

Pelton v Kevin Greer Fine Carpentry & More L.L.C.

2020 NY Slip Op 33893(U)

November 23, 2020

Supreme Court, New York County

Docket Number: 158786/2017

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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DEAN PELTON,

Plaintiff,

- v -

KEVIN GREER FINE CARPENTRY AND MORE L.L.C.,
THE DESIGN CENTER, KEVIN GREER, ROBERT
ROSANIA, DAVID ROSANIA, DANTE ROSANIA

Defendant.

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INDEX NO. 158786/2017
MOTION DATE 09/24/2020
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for MODIFY ORDER/JUDGMENT.

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action on October 3, 2017, alleging claims, among others, for breach of contract. Defendants did not interpose an answer to the complaint and the Plaintiff moved for a default judgment pursuant to CPLR 3125, which was granted by an Order dated October 23, 2018 which referred this matter to the Special Referee Part for assignment to a referee to hear and determine pursuant to CPLR § 4317 (b) the issue of the amount of money due and owing to the plaintiff, Dean Pelton (the "Plaintiff") by the defendants, Kevin Greer Fine Carpentry, LLC. ("KGFC"), The Design Center ("TDC"), Kevin Greer ("Greer"), Robert Rosania ("Robert"), David Rosania ("David"), and Dante Rosania ("Dante"). On November 25, 2019, Referee Helen Z. Galette held a hearing which found as follows:

The Plaintiff entered into a contract with KGFC on or about May 7, 2016, to perform a construction project at the Plaintiff's home at 77 Park Avenue, Apartment 5G, New York, New

York (the "Premises"), which included all labor, supervision, materials and equipment (the "Project"). Plaintiff alleges that the KGFC's work was defective and that KGFC in most respects failed to abide by the contract. As a result, the Plaintiff terminated the contract with KGFC, and thereafter, on or about January 28, 2017, the Plaintiff entered into an agreement to complete the work that KGFC failed to complete. The contract price for the Project, including change orders, was \$256,988.20. The Plaintiff made an initial contract deposit of \$143,710.29 and thereafter made additional payments to KGFC of \$39,137.78. In total, the Plaintiff paid KGFC the sum of \$182,848.07. A few months into the Project, it became apparent to the Plaintiff that KGFC was not purchasing materials to complete the Project, although Greer was asking the Plaintiff to give him money. The Plaintiff also learned that KGFC did not pay some of the subcontractors that worked on the Project. Thus, on or about November 16, 2016, the Plaintiff terminated KGFC's services. The Plaintiff did not pay KGFC the remaining contract balance of \$74,140.13. In Order to complete the Project, In total, the Plaintiff paid \$152,136.61 above the Project's cost, from which \$27,994.98 was subtracted based upon insufficient evidence, resulting in a total award in favor of plaintiff and against KGFC and Kevin Greer in the amount of \$124,141.63.

Defendants KGFC and Greer now move to modify the referee's decision. The Court notes that while said defendants were represented by counsel at the referee's hearing, Greer himself failed to appear to contest any award of damages. As raised by the moving defendants, the sole cause of action pleaded against Kevin Greer individually arose under the trust-fund provisions of Article 3-A of the Lien Law. Said defendants argue that as the special referee's decision made no reference to such a claim, damages against Greer individually was thus clearly erroneous.

Upon entry of default, allegations contained in Plaintiff's complaint are deemed admitted. *Rosenberg v. Litas Investing Co., Inc.*, 622 N.Y.S.2d 775 (2nd Dept. 1995). By defaulting, the

defendant admitted all traversable allegations in the complaint, including basic allegations of liability. *Rokina Opt. Co. v. Camera King*, 63 N.Y.2d 728 (2008). As discussed in *Teves v. Greenspun*, 159 A.D.3d 1105 (2018), “Pursuant to Lien Law article 3–a, payments received by a contractor from an owner for a home improvement contract prior to the substantial completion of work pursuant to said contract must be deposited into a trust account (see Lien Law § 71–a [4]; *Anthony DeMarco & Sons Nursery, LLC v. Maxim Constr. Serv. Corp.*, 130 A.D.3d 1409, 1410–1411 [2015]). The contractor, as trustee of these funds (see Lien Law § 70[2]), is “required to, among other things, maintain books or records with respect to each trust, detailing the trust assets receivable, trust accounts payable, trust funds received, trust payments made with trust assets and transfers in repayment of or to secure advances made pursuant to a notice of lending” (*Anthony DeMarco & Sons Nursery, LLC v. Maxim Constr. Serv. Corp.*, 130 A.D.3d at 1411; see Lien Law §§ 75[2], [3][A]–[E]; *Matter of Bette & Cring, LLC v. Brandle Meadows, LLC*, 81 A.D.3d 1152, 1153–1154 [2011]). The failure of a trustee to maintain these statutorily required books and records “shall be presumptive evidence that the trustee has applied or consented to the application of trust funds ... for purposes other than a purpose of the trust” (Lien Law § 75[4]; see *Anthony DeMarco & Sons Nursery, LLC v. Maxim Constr. Serv. Corp.*, 130 A.D.3d at 1411, 14 N.Y.S.3d 235).” By defaulting in this action, there is a rebuttable statutory presumption that Greer misappropriated trust funds and as Greer failed to testify at the hearing, said presumption has not been rebutted.

Defendants also object to the calculation of damages alleging that no evidence was presented to allow for a calculation of damages claimed for breach of contract since the contract was not admitted into evidence at the hearing. The Court notes that the subject contract was submitted on plaintiff’s application for a default judgment Defendants further argue that the court

failed to include the contract balance as an offset and failed to submit supporting evidence that the specific items alleged to have been required by the contract were the subjects of plaintiff's subsequent payments to contractors. Contrary to defendants' arguments, the referee's calculations clearly show that the contract balance of \$74,140.13 was set off against the total measure of damages and plaintiff established its damages based upon the un rebutted testimony of plaintiff at the hearing.

As such, defendants' motion is hereby denied in its entirety.

11/23/2020
DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED
<input type="checkbox"/>	GRANTED
<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	OTHER
<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: