

<b>Perez v Batiz</b>
2020 NY Slip Op 33289(U)
October 5, 2020
Supreme Court, New York County
Docket Number: 651888/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 59EFM

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ANGEL PEREZ, B & A RESTORATION CONTRACTORS  
INC.,

INDEX NO. 651888/2018

Plaintiff,

MOTION DATE 10/05/2020

- v -

MOTION SEQ. NO. 002

EDWIN BATIZ, BAR 13, INC., ZOE REALTY CORP.

**RESETTLED DECISION +  
ORDER ON MOTION**

Defendant.

-----X

HON. DEBRA A. JAMES:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 31  
were read on this motion to/for INQUEST

Upon the foregoing documents, it is  
ORDERED that the Order of this Court dated September 26, 2019  
is resettled as follows:

ORDER

Upon the foregoing documents, it is  
ORDERED that the motion of plaintiffs for a default  
judgment on the complaint against defendants Edwin Batiz, Bar  
13, Inc. and Zoe Realty Corp. is granted, over the opposition of  
defendant Edward Batiz; and, it is further

ORDERED that plaintiffs shall settle judgment on notice, by  
service via NYSCEF (and to 59nyef@nycourts.gov) of a proposed  
order/judgment with notice of settlement on counsel for  
defendant Batiz, and by regular first class mail on the

corporate defendants at their last known address(es), on or before October 27, 2020 and the return date of such settlement shall be October 29, 2020, as to the following causes of action for equitable relief, which are hereby severed:

1. on the first cause of action that seeks a judgment of foreclosure of a mechanics lien in favor of plaintiff B&A Restoration Contractors Inc. and against defendant Zoe Realty Corp. and Bar 13, Inc. in the amount of \$408,316, plus interest at the statutory rate from May 30, 2014 to the date of the judgment; and
2. on the fifth, sixth and seventh causes to the extent that they seek an accounting, (and upon such accounting, an judgment awarding monetary damages based on plaintiff Angel Perez's 50% interest in defendant Bar 13, Inc., shall be entered in favor of plaintiff Angel Perez and against defendants Edwin Batiz and Bar 13, Inc.) by submission of annual certified statements of account for defendant Bar 13, Inc., in accordance with customary and sound accounting practices and procedures for either defendant Bar 13, Inc.'s corporate tax reporting period for 2014, 2015, 2016, 2017, and 2018 or for the 2014, 2015, 2016, 2017, and 2018 calendar years based upon an inspection of the books and records of Bar 13,

Inc., prepared by a certified public accountant previously retained by defendant Bar 13, Inc. or to be prepared by a certified public accountant retained by the plaintiffs;

and it is further

ORDERED that the inquest for an assessment of damages on the second cause of action for breach of contract in favor of plaintiff B&A Restoration Contractors Inc. and against defendant Bar 13, Inc., the third cause of action for quantum meruit in favor of plaintiff Angel Perez against Bar 13, Inc., and the fourth cause of action for unjust enrichment in favor of Angel Perez and against defendants Edwin Batiz, Bar 13, Inc. and Zoe Realty Corp. having been referred to a Special Referee to hear and determine and such Referee (Ramos, JHO), having been appointed and following the hearing, having issued a Report dated February 5, 2020, upon the following directives:

ORDERED that this matter having come on before this court on September 24, 2019, on motion of the plaintiffs for a default judgment and the plaintiffs having been represented in connection therewith by Tamir Young, Esq., the defendant Edwin Batiz having been represented in connection therewith by Louis Klieger, Esq., and the defendants Bar 13, Inc. and Zoe Realty Corp. having defaulted in answering or otherwise appearing and, pursuant to CPLR 4317, the court having on its own motion determined to consider the appointment of a referee to determine as follows, the issue of damages separately triable and not requiring a trial by jury is involved, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) an assessment of damages on the first cause of action of the complaint against defendants Bar 13, Inc. and Zoe Realty, Inc. only to the extent of determining the amount of the mechanic's lien;
- (2) an assessment of damages on the second cause of action for breach of contract in favor of plaintiff B&A Restoration Corp. and against defendants Bar 13, Inc.;

(3) an assessment of damages on the fourth cause of action for unjust enrichment in favor of plaintiff Angel Perez and against defendant Bar 13, Inc. and Zoe Realty Corp.;

(4) an assessment on the fifth and seventh causes of action for conversion and breach of fiduciary duty against defendants Batiz and Bar 13, Inc.;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated; and it is further

ORDERED that this matter is 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 (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail, with proof of service by regular first class mail upon defendants Bar 13, Inc. and Zoe Realty Corp. at each such corporate defendants last known address(es), an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the plaintiff, counsel for defendant Edwin Batiz, and the corporate defendants by regular first class mail to such corporate defendants' last known address(es), of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties, accompanied by their counsel, shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED and ADJUDGED that pursuant to CPLR 3215(b), the Clerk is directed to enter judgment in favor of plaintiffs and against the defendants Edwin Batiz, Bar 13, Inc. and Zoe Realty Corp., in accordance with the Report of the aforementioned Special Referee, without any further application.

#### DECISION

Distinguishable on its facts from Sterk-Kirch v Uptown Communications & Elec., Inc., 124 AD3d 413, 413-414 (1<sup>st</sup> Dept. 2015), where plaintiffs failed to demonstrate that they additionally served the corporate defendant by first class mail at its last known address, as required by CPLR 3215(g)(4), plaintiffs at bar submit affidavits of service of the herein motion papers, to which copies of the summons and complaint are attached, which affidavits aver that such supporting papers were served by regular first class mail at the last known address(es) of the corporate defendants herein. See Aydin v New Super Gujrat Auto Repair, Inc., 34 Misc3d 1221(A), \*1 (Sup Ct, Kings County 2012).

The proposed Answer that defendant Batiz appends to his opposition papers, is verified by his attorney only and therefore is inadequate to demonstrate that such defendant has a meritorious defense to the complaint. See Grinshpun v Borokhovich, 100 AD3d 551 (1<sup>st</sup> Dept. 2012). However, a default judgment has yet been entered, defendant need not demonstrate a meritorious defense, but only need establish a reasonable excuse for his failure to timely answer the complaint. See Nabel Elec. V Triton Structural Concrete, Inc., 160 AD3d 507, 508 (1<sup>st</sup> Dept. 2018). However, doubling down on the omission of any affidavit of the individual defendant, defense counsel asserts in his opposing affirmation that "on information and belief, at all times mentioned in the affirmation of Tamar Young, Esq., good faith negotiations were continuing between the Plaintiff's and all the Defendants". As defense counsel admits that he has no personal knowledge of the facts of the reasons for defendant Batiz's failure to answer until almost a year after his answer was due, proffering a proposed answer with counterclaim only upon receipt of plaintiffs' motion for default, defendant Batiz has failed to demonstrate a reasonable excuse. See Stellato v Petrillo, 95 AD2d 704 (1<sup>st</sup> Dept. 1983).

To the extent that plaintiffs seek an accounting and foreclosure on a mechanic's lien, such remedies are equitable in nature, and not the subject of an inquest on damages. As for

the cause of action for an accounting, the preparation, in accordance with customary and sound accounting practices and procedures, of certified statements of accounts upon an inspection of the books and records of defendant Bar 13, Inc. by a certified accountant for the tax years in question shall be prepared forthwith, and judgment on the causes of action for unjust enrichment and conversion entered based upon same. See Glassman v Louis Shiffman, Inc., 56 AD2d 824 (1<sup>st</sup> Dept. 1977). See also Le Bel v Donovan, 96 AD3d 415 (1<sup>st</sup> Dept. 2012).

For the first time during a conference on this date with counsel for plaintiffs and counsel for defendant Edwin Batiz, counsel for plaintiff Angel Perez seeks the appointment of a receiver for defendant Bar 13, Inc. on his causes of action for conversion and unjust enrichment. As plaintiff does not seek to dissolve defendant Bar 13, Inc., such remedy does not lie. See New York Title & Mortg. Co. v Polk Arms, 262 NY 21 (1933). See

also In re Murray Hill Bank, 14 AD 318 (1<sup>st</sup> Dept. 1897). Nor is plaintiff entitled to such relief pursuant to Business Corporation Law § 1202(a).

10/5/2020  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: