

New Millenium Bldg. Sys. LLC v White Contr. & Renovation, Inc.

2022 NY Slip Op 31239(U)

April 12, 2022

Supreme Court, New York County

Docket Number: Index No. 652540/2019

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

Justice

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NEW MILLENIUM BUILDING SYSTEMS, LLC, ON BEHALF OF ITSELF AND ON BEHALF OF ALL OTHERS ENTITLED TO SHARE IN THE FUNDS RECEIVED BY WHITE CONTRACTING & RENOVATION, INC, RICHARD ALLAN, and DAVID MCCARTHY, AS TRUSTEE(S),

Plaintiffs,

- v -

WHITE CONTRACTING & RENOVATION, INC., RICHARD ALLAN, DAVID MCCARTHY, WITH THE CONSTRUCTION PROJECT(S) AT 555 WEST END AVENUE, NEW YORK, NY, BLOCK 0178; LOT 0029,

Defendants.

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INDEX NO. 652540/2019
MOTION DATE 06/03/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, and 27

were read on this motion for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is hereby ordered that plaintiff’s motion to renew or reargue this court’s decision of February 27, 2020, in which the court denied plaintiff’s motion for a default judgment without prejudice to renewal “after service of process has been effected on [defendant] Allan or if Allan is dropped from the case” (NYSCEF Doc. No. 19), is granted, on default and without opposition, and upon reargument the court vacates its prior order and grants the motion for a default judgment based upon the following memorandum decision.

Background

In this action on an unpaid invoice, plaintiff New Millenium Building Systems LLC originally sought entry of a default judgment pursuant to CPLR 3215 on its seventh cause of action for an account stated against defendants White Contracting & Renovation, Inc. (“White”) and David McCarthy (“McCarthy”), and sought to sever the action against defendant Richard

Allan (“Allan”). Plaintiff commenced this action by filing the summons and complaint on May 1, 2019 (NYSCEF Doc. Nos. 1-2). Affidavits of service filed on May 20, 2019 and June 5, 2019 attest to service on White by service on the Secretary of State pursuant to Business Corporation Law § 306(b) and on McCarthy by affixing and mailing the summons and complaint to the door of his house on May 30, 2019, respectively (NYSCEF Doc. Nos. 5, 7). Affidavits of additional service filed on June 6, 2019, attest to service on both defendants pursuant to CPLR 3215(g) on June 3, 2019 (NYSCEF Doc. Nos. 8-9). To date, neither White nor McCarthy have answered the complaint or otherwise appeared in this action. There is no opposition to the motion.

To date, plaintiff has been unable to effectuate service upon defendant Allan. Plaintiff concedes that its time to serve Allan, pursuant to CPLR 306(b), has expired, and consents to an order dismissing the complaint against Allan.

Discussion

“A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d]). Here, plaintiff asserts, and the court acknowledges, that it did not consider that plaintiff’s time to serve Allan had expired prior to plaintiff making the instant motion. Accordingly, the court grants the motion for reargument.

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). “The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts” (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). “[D]efaulters are deemed to have admitted all factual

allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action” (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, plaintiff has satisfied its burden to submit proof of service and proof of White and McCarthy’s default by submitting the affidavits of service and of additional service (NYSCEF Doc. Nos. 5, 7-9), and the affidavit of its counsel, Albert A. Hatem, Esq., attesting to the default (NYSCEF Doc. No. 23, ¶ 10). Plaintiff has satisfied its burden to submit proof of the facts constituting its claim against White by submitting the complaint (NYSCEF Doc. No. 2), the affidavit of Rob Allen, its Division Controller (NYSCEF Doc. No. 22), and an invoice pursuant to which plaintiff sold certain construction materials to White (NYSCEF Doc. No. 13). The invoice shows an outstanding balance of \$20,189.84, after the last payment, dated October 16, 2017, which is confirmed by Allen’s affidavit (*id.*; NYSCEF Doc. No. 22, ¶¶ 4-6). Accordingly, plaintiff has established its claim for an account stated against White. McCarthy, however, is identified in the complaint as an officer, owner, director, member and/or shareholder of White only (NYSCEF Doc. No. 2, ¶ 3), and plaintiff does not allege that McCarthy had complete dominion over White and abused the corporate form to perpetrate some fraud or wrong on plaintiff so as to justify piercing the corporate veil and holding him personally liable (*Morris v. New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141-42 [1992]).

Accordingly, it is hereby

ORDERED that the motion of plaintiff for leave to reargue its motion for default judgment on the seventh cause of action is granted; and it is further

ORDERED that, upon reargument, the court vacates its prior order, dated February 27, 2020, and grants plaintiff’s motion for default judgment as to the said cause of action against defendant White Contracting & Renovation, Inc.; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff New Millenium Building Systems LLC and against defendant White Contracting & Renovation, Inc. in the sum of \$20,189.04, with interest at the statutory rate from October 16, 2017, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion for default judgment against defendant David McCarthy is denied; and it is further

ORDERED that the complaint against defendant Richard Allan is severed and dismissed pursuant to CPLR 306(b), and the Clerk is directed to enter judgment in favor of defendant Richard Allen and against plaintiff New Millenium Building Systems LLC accordingly.

This constitutes the Decision and Order of the court.



4/12/2022		LOUIS L. NOCK, J.S.C.
DATE		
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE