

Ambrosino Constr. Corp. v Galasso

2012 NY Slip Op 33781(U)

January 5, 2012

Supreme Court, Queens County

Docket Number: 25819/2010

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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AMBROSINO CONSTRUCTION CORP.,
Plaintiff,
- against -

Index No.: 25819/2010
Motion Date: 11/18/11
Motion No.: 1
Motion Seq.: 2

2012 JAN 13 A 11:00
QUEENS COUNTY CLERK
FILED

PHILIP GALASSO, SILVANA GALASSO AND
FRANK L. GALASSO, as Trustee of the
PDJ IRREVOCABLE TRUST,

Defendants.

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The following papers numbered 1 to 14 were read on this motion by
defendant SILVANA GALASSO for an order pursuant to CPLR
5015(a)(1) and 5015(a)(3) vacating a judgment entered against her
on default filed and recorded in the Office of the Queens County
Clerk on July 18, 2011:

Papers
Numbered

- Order to Show Cause-Affidavits-Exhibits.....1 - 6
- Affirmation in Opposition-Affidavits-Exhibits.....7 - 11
- Reply affirmation.....12 - 14

This is an action commenced by plaintiff to recover a money
judgment in the amount of \$ \$1,533,777.09 for breach of a
construction contract, unjust enrichment, fraud and
misrepresentation and counsel fees. The complaint which was
filed on October 13, 2010 alleges that the plaintiff, AMBROSINO
CONSTRUCTION CORP., is a general contractor retained by the
defendants in June 2006 to perform construction and renovation on
the defendants' residence located in Sands Point, New York. The
parties entered into a standard written construction contract
dated June 22, 2006. The contract was signed by Michael Ambrosino
on behalf of the plaintiff and by Philip Galasso. Subject to

* 2]

additions and deductions by change order the contract sum was set at \$2,930,000.00. After performing work pursuant to the contract, the plaintiff billed defendants for labor performed and materials supplied the sum of \$2,379,002.42. It is alleged that to date the defendants have paid plaintiff a total of \$1,125,000.00 and have failed or refused to pay the balance of \$1,254,002.42.

Plaintiff commenced the instant action by filing a summons and complaint with the court on October 13, 2010. Defendants were personally served at their residence but failed to answer. In March 2011, the plaintiff moved this court for an order granting a default judgment against the defendants based upon their failure to answer the summons and complaint. The defendants, although duly served with the motion, failed to respond. By decision dated March 21, 2011, this Court granted a default judgment against all defendants without opposition and set the matter down for an inquest/assessment of damages. Defendants were served with notice of entry of the March 21, 2011 order as well as with a notice of inquest and certificate of readiness. The inquest was held before this Court on May 10, 2011. None of the defendants appeared. A Judgment in the amount of \$1,533,777.09 was entered against all three defendants on July 18, 2011 and served on defendants with notice of entry.

On September 21, 2011 defendant Silvana Galasso brought the within Order to Show cause to vacate the clerk's judgment pursuant tot CPLR 5015(a)(1) on the ground that defendant Silvana Galasso has a reasonable excuse for the default and a meritorious defense. In her affidavit in support of the motion, Silvana Galasso states that the default judgment should be vacated against her because she was not a signatory to the construction contract and thus not a party to the contract. As stated above, the contract was signed only by Philip Galasso and Ambrosino Construction. Further Silvana Galasso states that she has a reasonable excuse for failing to answer the summons and complaint and the motion for a default judgment because her husband, who managed all the finances, told her he would take care of it. Further defendant contends that the default judgment should be vacated pursuant to CPLR 5015(a)(3) on the ground of misrepresentation in the affidavit submitted by plaintiff, Antonio Ambrosino in support of the motion for a default judgment. The relevant portion of the affidavit states that "on or about June of 2006, AMBROSINO and defendants entered into a written agreement where AMBROSINO agreed to provide certain labor and materials for the construction and renovation of defendants' premises for which PHILIP GALASSO agreed to pay the sum of two million nine hundred thirty thousand (\$2,930,000) dollars, subject to possible additions and deductions." Silvana claims that as she

was not a signatory to the contract that Ambrosino's statement that the defendants entered into a written agreement was a misrepresentation.

In opposition to the motion, plaintiff's counsel asserts that it would be unreasonable for Silvana to have relied on her husband as they were involved in a divorce proceeding at the time in Nassau Supreme Court. Counsel also states that Silvana does not have a meritorious defense in that even though she is not a signatory to the contract she has benefitted from the construction and renovation project as she resides in the premises.

A defendant seeking to vacate a default must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (see CPLR 5015 [a] [1]; Assael v 15 Broad St., LLC, 71 AD3d 802 [2d Dept. 2010]; Leifer v Pilgreen Corp., 62 AD3d 759 [2d Dept. 2009]).

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and defendant's reply thereto, this court finds that defendant Silvana Galasso has presented a reasonable excuse for the default and a meritorious defense. Here, the written construction contract was solely between the plaintiff and Philip Galasso. Defendant correctly asserts that a contractual cause of action may not be asserted against a party with whom it was not in privity (see Sperry v Crompton Corp., 26 AD3d 488 [2d Dept. 2006]; Outrigger Constr. Co. v. Bank Leumi Trust Co., 240 AD2d 382 [2d Dept. 1997]). Further, as her husband negotiated the contract and was involved in payment for the construction it was reasonable for her to believe that he would have also responded to the summons and complaint and subsequent motion practice.

In addition, this court finds that the affirmation submitted in support of the motion by Antonio Ambrosino for a default judgment, incorrectly stated that plaintiff entered into a written agreement with defendants when in fact it was only Philip Galasso that signed the construction contract (see CPLR 5015[a] [3]; Matter of Travelers Ins. Co. v Rogers, 84 AD3d 469 [2d Dept. 2011]).

Lastly, public policy favors resolution of cases on the merits and plaintiff has not shown any prejudice if the answer is served late (see City Line Auto Mall, Inc. v. Citicorp Leasing, Inc., 45 AD3d 716 [2d Dept. 2007]; Ahmad v Aniolowiski, 28AD3d 692 [2d Dept. 2006]; Sippin v Gallardo, 287 AD2d 703 [2d Dept. 2001]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that defendant's motion to vacate the default judgment pursuant to CPLR §5015(a)(1) and 5015(a)(3) is granted, and the default judgment dated March 21, 2011, the order after inquest held on May 10, 2011 and the money judgment entered July 18, 2011 are hereby vacated as against Silvana Galasso only. Said defendant is granted leave to serve and file an answer to the summons and complaint within 20 days of service of a copy of this order with notice of entry thereof.

Dated: January 5, 2012
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

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