CNY Construction Mgt. Inc. v Environmental Educ. Assoc., Inc.

2015 NY Slip Op 31692(U)

August 28, 2015

Supreme Court, New York County

Docket Number: 154878/2014

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

---X

CNY CONSTRUCTION MANAGEMENT INC.,

Plaintiff,

Index No. 154878/2014

DECISION and ORDER

- against -

Mot. Seq. #001

ENVIRONMENTAL EDUCATION ASSOCIATES, INC., d/b/a UPPER NEW YORK STATE ENVIRONMENTAL, STARR GLOBAL ACCIDENT & HEALTH INSURANCE AGENCY, LLC and STARR INDEMNITY & LIABILITY COMPANY,

Defendants.

---X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, CNY Construction Management Inc., ("Plaintiff" or "CNY"), brings this action for declaration of coverage, breach of contract, breach of the duty of good faith and fair dealing, indemnity, and negligence. This action arises from a subcontract (the "Subcontract") between Plaintiff, as contractor, and defendant, Environmental Education Associates, Inc., d/b/a Upper New York State Environmental ("UNYSE"), to test for lead-based paint at construction project involving the construction of a restaurant known as Tetsu, located at 78 Leonard Street, New York, New York (the "Project"). Plaintiff claims that, while performing lead abatement work pursuant to the Subcontract, UNYSE improperly allowed lead dust to infiltrate common areas, ducts and residential units at the condominium located at 78 Leonard Street, New York, New York (the "Condominium").

Additionally, Plaintiff claims that defendants, Starr Global Accident & Health Insurance Agency, LLC ("Starr Global") and Starr Indemnity & Liability Company ("Starr Indemnity") (collectively, "Starr") (and together with UNYSE, collectively,

"Defendants"), issued a commercial general liability insurance policy (the "Starr Policy") to UNYSE providing coverage to UNYSE in connection with the performance of UNYSE's work on the Project and naming CNY as an additional insured. Plaintiff claims that Starr wrongfully disclaimed any responsibility for coverage for the lead dust infiltration at the Project and Condominium.

Plaintiff commenced this action on May 19, 2014, by summons and complaint. By stipulation of discontinuance dated February 13, 2015, Plaintiff discontinued this action as against Starr Accident and Starr Indemnity.

Plaintiff now moves for an Order, pursuant to CPLR § 3215, granting judgment on default in favor of Plaintiff and against UNYSE and directing an inquest as to damages. In support, Plaintiff submits: the attorney affirmation of Ellen August ("August"), dated April 16, 2015; copies of the pleadings herein; the affidavit of service of Plaintiff's summons and complaint upon UNYSE pursuant to BCL § 306 on May 29, 2014; the affidavits of additional service upon UNYSE pursuant to CPLR § 3215 on July 3, 2014 and April 7, 2015, respectively; the affidavit of merit of Michael Borrico ("Borrico"), Plaintiff's President, dated April 15, 2015; a copy of the Subcontract; a copy of the Change Order; and, a copy of a letter, dated March 31, 2014, from UNYSE's insurer.

UNYSE opposes. UNYSE cross-moves for an Order, pursuant to CPLR § 3012, permitting UNYSE to serve a late answer to Plaintiff's complaint and compelling Plaintiff to accept UNYSE's untimely answer as timely. In support, UNYSE submits: the attorney affirmation of Salvatore J. DeSantis, dated May 20, 2015; the affidavit of Andrew McLellan; and, a copy of the verified answer of UNYSE in the proposed form.

Plaintiff opposes UNYSE's cross-motion.

CPLR § 3215 provides, in relevant part: "[o]n any application for judgment by default, the applicant shall file proof ... of the facts constituting the claim, the default and the amount due by affidavit made by the party." (CPLR § 3215[f]). CPLR § 3215 does not contemplate that default judgments are to be "rubberstamped" once jurisdiction and a failure to appear have been shown. (*Feffer v. Malpeso*, 210 A.D.2d 60, 61 [1st Dep't 1994]; *see also Gagen v. Kipany Prods.*, 289 A.D. 2d 844, 846 [3d Dep't, 2001] ["[T]he granting of a default judgment does

not become a 'mandatory ministerial duty' upon a defendant's default."]). Rather, some proof of liability is required to satisfy the court as to the prima facie validity of the uncontested cause of action. (*Feffer*, 210 A.D.2d at 61). The standard of proof on an application for judgment by default "is not stringent, amounting only to some firsthand confirmation of the facts". (*Id.*).

