1717 E. 18th St. Owner's Inc. v New York Roofscapes, Inc
2024 NY Slip Op 32489(U)
July 8, 2024
Supreme Court, Kings County
Docket Number: Index No. 527212/2022
Judge: Lisa S. Ottley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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1717 EAST 18th STREET OWNER'S INC.,

Plaintiff,

-against-

NEW YORK ROOFSCAPES, INC, KIEFER & SCHUSTER ENGINEERING PLLC and BRADFORD T. KIEFER,

Defendants.

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Mot. Seq. # 2 and 3

Index # 527212/2022

DECISION AND ORDER

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for default judgment and an inquest submitted on February 29, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1&2 [Exh. A-G]
Notice of Cross-Motion and Affirmation	6&7; 8 [Exh. A-I]
Affirmation/Affidavit in Opposition	4 and 5 [Exh. A-I]
Memorandum of Law	3

Plaintiff moves pursuant to CPLR § 3215 for an order granting a default judgment against the defendant, Roofscapes, Inc. (hereinafter, "Roofscapes") and for an inquest, due to Roofscapes failure to answer the summons and verified complaint within the statutory time period. Roofscapes opposes plaintiff's motion and cross moves pursuant to CPLR § 3012(d) and CPLR §2004 for an order extending their time to serve an answer and compelling acceptance of the proposed verified answer with counterclaims and cross-claims.

This is an action to recover damages for breach of contract, professional malpractice, and negligence. In January 2021, plaintiff entered a contract with Roofscapes to design and construct a recreational roof terrace for its residential building. As part of the contract, and before any work was to commence, Roofscapes was required to retain a licensed engineer to determine the viability of the roof's structural capacity to support the proposed roof terrace, consisting of both dead and live loads. Roofscapes entered into an agreement with the defendants, Kiefer & Schuster Engineering, PLLC and Bradford T. Kiefer (hereinafter, K&S defendants), an engineering firm, to perform a feasibility study for the proposed roof terrace. The study, as delineated in the proposal sent by the K&S defendants to Roofscapes, dated February 24, 2021, would "determine the feasibility of supporting new pavers and planters on the existing roof structure as shown on [Roofscapes] drawing A201, dated 11/23/2020."

Upon completion of the feasibility study, the K&S defendants sent a letter/report to Roofscapes, dated March 1, 2021, stating that their review of the existing roof structure indicates that it could "support the additional dead load of the new pavers and planters as shown on drawing A201." Relying on this feasibility study, Roofscapes advised the plaintiff that the existing roof was able to support the terrace for its intended use and commenced construction in the spring of 2021. During the summer of 2021, plaintiff began the process of formulating house rules governing the use of the roof terrace by the residents, including the capacity limit on the number of persons who could use the roof at one time. Since the K&S defendants' report did not address the capacity limit, plaintiff made efforts to reach out directly to the K&S defendants for said information. Plaintiff hired its own independent engineer to conduct another study after the K&S defendants did not respond to plaintiff's several inquiries. Plaintiff's engineering expert advised plaintiff that the K&S defendants' report did not consider both the dead and live load capacities of the roof structure. Plaintiff's expert then performed his own inspection and performed probes of the roof and concluded that the roof structure would not support the live load of the proposed roof terrace. Based on its expert report, plaintiff determined that the roof terrace constructed by Roofscapes could not be used by its residents and had to be removed. Accordingly, plaintiff arranged for the roof terrace to be removed. Plaintiff commenced this action against Roofscapes for breach of contract and breach of warranty, and against the K&S defendants for professional malpractice and negligence arising out of the report they made to determine the structural soundness of the roof.

