

**Precision Servs., LLC v New Harbour Realty LLC**

2024 NY Slip Op 30270(U)

January 17, 2024

Supreme Court, Kings County

Docket Number: Index No. 511916/2020

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17<sup>th</sup> day of January 2024

HONORABLE FRANCOIS A. RIVERA

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PRECISION SERVICES, LLC,

Plaintiff,

- against -

NEW HARBOUR REALTY LLC, KBB HOLDINGS, LLC, KBB HOLDINGS CORP., INNOVATIVE RECLYCLING TECHNOLOGIES, INC., ARTHUR HELLER, JOE GOLDBERG, RIDGEWOOD SAVINGS BANK and JPMORGAN CHASE BANK, N.A

Defendants.

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By order to show cause filed on June 20, 2021, and signed on July 23, 2021, under motion sequence number one, defendant New Harbour Realty LLC, (hereinafter NHR) seeks an order: (1) vacating the mechanic's lien filed by plaintiff Precision Services LL (hereinafter PSL) that is the subject of the instant action and (2) dismissing the complaint for lack of personal jurisdiction.

By notice of cross motion filed on July 8, 2021, PSL seeks an order pursuant to CPLR §3215 directing the entry of judgment in favor of PSL as against defendant NHR for failure to appear or answer the complaint.

**BACKGROUND**

On July 8, 2020, PSL commenced the instant action to, among other things, foreclose a mechanic lien filed against the defendants by filing a summons and verified complaint with the Kings County Clerk's office (KCCO).

On October 6, 2020, PSL discontinued the action as asserted against Ridgewood Savings Bank as Mortgagee by filing a stipulation of discontinuance.

**DECISION & ORDER**

Index No.: 511916/2020

On June 14, 2023, PSL filed a supplemental summons and amended verified complaint with the KCCO.

The amended complaint verified complaint alleges fifty-nine allegations of fact in support of three denominated causes of action. The first cause of action is to foreclose a mechanic's lien. The second is for breach of contract. Third is for unjust enrichment.

The amended verified complaint alleges the following salient facts. On February 6, 2019, PLS entered a contract for the decontamination of mercury at a certain property located at 158 Lewis Ave. Brooklyn, NY (Block 1609; Lot 43) (hereinafter the premises). NHR, KBB Holdings, LLC (hereinafter KBB), Arthur Halber (hereinafter Halber) and Joe Goldberg (hereinafter Goldberg) owned the premises at the time the work was performed. The mechanic's lien stems from various obligors' non-payment for environmental services rendered on the premises.

On February 1, 2019, PLS commenced environmental services on the premises. Between that date and February 26, 2019, PLS performed \$68,390.96 of work at the premises. Plaintiff was only paid \$15,000 for its services leaving a deficiency of \$53,390.96. Between February 26 and July 9, 2019, plaintiff made various unsuccessful attempt to collect the deficiency. Plaintiff never received payment. On July 9, 2019, plaintiff filed a mechanic's lien with the KCCO against NHR (as property owner) and KBB (as employer of the lienor).

On or about June 13, 2022, the mechanic's lien was set to expire. This Court ordered the extension of the mechanic's lien for one year. Therefore, the mechanic's lien now expires on or about June 14, 2023. On or about June 14, 2023, plaintiff filed a Notice of Pendency on the premises. Defendants are liable to the plaintiff in the amount of \$53,390.96. Plaintiff is entitled to a judgement of foreclosure on the mechanic's lien. Plaintiff provided all the labor, equipment

and materials required pursuant to the contract therefore earning the services price. The labor, equipment and materials were with the knowledge, consent and benefit to the defendants.

Each of the defendants have failed to perform all the obligation required of them under the Contract and have materially breached the same by failing and refusing to pay the balance due. Plaintiff is entitled to judgment that each of NHR, KBB, Halber and Goldberg are jointly and severally liable to the plaintiff in the amount of \$53,390.96. Plaintiff is entitled to a judgement of foreclosure on the Mechanic's Lien. Despite due demand thereof, defendants NHR, Harbour, KBB, Halber and Goldberg, have failed and refused to pay for certain labor, equipment and materials furnished by plaintiff which has a fair and reasonable value of no less than fifty-three thousand three hundred ninety (\$53,390.96) after crediting the payment of \$15,000. By reason of the foregoing, there is a due and owing to the Plaintiff in the sum of \$53,309.96 with interest thereon.

## **LAW AND APPLICATION**

### *NHR'S Motion to Vacate the Lien and Dismiss the Complaint*

By order to show cause filed on June 20, 2021, and signed on July 23, 2021, under motion sequence number one, defendant NHR sought an order should vacating the mechanic's lien filed by PSL and dismissing the complaint.

The motion was supported by an affidavit of Jacob Glick, a member of the defendant NHR. Jacob Glick averred that NHR was never served with the summons or complaint, or the notice of lien. He further averred that PLS claims that it served the notice of lien to 896 Lafayette Ave. Brooklyn New York and that address does not exist and is not the address of NHR.

PLS filed an affidavit of service from its process server averring service of the summons, complaint and notice of mechanic liens upon NHR on August 14, 2020, by personal delivery to New York State Secretary of State. Limited Liability Company Law section 303 authorizes service of process on an LLC by service upon the New York State Secretary of State. It also provides that service is complete when the Secretary of State is served. A process server's affidavit of service constitutes prima facie evidence of proper service and, therefore, gives rise to a presumption of proper service (*Bethpage Fed. Credit Union v. Grant*, 178 A.D.3d 997, 997 [2<sup>nd</sup> Dept 2019]). A mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server's affidavit (*Id*). NHR's motion to vacate the mechanic's lien and dismiss the complaint due to lack of service of the summons, complaint and notice of mechanic liens is denied.

*PLS' Cross Motion for a Default Judgment*

By notice of cross motion filed on July 8, 2021, PSL seeks an order pursuant to CPLR §3215 directing the entry of judgment in favor of PSL as against defendant NHR for failure to appear or answer the complaint.

CPLR 3215 provides in pertinent part as follows:

(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 the complaint ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party ... Where a verified complaint has

been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215(f); *Atlantic Cas. Ins. Co. v. RJNJ Services, Inc.*, 89 A.D.3d 649, 651, 932 N.Y.S.2d 109 [2nd Dept 2011] ). CPLR 3215(f) states specifically, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim are to be set forth in an affidavit made by the party (*HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735, 736, 888 N.Y.S.2d 203 [2nd Dept 2009]).

CPLR 320(a) pertains to personal appearance and provides as follows.

The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after service of the summons, except that if the summons was served on the defendant by delivering it to an official of the state authorized to receive service in his behalf or if it was served pursuant to section 303, subdivision two, three, four or five of section 308, or sections 313, 314 or 315, the appearance shall be made within thirty days after service is complete.

Here PLS completed service upon NHR on August 14, 2020. NHR was therefore required to appear by no later than September 14, 2020. The time to respond, however, was tolled by an executive order of the former Governor of New York State due to the covid pandemic. The former Governor issued a series of nine subsequent executive orders that

extended the tolling period, eventually through November 3, 2020 (*Brash v. Richards*, 195 A.D.3d 582, 583 [2<sup>nd</sup> Dept 2021]).

Although NHR's time to appear was tolled for the number of days between September 14 and November 3, 2020, NHR did not move by order to show cause for dismissal until June 20, 2021, more than thirty days after the tolling period expired. NHR is therefore in default.

The complaint in this action is verified by PLS's attorney pursuant to CPLR 3020(d). However, the pleading does not demonstrate that the attorney has personal knowledge of the underlying facts supporting the claim. Therefore, the verified complaint may not be used in lieu of an affidavit by the movants pursuant to CPLR 105(u) (*see King v. King*, 99 A.D.3d 672, 951 N.Y.S.2d 565 [2<sup>nd</sup> Dept 2012]). There is no affidavit by a party attesting to a viable claim against NHR. Therefore, the motion is denied without prejudice (*HSBC Bank USA, N.A. v. Betts*, 67 A.D.3d 735, 736, 888 N.Y.S.2d 203 [2<sup>nd</sup> Dept 2009]).

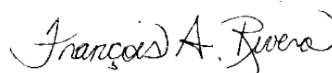
## CONCLUSION

The motion by defendant New Harbour Realty LLC for an order should vacating the mechanic's lien filed by plaintiff Precision Services LLC that is the subject of the instant action and dismissing the complaint is denied.

The cross motion by Precision Services LLC for an order pursuant to CPLR § 3215 directing the entry of judgment in its favor as against defendant New Harbour Realty LLC is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.