

Cardiff Bay Ctr., LLC v Empire Water Main & Sewer, Inc.
2020 NY Slip Op 34527(U)
November 13, 2020
Supreme Court, Queens County
Docket Number: 700998/2020
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

FILED

Present: HONORABLE CHEREÉ A. BUGGS
Justice

IAS PART 30

11/16/2020
10:18 AM

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CARDIFF BAY CENTER, LLC d/b/a PENINSULA
NURSING AND REHABILITATION CENTER,

Index No.: 700998/2020

COUNTY CLERK
QUEENS COUNTY

Plaintiff,

Motion
Date: October 21, 2020

-against-

Motion Cal. No.: 8

Motion Sequence No.: 1

EMPIRE WATER MAIN AND SEWER, INC.,

Defendant.

-----X

The following efile papers numbered 4-15, 17-21 submitted and considered on this motion by plaintiff Cardiff Bay Center, LLC d/b/a Peninsula Nursing and Rehabilitation Center seeking an Order granting a default judgment against defendant Empire Water Main & Sewer, Inc. for failure to appear or otherwise respond to the verified complaint pursuant to Civil Practice Law and Rules (“CPLR”) §3215 awarding plaintiff its actual damages based upon documentary evidence; or directing plaintiff to submit proof of damages by affidavit pursuant to 22 NYCRR §202.46.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 4-15
Affirmation in Opposition-Exhibits.....	EF 17-18
Reply Affirmation-Exhibits.....	EF 21

Plaintiff Cardiff Bay Center, LLC d/b/a Peninsula Nursing and Rehabilitation Center seeks an Order granting it a default judgment against defendant Empire Water Main & Sewer, Inc. for failure to appear or otherwise respond to the verified complaint pursuant to CPLR §3215 awarding plaintiff its actual damages based upon documentary evidence, or directing plaintiff to submit proof of damages by affidavit pursuant to 22 NYCRR §202.46.

The motion for default judgment is **granted** as to liability, as further set forth below.

Plaintiff commenced this action on January 11, 2020, to recover damages arising out of an alleged breach of a Proposal. Plaintiff alleged in its verified complaint as its first and third cause of action breach of the Proposal, its second cause of action alleged unjust enrichment and its fourth cause of action alleged damages due to defendant's failure to obtain proper permits for the work, in breach of the Proposal. Plaintiff claimed in its papers that on or about November 20, 2018, it entered into an agreement (hereinafter "Proposal") with defendant whereby the defendant agreed to furnish, excavate and install plumbing and drainage systems at its business location at 50-15 Beach Channel Drive, Far Rockaway, New York 11691. Plaintiff alleged that as part of the Proposal, it remitted a good faith deposit to the defendant in the sum of \$100,000.00, annexing a copy of a check dated November 26, 2018. On or around June 2019, plaintiff claimed that pursuant to the Proposal, the defendant began work at plaintiff's facility, however, the work performed by defendant was performed negligently and without obtaining the proper permits for such work as was required by the Proposal, and the work was not performed or completed pursuant to the terms of the Proposal. Other documentary evidence submitted in support of the motion included a copy of a Department of Buildings Stop Work Order, Violation due to failure to procure permits. Plaintiff claimed that it has been damaged in the sum of totaling \$106,000.00.

According to plaintiff's papers, defendant was served pursuant to Business Corporation Law (BCL) §306 on January 30, 2020, by delivering the notice of electronic filing, summons and verified complaint along with the statutory fee of \$40.00 to Sue Zousky as Business Document Specialist 2 of the Secretary of State of the New York State Department of State located in Albany, New York. Ms. Zousky is the Registered Agent/Statutory Agent of record for the defendant corporation (*see Perkins v 686 Halsey Food Corp.*, 36 AD3d 881 [2d Dept 2007]). The affidavit of service was filed in the Court on February 6, 2020. Plaintiff maintained that the notice required by CPLR §3215(g) was served upon the defendant on March 18, 2020. More than thirty (30) days had elapsed since the service of process and the CPLR §3215(g) notice was served, and defendant had failed to appear or otherwise respond to the complaint, which was verified by Kadeem Mitchell, plaintiff's Administrator at the time, demonstrating proof of the claim (*see Celnick v Freitag*, 242 AD2d 436 [1st Dept 1997], *Farrell v K.J.D.E. Corp.*, 244 AD2d 905 [4th Dept 1997]).

Defendant filed a notice of appearance and verified answer on July 20, 2020 and opposition to this motion on July 21, 2020. Defendant claimed that because of his filed answer and opposition, the motion is now moot, and a default judgment should not be granted against it since it has filed an answer. Defense counsel explained that due to COVID19 their offices were closed, and also, that under the Proposal it was not required to obtain permits.

In response, plaintiff argued that defendant failed to set forth a reasonable excuse for its default or a meritorious defense (*see CPLR 5015(a)(1)*; *Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138 [1986]). The excuse for its default, that its offices were closed due to the coronavirus epidemic, should not be accepted, because even if true, defendant's answer was due on March 1, 2020, prior to the closure of non-essential business by Governor Cuomo on March 20, 2020, and New York Court's suspension of non-essential matters on March 22, 2020. Plaintiff maintained that defendant took no action to cure the default until more than one month after plaintiff filed its motion. Also, no affidavit was submitted by defendant demonstrating a meritorious defense.

Discussion

CPLR §3215 titled “Default Judgment” states the following in relevant part:

(a) Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him...

(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party...[w]here a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due...[p]roof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.

CPLR 2101 titled “Form of papers” states the following in relevant part:

(f) Defects in form; waiver. A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections.

Defendant filed a verified answer on July 21, 2020. Plaintiff failed to reject the answer. However the answer was filed after the motion for a default judgment was already made and pending as of June 26, 2020. Therefore, the Court finds that plaintiff’s retention of defendant’s answer without objection did not constitute a waiver of objection as to the answer’s untimeliness which would serve to preclude the granting of a default judgment in plaintiff’s favor (*see* CPLR §3215 [a]; *see Estrella v Herrera*, 23 AD3d 320 [1st Dept 2005]; *compare Rozz v Law Offices of Saul Kobrick, P.C. et al.*, 134 AD3d 920 [2d Dept 2015]; *Wittlin v Schapiro’s Wine Co. Ltd.*, 178 AD2d 160 [1st Dept 1991]; *Diamadopolis v Balfour*, 152 AD2d 532 [2d Dept 1989]; *Monogue v Monette*, 138 AD2d 851 [3d Dept 1988]; *see* CPLR §3215[a]). A default judgment against the defendant is warranted due to its failure to show a reasonable excuse for its untimely answer, and failure to establish a reasonable excuse or meritorious defense (*see Estrella v Herrera*, 23 AD3d 320 [1st Dept 2005]). Here, defendant did not move this Court for any affirmative relief (*see generally* CPLR 317, 2004; 3012[d]; *see also* 5015). Therefore, based upon the foregoing, it is

ORDERED, that the plaintiff's motion for a default judgment against defendant Empire Water Main & Sewer, Inc. is granted as to liability only; and it is further

ORDERED, that the plaintiff is directed to appear at an Inquest as to the issue of damages in the Trial Scheduling Part, Courtroom 25 on **JANUARY 26, 2021** at 9:30 A.M., located at 88-11 Sutphin Boulevard, Jamaica, New York. Counsel for plaintiff is directed to file a Note of Issue/Certificate of Readiness along with the payment of the appropriate fees on or before Tuesday, **DECEMBER 21, 2020**, and it is further

ORDERED, that plaintiff is directed to attach a copy of this Order upon filing the Note of Issue and statement of readiness, and it is further

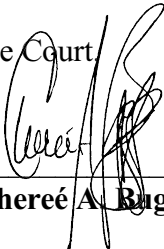
ORDERED, that the plaintiff shall serve a copy of this Order with Notice of Entry upon defendant as well as a Notice of Inquest with Certificate of Readiness.

The foregoing constitutes the decision and Order of the Court.

Dated: November 13, 2020

FILED

**11/16/2020
10:18 AM**



Hon. Chereé A. Buggs, JSC

**COUNTY CLERK
QUEENS COUNTY**