

<b>Legacy Bldrs./Devs. Corp. v 622 Third Ave. Co. LLC</b>
2014 NY Slip Op 30510(U)
February 28, 2014
Supreme Court, New York County
Docket Number: 156102/13
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
LEGACY BUILDERS/DEVELOPERS CORP.,

Plaintiff,

Index No. 156102/13

-against-

**DECISION/ORDER**

622 THIRD AVENUE COMPANY LLC, AMICK  
CARPENTRY CORP. a/k/a AMICK CONSTRUCTION  
CORP., CORPORATE WOODWORKING, INC.,  
DEPARTMENT OF TRANSPORTATION OF THE  
CITY OF NEW YORK and "JOHN DOE 1" through  
"JOHN DOE 10" the fictitious names being those  
individuals and/or entities unknown to plaintiff and  
having or claiming an interest in or lien upon 622  
Third Avenue, New York, New York (the "Property"),

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for: \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion and Affidavits Annexed.....	<u>2,3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Plaintiff Legacy Builders/Developers Corp. ("Legacy Builders") commenced the instant  
action against defendants 622 Third Avenue Company LLC ("622"), Amick Carpentry Corp. a/k/a  
Amick Construction Corp. ("Amick"), Corporate Woodworking, Inc. ("Woodworking"),  
Department of Transportation of the City of New York ("DOT") and "John Doe 1" through "John  
Doe 10" alleging causes of action for breach of contract, unjust enrichment and to foreclose on a

mechanic's lien. Plaintiff now moves for an Order pursuant to CPLR § 3215 for a default judgment against 622 on the ground that 622 has failed to answer or otherwise appear in the instant action and its time to do so has expired. Woodworking cross-moves for an Order pursuant to CPLR § 3215 for a default judgment against 622 on the ground that 622 has failed to answer or otherwise move as to Woodworking's cross-claims in the instant action and its time to do so has expired. 622 also cross-moves for an Order pursuant to CPLR § 3012 extending its time to answer and compelling the parties in this action to accept service of its answer and counterclaims. For the reasons set forth below, plaintiff's motion is denied, Woodworking's cross-motion is denied and 622's cross-motion is granted.

The relevant facts are as follows. 622 is the owner of the real property located at 622 Third Avenue, New York, New York, Block 1295, Lot 33 (the "Property"). The Property is managed by Cohen Brothers Realty Corporation ("CBRC"), a private real estate development and management firm. On or about February 10, 2012, Legacy Builders entered into an agreement with 622 whereby Legacy Builders agreed to construct the interior fit out of a new office suite on the thirty-fourth floor of the Property pursuant to 622's plans, specifications and design by, *inter alia*, furnishing all labor, materials and equipment necessary for the installation of partitions, carpentry, finishes, lathing, ceiling tiles, ceiling grids, framing, taping, spackling, drywall and patching. The agreed price of the work was initially \$17,000 but was allegedly increased to \$33,435 upon 622's request for additional work (the "Work").

Legacy Builders performed the Work at the Property from February 13, 2012 through April 17, 2012. Thereafter, Legacy Builders invoiced and demanded payment of \$33,435 for the Work performed at the Property. However, the complaint alleges that no amount has been paid by 622. On or about December 14, 2012, within eight months after furnishing the last items of material and

labor, Legacy Builders filed a Notice of Mechanic's Lien (the "Legacy Lien") on the Property in the amount of \$33,435. On that same date, Legacy Builders served a copy of the Lien on 622 by mailing it regular mail and certified mail to 622's last known address and the Affidavit of Service of the Lien was filed with the New York County Clerk. Legacy Builders alleges that the Lien has not been paid, waived, cancelled or discharged.

Additionally, 622's co-defendant, Woodworking, entered into a contract with 622 pursuant to which Woodworking provided certain specified materials and services at the Property. Woodworking alleges that 622 has failed and refused to remit the balance of the payments due and owing to Woodworking in the total amount of \$20,925. On January 23, 2013, Woodworking filed a Notice of Mechanic's Lien (the "Woodworking Lien") on the Property in the amount of \$27,000, the amount then outstanding. On March 26, 2013, Woodworking filed an Amended Mechanic's Lien (the "Amended Woodworking Lien") in the amount of \$20,925, the amount it alleges is currently outstanding.

On or about July 3, 2013, Legacy Builders commenced the instant action seeking judgment against 622 for breach of contract and unjust enrichment in the amount of \$33,435 plus interest, costs and disbursements and to foreclose on the Legacy Lien. On or about August 1, 2013, Woodworking interposed an answer, affirmative defenses, a counterclaim and cross-claims in this action. Specifically, Woodworking cross-claimed against 622 for breach of contract, violation of New York's Prompt Pay Act and unjust enrichment. Legacy Builders now moves for an Order pursuant to CPLR § 3215 for a default judgment against 622 on the ground that it has failed to answer or otherwise appear in the action and its time to do so has expired. Woodworking cross-moves for an Order pursuant to CPLR § 3215 for a default judgment against 622 on the ground that 622 has failed to answer or otherwise move as to Woodworking's cross-claims in the instant action

and its time to do so has expired. 622 cross-moves for an Order pursuant to CPLR § 3012 extending its time to answer and compelling the parties in this action to accept service of its answer and counterclaims.

To oppose a motion for a default judgment, a defendant must only demonstrate a reasonable excuse for the default and need not establish a meritorious defense. *See* CPLR § 3012(d); *see also Terrones v. Morera*, 295 A.D.2d 254, 255 (1<sup>st</sup> Dept 2002)(finding that plaintiff's motion for a default judgment was properly denied as defendants demonstrated a reasonable excuse for their failure to serve a timely answer and that no affidavit of merit was required as "no default order or judgment was obtained against defendants"); *see also Nason v. Fisher*, 309 A.D.2d 526 (1<sup>st</sup> Dept 2003)(holding that "there was no need for defendants to set forth a meritorious defense...since no default order or judgment had been obtained by plaintiff...") In the instant action, plaintiff's motion and Woodworking's cross-motion for a default judgment against 622 are denied as 622 has provided a reasonable excuse for its failure to serve a timely answer to the complaint and the cross-claims. 622's excuse for the default is that its counsel never received the summons and complaint and thus, never responded to the instant action, including Woodworking's cross-claims asserted against it. 622 has provided an affidavit of Steven Cherniak, the COO of CBRC, who has affirmed that it is CBRC's policy that all legal documents served upon the buildings it manages, including 622, are to be forwarded to his office for his review so that he can direct them to the proper persons and/or entities for appropriate action, namely, their counsel. Mr. Cherniak further affirms that he was only made aware of this action upon receipt of the instant motion for a default judgment when it was delivered to his office and forwarded to him. While 622 has not rebutted the presumption of adequate service upon it as plaintiff served it with the summons and complaint via the Secretary of State, it alleges that office clerical errors prevented 622's counsel from receiving such pleadings as

