

Callisonrtkl Inc. v Envirochrome Interiors, Inc.

2020 NY Slip Op 33510(U)

October 23, 2020

Supreme Court, New York County

Docket Number: 656981/2019

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

-----X

CALLISONRTKL INC.,CALLISONRTKL ARCHITECTS
PC,ON-TRAC CONSTRUCTION ASSOCIATES, INC.

Plaintiff,

INDEX NO. 656981/2019

MOTION DATE 10/22/2020

MOTION SEQ. NO. 001

- v -

ENVIROCHROME INTERIORS, INC.,BRIAN P.
ROTHSCHILD,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 34, 35, 36, 37, 38, 39, 40, 41, 42, 52, 53, 56, 59, 60, 61

were read on this motion to/for

JUDGMENT - DEFAULT

The motion by plaintiffs (MS001) for a default judgment against defendants is granted in part and denied in part, and the cross-motion by defendants is granted in part and denied in part. The motion (MS002) by plaintiff On-Trac Construction Associates, Inc. ("On-Trac") was withdrawn and the claims between On-Trac and defendants were resolved (NYSCEF Doc. No. 70).

Background

This action arises out of a commercial construction project. Defendant Envirochrome, a contractor, purportedly entered into an agreement with plaintiff CallisonRTKL Inc. in June 2018 to build out offices located at 233 Broadway in Manhattan. Plaintiff On-Trac was a subcontractor hired by Envirochrome. Plaintiffs contend that in connection with the final payment request from Envirochrome, defendants represented that they had completed the work and paid all money owed to employees and subcontractors.

Plaintiffs claim that less than a year later, two subcontractors filed mechanic's liens totaling \$379,700.58 and a third subcontractor has threatened to file another lien.

MS001

The Callison plaintiffs move for a default judgment against defendants. They point out that defendant Envirochrome was served via the Secretary of State on January 27, 2020 and defendant Rothschild was served via nail and mail on February 4, 2020. Rothschild is president of Envirochrome.

In opposition and in support of its cross-motion, defendants seek dismissal of the complaint based upon lack of personal jurisdiction over Rothschild or a traverse hearing, enlargement of the time to answer, dismissing the sixth cause of action for failure to plead fraud with particularity, dismissing the second and eleventh causes of action for unjust enrichment as duplicative of the breach of contract causes of action, dismissing the eighth cause of action for breach of fiduciary duty as duplicative of the trust fund diversion cause of action, dismissing the causes of action for trust fund diversion and breach of fiduciary duty for lack of standing, dismissing the third, fourth and fifth causes of action for breach of warranty as duplicative of the breach of contract cause of action, dismissing the cause of action for breach of covenant of good faith and fair dealing for failure to plead a cause of action and as duplicative of the breach of contract causes of action, determining that the action cannot proceed in the absence of subcontractor entities.

Default Against Envirochrome

The affidavit of service for this defendant claims that service was effectuated via Secretary of State on January 27, 2020. Defendants point to executive orders signed by Governor Cuomo on March 7 and March 20, 2020 that purportedly tolled all litigation deadlines

(Executive Orders 202 and 202.8). Although defendants make many arguments about how the ongoing pandemic should justify their failure to timely respond, they do not provide a reasonable excuse for why Envirochrome did not timely respond.

This defendant's time to answer or move lapsed at the end of February 2020. According to defendant Rothschild, he did not shut down Envirochrome's office until March 13, 2020. Simply put, defendant failed to articulate a reasonable excuse for why the corporate defendant did not timely answer. There are no claims that Envirochrome never received the summons and complaint or any excuse for this defendant's failure to timely appear and answer (or respond). Citing a pandemic that swept across the city weeks *after* its default does not justify the failure to answer.

Without a reasonable excuse, the Court has no choice but to grant plaintiffs a default judgment against defendant Envirochrome.

Defendant Rothschild

Defendant Rothschild was purportedly served via a person of suitable age and discretion on February 4, 2020 and was later mailed the summons and complaint on February 5, 2020 (NSYCEF Doc. No. 14). The Executive Order dated March 20, 2020 specified that "any specific time limit for the commencement, filing, or service of any legal action, notice, motion or other process or proceeding, including. . . the civil practice law and rules . . . is hereby tolled" (Executive Order 202.8). When combined with the declaration of a public health emergency on March 7, 2020 (Executive Order 202), the Court finds that the filing of answers was tolled for this defendant.

Plaintiffs are correct that the executive order leaves room for the argument that an answer is not covered but the Court declines to accept such a narrow view. The point of the orders was

to temporarily suspend court deadlines in light of the pandemic and Rothschild's time to answer fell (according to plaintiffs) on March 23, 2020. Therefore, the Court finds that Rothschild has a reasonable excuse for not answering.

With respect to the improper service claim, the Court denies Rothschild's claim that the case against him should be dismissed or that a traverse hearing is required. Rothschild claims that contrary to the affidavit of service, there is no one named Jane Rothschild at his home (NYSCEF Doc. No. 36, ¶ 4). However, Rothschild does not comment about the physical description of the person who was allegedly served via suitable age and discretion and, therefore, has not raised an issue of fact requiring a traverse hearing. Rothschild did not, for instance, claim that no one meeting that description lives at his home or mention who else (if anyone) lives at his residence. The Court cannot find that a traverse hearing is required based on a conclusory assertion. Providing an incorrect name does not automatically mean service was not properly effectuated.

Rothschild has also stated meritorious defenses to the allegations asserted by plaintiffs. He claims that the project was delayed due to no fault of defendants and the delayed start created a domino effect where more manpower and hours were required to finish the job. This created disagreements about overtime work and the total amounts sought by subcontractors. Clearly, there is a genuine dispute about what happened with this project and Rothschild should have an opportunity to contest the claims brought against him.

Now the Court turns to the portion of defendants' cross-motion that seeks dismissal of certain causes of action. Because the Court granted the branch of plaintiffs' motion for a default against Envirochrome, only the claims that involve defendant Rothschild must be explored. This includes the fourth through the ninth claims alleged in the amended complaint.

Breach of Express & Implied Warranty- Fourth & Fifth Causes of Action

Although dismissal of the fourth and fifth causes of action is mentioned in the notice of cross-motion, Rothschild did not offer any substantive arguments as to why they should be dismissed other than that they are duplicative. He failed to meet his prima facie burden to dismiss these claims. Offering a conclusory assertion that these claims are duplicative is not sufficient.

Fraud

“The elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation, scienter, reliance and damages” (*Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98, 665 NYS2d 415 [1st Dept 1997]).

Rothschild claims that the sixth cause of action must be dismissed because plaintiffs failed to plead fraud with the requisite particularity. This branch of the motion is denied. The Amended Complaint alleges that certain representations were made by defendants, including a false representation that it had obtained all lien waivers for the project when demanding the final payment (NYSCEF Doc. No. 12, ¶ 138). Plaintiffs’ theory is that they relied on this representation and paid monies, only to find out that the lien waivers were not obtained and defendants had not paid all outstanding amounts to subcontractors. Soon, multiple mechanic’s liens were filed against the project seeking more than half a million dollars. That states a clear fraud claim.

Seventh and Eighth Causes of Action

The Court finds that these causes of action were properly pled. Contrary to Rothschild’s claim that these are duplicative of the trust fund diversion claim, the Court finds that plaintiffs

are permitted to pursue these claims along with its trust diversion claim. At the pleading stage, the Court declines to dismiss these causes of action.

Ninth Cause of Action

The Court also declines to dismiss this cause of action. Plaintiffs claim that it has bonded certain liens and placed itself in a position where it will be liable to pay on the bonds. As plaintiffs point out, defendants have failed to show that they spent the trust funds in compliance with trust rules before taking money for themselves. In other words, the Court is unable to determine at this stage of the litigation about whether plaintiffs are beneficiaries pursuant to the Lien Law.

Summary

The Court recognizes that the ongoing pandemic and the related executive orders issued by the governor provide parties with extensions of time to answer. But those orders only permit extensions of time for defendants whose time to answer expired after they went into effect. Here, the corporate defendant's time to answer expired before these executive orders and no other excuse is offered for the default. Instead, defendants attempt to group both defendants' assertion of a reasonable excuse together. But that is improper because they were served at different times and they had different deadlines to answer. Rothschild's time to appear or answer fell after the executive orders had already taken effect.

The Court also denies defendants' claim that the case cannot proceed because certain subcontractor entities were not joined because no substantive arguments were made on this point; only Rothschild's affidavit made a passing reference to certain subcontractors.


Accordingly, it is hereby

ORDERED that the motion by plaintiff for a default judgment on liability is granted only against defendant Envirochrome Interiors, Inc. and an inquest will be held against this defendant to assess damages at time of trial or, if the matter is resolved with respect to the remaining defendant (Rothschild) before a trial, then plaintiffs shall file a note of inquest; and it is further

ORDERED that the cross-motion by defendants is granted only to the extent that defendant Rothschild has until November 17, 2020 to file an answer.

Remote Conference: February 22, 2021.

10/23/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE