

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

2021 NY Slip Op 30939(U)

March 26, 2021

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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INDEX NO. 158786/2017

DEAN PELTON,

MOTION DATE 01/25/2021

Plaintiff,

MOTION SEQ. NO. 006

- v -

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

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 83, 84, 85, 86, 87
were read on this motion to/for REARGUMENT/RECONSIDERATION

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

In an Order dated November 23, 2020, this Court denied defendant's motion seeking to
modify a referee's decision entered after defendants' default.

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 now move to reargue this Court's denial of said motion.

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]). A "motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court" (see, *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Simon v. Mehryari*, 16 AD3d 664 [2d Dept 2005]).

Defendants argue that plaintiff not only failed to establish its damages on the contract claim and has failed to establish any damages whatsoever for a trust-fund diversion under the Lien Law.

Defendant has failed to establish that this Court misapprehended the relevant law or facts. As this Court held in its prior decision, 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 unrebutted testimony of plaintiff at the hearing.

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

3/26/2021

DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE