SimplexGrinell, LP v P&M Elec. Contr., Corp.
2017 NY Slip Op 30657(U)
April 6, 2017
Supreme Court, New York County
Docket Number: 161092/2015
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK: Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK
---X
IN RE NEW YORK CITY ASBESTOS LITIGATION
---X
SIMPLEXGRINELL, LP,

Plaintiff,

-against-

P&M ELECTRICAL CONTRACTING, CORP.,

Defendants
---X

Index 161092/2015
Motion Seq. 002

DECISION & ORDER

PETER H. MOULTON, J.S.C:

This is an action to collect monies purportedly owed to plaintiff from defendant under a job order contract entered into between plaintiff, defendant and the City of New York. Defendant moves, pursuant to CPLR § 5015(a)(1), to vacate a judgment granted on default in plaintiff's favor on the issue of liability. Defendant argues that it had a reasonable excuse for its default, and has a meritorious defense to plaintiff's allegations.

BACKGROUND

On or about June 8, 2010, plaintiff and defendant entered into a job order between themselves and the City of New York, whereby plaintiff was to perform certain work and provide materials with respect to upgrading the fire alarm system at 60 Centre Street, New York, New York. Under the contract, plaintiff was to perform its work, provide the materials required, and submit its paper work including requisitions for payment to defendant. Defendant in turn would forward the paperwork, including requisitions for payment of the approved work performed by plaintiff, along to the City for payment. The City paid defendant a flat percentage of the approved requisition work performed by plaintiff. Plaintiff alleges that it fully performed the work required under the contract. Following the completion of plaintiff's work, the City issued a Substantial

Completion Acceptance to Plaintiff, indicating that the job was substantially complete. Subsequently, the job was closed. Shortly thereafter, all final payments were made to all of the different trades, including retainage.[1]

On September 17, 2014, plaintiff sent defendant an email regarding purportedly unpaid services that it rendered. On November 3, 2014, defendant responded to plaintiff and stated that it appeared that the late and recently submitted invoice included labor that was already included in a previous invoice paid by the City. In response, plaintiff emailed defendant on the same day and stated that "in reviewing the documents you sent over, you are correct that the 116 hours are duplicative billing. What about the retainage?"

Because the request for payment that is the subject matter of this lawsuit was submitted a year after substantial competition, defendant argues that the retainage was fully paid out and that there are no additional monies left to pay plaintiff for its services. As the money sought in this action includes double billing and retainage has been paid in full to plaintiff, defendant argues that there is no money owed by the City or defendant to plaintiff.

PROCEDURAL HISTORY

On or about October 29, 2015, plaintiff's former counsel, Roger B. Harmon, filed the Summons and Complaint. Thereafter, on December 1, 2015, defendant's former counsel, David H. Singer, filed a stipulation between the parties extending defendant's time to answer the complaint up to and including January 4, 2016. Subsequently, Robinson Brog Leinwand Greene Genovese & Gluck P.C. ("Robinson Brog") was retained by defendant to represent it in this

[1]Retainage refers to is a portion of the agreed upon contract price deliberately withheld until the work is substantially complete to assure that contractor or subcontractor will satisfy its obligations and complete its contract work.

matter. On December 11, 2015, Robinson Brog states that it timely served defendant's Verified Answer by mailing the same to plaintiff's former and then counsel, Mr. Harmon.

Defendant's counsel states that "[u]nfortunately, due to law office failure, Robinson Brog inadvertently did not e-file the Verified Answer, nor did it electronically file a notice of appearance on behalf of the Defendant." Defendant's counsel further states that "[a]t the time of serving the Verified Answer, I failed to realize that this litigation was filed in the commercial division of the Supreme Court of New York, where e-filing is mandatory."

On or about April 7, 2016, plaintiff, by its former counsel, moved for a default judgment against defendant. Thereafter, by the decision and order of the Honorable Arthur F. Engoron, J.S.C., dated June 27, 2016, a default judgment was entered against defendant and the matter was set down for an inquest. Defendant's counsel states that because he did not know that this matter required mandatory e-filing, he did not receive notice of plaintiff's motion and Justice Engoron's subsequent decision.

Defendant's counsel submits that on or about October, 2016, Robinson Brog was made aware of the judgment. Upon discovery of the default judgment, defendant's counsel claimed that he tried contacting plaintiffs' counsel to amicably settle the matter. As such, defendant's counsel submits that he did not immediately file this motion because he was hopeful that the matter could be resolved without the need for motion practice. Since plaintiff and defendant were subsequently unable to resolve this matter, defendant's counsel filed the instant motion.

In opposition to defendant's motion, plaintiff argues that defendant's prior counsel knew that this matter was e-filed, and did not oppose plaintiff's default motion. Plaintiff further submits that defendant's current counsel at Robsinson Brog never submitted a notice of substitution indicating that the firm had assumed the responsibility of being counsel of record for defendant.

In light of this, plaintiff argues that defendant's default was inexcusable. Plaintiff further argues that defendant's current counsel's statement that it "failed to realize that this litigation was filed in the commercial division of the Supreme Court of New York, where e-filing is mandatory," is disingenuous. To be sure, plaintiff notes that this case is not currently in the commercial division, and never has been in the commercial division. Regardless, plaintiff states that "*all* matters filed in Supreme Court, Civil Branch, New York County have had mandatory e-filing since February 19, 2013, regardless of whether the matter is in the commercial division." As such, plaintiff argues that defendant's failure to answer its motion was in derogation of Uniform Civil Rule 202.5-bb(c)(1), which states that all documents must be filed and served electronically.

DISCUSSION

Public policy strongly favors the adjudication of cases on their merits (*see National Union Fire Insurance Co. of Pittsburgh. PA v. Diamond*, 39 AD3d 360, 361 [1st Dept 2007]); *see also Navarro v. A. Trenkman Estate. Inc.*, 279 AD2d 257, 258 [1st Dept 2001]). Moreover, where a party seeks to vacate a default judgment, the "[a]ssessment of the sufficiency of the proffered excuse and the adequacy of merit rests within the sound discretion of the court" (*Mediavilla v. Gurman*, 272 AD2d 146, 148 [1st Dept 2000]). Under CPLR § 5015, the "moving party must provide a reasonable excuse for the failure to [respond] and must further demonstrate that the case has merit" (*Navarro*, 279 AD2d at 258). "Other facts that the court should consider include the nature of the underlying case, the potential prejudice to the other party and the willfulness and length of the delay" (*see Swain v. Janzen*, 121 AD2d 378, 379 [2d Dept 1986]).

Here, after plaintiff commenced the instant action and defendant's former counsel, Mr. Singer, filed a stipulation extending defendant's time to answer the complaint up to and including January 4, 2016, defendant's current counsel, Robinson Brog, was retained. In furtherance of the

firm's retention, defendant's current counsel at Robinson Brog submits that on December 11, 2015, Robinson Brog timely served defendant's Verified Answer on plaintiff's former and then counsel, Mr. Harmon. In addition, together with its Verified Answer, defendant's current counsel submits that it served a notice of deposition and notice for discovery and inspection on plaintiff's former and then counsel, Mr. Harmon. Although prudent and proper practice suggests that defendant's counsel should have followed up these actions by electronically filing a notice of substitution and a copy of defendant's Verified Answer, plaintiff was put on notice (even if only unofficially) of Robinson Brog's interest in the litigation by virtue of the firm's initial actions. It is axiomatic that a practicing attorney in New York County should have been aware of the court's e-filing practices, however, it also manifestly follows that plaintiff's former counsel should have exercised greater restraint when filing a motion for a default judgment given the communications that had transpired between him and Robinson Brog. Notably, Mr. Harmon's affidavit does not categorically refute the possibility that other correspondence from Robinson Brog may have been sent to his law office other than the Verified Answer. In any event, once defendant's current counsel was made aware of Justice Engoron's decision, earnest attempts were made to resolve this matter with plaintiff. After those attempts proved unsuccessful, defendant filed the instant motion less than a year after judgment had been entered against it.

Given New York courts' public policy favoring adjudication of cases on their merits, and given the lack of prejudice against plaintiff in light of the short duration that has elapsed between the judgment and the instant motion, this matter should be decided on its merits. Additionally, as set forth in its motion papers, defendant has demonstrated that his case has merit, and that it has a defense to the claims asserted in the complaint. Defendant has established that the money sought in this action includes at least some double billing and retainage was possibly paid in full. Plaintiff

has allegations to the contrary, warranting a resolution of these issues on their respective merits. In light of these competing claims, coupled with New York's preference for adjudicating disputes on their merits and the lack of prejudice to plaintiff, this court finds that the judgment entered against defendant must be vacated, and the matter decided on its merits. It is hereby

ORDERED that defendant's motion is granted, and the default judgment is vacated. The parties should contact my court attorney, Hasa Kingo, at hkingo@nycourts.gov to discuss how best to proceed no later than April 29, 2017.

This constitutes the Decision and Order of the Court.

April 6, 2017

J.S.C.