

Windham Contr. Corp. v Hailey Dev. Group, LLC

2019 NY Slip Op 32096(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 656206/2016

Judge: Anthony Cannataro

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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. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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INDEX NO. 656206/2016

WINDHAM CONTRACTING CORP.,
Plaintiff,

MOTION DATE 05/21/2019

- v -

MOTION SEQ. NO. 005

HAILEY DEVELOPMENT GROUP, LLC, RICHARD PETROSA,
MARY FILOCAMO, IRVING PLACE INVESTOR
LLC, CONNECTONE BANK, US LBM LLC, GMC CONTRACTING &
ESTIMATING SERVICE, INC., JOHN DOE NO. 1 THROUGH
JOHN DOE NO., 100,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 108

were read on this motion to/for JUDGMENT - DEFAULT.

This is an action for breach of contract, account stated, *quantum meruit*, and Lien Law 3A Trust Diversion relating to labor and materials supplied by plaintiff Windham Contracting Corp. to defendant Hailey Development Group, LLC ("Hailey") in connection with certain construction work at the premises known as 78 Irving Place ("the premises"). Plaintiff moves for an order pursuant to CPLR 3215 striking the pleadings of defendants Hailey and Richard Petrosa ("Petrosa"); granting a default judgment against defendant Hailey on its first, second, and third causes of action; and granting a default judgment on liability against defendants Hailey and Petrosa on behalf of itself and all others entitled to share in the recovery on the fourth and fifth causes of action; and setting this matter down for an inquest to hear and determine damages.

"It is well established that where service is proper and a plaintiff makes out the facts of its entitlement to judgment, a plaintiff is entitled to a default judgment when

defendant fails to appear," (*Ostroy v Six Sq. LLC*, 74 AD3d 693 [1st Dept 2010]). "CPLR 3215(f) requires that an applicant for a default judgment file 'proof by affidavit made by the party of the facts constituting the claim,'" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]).

This action was commenced by the filing of a summons and complaint on November 29, 2016. On March 28, 2017 defendants Hailey and Petrosa e-filed their answer. Defendants herein were previously represented in this action by the law firm of Ropers, Majeski, John & Bentley OC. Defendants' counsel moved to withdraw as counsel. In an order dated October 16, 2018, this Court granted the motion and ordered defendants' counsel to serve notice on defendants explaining the requirement to appear either by new counsel or *pro se* on or before November 29, 2018. Withdrawing counsel filed a notice of entry and an affirmation that the clients' they had represented were served via certified mail, return receipt requested, at their last known addresses. To date, defendants Hailey and Petrosa have failed to appear in any form and have not requested additional time to appear. Therefore, plaintiff has demonstrated that defendants were subject to the jurisdiction of the Court and are in default for failing to appear.

Plaintiff's affidavit establishes facts of its entitlement to judgment. On or about February 14, 2015 plaintiff entered into an agreement with Hailey pursuant to which it furnished certain materials, equipment, and labor to Hailey in connection with certain masonry and roofing work at the premises. Plaintiff alleges it performed all the terms and conditions of the agreement and that performance was duly accepted by Hailey. The total aggregate price of the labor, materials, and equipment supplied by plaintiff was \$240,763.58 of which \$220,763.58 allegedly remains outstanding despite demands for payment. Invoices and a statement of account reflecting the amount sought herein were allegedly sent to Hailey and were never objected to. As such, plaintiff establishes

entitlement to its claims for breach of contract, account stated, and *quantum meruit* as against Hailey. Petrosa, one of the individuals employed by and an officer of Hailey, together with defendant Hailey, allegedly wrongfully diverted trust fund monies received by Hailey for construction work performed by plaintiff and other trust fund beneficiaries from the owner of the premises in violation of New York Lien Law. Thus, defendants Hailey and Petrosa, by defaulting, admit all traversable allegations in the complaint including the diversion of funds causes of action asserted herein and concede liability, although not damages (*see Christian v Hashmet Mgt. Corp.*, 189 AD2d 597, 598 [1st Dept 1993]).

Accordingly, it is

Ordered that plaintiff's motion for a default judgment on its breach of contract, account stated, and *quantum meruit* causes of action is granted, without opposition, as against defendant Hailey Development Group, LLC; and it is further

Ordered that the Clerk shall enter judgment in favor of plaintiff and against defendant Hailey Development Group, LLC in the sum of \$220,763.58, plus statutory interest from September 8, 2015; and it is further

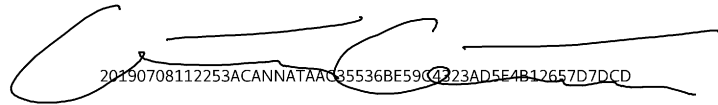
Ordered that plaintiff's motion for a default judgment on its diversion of funds causes of action, on behalf of itself and other Article 3-A of the Lien Law of the State of New York trust fund beneficiaries, is granted, without opposition, against defendants Hailey Development Group, LLC and Richard Petrosa; and it is further

Ordered that a Referee shall be designated to hear and determine the issue of damages including interest and attorneys' fees and to fix the pro-rata share that any trust fund beneficiary may be entitled to; and it is further

Ordered that the above issues are hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance

with the Rules of that Part, shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

7/8/2019
DATE



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ANTHONY CANNATARO, 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