In the affidavit of Borrico, Borrico avers: "[p]ursuant to a contract between CNY and TriMasa Restaurant Partners LLC ('TriMasa'), CNY is the general contractor on a project involving the construction of a restaurant known as Tetsu, located at 78 Leonard Street, New York, New York (the 'Project")." (Borrico Aff. ¶ 4). Borrico further avers, "[o]n or about January 7, 2014, CNY, as contractor, and UNYSE, as subcontractor, entered into a subcontract (the 'Subcontract') for the testing of paint on columns located on the Project." (*Id.* ¶ 6). Borrico avers that, "UNYSE performed testing pursuant to the Subcontract and identified the presence of lead based paint on the columns located at the Project" and that, "[o]n or about February 6, 2014, CNY and UNYSE agreed to a Subcontract Change Order, which expanded the Scope of Work in the Subcontract to include, among other things, sandblasting eight first-floor columns, four basement columns and three roll-up doors and containerizing and labeling project-related waste." (*Id.* ¶¶ 7-8).

Borrico avers that, "[u]pon information and belief, during the performance of its work, UNYSE improperly and negligently allowed lead dust to infiltrate common areas, ducts and residential units at the condominium located at 78 Leonard Street (the 'Condominium')." (*Id.* ¶ 9). Borrico avers that, "UNYSE failed and refused to perform the lead dust abatement and clean-up" and that, "[u]pon information and belief, as a result . . . the residents of the Condominium left their homes until the lead dust could be removed from the premises." (*Id.* ¶ 10). In addition, Borrico avers, "[u]pon information and belief, the lead dust covered personal property belonging to the residents . . . which required the cleaning of that property." (*Id.* ¶ 11).

Borrico avers that the Subcontract provides that UNYSE is liable for "those damages, liabilities or costs attributable to the sole negligence or willful misconduct of Unyse [sic]." (*Id.* ¶ 13). Additionally, Borrico avers that the Subcontract also requires UNYSE to maintain adequate general liability insurance and to indemnify CNY as an additional insured under UNYSE's policy. (*Id.* ¶ 14). Borrico avers that, "[u]pon information and belief, as a result of the lead dust infiltration UNYSE negligently caused, the Condominium incurred losses for which it and/or TriMasa seek to hold CNY liable," and that, "[p]ursuant to the Subcontract, UNYSE is

obligated to provide a full indemnification to CNY for those losses, as well as for any additional losses CNY incurs as a result of claims by the Condominium and/or its residents due to the lead dust infiltration occurrence." (*Id.* ¶¶ 17-18).

Additionally, Borrico avers that, "UNYSE failed to perform the subcontracted work in accordance with the requisite professional standards applicable to environmental consultants . . . [which] damaged the premises at the Project and caused injury to the residents of the Condominium." (*Id.* ¶ 19). Borrico further avers that, "in breach of the Subcontract, UNYSE failed to maintain general liability insurance that provided an indemnification to CNY as an additional insured for any liability arising out of the work UNYSE performed. (A copy of a March 31, 2014 letter from UNYSE's insurer, disclaiming any coverage obligation as to CNY, is annexed hereto as Exhibit 7.)" (*Id.* ¶ 20). Borrico avers:

> In performing its work in a negligent, defective and unprofessional manner, UNYSE breached its obligations under the Subcontract. Because of that breach, the Condominium and/or TriMasa have sought to hold CNY responsible for the damage UNYSE caused to the Condominium and its residents. CNY is entitled to an indemnification from UNYSE for the full amount of any such damages.

(*Id.* ¶ 21).

As far as UNYSE's cross-motion is concerned, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." (CPLR § 3012[d]). In order to be permitted to serve an untimely answer as timely, a defendant must provide both a reasonable excuse for the delay and demonstrate potentially meritorious defenses to the action. (*Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep't 2008]). Additionally, "[a]s a matter of general policy, disposition of controversies on the merits is favored." (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dep't 1964]).

UNYSE argues that UNYSE's delay in answering should be excused because UNYSE promptly forwarded Plaintiff's summons and complaint to its insurance agent. (DeSantis Affirm. ¶ 4). UNYSE argues that "there was an issue pertaining to insurance coverage that delayed Answering the complaint" and that when UNYSE, which is based in Buffalo, sought to find local counsel to appear in this matter, the

attorneys that UNYSE initially found in New York City could not represent UNYSE due to a conflict of interest. (*Id.*). In addition, UNYSE argues that the Condominium's claims for damages are still in the early stages of litigation, and that, insofar as Plaintiff's complaint sounds in indemnification for such claims, Plaintiff has not suffered any prejudice as a result of UNYSE's delay.

Here, Plaintiff has not demonstrated that it was prejudiced by UNYSE's delay in answering. Coupled with a potentially meritorious defense as to the scope of UNYSE's work and involvement at the Project and in light of New York's general policy favoring the disposition of controversies on the merits, under these circumstances, permission to serve a late answer to Plaintiff's complaint is warranted.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that the verified answer of UNYSE in the proposed form will be deemed filed and served upon service of a copy of this Order with notice of entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: August 28, 2015

EILEEN A. RAKOWER, J.S.C.