

Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC
2011 NY Slip Op 34216(U)
March 28, 2011
Supreme Court, New York County
Docket Number: 102131/2010
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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GALAXY GENERAL CONTRACTING CORP.,

Index No. 102131/2010

Plaintiff,

-against-

2201 7TH AVENUE REALTY LLC, BANCO POPULAR NORTH AMERICA, INDUSTRIAL FIRE DOOR & HARDWARE SUPPLY, INC., ALL CITY GLASS AND MIRROR CORP., NORTHERN BUILDING PRODUCTS, INC., JNP CONTRACTORS LTD., RELIANT ELECTRONIC CONTRACTING, INC., KATZ METAL FABRICATORS, INC., INDEPENDENT TEMPERATURE CONTROL SERVICES BORO KITCHEN CABINETS, INC., GRAYBAR ELECTRIC COMPANY, INC., TREVOR WHITTINGHAM, INC., NEW YORK CITY DEPARTMENT OF FINANCE; and the following persons or parties being either tenants or occupants of the liened premises herein being sued fictitiously because of their representative names are presently unknown to the plaintiff, i.e. John Doe "1" through John Doe "3,"

Defendants.

-----X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to foreclose on a Mechanic's Lien and to recover sums due for construction work performed, plaintiff Galaxy General Contracting Corp. ("plaintiff") moves for an order voiding the discharge of plaintiff's Mechanic's Lien and granting a default judgment against defendants, 2201 7th Avenue Realty LLC ("2201"), All City Glass and Mirror Corp., Katz Metal Fabricators, Inc., Trevor Whittingham, Inc., Industrial Fire Door & Hardware Supply, Inc., Northern Building Products, Inc., Reliant Electronic Contracting, Inc., for their failure to timely appear and answer plaintiff's summons and complaint, and appointing a referee to compute and

conduct the sale of the premises.

Factual Background

On July 18, 2007, plaintiff and 2201 as owner entered into a written agreement (the "Construction Contract") for plaintiff to furnish materials and labor for the construction of a high-rise condominium building at 2201 7th Avenue, New York, New York (the "property"). Banco Popular North America ("Banco Popular") made loans to 2201 for the acquisition and construction of the building (the "Loan Agreement").¹

According to the Complaint, on October 23, 2007, plaintiff entered into an Assignment And Consent To Assignment of Construction Contract (the "Assignment Contract") with 2201 and Banco Popular, whereby plaintiff was required to provide Banco Popular with a Letter of Credit in the amount of \$627,348.00 as a guarantee of completion of the project. The Assignment Contract allowed Banco Popular to assume the Construction Contract in the event of 2201's default.²

As of October 1, 2009, plaintiff allegedly substantially completed the work called for under the contract, the remaining value of which was \$2,751,106.80 (see Complaint, ¶¶28, 37,

¹ According to Banco Popular's opposition papers, section 5.2 of the Loan Agreement, states, in pertinent part, that "(a)s additional security for the payment of the Indebtedness, the Borrower hereby transfers and assigns to the Lender all of the Borrower's right, title and interest in and to the Plans..." Section 1.1 (kk) of the Loan Agreement defines "Plans," in pertinent part, as "(a)ny and all contracts, agreements, written or oral, between the Architect and the Borrower..."

² According to Banco Popular's opposition papers, the Assignment Contract provides, in pertinent part, as follows:

(c) Upon the occurrence of an Event of Default by Borrower [*i.e.*, 2201] under the "Loan Documents" (as defined in the Mortgage), and if Banco elects to exercise its rights in accordance with the terms and conditions of Section 5.2 of the Loan Agreement (the "Assignment"), Banco shall deliver written notice of such Event of Default to the Contractor [*i.e.*, Galaxy], which notice shall be conclusive evidence of such Event of Default upon which the Contractor may rely.
Id. Par. 2. (c), P. 2. (Emphasis added).

42). 2201 failed to make payment on the approved requisitions, and, as a result of such nonpayment and the alleged misapplication of funds advanced by Banco Popular for the requisitioned and approved payments, plaintiff terminated the Construction Contract on October 2, 2009.

On November 5, 2009, plaintiff notified Banco Popular that 2201 was in default and that the Construction Contract was terminated, and provided Banco Popular with an accounting of the amounts due. It is alleged that while Banco Popular had 45 days to assume the Construction Contract, Banco Popular did not assume said Contract or pay the amounts owed to plaintiff. Also, Banco Popular allegedly failed to notify plaintiff of 2201's default.

Consequently, plaintiff commenced this action in February 2010, and in March 2010, served defendants 2201, All City Glass and Mirror LLC, Katz Metal Fabricators, Inc., Trevor Whittingham, Inc., Industrial Fire Door & Hardware Supply Inc., Northern Building Products, Inc. and Reliant Electrical Contracting, Inc. (collectively, "defendants") with the Notice of Pendency and Summons and Complaint.³ In its fourth cause of action, plaintiff alleges that Banco Popular improperly drew down the line of credit and withdrew \$627,348 when the Construction Contract had already been terminated.

On or about March 16, 2010 (while a separate action was pending by 2201 against plaintiff, Index No. 117152/09 for an itemized statement under the Lien Law), a "Release and Discharge of Mechanic's Lien" (the "Release"), dated January 10, 2010, was filed. Plaintiff contends that said discharge was fraudulent. According to the affidavit of Mark Villa ("Villa"),

³ Plaintiff's motion is silent as to service upon JNP Contractors Ltd. and Graybar Electric Company, Inc., but seeks relief as to these defendants nonetheless.

the purported notary of the Release, he did not notarize the Release and knew of none of the parties. Villa attests to the differences between his signature and notary stamp, and the signature and notary stamp on the Release.

Thus, plaintiff requests that the Court issue an order declaring the fraudulent discharge of plaintiff's Mechanic's Lien void *nunc pro tunc*, and enter judgment on the summons and complaint to foreclose plaintiff's Mechanic's Lien.

Further, the time in which defendants had to answer plaintiff's complaint has expired and there was no extension of time requested or granted. Thus, defendants are in all respects in default. As such, plaintiff's motion for a judgment of foreclosure and sale against defendants, 2201 7th Avenue Realty LLC, All City Glass and Mirror Corp., Katz Metal Fabricators, Inc., Trevor Whittingham, Inc., Industrial Fire Door & Hardware Supply, Inc., Northern Building Products, Inc., Reliant Electronic Contracting, Inc., in this action and appoint a referee to compute and conduct the sale of the premises, is warranted.

In opposition, defendant Banco Popular argues that it did not breach its contract with plaintiff. Although Banco Popular never exercised its rights to the Plans in accordance with the Loan Agreement, and was therefore under no obligation to give written notice to plaintiff of 2201's default, Banco Popular forwarded plaintiff's counsel with notice of 2201's default on the loans held by Banco Popular in the aggregate principal amount of \$15,748,000.00⁴. Thus, Banco Popular did not breach its contract with plaintiff.

Plaintiff's conclusory claim that Banco Popular conspired with 2201 to defraud plaintiff

⁴Banco Popular commenced a foreclosure action which is pending in New York County before Hon. Bernard J. Fried, Index Number 650956/10.

out of its moneys is false, as plaintiff regularly forwarded to Banco Popular through the construction period a Partial Waiver of Lien, wherein plaintiff represented and warranted: that plaintiff had been paid and "waives any mechanic's, material man's or like liens"; that all of plaintiff's "subcontractors and suppliers have been fully paid or are otherwise satisfied;" and "to defend and indemnify and save Banco Popular North America harmless from any liability and expense (including attorney's fees) because of any liens or the enforcement thereof."

Further, plaintiff's instant motion is also procedurally defective and the relief requested premature, as a Referee cannot be appointed to compute the amount purportedly due to plaintiff on its Mechanic's lien unless plaintiff is first awarded summary judgment against all defendants who have answered the complaint, including Banco Popular. Plaintiff must then serve an additional motion for a Judgment of Foreclosure and Sale. In any event, Banco Popular's 2006 Mortgage Liens were recorded ahead of plaintiff's Mechanic's Lien and therefore have priority over plaintiff's lien. Thus, any claim by plaintiff that its Mechanic's lien is superior to Banco Popular's Mortgage Liens is false and incorrect.

In response, 2201's counsel argues that he was retained to represent 2201 on January 14, 2011, and has been unable to gain any cooperation from 2201's prior counsel Todd Rothenberg for 2201's files. 2201's counsel argues that although he cannot answer for the actions or failures to act by prior counsel, the record indicates that it was 2201 that first sued plaintiff, claiming that plaintiff's lien, for which it now claims this default, was baseless and unsupportable. The Court, (Braun, J.) in a May, 2010 decision found that 2201 "vehemently disputes" plaintiff's contention that it substantially completed the work forming the basis of its claim and further, awarded 2201 costs and expenses on such motion.

Finally, the amount sought in the plaintiff's complaint is \$2,751,106.80, certainly a material sum. There is a strong public policy in favor of resolving cases on the merits, and the Court may, in its discretion, accept law office failure as a reasonable excuse for the default. To the extent counsel's office or prior counsel may have defaulted in answering the underlying Complaint, such default should not be held against 2201, where 2201 has been very aggressive about pursuing the validity of the very lien claimed herein, and won a favorable decision from the Court, and was awarded costs and expenses in that decision.

2201 argues that it did not "cancel" the plaintiff's mechanic's lien, and therefore does not object to the restoration of said lien, without prejudice or waiver of its claims or defenses herein.

In reply, plaintiff argues that Banco Popular and 2201 has been in default in appearing and answering the summons and complaint in this mechanic's lien foreclosure action for one year now. This third counsel for 2201 sent an answer without moving to vacate the owner's default. Plaintiff's motion⁴ was made in December, returnable January 28, 2011 with the appropriate CPLR 2214(b) admonition that all opposing papers must be served seven days prior to the return date.

As to Banco Popular, Banco Popular had full knowledge that the requisition moneys it paid to 2201 were⁵ not being paid to plaintiff and that plaintiff had properly terminated the contract for nonpayment. Yet Banco Popular drew down on the letter of credit, which it had no right to do under the Assignment Contract. While Banco Popular's bad faith is clear, plaintiff did not request judgment against it at this time, but only against those who have defaulted in timely answering⁶ and appearing and to vacate the fraudulent discharge of plaintiff's lien.

As to 2201, plaintiff contends that the petition before Judge Braun, which was for an

itemized statement under §38 of the Lien Law, was dismissed and 2201 was represented by a Todd Rothenberg ("Rothenberg") who, at that time had replaced Marantz.

Further, while Whittingham claims he was duped by "attorney" Goldberg into signing over the deed and backdating that deed to be before he made the mortgages here, he made sure the deed was dated before 2201 did the mortgages. 2201 and Whittingham were shrewd enough to file an affidavit to avoid paying taxes. And, while trying to blame others, Whittingham did not forget to do a net lease back to himself, because he clearly did not trust Goldberg either. The affidavit for the fraudulent transfer on October 1, 2009 was executed, the day after Banco Popular gave a loan extension to 2201. This is particularly odd as Whittingham alleged in another action that he did not even meet Goldberg until April of 2010. And, there is a discrepancy in 2201's statement concerning when it allegedly sent the pleadings to his counsel.

The law requires plaintiff to move within one year for a default judgment which is what plaintiff has done. Thus, the instant motion is proper. 2201 has not timely appeared nor answered and the time has long since expired without any extension of time. And, there is no valid, timely opposition by 2201.

Discussion

At the outset, the Court notes that as to the allegations against Banco Popular, plaintiff acknowledges that it does not seek any relief against Banco Popular at this juncture. Therefore, the Court does not address the allegations of breach and fraud against Banco Popular at this juncture.

As to the branch of plaintiff's motion for a default judgment, it is well settled that CPLR §3215 "does not contemplate that default judgments are to be rubber-stamped once jurisdiction

and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] (McGuire, J., concurring), quoting *Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]; see *Resnick v Lebovitz*, 28 AD3d 533 [2d Dept 2006]). On an application for default judgment, the following proofs are required:

[T]he applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. . . . Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.
(CPLR §3215[f])

By submission of the verified complaint, proofs of service, and affirmation detailing failure of the defaulting defendants, plaintiff has established entitlement to a default judgement against All City Glass and Mirror Corp., Katz Metal Fabricators, Inc., Trevor Whittingham, Inc., Industrial Fire Door & Hardware Supply, Inc., Northern Building Products, Inc., Reliant Electronic Contracting, Inc., who have not appeared or opposed plaintiff's motion. While it is premature to appoint a Referee to compute the amounts due until the liability of all defendants is determined, plaintiff's instant motion is not procedurally defective as to these defaulting defendants.

However, as to plaintiff's motion against 2201, in order to successfully oppose a default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense (*ICBC Broadcast Holdings-NY, Inc. v Prime Time Advertising, Inc.*, 26 AD3d 239, 810 NYS2d 40 [1st Dept 2006] citing *114 W. 26th St. Assocs. v Fortunak*, 22 AD3d 346, 801 NYS2d

895 [2005]). Law office failure may meet the justifiable excuse prong in appropriate circumstances there is a strong public policy in favor of resolving cases on the merits, and the Court may, in its discretion, accept law office failure as a reasonable excuse for the default (*ICBC Broadcast Holdings-NY, Inc. v Prime Time Advertising, Inc.*, citing CPLR 2005 and *Putney v Pearlman*, 203 AD2d 333).

While the record does not indicate whether 2201's initial failure to answer the complaint can be attributed to the law office failure of 2201's prior counsel, the record does not indicate that 2201's default was due to *wilful* neglect on the part of 2201. 2201 previously challenged plaintiff's subject lien, and obtained a favorable decision, dated May 27, 2010 from the Court. Said decision indicates within weeks after plaintiff filed its lien, 2201 commenced an action for an itemized statement of the amounts allegedly due as per the lien. Respondent was ordered to provide a proper itemized statement. And, upon 2201's retainer of its present counsel, an appearance was entered, an answer served shortly thereafter, and diligent efforts were made by said counsel to represent 2201's interests in this action. Further, 2201 does not object to the cancellation of the purported Release. While the petition was later dismissed, however, such dismissal was the result of a stipulation, dated December 23, 2010. The order dismissing the petition is silent as to the basis of the stipulation, and does not address the prior order which granted 2201's petition on the merits.

As to 2201's meritorious defense of this action, 2201 has alleged sufficient facts to challenge the amounts due and owing to plaintiff. In its Verified Answer and Counterclaim, 2201 alleges that plaintiff breached the Construction Contract by failing to complete the work within the timeframe set forth in said contract, complete the work in a good or workmanlike

manner, making false statements to 2201 and Banco Popular as to the percentage of completion of said work, and/or making requisitions knowing them to be false, and failing to remit payment received on account of said requisitions to its subcontractors. Further, 2201 alleges the affirmative defenses of collateral estoppel and *res judicata*.

Further, there is a strong public policy favoring the resolution of cases on the merits (*Chevalier v 368 E. 148th Street Assocs., LLC*, 80 AD3d 411, 914 NYS2d 130 [1st Dept 2011] citing *Harczark v Drive Variety, Inc.*, 21 AD3d 876, 876-877, 800 NYS2d 613 [2005]).

Therefore, the plaintiff's motion for a default judgment against 2201 is denied, and the branch of plaintiff's motion for an order declaring the Release void *nunc pro tunc* is granted, as unopposed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for default judgment is granted solely as against All City Glass and Mirror Corp., Katz Metal Fabricators, Inc., Trevor Whittingham, Inc., Industrial Fire Door & Hardware Supply, Inc., Northern Building Products, Inc., and Reliant Electronic Contracting, Inc.; and it is further

ORDERED that the branch of plaintiff's motion to vacate the purported Release of Lien is granted, and said Release is hereby declared null and void; and it is further

ORDERED that the parties appear for a preliminary conference on April 12, 2011, 2:15

p.m.

This constitutes the decision and order of the Court.

Dated: March 28, 2011

A handwritten signature in black ink, appearing to read 'C. Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD