff was to supply certain formwork and services to the Project. The Peri Contract provided that payment for the formwork and related services was due net thirty (30) days.

From June 12, 2007 through September 19, 2007, plaintiff at the special instance and

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<sup>1</sup> Upon inquiry by the Court as to whether plaintiff intended to submit opposition papers to the cross-motion, plaintiff advised the Court that it would rest on its motion papers.

request of Cabrera Construction and with the knowledge and consent of the Owner, performed labor and services at the Property to improve same, consisting of the furnishing custom-made concrete form work systems and services for the agreed price and value of \$65,392.08. No part of such sum of has been paid, except \$6,215.85 leaving a balance due and owing from Cabrera Construction, to the plaintiff of \$59,176.23 (with interest from September 19, 2007), payment of which has been duly demanded and refused.

In April 2007, plaintiff served a copy of the Notice of Mechanic's Lien upon Cabrera Construction and BCRE, and filed the Affidavit of Service of said Notice of Mechanics Lien in the New York County Clerk's office.

On April 16, 2008, within eight months after the date of the furnishing of the last item of material, and the performance of the last item of labor, plaintiff filed the Notice of Mechanics' Lien. Plaintiff contends that at the time the lien was filed BCRE had not fully paid Cabrera Construction for the improvements to the Property.

On October 27, 2008, plaintiff commenced this action to collect amounts allegedly owed to it by Cabrera Construction and to foreclose upon the Mechanic's Lien.

BCRE was then served with process *via* the Secretary of State on October 30, 2008. Thus, BCRE's time to answer expired on or about December 1, 2008, and no extension of time to answer was requested or granted. Thereafter, BCRE attempted to serve an answer on or about May 28, 2009. However, BCRE's purported Answer, was rejected and returned as untimely. As BCRE has failed to appear, plead, or otherwise move in this action, and its time to do so has not been extended, BCRE is now in default in appearing, warranting a default judgment against it

pursuant to CPLR §3215(a).<sup>2</sup>

*BCRE's Opposition and Cross-Motion*

BCRE opposes plaintiff's motion and cross moves pursuant to CPLR §3012(d) for an order permitting it to interpose an answer and compelling the plaintiff to accept its Answer. BCRE argues that it has meritorious defenses to the Complaint and a reasonable excuse for any default in answering the Complaint, and thus, should be granted such leave.

As indicated in the affidavit of Al Gelsomino, a Project Executive for BCRE (the "Gelsomino Affidavit"), BCRE never received a copy of the Complaint from the Secretary of State. It was not until May 2009 that counsel for BCRE discovered the existence of this action during a telephone conversation with plaintiff's attorneys regarding another matter. BCRE was not aware of this action until it was advised by its attorneys of its existence and received a copy of the Complaint from its attorneys. Upon receipt of the Complaint, BCRE promptly served its Answer on or about May 28, 2009. Now, more than ninety days thereafter, and more than ten months after the time which plaintiff claims BCRE's time to answer ran, plaintiff moves for default judgment. BCRE also contends that plaintiff does not claim to have mailed an additional copy of the Complaint to BCRE pursuant to CPLR 3215(g). Without knowledge of the Complaint, it was impossible for BCRE to timely answer it. As BCRE was not otherwise aware of the Complaint, non-receipt thereof will serve as an adequate excuse of its failure to timely respond thereto.

Additionally, BCRE has meritorious defenses to the Complaint. As indicated in the

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<sup>2</sup> On April 23, 2009 plaintiff obtained a judgment against Cabrera Construction in the amount of \$75,640.04 for the labor and services to the Property.

Gelsomino Affidavit, BCRE paid Cabrera Construction (the entity with which plaintiff contracted) in full for all labor and materials provided to the Project. Thus, to the extent that Cabrera Construction failed to pay such amounts to plaintiff, plaintiff's remedy lies with Cabrera Construction. In fact, BCRE is currently litigating its claims with Cabrera Construction in an action entitled *C. Cabrera Construction, LLC v BCRE 15 Union Square West, LLC*, Index No. 303732/2007 venued in the Supreme Court of the State of New York, County of Bronx. Moreover, the Complaint is defective as a matter of law because it fails to name the necessary parties pursuant to Lien Law §44 and because plaintiff's mechanic's lien was discharged by the filing of a bond. Mr. Gelsomino attests that on August 7, 2008, months before this action was commenced, BCRE filed a mechanic's lien discharge bond with the New York County Clerk. Thus, plaintiff's pleadings are defective on their face for failing to name the surety on that bond as a defendant herein, and for failing to seek foreclosure against the bond as opposed to the Project.

#### *Discussion*

CPLR 3215(a) states in pertinent part:

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.

Plaintiff's submissions, including the Affidavit of Merit, demonstrate that the agreed upon value of the labor, materials, equipment and services furnished by plaintiff, but not paid for by BCRE is \$59,176.23. The submissions also establish that BCRE failed to timely appear in this action, although BCRE was served with process *via* the Secretary of State on October 30, 2008.

However, CPLR §3215(g)4(i) provides:

When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.

Thus, an application for a default judgment must be accompanied by an affidavit demonstrating compliance with CPLR §3215(g)(4)(i) and if such an affidavit is lacking, the application for leave to enter a default judgment is defective and should be denied (*Media Neurology, PC v State Nat. Ins. Co.*, 2003 WL 21050810 [N.Y. Sup. App. Term 2003]). “The purpose of CPLR 3215(g) is to give a defaulting defendant additional notice of the action before a judgment can be entered. That added notice affords a defaulting defendant an opportunity to assert a good excuse and meritorious defense or valid jurisdictional objection in order to have a default vacated and avoid entry of judgment” (internal citations omitted) (*342 Madison Ave. Assocs. Ltd. Partnership v Suzuki Assocs., Ltd.*, 187 Misc 2d 488, 722 NYS2d 729 [Sup Ct New York County 2001]). It is uncontested that plaintiff failed to establish that it complied with CPLR 3215(g)4(i), and thus, the application for a default judgment against BCRE must be denied.

Further, it is uncontested that BCRE did not receive the Complaint from the Secretary of State. Thus, there is a reasonable excuse for BCRE’s delay in answering the Complaint.

And, BCRE demonstrated that it has a meritorious defense to this action. It is uncontested that BCRE paid Cabrera Construction, with whom BCRE contracted, the amounts due and owing for Cabrera Construction’s services on the Project, that Cabrera Construction is the entity that failed to pay plaintiff pursuant to Cabrera Construction’s contract with plaintiff,

and that BCRE submitted a "Discharge of Mechanic's Lien Bond" in favor of plaintiff in the amount of \$72,184.00.

Nor does plaintiff allege or establish any prejudice as a result of BCRE's delay. It is also noted that this State's public policy favors determinations of claims on the merits (*see Pagan v. Four Thirty Realty LLC*, 50 AD3d 265, 855 NYS2d 63 [1<sup>st</sup> Dept 2008] [affirming denial of denial of default judgment, where defendants demonstrated reasonable excuse for their delay in answering complaint, defendants established *prima facie* meritorious defenses to plaintiffs' claims, and plaintiffs did not demonstrate any prejudice as result of delay]). Therefore, default judgment against BCRE is unwarranted.

Further, CPLR § 3012(d) provides that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Having established a reasonable excuse for its delay in answering the Complaint, BCRE is entitled to an order compelling plaintiff to accept BCRE's Answer in the form submitted with its cross-motion.

### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff pursuant to CPLR §3215 for an order directing the entry of judgment in favor of the plaintiff and against defendant BCRE 15 Union Square West, LLC on the Third Cause of Action, is denied; and it is further

ORDERED that the cross-motion by defendant BCRE 15 Union Square West, LLC pursuant to CPLR §3012(d) for an order permitting it to interpose an answer and compelling the plaintiff to accept its Answer is granted, and the Answer submitted with BCRE 15 Union Square

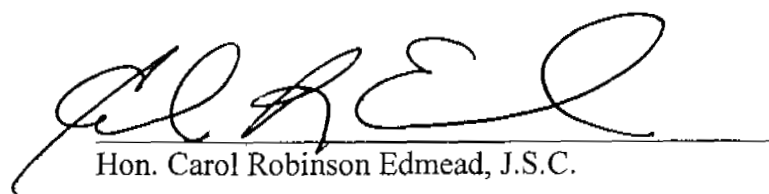
West, LLC's cross-motion is deemed served upon plaintiff effective May 28, 2009; and it is further

ORDERED that the parties appear for a Preliminary Conference on January 19, 2010, 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; and it is further

This constitutes the decision and order of the Court.

Dated: December 1, 2009



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

**HON. CAROLE DMEAD**

**FILED**  
DEC 07 2009  
NEW YORK  
COUNTY CLERK'S OFFICE