SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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DWORKIN CONSTRUCTION CORP. (USA),

Plaintiff,

- v -

ROCKBOTTOM FURNITURE AND CARPET, INC.,

Defendant.

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INDEX NO. 653807/2018

MOTION DATE 3/28/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

LOUIS L. NOCK, J.

Upon e-filed documents numbered 1 through 40, plaintiff's motion for summary judgment on its complaint is granted, in accord with the following memorandum.

Brief Background:

Plaintiff, a construction contractor, commenced this action by the filing of a summons and complaint on August 1, 2018, seeking damages from defendant, a construction subcontractor, for breach of the parties' subcontract due to defendant's non-performance thereof. Defendant was in default in responding to the complaint until plaintiff moved for a default judgment on November 23, 2018. That motion apparently motivated defendant to retain counsel and file a late answer on December 7, 2018, which was accepted as a record filing in this action (*see*, NYSCEF Doc. Nos. 18-20). But that is the last we have seen of the defendant in connection with this matter.

Plaintiff has now moved for summary judgment. Defendant has filed no opposition whatsoever.

Plaintiff has submitted the affidavit of its president, Mr. Lawrence Dworkin, who sets forth the facts and circumstances underlying this matter, supported by exhibit materials (*see*,

NYSCEF Doc. Nos. 31-39), which include the construction prime contract between plaintiff contractor and the property owner (*id.*, Doc. No. 34); the subcontract between the parties hereto (*id.*, Doc. No. 35); detailed job-related memoranda (*id.*, Doc. No. 36); a performance timetable (*id.*, Doc. No. 37); and the contract termination notice sent by plaintiff to defendant, detailing defendant's failures to perform under the subcontract (*id.*, Doc. No. 38). Mr. Dworkin has furnished the court with a facially credible account of defendant's non-performance; and plaintiff's need to hire replacement subcontracting services, leading to an added cost of $11,528.81 (*see*, NYSCEF Doc. No. 31 ¶¶ 2-9, 13-14). That figure is the entire amount being sought by plaintiff on its motion for summary judgment.

Defendant has Not Sustained its Affirmative Burden in Opposition to the Motion:

As noted above, defendant has interposed absolutely no opposition to plaintiff's motion for summary judgment. The only remnant of defendant's participation in this case is its verified answer, filed late on February 12, 2019 – six months or so after the commencement of this action (*see*, NYSCEF Doc. No. 18). The mere existence of that answer cannot suffice to defeat plaintiff's *prima facie* showings on this motion for summary judgment. "[T]he party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring trial of the action or tender an acceptable excuse for his failure so to do . . . ." (*Zuckerman v City of N.Y.*, 49 NY2d 557, 560 [1980]. *See also, id.*, at 562-63.) Here, defendant has submitted nothing in opposition to the motion; let alone any evidentiary submission in admissible form, as it was required to do.

The Purported Affirmative Defenses Alleged in the Answer are Without Merit:

Despite defendant's complete neglect to oppose the motion, which stands as an independent ground to grant plaintiff's motion, the court will discuss each of the purported

affirmative defenses found in the answer. The first such defense alleges improper service of process. However, CPLR 3211(e) required defendant to follow through on such defense by way of motion. As provided therein, "an objection that the summons and complaint . . . was not properly served is waived if, after having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading." Here, the answer was filed December 7, 2018. Thus, defendant's time to move in support of its said defense expired February 5, 2019. Defendant never moved, thus waiving any possible defense based on service. Thus, the first affirmative defense cannot possibly be sustained.

The second purported affirmative defense asserts the absence of any time-of-the-essence clause to which defendant might have been bound. That is plainly untrue. Paragraph 14.1 of the prime contract expressly provides that "Time limits stated in the Contract Documents are of the essence of the Contract" (NYSCEF Doc. No. 12). The subcontract, in turn, expressly provides that defendant must "abide by all of the provisions and conditions of the Construction Contract" (NYSCEF Doc. No. 13. *See also, id.*, under "Subcontractual Relations," containing the same provision). As Mr. Dworkin attests – unopposed – plaintiff terminated the subcontract almost a week after defendant was supposed to have completed the subcontracted-for work, because defendant had not even started (*see*, NYSCEF Doc. No. 31 ¶ 14).

The second purported affirmative defense also asserts that tile required for the job was not provided by plaintiff to defendant. However, nothing contained in the subcontract required plaintiff to provide any tile (*see*, NYSCEF Doc. No. 13, *passim*). In fact, defendant's very own proposal submitted to plaintiff in order to induce plaintiff to grant defendant the subcontract expressly included an obligation on its part for the "**Supply** and Installation of" tile (NYSCEF Doc. No. 39 [emphasis added]).

Finally, the second purported affirmative defense asserts, somewhat cryptically: "in essence, this contract never got off the ground and was stillborn." That unexplained assertion is belied by plaintiff's termination notice to defendant, dated May 11, 2018, in which plaintiff itemizes the numerous omissions to act by defendant, and complaining of defendant's inaction permeating the whole construction period (*see*, NYSCEF Doc. No. 38). It is further belied by plaintiff's affirmative undertaking to replace defendant with another subcontractor who, as Mr. Dworkin attests, performed the work, but at higher cost than that negotiated with defendant (*see*, NYSCEF Doc. No. 31 ¶¶ 3-5).

Thus, the second affirmative defense is entirely without merit.

Conclusion:

Plaintiff, having gone the full distance of presenting its proofs in support of summary judgment pursuant to CPLR 3212(b);[1] and defendant, having submitted nothing in opposition to the motion;[2] warrants a grant of summary judgment in favor of the plaintiff for the principal sum of $11,528.81, sought on its motion.

Plaintiff has suggested an interest accrual date starting at July 25, 2018, on the basis that such date was the date it had tendered full payment to the replacement subcontractor (*see*, NYSCEF Doc. No. 31 ¶ 20 & n 6). Considering that plaintiff could be entitled to an accrual start date measured by "**the earliest** ascertainable date the cause of action existed" (CPLR 5001[b] [emphasis added]), plaintiff's suggested accrual start date is eminently reasonable, and fully authorized.

[1] And coming after the expenditure of time and effort in moving for a default judgment at an earlier stage of the litigation.
[2] And, distinct of that, having interposed no meritorious affirmative defenses in its answer.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted; and, therefore, it is further

ORDERED that plaintiff shall have judgment against defendant in the principal sum of $11,528.81, plus interest accrued thereon at the statutory rate from July 25, 2018, through the date of satisfaction of judgment, plus statutory costs and disbursements, and that plaintiff shall have execution therefor.

This shall constitute the decision and order of the court.

ENTER:

Louis L. Nock

7/1/2019
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE