

55C Group Inc. v LCD Residence, Inc.

2013 NY Slip Op 31056(U)

May 13, 2013

Supreme Court, New York County

Docket Number: 101115/12

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

55C GROUP INC.,

INDEX NO. 101115/12

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

LCD RESIDENCE, INC.,

FILED

Defendant.

MAY 14 2013

MOTION CAL No. _____

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____ the lead on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 5/13/13

DM
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

55c GROUP INC.,

INDEX NO.
101115/12

Plaintiff,

- against -

DECISION/ORDER

LCD RESIDENCE INC.,

FILED

Defendant.

MAY 14 2013

DONNA MILLS, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, 55C Group Inc., seeks an order directing the entry of a judgment in the plaintiff's complaint pursuant to CPLR 3215 by reason of the defendant LCD Residence Inc.'s ("defendant or LCD") failure to answer the complaint.

The instant action seeks to enforce the plaintiff's mechanic's lien on real property located at 613 West 169th Street in New York County. On or about August 15th, 2007 Universal Construction Consultant Inc. ("Universal") and the defendant entered into a written agreement in which the defendant hired Universal to build a new six (6) story two family house on the subject premises. In consideration of this construction work, the defendant promised to pay Universal one million five hundred and thirty-eight thousand (\$1,538,000.00) dollars.

Universal commenced its work on this construction project on or about August 15, 2007 and finished its last work on or about November 1, 2010. Thereafter Universal requested the final payment for the project from the defendant but the defendant failed to make the payment. As a result, on December 10, 2010, Universal filed a Notice of Mechanic's lien in the Office of the Clerk of the County of New York. On August 9, 2011, Universal assigned its right to the plaintiff to the monies due from the defendant under the subject construction contract. The following day, August 10, 2011, the Assignment of

Universal's Mechanic's lien was filed with the Office of the Clerk of the County of New York. According to the plaintiff, the aforesaid lien has not been paid, waived, canceled or discharged, and that no other action or proceeding either at law or in equity has ever been brought to recover the claim of the plaintiff or any part thereof, except in this action.

The defendant has failed to appear or answer the complaint and plaintiff is now seeking a judgment validating its lien on the subject premises for the sum of ninety-six thousand four hundred and sixty dollars and forty-six cents (\$96,460.46).

In opposition to the motion for a default judgment, defendant LCD argues, inter alia, that service of process in this case was improper and that personal jurisdiction was not acquired. Specifically, defendant contends that the address on file with the Secretary of State is not its current mailing address and that plaintiff should have been aware of this fact.

At the outset, the Court notes that defendant does not dispute the duly executed affidavit of service on the Secretary of State which is annexed to plaintiff's moving papers. Therefore, the Court finds that said affidavit is prima facie proof of service (see Del Priore v. Furnival Machinery Co., 124 A.D.2d 695, 508 N.Y.S.2d 206 [2nd Dept.1986]). Moreover, once process was delivered to the Secretary of State, personal jurisdiction was acquired over defendant (see East New York Savings Bank v. Sun Beam Enterprises, Inc., 234 A.D.2d 131, 651 N.Y.S.2d 37 [1st Dept.1996]; Micarelli v. Regal Apparel Ltd., 52 A.D.2d 524, 381 N.Y.S.2d 511 [1st Dept.1976]). This is so even if defendant never actually received process (see Associate Imports, Inc. v. Leon Amiel Publisher, 168 A.D.2d 354, 562 N.Y.S.2d 678 [1st Dept.1990]; Micarelli v. Regal Apparel Ltd, supra).

It is well settled that a corporation's failure to maintain a current address with the Secretary of State is not an excuse for a delay and/or failure to appear in an action (see Santiago v. Sansue Realty Corp., 243 A.D.2d 622, 663 N.Y.S.2d 235 [2nd Dept.1997]).

This rule of law has been applied with equal force to a limited liability company (see Crespo v. A.D.A. Management and Mandy Associates, LLC, 292 A.D.2d 5, 739 N.Y.S.2d 49 [1st Dept.2002]).

In further opposition to the motion, defendant asserts that it never received additional notice of this action as required by statute. CPLR § 3215(g)(4)(i) states that an application for a default judgment must be accompanied by an affidavit demonstrating compliance with CPLR 3215(g)(4)(i) and if such an affidavit is lacking, the application for leave to enter a default judgment is defective and should be denied (see Vekiareilis v. Pall Corp., 302 A.D.2d 375, 754 N.Y.S.2d 564, 2003 N.Y. Slip Op 10711 [2nd Dept, Feb. 3, 2003]; Ocuto Blacktop & Paving Co. v. Trataros Constr., 277 A.D.2d 919, 715 N.Y.S.2d 565 [4th Dep't 2000]; Rafa Enters. v. Pigand Mgt. Corp., 184 A.D.2d 329, 586 N.Y.S.2d 888 [2nd Dep't 2003]). CPLR 3215(g)(4)(l) provides: "When a default judgment based upon non-appearance is sought against a domestic ... corporation which has been served pursuant to [Business Corporations Law § 306(b)], an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." CPLR 3215(g)(4)(ii), in pertinent part, provides: "The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to [Business Corporations Law § 306(b)], and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision."

Since the mailing of the notice of motion and accompanying exhibits satisfied the dictates of CPLR 3215(g)(4)(i) and CPLR 3215(g)(4)(ii), plaintiff was not required to annex to the motion a separate affidavit demonstrating compliance with these provisions. Inasmuch as plaintiff has otherwise demonstrated its entitlement to a default judgment, it

is hereby;

ORDERED that the motion for a default judgment is granted; and it is further

ORDERED that an immediate inquest of an assessment of damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said clerk a note of issue and statement of readiness and shall pay the fee therefor and said Clerk shall cause the matter to be placed upon the calendar for such trial.

Dated: 5/13/13

ENTER:

DM

J.S.C.

FILED DONNA M. MILLS, J.S.C.
MAY 14 2013
NEW YORK
COUNTY CLERK'S OFFICE