

Creative Trucking, Inc. v BQE Ind., Inc.

2013 NY Slip Op 32798(U)

October 29, 2013

Sup Ct, New York County

Docket Number: 650756/2012

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PART 61

Index Number : 650756/2012
CREATIVE TRUCKING INC.
vs
B Q E INDUSTRIES, INC.
Sequence Number : 002
VACATE DEFAULT JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed order.*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/29/13

Recy
HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
CREATIVE TRUCKING, INC.,

Plaintiff,

-against-

BQE INDUSTRIES, INC., and
R.A.M.S. MECHANICAL, INC.,

Defendants.

-----X
R.A.M.S. MECHANICAL INC.,

Third-Party Plaintiff,

-against-

NEW YORK RIGGING CORP.,

Third-Party Defendant.

-----X
HON. ANIL C. SINGH, J.:

Plaintiff, Creative Trucking, Inc. ("Creative"), and third-party defendant, New York Rigging Corp. ("Rigging"), move, pursuant to CPLR §§ 317 and 5015, to vacate the November 27, 2012 default judgment against them and, pursuant to CPLR § 3211, to dismiss the counterclaim and third-party complaint due to improper service and failure to state a claim. Defendant, R.A.M.S. Mechanical, Inc. ("RAMS"), opposes the motion.

The underlying causes of action arise from contracts for the removal of boilers at two construction projects. Defendant, BQE Industries, Inc. ("BQE"), was the general contractor at a construction project at the Clemente Soto Velez Cultural Center ("Cultural Center"), RAMS, as a

DECISION AND
ORDER
Index No. 650756/2012

Mot. Seq. 002

subcontractor, allegedly contracted with Creative to provide labor and materials to the project. Prior to Creative beginning work on the project, but after expending time and money preparing for the project, RAMS allegedly terminated Creative from the project. Creative sued BQE and RAMS for breach of contract. RAMS brought counterclaims against Creative for various causes of action relating to work performed at a construction project at the State University of New York at Farmingdale ("Farmingdale"). RAMS brought a third-party complaint against Rigging, alleging that Rigging and Creative are alter-egos of each other and alleging the same causes of action as set forth in the counterclaim against Creative.

No answer was made to the counterclaims or third-party complaint. RAMS moved for default judgment. In an order dated November 27, 2012, this Court granted RAMS' motion for a default judgment.

CPLR § 5015(a)(1) provides that the court which rendered a judgment or order may relieve a party from it upon the grounds of "excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party." To show an excusable default, the moving party must show an "acceptable excuse for its delay in appearing and answering plaintiffs' complaint and a meritorious defense to the action." *See Gray v. B. R. Trucking Co.*, 59 N.Y.2d 649, 650 (1983). CPLR § 2005 provides that "Upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure."

This is an e-filed case, and Plaintiff's attorney consented to electronic service through the

Court's e-filing system. Plaintiff's attorney, who also represents Rigging, affirms that he had entrusted access to his email and website to his wife, who is pregnant with another man's child and against whom a divorce petition has been filed. He further affirms that, unbeknownst to him, his wife destroyed some of his business files, including his website and the email account designated for service. He did not learn of this until late in November of 2012. He affirms that in the months since he learned of the problem with the email account, the burden of his marital problems and having to change his residence and office addresses resulted in his clients failing to appear or answer the counterclaims. Defendant argues that there is no reasonable excuse due to the length of time proceedings in this matter were ignored. This Court finds that there is an acceptable excuse for the delay in answering.

The party seeking to set aside a default must also "set forth facts sufficient to make a prima facie showing of a meritorious defense." *Batra v. Office Furniture Serv.*, 275 A.D.2d 229, 231 (1st Dep't 2000). Creative and Rigging provide as defenses to the counterclaims and third-party complaint the existence of a Release and Waiver of Lien with regards to the Farmingdale project as well as improper service. Rigging and Creative further contend that they are separate companies, not alter egos, that the contract for the Farmingdale project was signed by Creative, not Rigging, and that therefore, the claims against Rigging must be dismissed. Accordingly, Creative and Rigging have set forth facts which could support a defense.

Rigging and Creative also seek to dismiss the counterclaims and third-party complaint. In ruling upon a motion to dismiss, the court must "determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. In

furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference." (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y. 2d 144 [2002], internal quotations and citations omitted.).

Rigging claims that there was improper service of process with regards to the third-party summons and complaint. Rigging mistakenly relies upon NY Bus. Corp. § 306-A (e)(2) to support this contention. However, this section applies to instances where the party whose address has been designated by a corporation for service of process has resigned with regards to the receipt of process, of which there is no allegation in this case. Rigging and Creative also claim that there was no personal delivery of the counterclaims or third-party complaint. However, there is no affidavit attesting to personal knowledge of such.

The counterclaims and third-party complaint set forth facts which, if taken as true, establish a cause of action. RAMS alleges, among other things, that it issued purchase orders to Creative/Rigging, that Creative/Rigging failed to complete their work under the purchase orders, that RAMS had to hire third-parties to complete Creative/Rigging's work, and that Creative/Rigging wrongfully removed a boiler owned by SUNY Farmingdale and in RAMS' possession. Such allegations, if taken as true, are sufficient to support RAMS' causes of action for breach of contract and conversion. Therefore, dismissal of the counterclaims or third-party complaint is not warranted.

For the reasons set forth herein, and upon all of the papers submitted in support of and opposition to the motion, it is hereby

ORDERED that that portion of Plaintiff's motion to vacate its default herein is granted on

condition that Plaintiff serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that that portion of Third-Party Defendant's motion to vacate its default herein is granted on condition that Third-Party Defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that that portion of Plaintiff's motion to dismiss the counterclaims is denied; and it is further

ORDERED that that portion of Third-Party Defendant's motion to dismiss the third-party complaint is denied; and it is further

ORDERED that Plaintiff and Third-Party Defendant shall serve a copy of this order with notice of entry on the County Clerk (Room 141B) and upon the Trial Support Office (Room ~~148~~); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on JANUARY 22ND 2014, 2013, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 10/29/13
New York, New York

acc
Anil C. Singh