MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART: 14

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KHOURY CONSTRUCTION, INC.,

- against -

ROOSEVELT AVENUE DONUTS, INC., et al.

INDEX NO. 14224/09

MOTION SEQ. NO. 1

BY: Elliot, J.

DATED: January 5, 2011

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On or about June 2004, plaintiff was engaged by defendant Roosevelt Avenue Donuts, Inc. (Roosevelt), a tenant at the real property known as 74-13 Roosevelt Avenue, Jackson Heights, New York, to perform general contracting work there, and supply materials and equipment to it. Plaintiff alleges that it performed its work, and furnished the materials and equipment, pursuant to the agreement, and therefore, defendant Roosevelt was required to pay it the sum of $202,831.00 under the agreement. It also alleges that defendant Roosevelt made only a partial payment, and there remains an outstanding sum of $36,331.00 due and owing plaintiff. Plaintiff further alleges that it filed and served a notice of mechanic's lien upon defendant Fichberry Corp. (Fichberry), the owner of the property, and defendant Roosevelt, claiming that plaintiff is owed $36,331.00 for its labor performed and materials and equipment furnished. Plaintiff also claims the lien is good, valid and subsisting against the property. Plaintiff commenced this action asserting causes of action against

defendant Roosevelt for breach of contract, quantum meruit and an account stated, and a cause of action against defendant Fichberry for foreclosure of the mechanic's lien.

Plaintiff moves for leave to enter a default judgment against defendants Roosevelt and Fichberry upon their failure to appear or answer the complaint pursuant to CPLR 3215, and for leave to appoint a referee to compute the amount due and owing plaintiff, and determine whether the property should be sold in one parcel.

Although defendant Roosevelt does not cross move to vacate its default in answering, it opposes the motion, and requests that it be granted leave to serve a late answer as proposed, including an affirmative defense based upon improper service of process.

Defendant Fichberry Corp. N.V. s/h/a Fichberry Corp. opposes the motion, asserting that plaintiff is not entitled to a default judgment because the court lacks personal jurisdiction over it due to improper service of process.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the plaintiff is required to file proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant's default in answering or appearing (*see* CPLR 3215; *see Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2008]; *Levi v Oberlander*, 144 AD2d 546 [1988]).

In support of its motion, plaintiff offers affidavits of service dated June 5, 2009, of a licensed process server, indicating that on June 4, 2009, at 12:35 P.M. at 74-13 Roosevelt Avenue, Jackson Heights, New York, defendants Roosevelt and Fichberry were

personally served by delivery of copies of the summons and verified complaint to one "Sharif Uddin," as the managing agent of both corporations. The affidavits include a physical description of Sharif Uddin.

In addition, plaintiff offers a copy of the complaint verified by Tony Khoury, the president of plaintiff, and an affirmation of its counsel indicating that defendants Roosevelt and Fichberry are in default in appearing, answering or moving with respect to the complaint. Plaintiff also offers an affidavit of service of an additional copies of the summons and verified complaint by regular mail on March 1, 2010 to defendants Roosevelt and Fichberry at the Roosevelt Avenue address, as their last known address.

The affidavits of service, dated June 5, 2009, constitute prima facie evidence of proper service of process upon defendants Roosevelt and Fichberry pursuant to CPLR 311(a)(1) (*see McIntyre v Emanuel Church of God In Christ, Inc.*, 37 AD3d 562 [2007]).

Although defendant Roosevelt asserts it was not properly served with process, it has failed to offer any proof to rebut the statements in the process server's affidavit. It does not deny that the individual described in the affidavit is its managing agent (*see C&H Import & Export, Inc. v MNA Global, Inc.*, ___ AD3d ___ [2010], 2010 WL 5095539, 2010 NY App Div LEXIS 9311). In addition, its proposed verified answer does not include any factual allegations in support of its proposed affirmative defense based upon improper service of process. As a consequence, a hearing on the issue of the propriety of the service

of process upon defendant Roosevelt is unwarranted. Thus, to the extent Roosevelt seeks to vacate its default in answering pursuant to CPLR 5015(a)(4), its application is denied.

To the extent defendant Roosevelt also requests its default in answering be vacated pursuant to CPLR 5015(a)(1) and for leave to serve a late answer pursuant to CPLR 3012, "[a] defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when opposing a motion for leave to enter judgment upon its failure to appear or answer and moving to extend the time to answer or to compel the acceptance of an untimely answer" (*Lipp v Port Auth. of N.Y. & N.J.*, 34 AD3d 649, 649 [2006]; *see* CPLR 3012[d]; 5015 [a][1]). Counsel's assertion that defendant Roosevelt had no notice of this action, before receipt of a copy of the instant motion, is not based upon his personal knowledge, and defendant Roosevelt has failed to offer any other proof related to the reasonable excuse for its default in answering. Under such circumstances, the application by defendant Roosevelt to vacate its default in answering the complaint pursuant to CPLR 5015(a)(1) and for leave to serve a late answer pursuant to CPLR 3012 is denied.

Likewise, to the extent defendant Roosevelt seeks to vacate its default in answering pursuant to CPLR 317, a defendant which seeks to be relieved of its default in answering pursuant to that section, must demonstrate that it did not receive notice of the action in time to defend and has a meritorious defense (*see C&H Import & Export, Inc. v MNA Global, Inc.*, ___ AD3d ___ [2010], 2010 WL 5095539, 2010 NY App Div LEXIS

9311, *supra*). Again, counsel for defendant Roosevelt does not have personal knowledge of Roosevelt's purported lack of notice of the action in time to defend it (*see Irwin Mtge. Corp. v Devis*, 72 AD3d 743 [2010]; *Sturino v Nino Tripicchio & Son Landscaping*, 65 AD3d 1327 [2009]). The application by defendant Roosevelt to vacate its default in answering pursuant to CPLR 317 is denied (*see C&H Import & Export, Inc. v MNA Global*, Inc., ___ AD3d ___ [2010], 2010 WL 5095539, 2010 NY App Div LEXIS 9311, *supra*).

Counsel for defendant Fichberry asserts that Fichberry is a foreign corporation authorized to do business in New York, and owns the subject property, and has no office, directors, employees or agents in New York. Counsel also asserts that "Sherif" (sic) Uddin has never been an employee, agent, servant, officer or director of the corporation. Counsel for defendant Fichberry, however, makes no claim that he has personal knowledge of the facts, and to the extent he indicates he obtained his information through his review of his client's corporate records, the unidentified records were not submitted on the motion, and counsel makes no claim he is aware of the client's business practices regarding record keeping (*cf. DeLeon v Port Authority of New York and New Jersey*, 306 AD2d 146 [2003]).

Defendant Fichberry also offers the affidavit of Malak I. Ahmad, the president of Beshir Realty Corp. (Beshir), an out-of-possession landlord at the subject property pursuant to a triple net lease, to demonstrate improper service of process upon Fichberry. Such affidavit, however, is insufficient to rebut any of the averments in the process server's affidavit. Mr. Ahmad fails to state, based upon his personal knowledge, that defendant

Fichberry had no managing agent named Sharif Uddin on June 4, 2009, or that no person matching the physical description of Mr. Uddin was at the Roosevelt Avenue location on that date at 12:35 P.M.

Under such circumstances, defendant Fichberry has failed to demonstrate the court lacks personal jurisdiction over it due to improper service of process.

Plaintiff has demonstrated its entitlement to a default judgment against the defendants Roosevelt and Fichberry by submitting proof of service of the summons and verified complaint, proof of the facts constituting its claims, and proof of the default by defendants Roosevelt and Fichberry in answering (*see* CPLR 3215[f]; *Matone v Sycamore Realty Corp.*, 50 AD3d 978 [2008]; *Allstate Ins. Co. v Austin*, 48 AD3d 720). Plaintiff's motion is granted.

Settle order. Provide therein for an order appointing a referee to compute the amount due to plaintiff, with respect to Fichberry, under the mechanic's lien and whether the property should be sold in one parcel. With respect to Roosevelt, provide therein that the matter will be set down for an assessment of damages upon the court's determination of the claim as to the mechanic's lien.

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J.S.C.