

Oliveira Contr., Inc. v Amcor Elec. Contr. Corp.

2015 NY Slip Op 32789(U)

November 30, 2015

Supreme Court, Nassau County

Docket Number: 600846-14

Judge: Jerome C. Murphy

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. JEROME C. MURPHY,
Justice.

OLIVEIRA CONTRACTING, INC.,

Plaintiff,

TRIAL/IAS PART 22

Index No.: 600846-14

Motion Date: 9/23/15

Sequence Nos.: 001, 002

MG, MD

DECISION AND ORDER

- against -

AMCOR ELECTRICAL CONTRACTING CORP.
and ANTHONY MORMANDO,

Defendants.

The following papers were read on this motion:

Sequence No. 1:

Notice of Motion, Affirmation in Support of Manny Frade, Affirmation in Support of Carmelina Oliveira and Exhibits.....	1
Plaintiffs' Memorandum of Law in Further Support and in Opposition to Defendants' Cross-Motion and Exhibits.....	2

Sequence No. 2:

Notice of Cross-Motion, Affidavit, Affirmation and Exhibits.....	3
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PRELIMINARY STATEMENT

In Sequence No. 1, plaintiff brings this application for an order and judgment pursuant to 22 NYCRR § 202.27(a) and Rules 1(a) and 12 of the Rules of the Commercial Division of the Supreme Court, striking the amended answer of defendant, Amcor Electrical Contracting Corp. in connection with this action; and all such other and further relief as the Court deems just and proper.

In Sequence No. 2, defendants bring this application for an order vacating the note of issue, summary judgment dismissing the action for failure to state a cause of action pursuant to CPLR § 3211(a)(7), dismissal of the action for failure of proof in support of a default judgment, or, in the alternative, scheduling the action to proceed to a preliminary conference with defendants' present

counsel.

BACKGROUND

Oliveira Contracting, Inc. ("Oliveira") was the general contractor for two different projects for the Metropolitan Transportation Agency ("MTA"). The first project was entitled "Installation of ADA Elevators at The Hunts Point Avenue Station - Pelham Line (IRT), Borough of the Bronx" (the "Elevator Project"). The second was entitled "Replacement of Three (3) Escalators at Three Locations" (the "Escalator Project"). Plaintiff and defendant, as subcontractor, executed a contract for the Elevator Project, dated February 16, 2012, calling for Amcor Electrical Contractors ("Amcor") to perform work in the amount of \$975,000.00 (Exh. "A" to Memorandum of Law). The second contract called upon Amcor to provide work on the Escalator Project in the amount of \$690,000.00 (Exh. "B"). This document was not signed, but plaintiff alleges that defendant actually performed some services under the terms of the contract. Exh. "C" is a fax under cover of which plaintiff forwarded the contract to defendant for signature on October 4, 2013.

Plaintiff commenced this action by filing a Summons and Complaint with the Nassau County Clerk on February 24, 2014 (Exh. "A" to Motion). The Complaint alleged breach of contract by defendant and sought damages of not less than \$500,000.00, indemnification, and attorney's fees. Amcor filed an Amended Answer on or about June 30, 2014. On July 10, 2014, Oliveira served Interrogatories and First Notice of Discovery and Inspection, and, plaintiff alleges that to the date of the motion there has been no response by defendants.

The Court conducted a Preliminary Conference on November 5, 2014, at which time it issued a Preliminary Conference Order (Exh. "F"). By email dated March 3, 2015, counsel for plaintiff advised counsel for defendant of the rescheduled Conference Date of March 23, 2015 (Exh. "G"). By correspondence dated March 9, 2015, counsel for defendant advised counsel for plaintiff that her client had terminated her representation (Exh. "H").

Defendants did not appear on March 23, 2015, and counsel for plaintiff notified Amcor by certified mail of the same date, that the Compliance Conference has been rescheduled for May 4, 2015, and that if they fail to appear, plaintiff will move to strike the Answer and for summary judgment (Exh. "I"). Defendant failed to appear on May 4, 2015, and the Court rescheduled the Conference for July 13, 2015, but Amcor again failed to appear.

Plaintiff asserts that the failure of defendant to appear for three Court-directed conferences, its failure to respond to outstanding discovery demands for a protracted period, and its failure to provide

any evidence of its intention to retain substitute counsel, entitles plaintiff to an Order striking the Answer and granting judgment in favor of plaintiff.

Defendant responds with a cross-motion submitted by newly-retained counsel. Annexed is an affidavit from Anthony Mormondo, defendant and principal of Amcor. He sets forth his misunderstanding that, because his original attorney submitted an Answer, there was no basis upon which a default judgment could be granted. He further asserts that when, in the beginning of August, 2015, upon receipt of a Court Order directing that Amcor appoint new counsel, he proceeded to retain counsel. He acknowledges the failure of Amcor to appear for the scheduled conferences.

Mr. Mormondo states that Amcor substantially completed its work on the Escalator Project (Contract #E34020), but that Oliviera failed to pay \$251,527.00, and that, with respect to the Elevator Project at Hunts Point (Contract #A36117), Amcor overnighted Oliviera on December 2, 2013 with a requisition for \$26,457, and on January 6, 2014, with a requisition for \$60,235.63, neither of which were paid or addressed by Oliviera. On January 15, 2014, he emailed Larry Oliveira and the project manager, Joel Martins, that due to "financial matters between Amcor and Oliveira that needed to be ironed out * * * I will be unable to continue." (Exh. "C" to Opposition). He claims that a total of \$250,883.58 was unpaid to Amcor on the Elevator Project.

Defendant also asserts that the alleged false and incorrect information contained in Certified Payrolls and lien waivers were never alleged by the MTA or the New York City Transit Authority, and are alleged upon information and belief by counsel for plaintiff. Amcor had no unpaid laborers or subcontractors, and only left the job because of the failure of Oliveira to make payment to prevent them from not being paid.

Based upon the foregoing, Amcor requests that their default and the Note of Issue be vacated, and the main action dismissed for failure to state a cause of action for failure of proof, or, in the alternative, that the action to proceed to a conference with defendants' present counsel.

Plaintiff responds with a Memorandum of Law in further support of their motion and in opposition to the cross-motion by defendants, contending that Amcor has not submitted a reasonable excuse for its failure to appear at three scheduled conferences and had failed to demonstrate a meritorious defense to the claims. Defendant, they assert, has failed to provide any documentary evidence substantiating its claim that it is owed money by plaintiff, or that they did not engage in fraudulent conduct with respect to their billing practices.

Plaintiff submits a 27-page affirmation of counsel, and a 9-page affidavit by Joel Martins, the

Manager of Oliveira. Counsel's affirmation serves to introduce a series of documents which, he claims, reflect the misrepresentations in Certified Payrolls and conflicts in Contractor Access Forms, evidencing the fact that personnel identified in the certifications were, in fact, performing work at another location. He claims that the falsification of the certified payroll reports were done so as to enable Amcor to receive payment to which it was not entitled.

The first page of Exh. "W" to the Memorandum deals with the Elevator Project. It reflects a revised contract amount of \$1,046,618.95, payments to Amcor of \$787,651.70, with a contract balance at the time of termination of work of \$258,967.25. However, it also enumerates \$947,952.43 as projected costs against Amcor, resulting in an amount allegedly due from Amcor of \$688,985.18. While defendant's claim against plaintiff is reflected in the calculations, it appears to be far outweighed by amounts owed by Amcor, but paid or payable by Oliveira which are far in excess of the amount claimed by Amcor. Almost 50% of the amount claimed by plaintiff involves payment of \$469,502.49 to Voltamp on account of an invoice for \$490,531.26. Despite representations by defendant in releases and lien waiver, there have been liens filed by Calico Electrical Supply Corp. for materials in the amount of \$43,352.23, and by Benfield Electrical Supply, also for materials, in the amount of \$80,476.95.

Mr. Martins' affidavit also goes into particulars as to the conflicts between certified payrolls and sign-in sheets on the Escalator and Elevator Projects. He claims that, as a result of the falsification of payroll reports, Oliveira overpaid Amcor for the Escalator Project in the amount of \$64,410.00. When, on January 24, 2014, Oliveira discovered the payroll discrepancies, Oliveira emailed Mr. Mormando, requesting an explanation. Instead of responding, Amcor abandoned the projects, with all employees discontinuing work and removing their tools. After notifying Amcor, Oliveira undertook to complete the work and charge Amcor for the costs thereof.

He also points out that, under the terms of the Subcontract, the November and December requisitions in the amount of \$86,692.63, were not due at the time of Amcor's abandonment of the project. § 4.3 of the Subcontract provided that Oliveira would pay Amcor within fifteen (15) days of receipt of payment from the Owner of the Project (MTA). At the time of the termination of work, Oliveira had not yet received payment from the Owner, and the 15 days within which to make payment to Amcor had not even begun to run.

Plaintiff asserts that as a result of misrepresentations and diversion of trust funds by defendants, and Amcor's breach of contract, Oliveira has incurred costs of \$170,440.57 to correct and complete

Amcor's work on the Elevator Project. For the same reasons, Oliveira has incurred costs of \$688,985.18 to correct and complete Amcor's work in connection with the Elevator Project. Spreadsheets with substantiating documents are annexed as Exhs. "Q" and "W" respectively.

Defendants have not submitted a Reply in Support of their Cross-motion such as would rebut the itemized damages claimed by plaintiff.

DISCUSSION

The law favors resolution of matters on the merits, but the Uniform Rules for the New York State Trial Courts, 22 NYCRR §202.27(a) provides, *inter alia*, that if a plaintiff appears at a scheduled conference, but the defendant does not, the Court may grant a judgment by default and order an inquest. The statute imports a degree of discretion with the Court, whereby it can withhold such relief upon the showing of a reasonable excuse for the non-appearance and a meritorious claim or defense (*Hagen-Meurer v. Balakhane*, 127 A.D.3d 1020 [2d Dept. 2015]).

Defendant in this case, after discharging his counsel, missed not one, but three court-directed conferences. Defendants do not deny their awareness of the conference, but merely submit that, having served an Answer, they did not believe that they could be subjected to a default. This is clearly not a reasonable excuse to ignore the Court and subject their adversary to the cost of appearances by their counsel.

Neither has defendant set forth a potentially meritorious defense. While defendants claim that they were unpaid by plaintiff, and were thereby forced to abandon the Project so as to avoid non-payment of employees and suppliers, they have not contradicted the contention of plaintiff that the amount claimed by them was not due as of the time they walked off the project. As a result, plaintiff incurred significant expenses to rectify and complete work on both the Escalator and Elevator Projects. Plaintiff has itemized these expenses, with no response from defendants.

Plaintiff, appropriately, does not request default judgment and inquest against Anthony Mormando, individually. There is no evidence of a personal guaranty or conduct by Amcor which justifies the piercing of the corporate veil. It is therefore

ORDERED, that the motion by plaintiff to strike the Answer of defendant Amcor Electrical Contracting Corp. is granted, and it is further

ORDERED, that the cross-motion by defendants to vacate the default and dismiss the action is denied, and it is further

ORDERED, that this matter is currently set down for a Conference on December 1, 2015, in

this Part 22, wherein all undecided liability and damage issues as they relate to defendant, Anthony Mormondo, and undecided damage issues as they relate to defaulting defendant Amcor Electrical Contracting Corp., shall be discussed, and a trial date scheduled.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
November 30, 2015

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

DEC 02 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE