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| <b>805 N. Blvd LLC v C &amp; B Gen. Constr. Corp.</b>                                                                                                                                                                          |
| 2023 NY Slip Op 35130(U)                                                                                                                                                                                                       |
| March 14, 2024                                                                                                                                                                                                                 |
| Supreme Court, Nassau County                                                                                                                                                                                                   |
| Docket Number: Index No. 611458/2020                                                                                                                                                                                           |
| Judge: Jerome C. Murphy                                                                                                                                                                                                        |
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**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

**805 N. BLVD LLC,**

**Plaintiff,**

**- against -**

**C & B GENERAL CONSTRUCTION CORP.,  
DAVID MORENO, S&L SPRINKLER and  
FIRE PROTECTION, INC., AIRTIGHT  
INSTALLATION LLC, FOUR SEASONS  
ROOFING INC., and JOHN DOES 1 to 10,**

**Defendants.**

**TRIAL/IAS PART 5**

**Index No.: 611458-2020**

**Motion Date: 11-15-23**

**Sequence No.: 001**

**DECISION AND ORDER**

**C & B GENERAL CONSTRUCTION CORP.,**

**Third-Party Plaintiffs,**

**-against-**

**S&L SPRINKLER & FIRE PROTECTION, INC.,**

**Third-Party Defendant.**

The following papers were read on this motion:

*Motion Sequence No. 001:*

Notice of Motion, Affirmation, Affidavit of Robert Sadian, and Exhibits..... 1

**PRELIMINARY STATEMENT**

In Motion Sequence No. 001, plaintiff moves, pursuant to CPLR 3215, for leave to enter a default against defendants David Moreno and Airtight Installation LLC, and to set this matter down for an inquest in favor of plaintiff to assess damages in an amount to be proven at such inquest, and for such other and further relief as this Court deems just and proper. No opposition has been submitted.

**BACKGROUND**

According to the unverified amended complaint, dated and filed April 20, 2023, plaintiff, owner of a commercial building and property located at 805 Northern Boulevard, in Great Neck (hereinafter the subject property), seeks to recover damages for breach of contractual duties and express and implied warranties (first cause of action) and negligence (second cause of action) against, among others, defendant Airtight Installation, LLC (hereinafter Airtight), and to recover damages for breach of contract against defendant David Moreno (third cause of action) (*see* NYSCEF Doc. Nos. 64, 92). Plaintiff alleges, inter alia, that this action arises out of defective construction performed at the subject property; that Airtight was a subcontractor engaged by defendant C&B General Construction Corp. (hereinafter C&B), the general contractor/project manager of the subject construction project, pursuant to a subcontract annexed as Exhibit 5 to the amended complaint; that plaintiff was an intended beneficiary of Airtight's subcontract; and that Airtight assumed a duty to perform its work for the benefit of both plaintiff and C&B (*see id.*). Further, plaintiff alleges that Moreno was hired to supervise some of the work being performed so that the work was done properly and that Moreno had represented that he was qualified to perform this task (*see id.*).

Plaintiff now moves, pursuant to CPLR 3215, for leave to enter a default against Moreno and Airtight due to their failure to appear or answer in response to the amended complaint, and to set this matter down for an inquest to assess damages. Neither Moreno nor Airtight have opposed this motion.

#### DISCUSSION

On a motion pursuant to CPLR 3215 for leave to enter a default judgment, a plaintiff is required to submit proof of service of the summons and complaint, "proof of the facts constituting the claim," and proof of the defendant's default in answering or appearing (CPLR 3215[f]; *see Rosenzweig v Gubner*, 194 AD3d 1086, 1088 [2<sup>nd</sup> Dept. 2021]; *Roy v 81E98th KH Gym, LLC*, 142 AD3d 985, 985 [2<sup>nd</sup> Dept. 2016]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59 [2<sup>nd</sup> Dept. 2013]). "To demonstrate 'the facts constituting the claim' the movant need only submit sufficient proof to enable a court to determine that 'a viable cause of action exists'" (*Fried v Jacob Holding, Inc.*, 110 AD3d at 59-60, *quoting Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *see Rosenzweig v Gubner*, 194 AD3d at 1088; *Roy v 81E98th KH Gym, LLC*, 142 AD3d at 985).

#### *Motion as against Airtight*

Plaintiff submits evidence that two copies of the "amended" summons and amended complaint were delivered for Airtight to the Corporation Division of the Department of State on May 18, 2023 (*see* NYSCEF Doc. Nos. 67, 93). The related affidavit of service was e-filed on May 25, 2023 (*see* NYSCEF Doc. Nos. 67, 93). Service upon Airtight was complete on May 18, 2023 when

the Secretary of State was served (*see* Limited Liability Company Law § 303[a]; *see also* CPLR 311-a[a]). Airtight neither answered nor moved within the 30 days following service as allotted by statute as per the affirmation of plaintiff's counsel<sup>1</sup> (*see* CPLR 320[a]).

Plaintiff submits an affidavit from Robert Sadian, its managing member, which is based upon his own personal knowledge, in which he avers that “[d]efendants badly mismanaged the project, resulting both in defects in the construction and long delays in completing the project, both of which caused extensive damage to Plaintiff” (NYSCEF Doc. No. 98). Sadian also avers that he has “carefully reviewed the Amended Complaint and all of its exhibits . . . The Amended Complaint and all the facts alleged in it are true to my knowledge, except as to matters alleged on information and belief, and as to those matters I believe them to be true” (*id.*).

In the amended complaint, plaintiff alleges that Airtight was responsible for the HVAC system (*see* NYSCEF Doc. Nos. 64, 92). Plaintiff alleges that, “despite warranties and claimed expertise”, Airtight “did substandard and inferior construction work”, resulting in “[t]he HVAC system ha[ving] numerous problems, including significant leakage in the duct risers, ducts that were not sealed in several of the joints, duct sections which exhibited separation and an inadequate securement with either screws or duct mate connectors, and loose or missing insulation in the installed system” (*id.* at ¶23[h]).

#### First Cause of Action

For plaintiff's first cause of action which was asserted against Airtight, along with the other defendants, except for Moreno, plaintiff alleged as follows:

“37. As set forth above, C & B expressly warranted the work it did directly, and provided ‘guarantees and warranties’ all of its work, and the three subcontractor defendants took on this responsibility to the extent of the work they undertook in their respective subcontracts.

38. As professional commercial building contractors, the Construction Defendants owed a duty to Plaintiff to perform their work with reasonable care and competence, and perform their respective construction tasks in a workmanlike manner.

39. By promoting itself as providing ‘Superior Construction Services for Residential and Commercial Properties,’ and then agreeing to manage the Project, C & B gave an implied warranty that its work would be done in an excellent and superior manner.

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<sup>1</sup> Plaintiff also sent by first class mail an additional copy of the “amended” summons and amended complaint to Airtight on September 22, 2023 (*see* NYSCEF Doc. No. 96).

40. All of these duties and warranties were breached when the Construction Defendants performed their work in a substandard and inferior manner, and thereby causing material defects in the building.

41. Plaintiff has been damaged in that it has already expended hundreds of thousands of dollars to remediate all of the inferior work and defects complained of herein, and continues to expend hundreds of thousands of dollars in remediation damages.

42. Additionally, as a result of the defective work of C & B, S & L and Four Seasons, the completion of the project was significantly delayed resulting in the loss of substantial rental income.

43. Plaintiff has been damaged thereby in an amount to be determined at trial, but no less than \$6 million” (*id.*).

Annexed as Exhibit 5 to the amended complaint is the subcontract between C&B and Airtight pursuant to which Airtight agreed to perform certain work at the project in exchange for \$290,485 to be paid in installments based on progress of the work (*see* NYSCEF Doc. No. 92). Airtight’s subcontract provided that, with respect to the HVAC work it was to perform, Airtight “assumes . . . all obligations, risks and responsibilities which [C&B] assumes towards [plaintiff]” (*id.*). Final payment was to be made upon, *inter alia*, approval by plaintiff (*see id.*). This subcontract also provided that “[w]ork performed under the Contract shall be warrantied for a period of one year” (*id.*). The rider to the subcontract was signed by Airtight’s president on March 13, 2017 (*see id.*).

In addition, as part of Exhibit 1 to the amended complaint is a subsequent agreement between C&B and plaintiff entered into in August 2019, whereby it was agreed that plaintiff would pay C&B a final payment of \$200,000 and that “C&B represent[ed] and warrant[ed] that [plaintiff] ha[d] no remaining payment obligations to C&B and/or any subcontractor in connection with the Project or otherwise with respect to the Property” and that “C&B further represent[ed] and warrant[ed] that all previous guarantees and warranties provided by C&B and its subcontractors related to work performed and materials used in connection with the Project remain in effect” (*id.*).

Moreover, plaintiff pleaded that it was “an intended beneficiary” of the Airtight subcontract which Airtight “took upon itself the duty to perform its work for the benefit of both [plaintiff] and C&B” citing to the scope of work provision of the subcontract which provided that Airtight assumed “all obligations, risks, and responsibilities which [C&B] assume[d] towards [plaintiff]” (*id.*).

In light of the foregoing, plaintiff has submitted facts demonstrating that the first cause of action insofar as alleged against Airtight is viable.

#### Second Cause of Action

For its second cause of action, which was asserted against Airtight, along with the other defendants, except for Moreno, plaintiff alleged as follows:

“45. The material defects caused by the Construction Defendants shoddy workmanship created a dangerous and unhealthy situation to the tenants of the building and their clients, which, as noted, include patients of medical offices who are or would be tenants of the building.

46. Accordingly, the nature of the performance called for from the Construction Defendants is affected with a significant public interest and the failure to perform the service carefully and competently could potentially have catastrophic consequences.

47. The Construction Defendants failed to perform their work with reasonable care and competence, resulting in the current state of the building, and thereby acted with negligence.

48. Plaintiff has been damaged in that it has already expended hundreds of thousands of dollars to remediate all of the inferior work and defects complained of herein, and continues to expend hundreds of thousands of dollars in remediation damages.

49. Additionally, as a result of the defective work, the completion of the project has been significantly delayed resulting in the loss of substantial rental income.

50. Plaintiff has been damaged thereby in an amount to be determined at trial, but no less than \$6 million” (*id.*).

“[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). “This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (*id.* at 389). Here, plaintiff does not allege facts give rise to a duty independent of the contractual duty or the warranty. Consequently, in light of the foregoing, plaintiff has not submitted facts demonstrating that the second cause of action insofar as alleged against Airtight is viable. As a result, that branch of plaintiff’s motion insofar as it relates to the second cause of action insofar as asserted against Airtight is denied with leave to renew.

#### Request for an Inquest

Plaintiff also seeks, upon being granted leave to enter a default judgment, for the matter to be set down for an inquest on the damages it has sustained. Since there are remaining defendants that have not defaulted, an inquest on the first cause of action insofar as asserted against Airtight will be

held at the time of trial.

*Motion insofar as against Moreno*

Plaintiff submits evidence that Moreno was personally served with the “amended” summons and amended complaint on June 5, 2023 (*see* NYSCEF Doc. Nos. 69, 94). The related affidavit of service was e-filed on June 6, 2023 (*see* NYSCEF Doc. Nos. 94). Moreno neither answered nor moved within the 20 days following service as allotted by statute as per the affirmation of plaintiff’s counsel<sup>2</sup> (*see* CPLR 308[1], 320). Further, plaintiff submits evidence of its compliance with CPLR 3215(g)(3)(i). Plaintiff served Moreno with an additional notice of the “amended” summons and amended complaint by mailing copies of same on September 22, 2023, in an envelope marked “personal and Confidential” to Moreno’s Long Island City address (*see* NYSCEF Doc. Nos. 95).

In the amended complaint, the facts of which Sadian avers are true in his affidavit, plaintiff alleged that it hired Moreno “to make sure that certain of the Construction Defendants’ work was performed properly”, “Moreno represented that he was qualified and agreed to perform such a function but failed to properly do so” and that because Moreno “did not fulfill his responsibility”, he “is therefore also liable for the resulting damage” (NYSCEF Doc. Nos. 64, 92).

Specifically, with respect to the third cause of action asserted against Moreno, plaintiff alleged as follows:

“52. Defendant Moreno was hired to supervise certain of the work being performed to ensure that it was performed in a proper and workmanlike manner and without defects.

53. Defendant Moreno represented that he was qualified and agreed to perform such a function, but failed to properly do so.

54. Plaintiff has been damaged in that it has already expended hundreds of thousands of dollars to remediate all of the inferior work and defects complained of herein, and continues to expend hundreds of thousands of dollars in remediation damages.

55. Additionally, as a result of the defective work, the completion of the project has been significantly delayed resulting in the loss of substantial rental income.

56. Plaintiff has been damaged thereby in an amount to be determined at trial, but no less than \$6 million” (NYSCEF Doc. Nos. 64, 92).

“The essential elements of a cause of action to recover damages for breach of contract are

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<sup>2</sup> Plaintiff also sent by first class mail an additional copy of the “amended” summons and amended complaint to Airtight on September 22, 2023 (*see* NYSCEF Doc. No. 96).

“the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach” (*Cruz v Cruz*, 213 AD3d 805, 807 [2<sup>nd</sup> Dept. 2023], *quoting Klein v Signature Bank, Inc.*, 204 AD3d 892, 895 [2<sup>nd</sup> Dept. 2022]). Here, plaintiff does not plead all of the essential elements of a breach of contract cause of action against Moreno. As a result, that branch of plaintiff’s motion insofar as it relates to Moreno is denied with leave to renew.

Accordingly, it is

ORDERED that the branch of plaintiff’s motion which is for leave to enter a default judgment against defendant Airtight Installation LLC with respect to the first cause of action is GRANTED; and it is further

ORDERED that an inquest to assess damages as to defendant Airtight Installation LLC with respect to the first cause of action will be held at the time of trial; and it is further

ORDERED that the branches of plaintiff’s motion which are for leave to enter a default judgment against defendant Airtight Installation LLC with respect to the second cause of action and against defendant David Moreno with respect to the third cause of action are DENIED with leave to renew.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
March 14, 2023

ENTER :

  
JEROME C. MURPHY  
J.S.C.

**ENTERED**

**Mar 15 2024**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE