

<b>Nouveau El. Indus., Inc. v Tracey Towers Hous. Co., Inc.</b>
2011 NY Slip Op 34037(U)
April 25, 2011
Supreme Court, Bronx County
Docket Number: 0381012/2009
Judge: Ben R. Barbato
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[\* 1]

MAY 09 2011

PART ■ PP-3

- Case Disposed
- Settle Order
- Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX:

-----X  
 NOUVEAU ELEVATOR INDUSTRIES

Index No. 0381012/2009

-against-

Hon. ~~EDGAR G. WALKER~~  
*BEN R. BARBATO*

TRACEY TOWERS HOUSING CO. INC.

Justice.

-----X

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, DEFAULT JUDGMENT  
 Noticed on September 15 2009 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *motion is decided in accordance with the attached Opinion and Order*

Motion is Respectfully Referred to:  
 Justice: \_\_\_\_\_  
 Dated: \_\_\_\_\_

Dated: 4/25/2011

Hon. *Ben R. Barbato*  
~~EDGAR G. WALKER, J.S.C.~~

**BEN R. BARBATO**

**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX**

**Present:** Honorable Ben R. Barbato

\_\_\_\_\_  
NOUVEAU ELEVATOR INDUSTRIES, INC.,

Plaintiff,

-against-

TRACEY TOWERS HOUSING CO., INC., a/k/a  
TRACEY TOWERS CO., INC., TRACEY TOWERS  
ASSOCIATES a/k/a TRACEY TOWERS  
ASSOCIATES, LP; R. Y. MANAGEMENT CO.,  
INC., LEON D. DEMATTEIS CONSTRUCTION  
CORPORATION; NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE;  
NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD; NEW YORK CITY  
PARKING VIOLATIONS BUREAU; NEW YORK  
CITY TRANSIT ADJUDICATION BUREAU and  
"JOHN DOE #1 through "JOHN DOE # 10", the last  
ten names being fictitious and unknown to the  
plaintiff, the person or parties intended being the  
person or parties, if any, having or claiming an  
interest in or lien upon the Mortgage premises  
described in the Complaint,

Defendants.

\_\_\_\_\_  
The following papers numbered 1 to 22 read on a motion for an Order granting default judgment and setting the matter down for inquest, noticed on September 15, 2009; cross-motion for an Order to compel acceptance of Verified Answer with Counterclaims, noticed on October 15, 2009; motion for an Order appointing a temporary receiver noticed on November 2, 2009; motion for an Order dismissing Verified Complaint, noticed on November 4, 2009, and duly transferred March 1, 2011.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1, 2, 3
Notice of Cross-Motion, Affirmation & Exhibits	4, 5, 6
Affirmation in Opposition & Exhibits	7, 8
Notice of Motion, Affirmation & Exhibits	9, 10, 11
Affirmation in Opposition	12
Reply Affirmation & Exhibit	13, 14
Notice of Motion, Affirmation & Exhibits	15, 16, 17

**DECISION/ORDER**

Index No.:381012/09

Memorandum of Law (Andriola)  
Affirmation in Opposition & Exhibit  
Reply Affirmation & Exhibit

18  
19, 20  
21, 22

Upon the foregoing papers, and after reassignment of this matter from Justice Edgar G. Walker on March 1, 2011, the above stated motions are hereby consolidated for the purposes of this decision. Plaintiff, Nouveau Elevator Industries, Inc.(Nouveau), seeks an Order pursuant to CPLR §3215 as against Defendants, Tracey Towers Housing Co., Inc., a/k/a Tracey Towers Co., Inc., Tracey Towers Associates a/k/a Tracey Towers Associates, LP (“TTA”); R.Y. Management Co.,Inc.( R.Y. Management ), Leon D. Dematteis Construction Corporation (Dematteis); New York State Department of Taxation and Finance; New York City Environmental Control Board; New York City Parking Violations Bureau; New York City Transit Adjudication Bureau granting entry of a default judgment; Defendants, Tracey Towers Housing Co., Inc., a/k/a Tracey Towers Co., Inc., Tracey Towers Associates a/k/a Tracey Towers Associates, LP ( TTA); R.Y. Management Co., Inc.( R.Y. Management), Leon D. Dematteis Construction (Dematteis) seek an Order pursuant to CPLR §3215 compelling Plaintiff to accept Defendants’ Verified Answer with Counterclaims; Plaintiff seeks an Order appointing a temporary receiver of that property known as 20 West Mosholu Parkway South & 40 West Mosholu Parkway South, Bronx New York 10468 a/k/a Block: 3251, Lot 490; Defendants, R.Y. Management Co.,Inc. (R.Y. Management), Leon D. Dematteis Construction Corporation (Dematteis), seek an Order pursuant to CPLR §3211 dismissing Plaintiff’s Verified Complaint as against them.

The above captioned matter alleges the breach of a contract and the foreclosure of a mechanic’s lien. Plaintiff Nouveau asserts that on September 29, 2006 they entered into a contract with R.Y. Management to supply elevator maintenance, repairs, material and service for those buildings and/or properties described above and which are, along with the contract, the

subject matter of this law suit. It is alleged that Tracey Towers holds legal title to the subject property as general partner of and on behalf of TTA. It is further alleged that Dematteis is also a general partner of TTA and that R.Y. Management, at the time of the contract, was the managing agent of the property. Plaintiff alleges that Defendants breached their contractual obligation to Plaintiff in that they have failed to pay, pursuant to demand, the sum of \$2,314,955.43 alleged to be due and owing Nouveau pursuant to said contract. Plaintiff, by Summons and Verified Complaint dated May 6, 2009, commenced the instant law suit. Plaintiff now seeks a default judgment as against the named Defendants and the appointment of a Temporary Receiver.

Settlement discussion between Plaintiff and Defendants constitute a reasonable excuse for Defendants' failure to answer Plaintiff's Verified Complaint. see CPLR §3012 (d); also see *Vasquez v. Beharry* 82 A.D.3d 649 (1<sup>st</sup> Dept 2011). Further contrary to Plaintiff's position and Defendants' presentation of a meritorious defense Defendant is not required to demonstrate the existence of such defense. see *Verizon New York, Inc. v. Chase Construction Company Inc.*, 63 A.D. 3d 521 (1<sup>st</sup> Dept. 2009).

With respect to that portion of Plaintiff's motion requesting the appointment of a temporary receiver the court notes the Affirmation submitted is upon information and belief and is devoid of any meaningful demonstration that assets are being diverted or wasted to warrant the appointment of a temporary receiver. Such relief is reserved for those instances where it is necessary for the protection of the parties to the action from suffering irreparable harm. There has been no such demonstration presented for this court's consideration. See *DiBona v. General Rayfin Ltd.* 45 A.D.2d 696 (1<sup>st</sup> Dept. 1974), *In re Armienti*, 309 A.D.2d 659 (1<sup>st</sup> Dept. 2003); *In Re Harrison Realty Corp.*, 295 A.D. 2d 220 (1<sup>st</sup> Dept. 2002).

In determining whether Plaintiff's Verified Complaint pleads a viable cause of action as

against the Defendants, R.Y. Management and Dematteis “ . . . the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.” *1414 Realty Corp. v. G & G Realty Co.*, 272 A.D.2d 309 (2<sup>nd</sup> Dept. 2000) citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275. A reading of the Verified Complaint identifies the Defendant R.Y. Management as a disclosed agent of Tracy Towers at the time of the signing of the subject contract. While it has been determined that an obligation to perform pursuant to a contract may attach to one not in privity the general rule requires privity or its equivalent for the imposition of liability for non performance. see *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399; also see *Henry v. Guastella & Associates*, 113 A.D.2d 435 (4<sup>th</sup> Dept. 1985). Further, when an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent’s intention to be personally bound. see *Savoy Record Co. v. Cardinal Export Corp.*, 15 N.Y.2d 1.

Therefore it is

**ORDERED**, that Plaintiff, Nouveau Elevator Industries, Inc.’s, motion for an Order pursuant to CPLR §3215 as against Defendants, Tracey Towers Housing Co., Inc., a/k/a Tracey Towers Co., Inc., Tracey Towers Associates a/k/a Tracey Towers Associates, LP (“TTA”); R.Y. Management Co., Inc. ( R.Y. Management ), Leon D. Dematteis Construction Corporation (Dematteis); New York State Department of Taxation and Finance; New York City Environmental Control Board; New York City Parking Violations Bureau; New York City Transit Adjudication Bureau granting entry of a default judgment is **denied** it is further


**ORDERED**, that Plaintiff, Nouveau Elevator Industries, Inc.’s, motion for an Order appointing a temporary receiver for that property known as 20 West Mosholu Parkway South &

40 West Mosholu Parkway South, Bronx New York 10468 a/k/a Block: 3251, Lot 490 is **denied**  
it is further

**ORDERED**, that Defendants, Tracey Towers Housing Co., Inc., a/k/a Tracey Towers  
Co., Inc., Tracey Towers Associates a/k/a Tracey Towers Associates, LP ( TTA); R.Y.  
Management Co., Inc.( R.Y. Management), Leon D. Dematteis Construction (Dematteis) cross-  
motion for an Order pursuant to CPLR §3215 compelling Plaintiff to accept Defendants' Verified  
Answer with Counterclaims is **granted** it is further

**ORDERED**, that Defendants, R.Y. Management Co.,Inc. (R.Y. Management), Leon D.  
Dematteis Construction Corporation (Dematteis), motion for an Order pursuant to CPLR §3211  
dismissing Plaintiff's Verified Complaint as against them is **granted**.

Dated: April 25, 2011

  
Hon. Ben R. Barbato, A.J.S.C.