

UA Bldrs. Corp. v Imperial Gen. Constr., Corp.

2024 NY Slip Op 32776(U)

August 7, 2024

Supreme Court, New York County

Docket Number: Index No. 652639/2019

Judge: Emily Morales-Minerva

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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. EMILY MORALES-MINERVA PART **42M**

Justice

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INDEX NO. 652639/2019

UA BUILDERS CORP.,

MOTION DATE 05/16/2024

Plaintiff,

MOTION SEQ. NO. 005

- v -

IMPERIAL GENERAL CONSTRUCTION, CORP.,
XHELADIN VELIU, ARBEN VELIU, AFRIM VELIU

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 67, 68, 69, 70, 71
were read on this motion to/for JUDGMENT - DEFAULT

APPEARANCES:

Tuttle Yick LLP, New York, New York (Alexa Elizabeth DePierro Esq., of counsel) for plaintiff.

HON. EMILY MORALES-MINERVA:

In this action for, among other things, breach of contract, plaintiff UA BUILDERS CORP. ("UA Builders") moves, pursuant to CPLR § 3215 and 22 NYCRR § 202.27(a) for an order: (1) granting it leave to enter a default judgment against defendant IMPERIAL GENERAL CONSTRUCTION, CORP. ("Imperial"), (2) striking defendant Imperial's answer, (3) dismissing Imperial's counterclaims with prejudice, and (4) granting it such other and further relief as the court deems proper. No opposition is submitted.

For the reasons set forth below, the court denies the motion (seq. no. 005) in its entirety.

BACKGROUND

UA Builders was a general contractor for three projects ("Projects") throughout Bronx County, New York. UA Builders retained Imperial to serve as the roofing subcontractor for the Projects under three separate subcontracts in or around July 2018 (see NYSCEF Doc. No. 40, Subcontracts). UA Builders allege that Imperial failed to complete the work it was contracted for. It follows that, on May 3, 2018, UA Builders filed a compliant alleging breach of contract, unjust enrichment, fraud, and negligence.

On September 9, 2019, Imperial appeared in this action, through counsel, and filed an answer to UA Builders' complaint, with counterclaims. Note of Issue was then filed on October 12, 2021, whereby UA Builders demanded "not less than \$75,000.00 plus interest costs, fees and disbursements" (see NYSCEF Doc. No. 32, Note of Issue).

By notice of motion (seq. no. 002), dated December 13, 2021, UA Builders moved, pursuant to CPLR § 3212, for an order granting it summary judgment against all defendants. By Decision and Order dated June 17, 2022 (N. Bannon, J.S.C.), the court

granted UA Builders' summary judgment motion (seq. no. 002) to the extent of dismissing the complaint as against defendants XHELADIN VELIU, ARBEN VELIU, AFRIM VELIU (collectively "individual defendants"), but severed and continued the first three causes of action as against Imperial.

By notice of motion (seq. no. 003) dated August 10, 2023, Imperial's counsel moved to be relieved, citing Imperial's failure to cooperate and pay attorney fees. The court (N. Bannon J.S.C) granted said motion and stayed the matter for thirty days, instructing defendant Imperial to retain new counsel. The Decision and Order further states that the parties "shall appear for the settlement conference scheduled for October 3, 2023" (NYSCEF Doc. No. 60, Decision and Order [N. Bannon J.S.C.], dated August 10, 2023, p 2).

On October 3, 2023, defendant Imperial failed to appear for the scheduled settlement conference and failed to notify the court of any substitute counsel. On that basis, UA Builders moved, by notice of motion (seq. no. 004) dated October 19, 2023, pursuant to CPLR § 3215 and 22 NYCRR § 202.27(a), to strike Imperial's answer and counterclaims, and for leave to enter a default judgment. The court (N. Bannon, J.S.C.) denied said motion without prejudice.

In denying said application, Honorable Nancy Bannon did not strike Imperial's answer, but did hold that "any further default

shall result in the striking of Imperial's answer and counterclaim" (see NYSCEF Doc. No. 66, Decision and Order, dated October 19, 2023, p 2). The same court also held that plaintiff did not demonstrate entitlement to default judgment, pursuant to CPLR § 3215, reasoning that plaintiff submits "only an affirmation of counsel, which is insufficient" (id.).

