Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Aurora Contractors, Inc.,

Plaintiff,

-against-

Mt. Sinai Senior Services, Inc., Sovereign Bank, Carver Federal Savings Bank, New Life Management & Development, Inc., Bladykas Engineering, P.C.and Ehasz Giacalone Architects, P.C.,

Defendants.

Ehasz Giacalone Architects, P.C.

Third-Party Plaintiff,

-against-

Active Retirement community, Inc. and New Life Management & Development, Inc.,

Third-Party Defendants.

Index No.: 38321/~~2998~~ 2009

Motion Sequence No.: 001; MD
Motion Date: 5/26/10
Submitted: 6/2/10

Motion Sequence No.: 002; XMD
Motion Date: 5/26/10
Submitted: 6/2/10

Attorneys/Parties [See Rider Annexed]

Upon the following papers numbered 1 to 45 read upon this motion and cross motion for default judgment: Notice of Motion and supporting papers, 1 - 9; Notice of Cross Motion and supporting papers, 23 - 35; Answering Affidavits and supporting papers, 10 - 13, 14 - 16, 17 - 22, 36 - 44.

This action involves the proposed construction of a continuing care retirement community and senior health care facility at the corner of Route 25A and Wylde Road, in the Hamlet of Mount Sinai, Town of Brookhaven, New York. In furtherance of its development plans, on or about

October 14, 2004, the defendant Mt. Sinai Senior Services, Inc. (Mt. Sinai) entered into a contract with the defendant/third party plaintiff Ehasz Giacalone Architects P.C. (EGA) for architectural services. On or about November 29, 2005, Mt. Sinai signed a contract for engineering services with the defendant Bladykas Engineering, P.C. (Bladykas). On December 20, 2006, Mt. Sinai secured a loan and executed a note and mortgage on the subject parcel in favor of the defendant Sovereign Bank (Sovereign). On February 28, 2008, Mt. Sinai borrowed additional funds from Sovereign and executed an allonge and an additional first mortgage. On or about May 2, 2008, Mt. Sinai entered into a contract for construction management services with the plaintiff Aurora Contractors, Inc. (Aurora). In addition, it appears that Mt. Sinai executed an additional note and mortgage with the defendant Carver Federal Savings Bank (Carver). However, the record does not reveal the details of that alleged transaction.

After Mt. Sinai was not able to obtain financing to complete the project and it failed to pay its bills, Bladykas filed a mechanic's liens against Mt. Sinai's Wylde Road property on April 14, 2009. EGA alleges that it filed its own mechanic's lien on or about May 2, 2009. However, the copy of the purported lien attached to EGA's papers does not indicate that it was filed with the County Clerk. Aurora filed its mechanic's lien on July 27, 2009.

Aurora now moves for a default judgment against Mt. Sinai based on its allegations that Mt. Sinai is in breach of the contract between the parties. CPLR §3215(a) states, in relevant part: "When a defendant has failed to appear, plead or proceed to trial on 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." A party seeking a judgment on default is required to submit proof of the service of the summons and complaint, proof of the facts constituting the claim and proof of the default in answering or appearing (CPLR §3215(f); Matone v. Sycamore Realty Corp., 50 AD3d 978 [2nd Dept., 2008], *lv denied* 11 NY3d 715 [2009]; Allstate Ins. Co. v. Austin, 48 AD3d 720 [2nd Dept., 2008]; Grinage v. City of New York, 45 AD3d 729 [2nd Dept., 2007]). In addition, when service of the summons and complaint has been made pursuant to Business Corporation Law §306, a default judgment may not be granted against a non-appearing corporation without proof of compliance with the additional service requirements of CPLR §3215 [g][4][i], [ii] (see, CPLR §3215; Business Corporation Law §306 [b][1]; Allstate Ins. Co. v. Austin, 48 AD3d 720 [2nd Dept., 2008]; Perkins v. 686 Halsey Food Corp., 36 AD3d 881 [2nd Dept., 2007]; Shimel v. 5 South Fulton Ave. Corp., 11 AD3d 527 [2nd Dept., 2004]; see also, Matone v. Sycamore Realty Corp., 50 AD3d 978 [2nd Dept., 2008]). That is, a second copy of the summons in the action must be mailed to the named defendant corporation at its last known address at least twenty days before the entry of judgment along with a notice that service is being made or has been made pursuant to BCL §306. Here, Aurora has failed to demonstrate its entitlement to a default judgment against Mt. Sinai. The affidavit of service attached as exhibit "C" to its papers does not indicate what was mailed to Mt. Sinai, nor does it contain a copy of the document referenced therein. The Court is not able to determine, at this time, whether Aurora has complied with the requirements of CPLR §3215(g)(4)(i) and (ii).

Aurora also moves for a default judgment foreclosing on its mechanic's lien filed against Mt. Sinai's real property on July 27, 2009. The duration of a mechanic's lien is limited to one year after a notice of lien has been filed unless an action to foreclose the mechanic's lien is commenced within that time and a notice of pendency is filed or an extension of the lien has been obtained (see, Lien Law §17; In the Matter of Lindt & Sprungli USA, Inc. v. PR Painting Corp., 292 AD2d 610 [2nd Dept., 2002]). Although it is clear that Aurora commenced an action to foreclose its mechanic's lien within one year of the filing of its notice of lien, it has failed to include a copy of the notice of pendency required to avoid the discharge of its lien and those of Bladykas and EGA, by operation of law. Where a mechanic's lienor is made a party defendant in an action to enforce another lien and a notice of pendency has been filed in that action, the lien of such defendant is continued (see, Lien Law §17; In re Application of Assay Partners v. Econowatt Corp., 176 AD2d 180 [1st Dept., 1991]). In the instant case, since Bladykas and EGA were made defendants herein, if they are named in the notice of pendency, their mechanic's liens were continued without further act on their part and the notice of pendency enured to their benefit as well as to that of plaintiff (see, Lien Law §19[2]; Gebhardt v. Charleston Chemicals, Inc., 133 NYS2d 764 [Sup Ct. Queens County1953]). Without proof that a notice of pendency has been filed, or that the named parties have made applications to extend their mechanic's liens, the Court is unable to determine the rights of the parties or whether Aurora is entitled to the relief requested. Considering that Aurora does not have a monetary claim against Carver and that Carver's alleged default is not relevant unless and until the issue of priority in the lien foreclosure is addressed, the Court finds it unnecessary to render a decision on that branch of Aurora's motion at this time.

Accordingly, Aurora's motion is denied with leave to renew upon proper proof.

EGA cross-moves for a default judgment against Mt. Sinai based on its on its cross claim for breach of contract. The record reveals that it served its answer on Mt. Sinai pursuant to Business Corporation Law §306. As discussed above, EGA must prove that it has complied with the additional service requirements of CPLR §3215 (g)(4)(i) and (ii). In support of its motion EGA submits, *inter alia*, a letter dated March 25, 2010 which indicates that it mailed a copy of the summons to Mt. Sinai. However, said letter is not in affidavit form and it does not indicate that EGA has served the required notice pursuant to statute.

In addition, EGA cross-moves for a default judgment foreclosing on its mechanic's lien allegedly filed against Mt. Sinai's real property on or about May 2, 2009. Initially, the Court cannot determine whether the lien is valid as it cannot determine if EGA filed the mechanic's lien attached as an exhibit to its motion papers. In addition, for the reasons cited above, the Court cannot determine whether EGA's lien, if properly filed on May 2, 2009, has been discharged by operation of law. Considering that EGA does not have a monetary claim against Carver and that Carver's alleged default is not relevant unless and until the issue of priority in the lien foreclosure is addressed, the Court finds it unnecessary to render a decision on that branch of EGA's motion at this time.

Accordingly, EGA's cross motion is denied with leave to renew upon proper proof.

Based upon the foregoing, it is

ORDERED that the motion by the plaintiff Aurora Contractors, Inc. which seeks an order pursuant to CPLR §3215 for a default judgment against the defendants Mt. Sinai Senior Services, Inc. and Carver Federal Savings Bank (1) on its causes of action for breach of contract, and (2) on its cause of action seeking foreclosure of its mechanic's lien, is denied with leave to renew; and it is further

ORDERED that the cross motion by defendant/third party plaintiff Ehasz Giacalone Architects P.C. which seeks an order pursuant to CPLR §3215 for a default judgment against the defendants Mt. Sinai Senior Services, Inc. and Carver Federal Savings Bank (1) on its cross claim for breach of contract, and (2) on its counterclaim and cross claim seeking foreclosure of its mechanic's lien, is denied with leave to renew.

Dated: August 18, 2010

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

RIDER

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