

Kobax Corp. v Townhouse Renovations Inc.

2019 NY Slip Op 31031(U)

April 9, 2019

Supreme Court, New York County

Docket Number: 159085/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 159085/2017

KOBAX CORP.,

Plaintiff,

MOTION SEQ. NO. 001, 002

- v -

TOWNHOUSE RENOVATIONS INC. and MKB FAMILY LLC,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12 were read on this motion to/for DEFAULT JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 were read on this motion to/for COMPEL

Upon the foregoing documents, it is ordered that the motions are decided as follows.

In this action by plaintiff Kobax Corp. (“Kobax”) against Townhouse Renovations Inc. (“TRI”) and MKB Family LLC (“MKB”) (collectively “defendants”) seeking, inter alia, to foreclose on a mechanic’s lien, Kobax moves (mot. seq. 001), pursuant to CPLR 3215, for a default judgment against defendants. MKB opposes the motion and moves (mot. seq. 002), pursuant to CPLR 3012, to compel plaintiff to accept its answer. TRI does not oppose Kobax’s motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

In or about August of 2016, TRI and MKB entered into an agreement pursuant to which TRI agreed to renovate a property owned by MKB located at 109 East 81st Street, New York, New

York ("the premises"). In or about September 2016, Kobax and TRI entered into a subcontract pursuant to which Kobax agreed, inter alia, to perform significant construction and demolition work at the premises. The agreed value of the labor and materials under the contract was \$219,670. Kobax claims that, although it fully performed its obligations under the contract by January 2017, it has only been paid in part for its work and the materials and it is still owed \$72,982.

On April 17, 2017, Kobax filed a notice of mechanic's lien against the premises claiming that it was owed \$72,982 under the contract. Doc. 3 at par. 7. Kobax commenced the captioned action against TRI and MKB by filing a summons and verified complaint on October 11, 2017. Doc. 2. On or about the same date, Kobax filed a notice of pendency stating that it had commenced litigation to foreclose on the mechanic's lien. Doc. 21. In its complaint, Kobax sought to foreclose on its mechanic's lien and set forth claims for account stated, breach of contract, and unjust enrichment against defendants. Doc. 2. Kobax also alleged conversion and violations of Labor Law §§ 76 and 77 as against TRI only. Doc. 2. On November 7, 2017, TRI and MKB were served with process via the Secretary of State pursuant to Business Corporation Law § 306 and Limited Liability Company Law § 303, respectively. Doc. 7.

On March 5, 2018, Kobax moved (motion sequence 001) for a default judgment as against TRI and MKB. Doc. 9. In support of the motion, Kobax submitted an attorney affirmation attesting, inter alia, to the fact that defendants failed to answer; the notice of mechanic's lien; the summons and verified complaint; the affidavits of service of the summons and complaint; and a letter to MKB's attorney, dated October 26, 2017, asking whether he would accept service of the summons and complaint and notice of pendency. Doc. 22. MKB's attorney declined to accept service. Doc. 22.

On April 17, 2018, MKB filed a verified answer containing affirmative defenses, a counterclaim, and cross claims. Doc. 13. On April 20, 2018, Kobax's attorney served a notice rejecting MKB's answer on the ground that it was filed 161 days after service of the summons and complaint and 45 days after Kobax moved for a default judgment. Doc. 14.

On May 1, 2018, MKB moved (motion sequence 002), pursuant to CPLR 3012(d), to compel Kobax to accept its answer and to deny Kobax's motion for a default judgment. In an affirmation in support of the motion, MKB's attorney argued, inter alia, that Kobax should be compelled to accept MKB's answer because it (MKB) never received a copy of the summons and complaint or the motion for default.

In support of its motion, MKB also submitted the affidavit of its principal, Maria Broughton-Khudoyan, who averred, inter alia, that "MKB's registered agent with the secretary of state is 2 Rector St., Ste. 1202, New York, New York 10006" but that "MKB does not maintain an office at that address," although its accountants, who do have an office there, never received the summons and complaint or the motion for default. Doc. 18.

In opposition to MKB's motion, Kobax argues, inter alia, that this Court should not compel Kobax to accept MKB's answer since it so untimely. Kobax further asserts that, although it offered to serve MKB through its counsel on October 24, 2017, counsel for MKB, who said it did not have authority to accept service on behalf of MKB, cannot now feign ignorance of the litigation. Kobax further asserts that MKB does not deny that service on its accountant's office constituted valid service since the accountant was the agent for service listed with the Secretary of State.

In reply, MKB, among other things, reiterates its argument that it has a reasonable excuse for its default since it was not served with the summons and complaint or the motion for default.

LEGAL CONCLUSIONS:**Kobax's Motion for a Default Judgment**

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial..., the plaintiff may seek a default judgment against him.” It is well settled that in order to establish its entitlement to a default judgment pursuant to CPLR 3215, a party must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016). A default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them. *See Woodson v Mendon Leasing Corp.*, 100 NY2d 63 (2003).

Here, Kobax has submitted proof of service of the summons and complaint on TRI and MKB. Doc. 7 and 8. Additionally, Kobax’s attorney establishes the default by representing that TRI and MKB failed to answer the complaint. Doc. 9. However, Kobax has failed to establish the facts constituting the claim.

In order to set forth the facts constituting the claim in a motion for default judgment pursuant to CPLR 3215, a party must submit either a complaint verified by a party with personal knowledge of the facts of the case, or an affidavit by such an individual. *See Mullins v DiLorenzo*, 199 AD2d 218, 219–20 (1st Dept 1993). An attorney affirmation will not suffice for this purpose. *See Mattera v Capric*, 54 AD3d 827, 828 (2d Dept 2008). Nor will a complaint verified by counsel, which “amounts to no more than an attorney’s affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215.” *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994). Since Kobax has submitted neither a complaint verified by, nor an affidavit executed by, an individual with personal knowledge of the facts constituting the alleged claim, it has failed to establish its

entitlement to a default judgment against TRI and MKB. Thus, the motion is denied with leave to renew as against TRI only, upon proper papers, within sixty days after service of this order with notice of entry. For the reasons set forth below, the motion is denied as moot as to MKB.

MKB's Motion To Compel Acceptance of Its Answer

A motion to file a late answer is governed by CPLR 1012(d), which provides that “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.” The decision whether to allow a defendant to file a late answer lies in the discretion of the court. *See Myers v City of New York*, 110 AD3d 652 (1st Dept 2013).

Although Kobax asserts that MKB's motion to compel must be denied since it (MKB) did not file its answer until 161 days after service of the summons and complaint and 45 days after Kobax moved for a default judgment, it fails to demonstrate any way in which it has been prejudiced by this delay. *See HSBC USA v Lugo*, 127 AD3d 502, 503 (1st Dept 2015). Additionally, the facts of this case do not suggest that MKB's delay was willful. *HSBC USA v Lugo*, 127 AD3d at 503.

MKB proffers as a reasonable excuse for failing to answer that it was never served with the summons and complaint since the complaint was served on its accountant's office. Since Kobax has submitted an affidavit of service reflecting that MKB was served with process, service on it was presumptively valid. *Madison Acquisition Group, LLC v 7614 Fourth Real Estate Dev., LLC*, 111 AD3d 800 (2d Dept 2013). Although MKB's excuse for its delay is “less than compelling”, such an excuse may suffice on a CPLR 3012(d) motion given the “strong preference in our law that matters be decided on their merits in the absence of demonstrable prejudice.”

Elemery Corp. v 773 Assoc., 168 AD2d 246, 247 (1st Dept 1990). Given this policy, as well as the fact that MKB is clearly represented by counsel and wishes to participate in this litigation, its motion to compel Kobax to accept its answer is granted.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff Kobax Corp. (motion sequence 001) seeking a default judgment against defendant Townhouse Renovations Inc. is denied with leave to renew upon proper papers within 60 days after service of this order with notice of entry, upon penalty of dismissal of Kobax Corp.'s claims against Townhouse Renovations Inc.; and it is further

ORDERED that the branch of the motion by plaintiff Kobax Corp. (motion sequence 001) seeking a default judgment against defendant MKB Family LLC is denied as moot; and it is further


ORDERED that the motion by defendant MKB Family LLC (motion sequence 002) seeking to compel plaintiff Kobax Corp. to accept its answer is granted, and the answer filed by said defendant on April 17, 2018 (Doc. 13) is deemed served *nunc pro tunc*; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on July 9, 2019 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

4/9/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE