

**C McCormack Inc. v 6 St Nicholas LLC**

2011 NY Slip Op 33657(U)

June 1, 2011

Supreme Court, Nassau County

Docket Number: 011841-10

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**

-----x  
**C McCORMACK INC.,**

**Plaintiff,**

**-against-**

**6 ST NICHOLAS LLC,**

**Defendant.**  
-----x

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 011841-10**

**Motion Seq. No: 2  
Submission Date: 4/12/11**

**The following papers having been read on this motion:**

**Notice of Motion, Affirmation, Affidavit in Support and Exhibits....x  
Correspondence dated March 31, 2011 and certified mail receipt....x**

This matter is before the Court for decision on the motion filed by Plaintiff C. McCormack Inc. ("Plaintiff") on March 18, 2011 and submitted on April 12, 2011. For the reasons set forth below, the Court grants Plaintiff's motion, awards Plaintiff judgment against Defendant for the relief demanded in the Verified Complaint, and refers the matter to an inquest for the determination of damages.

**JBACKGROUND**

**A. Relief Sought**

Plaintiff moves for an Order, pursuant to CPLR § 3215, granting Plaintiff judgment against Defendant 6 St Nicholas LLC ("Defendant") for the relief demanded in the Verified Complaint ("Complaint") and directing an assessment of damages. <sup>1</sup>

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<sup>1</sup> Although Plaintiff's notice of motion reflects Plaintiff's request that the Court direct an assessment of damages on the ground that damages are uncertain, the Affirmation and Affirmation in Support request judgment in the sum certain of \$178,659.00, plus costs and disbursements, and provide documentation in support of that request.

[\* 2]  
Defendant has submitted no opposition or other response to Plaintiff's motion.

**B. The Parties' History**

The parties' history is set forth in a prior decision of the Court dated February 2, 2011 ("Prior Decision"). In the Prior Decision, the Court denied, without prejudice, Plaintiff's motion for a default judgment ("Prior Motion") in light of Plaintiff's failure to provide an affidavit of someone with personal knowledge of the relevant facts to authenticate and explain the documents on which Plaintiff relied in its Prior Motion. The Court also directed Plaintiff to serve Defendant, via certified mail, return receipt requested, with a copy of any future motion brought in this matter, and Plaintiff has provided proof that it complied with that directive in connection with the instant motion ("Instant Motion").

As noted in the Prior Decision, the Complaint alleges that in or about August of 2004, Plaintiff entered into an agreement with Defendant to furnish all labor and materials necessary to convert and rehabilitate an existing eleven unit residential walk-up apartment building located at 6 St. Nicholas Terrace, New York, New York ("Premises") to fifteen units, for the estimated sum of \$1,000,000.00.

Defendant performed certain tasks, including roof and boiler installations, that were originally contemplated to be performed by Plaintiff. Accordingly, the parties agreed to reduce the contract price to \$900,000.00.

Plaintiff satisfied its obligations under the agreement by performing the necessary construction work at the Premises, which led to the issuance of a certificate of occupancy allowing the occupancy of fifteen residential units at the Premises. Defendant acknowledged Plaintiff's performance on the work under the agreement by making payments to Plaintiff during the construction process. Defendant has made payments to Plaintiff in the sum of \$721,341.00 and, therefore, owes Plaintiff an additional \$178,659.00. The Complaint is verified by Joseph McCormack, President of Plaintiff Corporation.

In his Affirmation in Support of the Instant Motion, counsel for Plaintiff ("Counsel") reaffirms the allegations, as set forth in the Prior Motion, regarding service of the Summons and Complaint on Defendant and Defendant's failure to answer or move with respect to the Complaint. Counsel provides a copy of the agreement between the parties (Ex. C to Graber Aff. in Supp.), and a "breakdown of the current arrears" ("Arrears Summary") (Graber Aff. at ¶ 6)

(Ex. D to Graber Aff. in Supp.).

In his Affidavit in Support of the Instant Motion, Joseph McCormack (“McCormack”) affirms that he is the President of the Plaintiff corporation and is fully familiar with the relevant facts and circumstances. He affirms the truth of the allegations in the Complaint regarding the parties’ agreement, Plaintiff’s performance of the work pursuant to that agreement, Defendant’s acknowledgment of that work by making payments to Plaintiff during the construction process, and Defendant’s failure to compensate Plaintiff fully pursuant to the parties’ agreement. McCormack affirms that Defendant has made payments of \$721,341.00, and still owes Plaintiff \$178,659.00. McCormack makes reference to the Arrears Summary, which details the payments made by Defendant and the outstanding balance.

C. The Parties’ Positions

Plaintiff submits that it has demonstrated its right to judgment by presenting proof of service of the summons and complaint, and service of the Instant Motion in compliance with the Prior Order, and proof of the claim through the McCormack affidavit which establishes the parties’ agreement, Plaintiff’s performance, Defendant’s default and the amount due.

Defendant has not answered the Complaint or submitted any response to the Instant or Prior motion.

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69

A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

C. Application of these Principles to the Instant Action

Plaintiff has demonstrated its right to judgment against Defendant by presenting proof of service of the summons and complaint, and presenting the McCormack affidavit which sets forth the facts constituting the claim and Defendant's default. Plaintiff has made out a *prima facie* showing of a cause of action against Defendant by providing proof of the parties' agreement, Plaintiff's performance, and Defendant's breach of the agreement. In light of the foregoing, the Court awards Plaintiff judgment against Defendant and refers the matter to an inquest for the determination of damages. Accordingly, it is hereby

**ORDERED**, that Plaintiff have judgment against Defendant for the relief demanded in the Complaint; and it is further

**ORDERED**, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of damages on July 6, 2011 at 9:30 a.m.; and it is further

**ORDERED**, that Plaintiff shall serve upon the Defendant by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before June 22, 2011; and it is further

**ORDERED**, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against Defendant in accordance with the decision of the Special Referee.

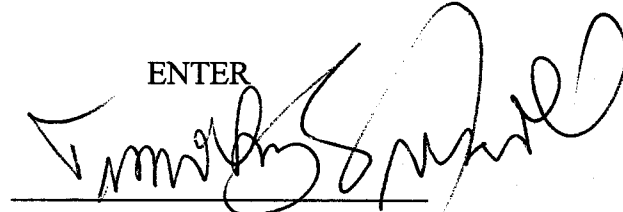
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

June 1, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

JUN 07 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**