

C McCormack Inc. v 6 St. Nicholas LLC

2011 NY Slip Op 33658(U)

February 2, 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: 1
Submission Date: 12/9/10**

The following papers having been read on this motion:

Notice of Motion, Affirmation and Exhibits....x

This matter is before the Court for decision on the motion filed by Plaintiff C. McCormack Inc. ("Plaintiff") on December 1, 2010 and submitted on December 9, 2010. For the reasons set forth below, the Court denies Plaintiff's motion, without prejudice.

BACKGROUND

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.

Defendant has submitted no opposition or other response to Plaintiff's motion.

B. The Parties' History

The Complaint (Ex. A to Graber Aff. in Supp.) alleges as follows:

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, counsel for Plaintiff (“Counsel”) affirms as follows:

Service of the Summons and Complaint was effected on Defendant on or about September 8, 2010, as reflected by the Affidavit of Service provided (Ex. B to Graber Aff. in Supp.). Defendant has not answered or moved with respect to the Complaint and the time for Defendant to do so has expired. Defendant’s time to answer has not been extended, and Defendant has made no request for such an extension.

Counsel provides a copy of the agreement between the parties (Ex. C to Graber Aff. in Supp.), and a “breakdown of the current arrears” (Graber Aff. at ¶ 6) (Ex. D to Graber Aff. in Supp.).

C. The Parties’ Positions

Plaintiff submits that the Complaint sets forth facts sufficient for the granting of the required relief. Counsel submits that this application is properly made *ex parte*, pursuant to CPLR § 3215(g), which requires that notice of this application be given only to a defendant who has appeared in a proceeding.

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).

Although a defaulting defendant is deemed to have admitted all the allegations in the complaint, the legal conclusions to be drawn from such proof are reserved for the Supreme Court's determination. *McGee v. Dunn*, 75 A.D.3d 624, 624 (2d Dept. 2010), quoting *Venturella-Ferretti v. Ferretti*, 74 A.D.3d 792 (2d Dept. 1992) and citing, *inter alia*, CPLR § 3215(b). There is no mandatory ministerial duty to enter a default judgment against a defaulting party. *Id.*, citing *Resnick v. Lebovitz*, 28 A.D.3d 533, 534 (2d Dept. 2006), quoting *Gagen v. Kipany Prods.*, 289 A.D.2d 844, 846 (2d Dept. 2006) (internal citations omitted). Instead, the court must determine whether the motion was supported with enough facts to enable the court to determine that a viable cause of action exists. *Id.*, quoting *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 (2003). In determining whether the plaintiff has a viable cause of action, the court may consider the complaint, affidavits, and affirmations submitted by the plaintiff. *Id.* at 625, quoting *Litvinskiy v. May Entertainment Group, Inc.*, 44 A.D.3d 627, 627 (2d Dept. 2007).

B. Application of these Principles to the Instant Action

Although Plaintiff has provided copies of the agreement between the parties, and a document purporting to establish the current arrears, Plaintiff has not provided an Affidavit of someone with personal knowledge of the relevant facts to authenticate and explain those documents. Without that Affidavit, the Court has an insufficient record before it on which to grant relief. Accordingly, the Court denies Plaintiff's motion without prejudice. The Court directs Plaintiff to serve Defendant, via certified mail, return receipt requested, with a copy of any future motion brought in this matter.

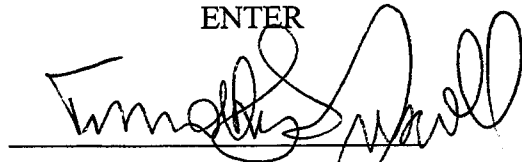
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

February 2, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

FEB 04 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**