

United Tr. Mix, Inc. v BM of NY Constr. Corp.

2016 NY Slip Op 32664(U)

November 18, 2016

Supreme Court, New York County

Docket Number: 850290/2015

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 850290/2015
 UNITED TRANSIT MIX, INC.
 vs
 BM OF NY CONSTRUCTION CORP.
 Sequence Number : 002
 DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE 10/14/16

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). 53-65

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER**

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

Dated: 11/18/16

Shirley Werner Kornreich, J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.

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 54

-----X
UNITED TRANSIT MIX, INC.,

Index No.: 850290/2015

Plaintiff,

DECISION & ORDER

-against-

BM OF NY CONSTRUCTION CORP, BENEDETTO
CUPO, ABN REALTY, LLC, BROOKLYN REBAR,
LLC, TRIBORO HARDWARE & SUPPLY CORP.,
BANCO POPULAR NORTH AMERICA, COMPANIES
1-100 (fictitious entities), and JOHN DOES 1-100
(fictitious persons),

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiff United Transit Mix, Inc. (United) moves, pursuant to CPLR 3215, for a default judgment against defendants BM of NY Construction Corp. (BMNY) and Benedetto Cupo.

Plaintiff's motion is granted, on default, for the reasons that follow.

This case, along with a related action,¹ concern construction work performed at a building located at 19 Park Place in Manhattan. This action also involves United's claims against BMNY and its President, Cupo, for BMNY's failure to pay United for concrete used on the construction job. BMNY was the general contractor on the project, and United was one of its subcontractors. The property owner is defendant ABN Realty, LLC (ABN). Pursuant to a subcontract, BMNY was required to pay \$670,080.30 to United for the concrete, a sum not paid.

¹ The related action, *ABN Realty LLC v BM of NY Constr. Corp.*, Index No. 651704/2015, was discontinued by so-ordered stipulation dated June 30, 2016.

Pursuant to a settlement between ABN and United, ABN paid \$175,000 to United, reducing the amount owed by BMNY. United now seeks \$495,080.30 from BMNY.²

United commenced this action on October 1, 2015 and filed an amended complaint (the AC) on March 11, 2016. *See* Dkt. 21. In the AC, United asserts a claim against BMNY for breach of contract³ and a cause of action against BMNY and Cupo for violations of Article 3-A of the Lien Law, including Lien Law §§ 70, 71, 75, and 79-1. They provide, in relevant part, that funds received by a contractor are held in trust and that a principal of contractor who diverts such trust funds may be held personally liable. *See Holt Const. Corp. v Grand Palais, LLC*, 108 AD3d 593, 597 (2d Dept 2013) (“the individual officers of a corporate trustee may be held personally liable pursuant to Lien Law article 3-A for knowingly participating in a diversion of trust assets”), citing *Ippolito v TJC Dev., LLC*, 83 AD3d 57, 68 (2d Dept 2011). United also seeks punitive damages.

BMNY and Cupo appeared in this action, were represented by counsel, and participated in discovery. However, by order to show cause on June 20, 2016, Andrew Greene & Associates, P.C., moved for leave to withdraw as their counsel. The court granted the motion in an order dated June 30, 2016, which stated that BMNY and Cupo would be held in default if they failed to appear at a status conference on August 11, 2016. *See* Dkt. 48. They failed to appear. Their default was noted in an August 11, 2016 order. *See* Dkt. 51. On September 20, 2016, United

² The claims asserted against ABN were discontinued by stipulation filed on June 22, 2016. *See* Dkt. 43. References to “Dkt.” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

³ This claim is pleaded in three essentially duplicative cause of action, a fact recognized in United’s moving brief. *See* Dkt. 61 at 4.

filed the instant motion seeking a default judgment, requesting: (1) the balance owed for the concrete under the subcontract, \$495,080.30 (2) to hold Cupo personally liable under the Lien Law; and (3) punitive damages. BMNY and Cupo were served with the motion but did not submit opposition.

Pursuant to CPLR 3215 and 22 NYCRR 202.27, where, as here, a party fails to appear at a conference directed in connection with an order relieving their counsel, they should be held in default, their pleadings should be stricken, and an inquest may be ordered to determine damages. *See 60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511 (1st Dept 2013). “[A] defaulting defendant is deemed to have admitted all the allegations in the complaint.” *McGee v Dunn*, 75 AD3d 624 (2d Dept 2010).

On its breach of contract claim, United is entitled to judgment against BMNY for the balance owed on the subcontract, \$495,080.30, plus 9% pre-judgment interest pursuant to CPLR 5001(a) and 5004. By virtue of Cupo’s default, he is deemed to have admitted that he intentionally misappropriated that money, and, therefore, is personally liable. *See Holt Const.*, 108 AD3d at 597. The court grants an award of punitive damages, but not in the \$1 million amount requested by United, which is almost twice the amount owed. While punitive damages are not ordinarily recoverable in a commercial breach of contract case, and only where the defendant evinces the requisite criminal culpability [*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 (2007)], there is authority that a defendant held liable in a civil action under Lien Law § 79-a may be held liable for punitive damages because a violation of that statute is a criminal offense. *See Sabol & Rice, Inc. v Poughkeepsie Galleria Co.*, 175 AD2d 555, 556-57 (3d Dept 1991) (violation of Lien Law § 79-a “constitute[s] larceny punishable under the Penal Law []

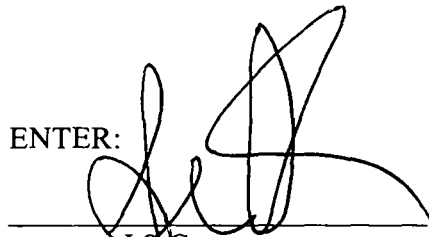
and, thus, would clearly satisfy the high threshold of moral culpability necessary to support a punitive damages award.”); *see also Pinnacle Envtl. Sys. Inc. v R.W. Granger & Sons Inc.*, 245 AD2d 773, 775 (3d Dept 1997) (same).⁴ The court notes that, during the course of this action, no bona fine excuse for the conduct of BMNY and Cupo has ever been proffered. Under these circumstances, since BMNY and Cupo are held liable for misappropriation of trust funds, the court awards United \$50,000 in punitive damages. Accordingly, it is

ORDERED that the motion by plaintiff United Transit Mix, Inc. for a default judgment against defendants BM of NY Construction Corp. and Benedetto Cupo is granted, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendants, jointly and severally, in the amount of \$495,080.30, plus 9% pre-judgment from October 1, 2015 to the date judgment is entered, plus an additional \$50,000 in punitive damages; and it is further

ORDERED that within 3 days of the entry of this order on the NYSCEF system, plaintiffs shall serve a copy of this order on BMNY and Cupo along with notice of entry by overnight mail.

Dated: November 18, 2016

ENTER:


 J.S.C.
 SHIRLEY WERNER KORNREICH
 J.S.C.

⁴ As the Second Department observed, “not every violation of Lien Law article 3-A constitutes the criminal offense of larceny; it is a crime only if there is “proof of larcenous intent.” *See ARA Plumbing & Heating Corp. v Abcon Assocs., Inc.*, 44 AD3d 598, 599 (2d Dept 2007). In this case, the AC alleges, and defendants admit by virtue of their default, that their Lien Law violations were intentional. *See* AC ¶ 32. It also should be noted that while only the Third Department appears to have ruled on this issue (a holding binding on this court in the absence of contrary First Department precedent [*see D’Alessandro v Carro*, 123 AD3d 1, 6 (1st Dept 2014)]), a New York federal bankruptcy judge recently followed this precedent. *See In re Waterscape Resort LLC*, 520 BR 424, 436 (Bankr SDNY 2014).