Discussion

In support of its motion, plaintiff submitted proof of service of the summons and complaint pursuant to BCL §306(b) and CPLR § 311; proof of the facts constituting its claim via the complaint; and proof of the Roofscapes's default in not answering or appearing within 30 days of being served on September 26, 2022. In opposition to plaintiff's motion and in support of its cross-motion, Roofscapes argues that it has a reasonable excuse for not timely interposing an answer and meritorious defenses to this action. With respect to a reasonable excuse, Roofscapes argues that it did not receive the summons and complaint due to a period of mail disruption caused by an inadequate office assistant between September 2022 and April 2023. Roofscapes can only speculate and does not know what happened to the mail that was not received. In addition, Roofscapes offered alternative theories for not receiving the summons and complaint related to its office being in a shared corporate office suite operated by ServeCorp. During the period of mail disruption, mail may have been forwarded to another client of ServeCorp, misplaced by ServeCorp, or not received due to some other reasons related to ServeCorp's operations. Roofscapes has proffered the meritorious defenses of documentary evidence; failure to state a cause of action; waiver of claims based on course of conduct; accord and satisfaction; spoliation of evidence; failure to mitigate damages; unclean hands; failure to add necessary parties; and statute of frauds.

A plaintiff seeking leave to enter a default judgment under CPLR §3215 must file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default. *See, CPLR 3215[f]; Liberty County Mut. v Avenue I Med.*, P.C., 129 A.D.3d 783, 11 N.Y.S.3d 623 (2nd Dept., 2015). A defaulting defendant is deemed to have admitted all the allegations in the complaint. *See, McGee v Dunn*, 75 A.D.3d 624, 906 N.Y.S.2d 74 (2nd Dept., 2010). An affidavit or verified complaint submitted in support of a motion pursuant to CPLR § 3215(f) for leave to enter a default judgment need only allege enough facts to determine whether a viable cause of action exists. *See, Woodson v Mendon Leasing Corp.*, 100 N.Y.2d 62, 760 N.Y.S.2d 727 (2003). To defeat a facially sufficient CPLR §3215 motion, a defendant must show either that there was no default, or that it had a reasonable excuse for its delay and a potentially meritorious defense. *See, Fried v Jacob Holding, Inc.*, 110 A.D.3d 56, 970 N.Y.S.2d 260 (2nd Dept., 2013).

Here, plaintiff has demonstrated that it has met each prong of the standard set forth by CPLR § 3215 by submitting an affidavit of service of the summons and complaint pursuant to BCL §306(b) and CPLR § 311; the complaint as proof of the facts constituting its claim; and proof that Roofscape did not answer or appear in this action within 30 days of being served on September 26, 2022. See, *Lugo v Corso*, 215 A.D.3d 944, 187 N.Y.S.3d 755 (2nd Dept., 2023). Roofscapes's arguments that its failure to appear or answer the complaint was caused by mail disruption, an inadequate office assistant, or its office being in a shared corporate office suite operated by ServeCorp are unsubstantiated and insufficient to constitute a reasonable excuse for its default. *See, Hairston v Marcus Garvey Residential Rehab Pavilion, Inc.*, 163 A.D.3d 530, 80 N.Y.S.3d 407 (2nd Dept., 2018). Furthermore, Roofscape's unsubstantiated speculation and conclusory assertions that the failure to appear or answer might possibly have been caused by an error of a former employee in neglecting to transmit the pleadings to the President and manager of Roofscape are inadequate to excuse the default. *See, Elite Limousine Plus v Allcity Ins. Co.*, 266 A.D.2d 259, 698 N.Y.S.2d 251 (2nd Dept., 1999). Inasmuch as Roofscapes failed to establish a reasonable excuse for its default, it is unnecessary to consider whether Roofscapes demonstrated the existence of a potentially meritorious defense. *See, Diaz v Wyckoff Hgts. Med. Ctr.*, 148 A.D.3d 778, 49 N.Y.S.3d 149 (2nd Dept., 2017).

Accordingly, plaintiff's motion for default judgment against Roofscapes and directing an inquest is hereby granted in the entirety.

Roofscapes's cross-motion for an order extending its time to serve an answer and compelling acceptance of the proposed verified answer with counterclaims and cross-claims is hereby denied in the entirety.

This matter is to be set down for an Inquest to determine damages on August 19, 2024, at 10:00 a.m. before this court, Room 479 at 360 Adam Street, Brooklyn, New York.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
July 8, 2024

HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
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