

**East Port Excavation & Util. Contr., Inc. v Stoneridge
Homes, Inc.**

2010 NY Slip Op 32531(U)

September 9, 2010

Supreme Court, Nassau County

Docket Number: 000182-08

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

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**EAST PORT EXCAVATION & UTILITIES
CONTRACTORS, INC.,**

Plaintiff,

-against-

**STONERIDGE HOMES, INC., NASSAU COUNTY
INDUSTRIAL DEVELOPMENT AGENCY,
839 PROSPECT AVENUE, LLC, NEW YORK
CONTRACTING & CONSTRUCTION
MANAGEMENT CORP., SALVATORE
SANGEORGE AND "JOHN DOE ONE" THROUGH
"JOHN DOE TEN",**

Defendants.

-----x

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 000182-08
Motion Seq. Nos. 6, 7 and 8
Submission Date: 7/20/10**

Papers Read on these Motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Notice of Cross-Motion, Affirmation in Support and Exhibits.....x**
- Notice of Motion, Affirmation in Support and Exhibits.....x**

This matter is before the court on 1) the motion by Plaintiff East Port Excavation & Utilities Contractors, Inc. ("East Port" or Plaintiff) filed on July 7, 2010, 2) the cross motion by Defendant New York Contracting & Construction Management Corp. ("New York Contracting") filed on July 13, 2010, both of which were submitted on July 20, 2010, and 3) the motion by Defendant All Systems Precast, Inc. ("All Systems"), sued herein as "John Doe," filed on July 19, 2010 and submitted on July 27, 2010. For the reasons set forth below, the Court

1) grants Plaintiff's motion to strike the Verified Answer of Defendants Stoneridge and 839 Prospect Avenue, LLC; 2) grants New York Contracting's cross motion to strike the "Answer to Verified Cross Claims and Counter Claims of NY Contracting and Construction Management"

submitted by Defendants Defendants Stoneridge Homes, Inc. (“Stoneridge”) and 839 Prospect Avenue, LLC (“839 Prospect”) in response to New York Contracting’s cross-claims; 3) grants New York Contracting’s motion for a default judgment against Stoneridge and 839 Prospect on its first and second cross claims against those Defendants and refers the issue of damages to trial; 4) reserves decision on New York Contracting’s motion for judgment on its third cross claim, the lien foreclosure action, pending the resolution of the damages issue on the first and second cross claims against Stoneridge and 839 Prospect; 5) grants all Systems’ motion to strike the “Answer to Verified Cross Claims and Counterclaims of All Systems Precast” submitted by Defendants Stoneridge and 839 Prospect; 6) grants All Systems’ motion for a default judgment against Stoneridge on its first cross claim against Stoneridge and refers the issue of damages to trial; 7) reserves decision on All Systems’ motion for judgment against Stoneridge on its third cross claim, the lien foreclosure action, pending the resolution of the damages issue on the first cross claim against Stoneridge; and 8) denies All Systems’ motion for judgment against 839 Prospect.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order striking the Verified Answer (“Answer”) interposed by Defendants Stoneridge and 839 Prospect 1) pursuant to 22 NYCRR § 202.27 and Rule 12 of Commercial Division 22 NYCRR § 202.70(g) based on Defendants’ failure to appear at conferences before the Court, and 2) based on Defendants’ failure to comply with the Court’s Order dated November 16, 2009 (“Prior Order”) (Ex. F to Stern Aff. in Supp.) directing Defendants Stoneridge and 839 Prospect to obtain alternate counsel.

Defendant New York Contracting moves for an Order striking the pleading titled “Answer to Verified Cross Claims and Counter Claims of NY Contracting and Construction Management” (Ex. 2 to Scher Aff. in Supp.) interposed by Defendants Stoneridge and 839 Prospect in response to New York Contracting’s “Verified Answer Cross-Claims and Counterclaims” (Ex. 1 to Scher Aff. in Supp.).

Defendant All Systems, sued herein as “John Doe,” moves for an Order 1) striking the “Answer to Verified Cross Claims and Counterclaims of All Systems Precast” (Ex. D to Fogarty Aff.) submitted by Defendants Stoneridge and 839 Prospect; and 2) granting judgment in favor

of Defendant All Systems on its cross claims as against Stoneridge and 839 Prospect set forth in All Systems' "Verified Answer, Cross-Claims and Counterclaims" (Ex. C to Fogarty Aff.).

Defendants Stoneridge and 839 Prospect have not submitted any response to the motions or cross motion.

B. The Parties' History

In his Affirmation in Support, counsel for Plaintiff affirms as follows:

Plaintiff commenced this action against Defendants Stoneridge and 839 Prospect Avenue on January 29, 2008 by serving them, pursuant to Business Corporation Law ("BCL") § 306 and Limited Liability Company Law ("LLCL") § 303, respectively, with the Summons with Notice ("Summons"), Verified Complaint ("Complaint") and Notices of Pendency. Plaintiff provides Affidavits of Service (Ex. B to Stern Aff.) in support. On February 25, 2008, Plaintiff served an additional copy of the Summons, Complaint and Notices of Pendency on Stoneridge, pursuant to BCL § 306, as reflected by documentation provided by Plaintiff reflecting that additional service (Ex. C to Stern Aff.). Pursuant to LLCL § 303, no additional mailing is required with respect to 839 Prospect.

When Defendants Stoneridge and 839 Prospect failed to appear and answer, Plaintiff moved for a default judgment. Subsequent to the filing of that motion, and as reflected in his application to be relieved, Attorney Tejinder Sing Bains ("Bains") contacted counsel for Plaintiff to request permission for those Defendants to appear. Counsel for Plaintiff acceded to Bains' request on the condition that Defendants Stoneridge and 839 Propsect interpose an answer, to which Bains agreed. Stoneridge and 839 Prospect interposed their Verified Answer dated February 4, 2009 (Ex. A to Stern Aff.). As agreed, Plaintiff subsequently withdrew its motion.¹

In the Prior Order, the Court, *inter alia*, 1) granted Bains' application to be relieved as counsel for Stoneridge and 839 Prospect; 2) directed that substitute counsel for Stoneridge and 839 Prospect appear for a Preliminary Conference before the Court on January 7, 2010 at 9:30 a.m.; and 3) directed that the failure by any party to appear, by counsel, at the Preliminary Conference shall result in the Court entertaining an application by counsel for any party that appears for a default against the non-appearing party. Substitute counsel did not appear as

¹ Plaintiff provides an E-Courts printout reflecting that withdrawal on March 11, 2009 (Ex. E to Stern Aff.) when this matter was assigned to the Honorable Leonard B. Austin.

directed and the Conference was adjourned to April 12, 2010. By letter dated March 24, 2010 (Ex. G to Stern Aff.), counsel for Plaintiff notified Defendants Stoneridge and 839 Prospect of the April 12, 2010 conference date. That letter also advised the Defendants that corporations must appear by counsel.

Defendants Stoneridge and 839 Prospect have not submitted any response to Plaintiff's motion.

With respect to the cross motion, counsel for New York Contracting affirms as follows:

The facts presented in Plaintiff's motion, as outlined *supra*, are accurate and counsel for New York Contracting submits that New York Contracting is entitled to the relief in its cross motion for the same reasons that Plaintiff is entitled to relief on its motion.

Counsel for New York Contracting provides a copy of the Verified Answer, Cross-Claims and Counterclaims interposed by New York Contracting (Ex. 1 to Scher Aff.), and the response of Defendants Stoneridge and 839 Prospect titled "Answer to Verified Cross Claims and Counter Claims of NY Contracting and Construction Management" (Ex. 2 to Scher Aff.), submitted by Attorney Bains, whom the Court has since relieved. With respect to their cross claims against Stoneridge and 839 Prospect, New York Contracting alleges, *inter alia*, that 1) New York Contracting entered into an agreement (Ex. 1 to Cross Claims) with Stoneridge pursuant to which New York Contracting would perform certain construction work on property ("Property") owned by 839 Prospect, and Stoneridge would compensate New York Contracting \$182,700 for that work; 2) New York Contracting performed the work as agreed; 3) thereafter, at the request of Stoneridge, New York Contracting performed additional work which had a value of \$71,023.74, no part of which has been paid; 4) on April 20, 2007, New York Contracting filed a Notice of Lien ("Lien") with respect to the unpaid work performed on the Property in the sum of \$71,023.74 in the Office of the Clerk of Nassau County; 5) the Lien reflects that the time when the last item of work was performed was January 19, 2007; 6) New York Contracting served the Lien on Defendants Stoneridge and 839 Prospect; 7) the Lien has not been waived, paid, satisfied or discharged; and 8) the interests by Plaintiff and the co-Defendants, if valid, are subordinate to that of New York Contracting. New York Contracting seeks, *inter alia*, judgment against Stoneridge and 839 Prospect in the sum of \$71,023.74, plus interest.

In his Affirmation in Support, counsel for All Systems affirms as follows:

Plaintiff sued All Systems in this action as “John Doe.” “John Doe One” through John Doe Ten” are fictitious names of lienors and others who may have an interest in the property at issue. Upon learning of this action, All Systems entered into a stipulation (Ex. B to Fogarty Aff.) with Plaintiff, and Defendants Nassau County Industrial Development Agency (“NCIDA”) and New York Contracting pursuant to which All Systems would be included as a party in the caption and permitted to submit an Answer. Subsequently, All Systems filed and served its Verified Answer, Cross-Claims and Counterclaims on September 10, 2008. Stoneridge and 839 Prospect, by then-counsel Bains, served their “Answer to Verified Cross Claims and Counterclaims of All Systems Precast” on or about April 29, 2009. Counsel for All Systems reaffirms the procedural history of this matter, including the failure of Stoneridge and 839 Prospect to comply with the Court’s Prior Order.

In its first cross claim against Stonebridge, All Systems seeks the sum of \$43,457.11. In paragraphs 4-9 of the first cross claim Stoneridge, All Systems alleges that 1) on or about November 15, 2006, All Systems entered into a contract with Stoneridge to supply and install a precast plan on certain premises which, according the Stonebridge’s second cross claim against NCIDA, are owned by NCIDA; 2) under that contract, Stoneridge originally agreed to pay All Systems \$826,000; 3) due to changes requested by Stoneridge, the parties agreed to revise the contract at an additional cost of \$43,142.06, resulting in a total amount due of \$869,142.06; 4) All Systems completed the additional work; and 5) Stoneridge has paid All Systems the sum of \$825,684.95, leaving a balance due of \$43,457.11, no part of which has been paid despite due demand.

In its third cross claim against Stoneridge, which is a lien foreclosure action also asserted against NCIDA and New York Contracting, All Systems 1) realleges the allegations in support of its first cross claim; and 2) alleges that it filed a Notice of Mechanic’s Lien with the Nassau County Clerk in the sum of \$43,457.11 in connection with the funds owed by Stoneridge and served that lien on Stoneridge, among others. All Systems also alleges that 1) Plaintiff filed a Notice of Lien in connection with the same premises in the sum of \$91,660.00 and may have an interest in these proceedings; and 2) New York Contracting filed a Notice of Lien in connection with the same premises and may have an interest in these proceedings.

Although All Systems' motion includes an application for a judgment against 839 Prospect, its Verified Answer, Cross-Claims and Counterclaim includes no claims against 839 Prospect or request for relief against 839 Prospect.

C. The Parties' Positions

With respect to its motion, Plaintiff submits that the Court should strike the Answer of Defendants Stonebridge and 839 Prospect 1) pursuant to 22 NYCRR § 202.27 and Rule 12 of Commercial Division 22 NYCRR § 202.70(g), based on the Defendants' failure to appear, and 2) in light of the Defendants' violation of the Prior Order directing substitute counsel to appear on their behalf.

With respect to its cross motion, New York Contracting submits that, in light of the failure of Stonebridge and 839 Prospect to appear as directed, and the documentation submitted by New York Contracting, the Court should 1) strike the response of Stonebridge and 839 Prospect to New York Contracting's cross claims against them; 2) direct the entry of judgment in favor of New York Contracting and against Defendants Stonebridge and 839 Prospect in the amount of \$71,023.74, together with interest from January 19, 2008; and 3) grant foreclosure of New York Contracting's lien.

With respect to its motion, All Systems submits that the Court should grant the requested relief in light of the failure of Stoneridge and 839 to comply with the Court's Order to retain counsel and appear at court conferences.

RULING OF THE COURT

Rule 12 of § 202.70 Rules of the Commercial Division of the Supreme Court, titled "Non-Appearance at Conference," provides as follows:

The failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27 of this Part, including dismissal, the striking of an answer, an inquest or direction for judgement, or other appropriate sanction.

The Court grants Plaintiff's motion to strike the Answer of Defendants Stoneridge and 839 Prospect Avenue, LLC in light of their non-appearance at the conference as directed by the Court, as well as their failure to appear in any manner since their prior counsel was granted Permission to withdraw.

The Court also grants New York Contracting's cross motion to strike the response of Defendants Stoneridge and 839 Prospect Avenue, LLC to New York Contracting's cross-claims, titled "Answer to Verified Cross Claims and Counter Claims of NY Contracting and Construction Management," in light of their non-appearance. In addition, the Court grants New York Contracting judgment against Defendants Stoneridge and 839 Prospect on the first and second cross claims against those Defendants, but refers to trial the issue of damages because there is an insufficient record to support a determination of damages at this juncture. Specifically, New York Contracting seeks compensation for work performed pursuant to a subsequent oral agreement, not reflected in the written Agreement or any other writing. The Court, however, has not identified a provision in the written Agreement that authorized the additional performance of work, and/or established the terms of compensation for that additional work, and New York Contracting has not referred to any such provision. Thus, there is an insufficient basis before the Court to conclude that the sum sought by New York Contracting for that additional work is reasonable and the issue of damages is referred to trial. The Court reserves decision on New York Contracting's motion for a judgment against Stoneridge and 839 Prospect on the third cross claim, a lien foreclosure action, pending the resolution of the damages issue on the first and second cross claims as directed herein.

The Court also grants the application of All Systems for judgment on its first cross claim against Defendant Stoneridge, in light of its failure to appear as directed in the Prior Order, but refers the issue of damages to trial, as there is an insufficient factual record for the Court to determine damages at this time. The Court reserves decision on All Systems' motion for judgment on its third cross claim against Stoneridge, a lien foreclosure action, pending the resolution of the damages issue on the first cross claim as directed herein. The Court, however, denies All Systems' motion for judgment against 839 Prospect because Stonebridge has not asserted a cross claim against 839 Prospect, and has not articulated another basis for its claim to relief against 839 Prospect.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a conference on October 1, 2010 at 9:30 a.m at which time the Court will schedule the trial on the issue of damages as directed herein.

ENTER

DATED: Mineola, NY

September 9, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
SEP 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE