

Arista A.C. Corp. v NAF Constr. Mgt., LLC

2022 NY Slip Op 33469(U)

October 14, 2022

Supreme Court, New York County

Docket Number: Index No. 156306/2021

Judge: Paul A. Goetz

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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. PAUL A. GOETZ **PART** **47**

Justice

-----X

ARISTA AIR CONDITIONING CORP.,

Plaintiff,

INDEX NO. 156306/2021

MOTION DATE 06/27/2022

MOTION SEQ. NO. 001

- v -

NAF CONSTRUCTION MANAGEMENT, LLC and HFZ 235
WEST 75TH STREET OWNER LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for JUDGMENT - DEFAULT.

Plaintiff Arista Air Conditioning Corp. commenced this action for breach of contract, unjust enrichment and to foreclose on a mechanic’s lien in the amount of \$93,256.52 for construction services rendered to defendant NAF Construction Management, LLC (NAF) at a property owned by defendant HFZ 235 West 75th Street Owner, LLC (HFZ). HFZ has interposed an answer with counterclaims (NY St Cts Elec Filing [NYSCEF] Doc No. 10). Plaintiff moves, pursuant to CPLR 3215, for a default judgment against NAF for its failure to timely answer or otherwise appear in this action. NAF has not submitted any opposition.

An application for a default judgment must be supported with “proof of service of the summons and the complaint[,] ... proof of the facts constituting the claim, [and] the default” (CPLR 3215 [f]). The affidavit of service sworn to July 12, 2021 shows that plaintiff served NAF with process pursuant to Limited Liability Company Law § 303 by delivering duplicate copies of the amended summons and amended verified complaint, amended notice of pendency and notice of electronic filing to the Secretary of State on July 9, 2021 (NYSCEF Doc No. 7).

Plaintiff has demonstrated that NAF has not appeared or answered the complaint within 30 days of that date or sought an extension of time to do so. Plaintiff has also shown that it served NAF with a notice of default and an additional copy of the amended summons by mail on May 3, 2022 (NYSCEF Doc No. 12; NYSCEF Doc No. 20, Rosalyn Maldonado [Maldonado] affirmation, Ex C).

Turning to the merits, a cause of action for breach of contract requires the existence of a valid contract, the plaintiff's performance, the defendant's breach and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiff's proof is insufficient to establish the facts constituting the first cause of action for breach of contract. Plaintiff's chief financial officer, Yvette Gitelman (Gitelman), avers that NAF hired plaintiff on August 28, 2020 to perform certain construction work at a property located at 235 West 75th Street, New York, New York 10023 (the Property), and that plaintiff performed this work "in accordance with the contract" (NYSCEF Doc No. 17, Gitelman aff, ¶¶ 1 and 4-6). Gitelman's affidavit and the amended complaint, however, fail to specify whether the contract was an oral or written agreement and fail to detail the specific terms of the contract that NAF allegedly breached (*see Manipal Educ. Ams., LLC v Taufiq*, 203 AD3d 662, 663 [1st Dept 2022]). For instance, the amended complaint alleges that NAF has failed to pay the contract amount of \$93,256.52 (NYSCEF Doc No. 4, ¶ 10), but the notice of mechanic's lien reflects a contract amount of \$103,618.35 (NYSCEF Doc No. 18, Gitelman aff, Ex A). Gitelman has not stated whether NAF ever made a partial payment. Therefore, plaintiff is not entitled to a default judgment as against NAF on its breach of contract cause of action.

A cause of action for unjust enrichment requires a plaintiff to establish that: "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good

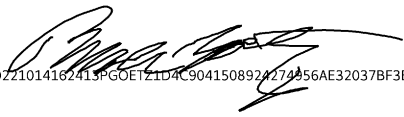
conscience to permit [the other party] to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). Gitelman avers that plaintiff performed construction services worth \$93,256.52, NAF accepted plaintiff’s payment applications without objection, and NAF has failed to pay plaintiff (NYSCEF Doc No. 17, ¶¶ 7-8). Plaintiff’s proof by affidavit is sufficient to establish the facts constituting the second cause of action for unjust enrichment, but only as to liability as plaintiff failed to furnish documentary proof of its damages, such as bills or invoices.

As for the third cause of action, plaintiff filed a Notice of Mechanic’s Lien in the unpaid amount of \$93,256.52 four months after it last performed work at the Property (NYSCEF Doc No. 4, ¶ 12; NYSCEF Doc No. 17, ¶ 7; NYSCEF Doc No. 18). The notice of lien contains the requisite information required under Lien Law § 9, and plaintiff has shown that the lien has not been discharged (*see* Lien Law § 19). Additionally, plaintiff has established that it filed a notice of pendency and commenced a foreclosure action within one year from the filing of the mechanic’s lien (*see* Lien Law § 17). However, a “subcontractor’s right to recover is derivative of the right of the general contractor to recover, and if the general contractor is not owed any amount under its contract with the owner at the time the subcontractor’s notice of lien is filed, then the subcontractor may not recover” (*C.C.C. Renovations, Inc. v Victoria Tower Dev. Corp.*, 168 AD3d 664, 666 [2d Dept 2019]; *see also* Lien Law § 4 [1]). Here, plaintiff’s proof fails to establish that the amount it is owed for the services it provided at the property under the relevant subcontract does not exceed the amount owed by HFZ to NAF. Thus, plaintiff is not entitled to a default judgment on its lien foreclosure cause of action.

Accordingly, it is

ORDERED that the motion by plaintiff Arista Air Conditioning Corp. for a default judgment as against defendant NAF Construction Management, LLC (motion sequence no. 001) is granted but only as to this defendant's liability on the second cause of action, and the balance of the motion is otherwise denied; and it is further

ORDERED that the taking of an inquest and the assessment of damages against defendant NAF Construction Management, LLC shall be conducted at the time of the trial against the remaining defendant HFZ 235 West 75th Street Owner, LLC.


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10/14/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE