

**Expressive Lighting Inc. v JTL Constr. Corp.**

2019 NY Slip Op 32516(U)

July 31, 2019

Supreme Court, Kings County

Docket Number: 500836/2018

Judge: Bernard J. Graham

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

Index No: 500836/2018  
Motion Calendar No.  
Motion Sequence No.

EXPRESSIVE LIGHTING INC.,

Plaintiff(s),

-against-

**DECISION / ORDER**

Present:

**Hon. Judge Bernard J. Graham**  
Supreme Court Justice

JTL CONSTRUCTION CORP,  
JOHN LOMIO, DANIEL J. HULBERT, et al.,

Defendant(s).

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: dismiss the plaintiff's complaint as against defendant Hulbert pursuant to CPLR § 3212(b); cross-motion by the plaintiff directing the entry of judgment against the defendants.**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavits Annexed.....	_____ 1-2, 3-4 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits & cross-motion.....	_____ 5-6,7 _____
Replying Affidavits.....	_____ 8 _____
Exhibits.....	_____
Other: .....	_____

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendant, Daniel J. Hulbert ("Mr. Hulbert"), has moved, pursuant to CPLR §3212(b), for an Order awarding summary judgment to the defendant and a dismissal of the plaintiff's, Expressive Lighting Inc. ("Expressive Lighting"), complaint upon the grounds that this defendant is not liable to the plaintiff, as he was neither an officer nor a director of the defendant JTL Construction Corp. ("JTL Construction") nor did he violate the Lien Law. In addition, this defendant seeks to vacate his default in complying with the stipulation dated November 5, 2018, and in doing so requests a further extension of

time within which to comply with the discovery requests of the plaintiff. The plaintiff opposes the relief sought by this defendant and has cross-moved for the entry of a judgment as against said defendants. Based upon the default of the defendants in complying with a stipulation, the plaintiff argues that the defendants answers should be stricken.

Background:

In the underlying matter, 111 Livingston LLC (“111 Livingston”) and Brooklyn Law School (“BLS”)<sup>1</sup>, hired and engaged defendant JTL Construction as a general contractor to manage the construction, as well as to perform work, labor and services in connection with the property known as 111 Livingston Street, Floors 20 & 21, Brooklyn, New York (“the subject premises”). On or about February 21, 2017, 111 Livingston, BLS, as well as defendant JTL Construction hired the plaintiff to furnish electrical and lighting materials with respect to the construction of the subject premises. It is alleged that between February 21, 2017 and October 18, 2017, the plaintiff furnished materials and performed work pursuant to an agreement. It is further alleged that the agreed price and reasonable value of the materials furnished was \$384,557.17, of which the sum of \$311,411.00 was paid, leaving a balance due and owing of \$73,146.17. The plaintiff maintains that they sent monthly statements of account to the defendant, JTL Construction, seeking payment of the outstanding balance due.

When the defendant failed to pay the balance owed, the plaintiff filed a Notice of Mechanic’s Lien, in the office of the Clerk of the County of Kings, on or about February 21, 2017.

It was alleged by the plaintiff that defendants, John Lomio and Daniel J. Hulbert, as officers and directors of JTL Construction, had received advances and payments of money which constituted a trust as defined by Article 3A and Section 13 of the Lien Law. Said monies were to be held in trust for and on behalf of the plaintiff and other labor and

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<sup>1</sup> 111 Livingston LLC and Brooklyn Law School were defendants in this action and pursuant to a stipulation of partial discontinuance, dated August 15, 2018, the plaintiff discontinued the action as against these two parties.

materialman similarly situated. It is further alleged that by failing to hold these monies in trust, these defendants violated the terms of the trust provisions and the fiduciary relationship as set forth in Article 3A and Section 13 of the Lien Law.

An action was commenced by the plaintiff on or about January 15, 2018,<sup>2</sup> by the filing of a summons and complaint with the office of the County Clerk. Issue was joined by the service of defendants' (John Lomio and Daniel J. Hulbert) answer dated March 9, 2018. JTL Construction did not answer the complaint nor did they move for an extension of time within which to answer and they remain in default.

Discovery demands were made by the plaintiff of the defendants, but no responses were submitted by the defendants. No discovery demands were made by the defendants. A Preliminary Conference was held on May 10, 2018, in which an order was issued delineating a schedule of all outstanding discovery.

Thereafter, defendants' counsel, Marc Stuart Goldberg, moved to withdraw from this matter. By consent to change attorney, the office of Rattet PLLC substituted as counsel for the defendants on October 9, 2018. On October 12, 2008, in response to a motion by plaintiff to strike the answer of the defendants, due to the failure to comply with their discovery requests, the parties, by their attorneys, entered into a stipulation which provided for defendants Mr. Hulbert and Mr. Lomio to provide responses to all outstanding discovery on or before November 2, 2018. In the event that said responses were not provided by November 13, 2018, the answer of these defendants would be stricken, and the plaintiff could enter a judgment for violation of Article 3-A of the Lien Law for the full amount of their claim. Counsel for the defendants did obtain two further extensions, (until November 27, 2018 and then until December 4, 2018) within which to comply, but the defendants admittedly were not in compliance.

Defendant (Hulbert's contentions):

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<sup>2</sup> To foreclose the Mechanic's Lien, for breach of contract and for violation of Article 3-A of the Lien Law.

Mr. Hulbert, in support of his motion, maintains that he has never been an officer or director of JTL Construction and did not sign as a guarantor for the obligations of JTL Construction. While he was an employee of JTL<sup>3</sup>, he never had signatory authority over the bank accounts of JTL Construction, he did not have the power to allocate or direct funds nor did he obtain any benefits that were received from the project's owner. Additionally, he maintains that he has never been an Article 3A trustee.

Mr. Hulbert asserts that he did not personally guarantee the alleged debt of JTL Construction and in the absence of a writing, that claim is void pursuant to GOL § 701(2).

In support of the motion, Mr. Hulbert offers the affidavit of co-defendant, John Lomio, who had been the president of JTL Construction. Mr. Lomio stated that he was the sole signatory on the bank accounts of JTL Construction and that Mr. Hulbert had not been either an officer or director of the company. He states that all proceeds derived from the project were utilized for trust purposes permitted by Lien Law § 71 or otherwise allowed by law. Mr. Lomio stated that he allowed Mr. Hulbert to use the title "Executive Vice-President" because he interacted with owners and other contractors in order to provide estimates, but he did not have the ability to decide on subcontractor or materialman payments.

In further support of the defendant's motion, Mr. Hulbert offers the affidavit of Laurence Rush. Mr. Rush was the bookkeeper and accountant of JTL Construction from 2012 until it ceased doing business in 2018. Mr. Rush stated that Mr. Hulbert had been an independent contractor who did business with JTL Construction until the early portion of 2017 and he then became an employee of JTL Construction until October 2017. As to the ownership of the stock of JTL Construction, Mr. Rush asserts that one hundred percent of the stock in the company was held by John Lomio Sr. until January 2, 2016 when it was transferred to his son, John Lomio Jr. Mr. Rush states that at no time was Mr. Hulbert, a stockholder, officer or director of JTL Construction, nor did he have

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<sup>3</sup> Mr. Hulbert has submitted a redacted copy of his W-2 statement for 2017 to show that he was a paid employee of JTL Construction.

signature authority over their bank accounts, he did not control any funds on behalf of the company, including payments by project owners and he was not an Article 3-A Trustee.

As to compliance with the stipulation dated November 5, 2018 pertaining to discovery, Mr. Lomio maintains that JTL Construction had been unable to afford the necessary bookkeeping and accounting services, and as a result did not file tax returns for 2016 or 2017. Mr. Lomio contends that JTL Construction had financial woes and having significantly underbid the Brooklyn Law School project contributed to the company's demise. In addition, in December 2017, JTL Construction was evicted from its rental premises at 1123 Broadway, New York, N.Y. by their landlord and was also ousted from their temporary premises in Rye, New York, the result of which was that important books and records were lost or mislaid during this chaotic period. As a result, despite being given additional time within which to comply with plaintiff's discovery requests, defendants were not in compliance due to the "overwhelming extent of the task". Defendants maintain that they attempted to retain Lee Klinger, a CPA to assemble the necessary records, but were unable to afford his services. In addition, Laurence Rush, their former bookkeeper and CPA advised the defendants that if he were to assist them, it will take him at least two to three months within which to comply.

In addition, James Glucksman, Esq., who is of counsel to their current counsel, Rattet, PLLC, has requested additional time within which his clients could comply with discovery requests, in order to demonstrate that all proceeds of any advance JTL received and any payments on requisitions were paid out to subcontractors, laborers and withholding taxes related to the project. Counsel asserts that pursuant to CPLR § 2004, there is ample authority for the Court to extend the time to comply, upon good cause shown which he asserts the defendants have exhibited.

Finally, Mr. Hulbert maintains that the plaintiff cannot prevail against him personally because there is no privity, contractual or otherwise. Further, with respect to an Article 3-A claim, the plaintiff must plead and prove "a possessory right or interest in" the allegedly converted funds (see Fulton v. Hankin & Mazel, PLLC, 132 AD3d 806, 18 NYS3d 654 [2<sup>nd</sup> Dept. 2015]), and the plaintiff has failed to do so.

Plaintiff's contention

The plaintiff, in support of its cross-motion to direct entry of a judgment in favor of the plaintiff and against the defendants, as well as in opposition to the defendants' motions, has offered the affirmation of its counsel, Stuart Zisholtz, as well as the affidavit of Jack Weissman, its accounts receivable manager.

The plaintiff maintains that since Mr. Hulbert has held himself out to be the Executive Vice-President of JTL Construction, and under the Lien Law a Trustee can be any officer, director or agent, that he should be liable to the plaintiff for the damages they sustained. Further, the plaintiff has offered documents obtained from Brooklyn Law School that Mr. Hulbert was the party responsible for preparing and submitting the requisition for payment on behalf of JTL Construction (see Exhibit "C" annexed to plaintiff's affidavit in opposition).

The plaintiff maintains that neither the Statute of Frauds nor General Obligations Law § 5-701(2) are applicable here as Article 3-A of the Lien Law directs personal liability by any Trustee who is responsible for the diversion of trust funds received from an owner.

The plaintiff contends that the stipulation dated November 2, 2018 is clear that the failure of the defendant to comply with its terms would result in the striking of the defendants' answer. Accordingly, the plaintiff is entitled to a judgment as a result of the default of the defendants.

Discussion:

This Court has reviewed the submissions of counsel for the respective parties and considered the arguments presented herein, as well as the applicable law in making the determination with respect to whether the plaintiff should be entitled to a judgment against the defendants, as well as whether defendant Daniel Hulbert is liable herein for the monies owed by JTL Construction.

This Court will initially address the merits of plaintiff's cross-motion. Here, the plaintiff contends that based upon the terms of a stipulation entered into by the attorneys for the respective parties, the defendants' default would result in their answer being stricken. The stipulation further provided that in the event of a default, the plaintiff may enter a judgment for the full amount of their claim based upon the defendants' violation of Article 3-A of the Lien law. The plaintiff asserts that the default by the defendants in providing discovery should result in a self-executing order. Under the circumstances, the conditional order should have become absolute. (See Marrone v. Orson Holding Corp., 302 AD2d 371, 753 NYS2d 899 [2003]); Stewart v. City of New York, 266 AD2d 452, 698 NYS2d 874 [1999]).

This Court has also considered that defendants' counsel did request and obtained the consent of counsel for the plaintiff, for additional time within which to comply. However, despite the additional three-week extension, the defendants failed to timely reply. The defendants have now offered the explanation that due to their lack of funds (JTL Construction had ceased to exist based upon their financial woes) and the fact that the business was forced to relocate on multiple occasions resulting in their documents and paperwork being misplaced and perhaps mislaid, that their anticipated time to comply was clearly misjudged and miscalculated. The defendants have also offered the affidavit of JTL Construction's former bookkeeper, and accountant, Laurence Rush, that he was contacted by Mr. Lomio to assist in complying with the discovery requests, but due to the commitment of time and resources involved, the time period allowed made it prohibitive for the defendants to timely comply. The defendants have also made the argument that after their original counsel withdrew from this matter, they did obtain counsel to assist in defending this matter and to obtain additional time within which to comply with discovery requests, and thus they should not be deemed to have been dilatory in defending this case..

This Court has further considered that actions should be resolved on the merits wherever possible, and the nature and degree of the penalty imposed is a matter of

discretion with the court (see Pascarelli v. City of New York, 16 AD3d 472, 791 NYS2d 617 [2005]; Espinal v. City of New York, 264 AD2d 806, 695 NYS2d 610 [1999]).

In addition, this Court finds that the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery is willful and contumacious (see Harris v. City of New York, 211 AD2d 663, 622 NYS2d 289 [1995]; Lestingi v. City of New York, 209 AD2d 384, 618 NYS2d 731 [1994]). While this Court does not find that the delay in furnishing the requested discovery is appropriate, it has not been clearly demonstrated that this delay was the product of willful and contumacious conduct (see Vogel v. Benwil Indus., 267 AD2d 232, 699 NYS2d 870 [1999]).

As such, this Court will afford the defendants an additional sixty-day period after entry of this Order within which to fully respond to plaintiff's discovery requests. No further extension will be afforded the defendants as there has been a substantial period of time since November 2018 within which to comply. The plaintiff's cross-motion is denied without prejudice with leave to renew.

This Court further considered the motion to dismiss the action by defendant Mr. Hulbert. In moving for this relief, Mr. Hulbert seeks a determination from this Court that he should not be liable for the debts of JTL Construction, based upon the argument that he was primarily a sub-contractor and an employee, he was not an officer or director of JTL Construction, did not have signatory authority over their bank accounts or the power to allocate or direct funds, and not having been an Article 3A trustee, he did not violate the Lien Law. Mr. Hulbert offered the affidavits of JTL Construction's former accountant and bookkeeper, Lawrence Rush, as well as Mr. Lomio to support his contention that his relationship with JTL Construction was that of a sub-contractor and an employee and that he did not own any of their stock. In opposition thereto, the plaintiff has offered some documentation that Daniel Hulbert had held himself out as a vice-president of JTL Construction and was involved in the contractor's application for payment on multiple occasions which may call into question his status as having been a Trustee. However, in the absence of the defendants providing full disclosure as to

discovery which the plaintiff also acknowledges is crucial in determining whether Daniel Hulbert is liable for the debts of JTL Construction, this Court is unable to make a definitive determination at this time. As a result, defendant's motion to dismiss the plaintiff's complaint is denied without prejudice with leave to renew following the completion of discovery.

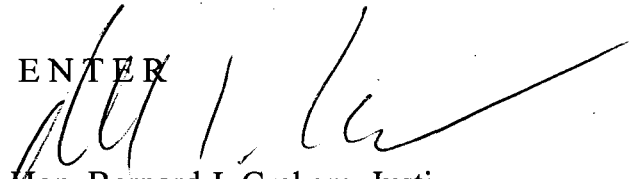
Conclusion:

The motion by defendant Daniel Hulbert for additional time within which to comply with plaintiff's discovery requests is granted only to the extent of affording said defendant an additional sixty (60) day period following the entry of this Order to fully comply. The motion by defendant Mr. Hulbert to dismiss and the cross-motion by plaintiff for a default judgment are both denied without prejudice.

This shall constitute the decision and order of this Court.

Dated: July 31, 2019  
Brooklyn, New York

ENTER

  
Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

2019 AUG 14 AM 9:26  
FILED  
KINGS COUNTY CLERK