Thereafter, the undersigned scheduled a status conference in this matter. At said conference, plaintiff UA Builders appeared, by counsel, and defendant Imperial did not appear. During the conference, this court directed plaintiff to file the instant application on or before May 16, 2024.

UA Builders submitted the instant motion (seq. no. 005) on May 16, 2024. In the instant motion, plaintiff attempts to cure the defect in their previous motion (seq. no. 004) by submitting the affirmation of Albert Gurakuq Gjonbalaj, an authorized signatory of UA Builders.¹ Imperial neither appeared nor submitted any opposition to the subject application.

¹ The court notes the discrepancy of \$46,291.00 and \$75,000.00 in the relief requested in the affirmation of Albert Gurakuq Gjonbalaj and the complaint (see Reynolds Sec., Inc. v Underwriters Bank & Tr. Co., 44 NY2d 568 [1978] [providing that where damages sought are for a "sum certain," there can be no dispute as to the amount due for a money judgment under a default judgment motion]).

ANALYSIS

A proponent for a default judgment must provide proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default (CPLR § 3215 [f]; see also Gordon Law Firm, P.C. v Premier DNA Corp., 205 AD3d 416, 416 [1st Dept 2022]). A court lacks personal jurisdiction over a defendant who is not properly served with process (see Nationstar Mtge., LLC v. Esdelle, 186 A.D.3d 1384, 1386 [2d Dept 2020]). Furthermore, the movant must comply with the additional mailing requirements, as articulated in CPLR § 3215(g).²

Here, in support of its motion for a default judgment against corporate defendant Imperial, UA Builder submits an affidavit of service, pursuant to Business Corporation Law § 306. The affidavit of service indicates that process server James Boland effectuated service of the summons and complaint on the Secretary of State on May 31, 2019, at 2:40PM (see NYSCEF Doc. No. 002, affidavit of service). However, UA Builders failed to demonstrate compliance with the additional service

² CPLR 3215[g][4][i] provides, in pertinent part, that when a default judgment is sought against a corporation that has been served by service upon the Secretary of State (see Business Corporation Law § 306[b]), the plaintiff must mail an additional copy of the summons and complaint to the corporation “via first class mail” at its “last known address,” and it “shall be accompanied by a notice to the corporation that service is being made pursuant to Business Corporation Law § 306.”

requirements that apply to corporate defendants pursuant to CPLR § 3215(g)4).

The May 16, 2024 affidavit of service, affirms that the notice of motion, with exhibits annexed thereto, was served on Imperial (see NYSCEF Doc. No. 71, affidavit of service; see CPLR § 3215[g][1] [providing that a defendant that has appeared is entitled to "at least five days' notice of the time and place of the application"])). Yet, UA Builders fail to comply with the additional notice requirements for service upon a corporation under CPLR § 3215(g)(4)(i). The affidavit of service submitted does not indicate (1) it included the summons and complaint, (2) that service was "being made or has been made" pursuant to Business Corporation Law § 306, and (3) that the mailing address is the "last known address" of the corporate defendant Imperial (see CPLR § 3215[g][4][i]). As such, the plaintiff's motion for default judgment against Imperial is denied.

Additionally, the court denies the motion to strike Imperial's answer, and to dismiss Imperial's counterclaims with prejudice under 22 NYCRR 202.27(a). "In the absence of actual notice of the ... conference date, the defendant's failure to appear at that conference 'could not qualify as a failure to perform a legal duty, the very definition of a default'" (Foley Inc. v Metropolis Superstructures, Inc., 130 AD3d 680 [2d Dept 2015], quoting Pelaez v Westchester Med. Ctr., 15 AD3d 375 [2d

Dept 2005]). Here, UA Builders provides no evidence that Imperial was given notice of the April 11, 2024 status conference. Further, a search of court record also reveals no evidence that Imperial, as an unrepresented corporate defendant, was given notice of the conference date. Thus, under the circumstances, and considering that public policy favors resolution of cases on the merits, this court denies the motion in its entirety, without prejudice, upon renewal of proper papers within 30 days of the date of this order (see Harwood v Chaliha, 291 AD2d 234 [1st Dept 2002]).

Accordingly, it is

ORDERED, that plaintiff UA BUILDERS CORP.'s motion for default judgment against defendant IMPERIAL GENERAL CONSTRUCTION CORP. is denied, without prejudice, upon renewal of proper papers within 30 days of the date of this order.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

8/7/2024

DATE


EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: