

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

2024 NY Slip Op 34407(U)

December 11, 2024

Supreme Court, New York County

Docket Number: Index No. 652639/2019

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

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UA BUILDERS CORP.,

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 652639/2019

MOTION DATE 09/05/2024

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 73, 74, 75, 76, 77, 78, 79, 80

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, the court denied, without prejudice plaintiff UA BUILDERS CORP.'s motion (seq. no. 05) for an order, granting a default judgment against defendant IMPERIAL GENERAL CONSTRUCTION, CORP. (Imperial Corp.). Now, for a second time, plaintiff moves, by notice of motion (seq. no. 06), for an order: (1) granting it a default judgment against Imperial Corp., (2) striking Imperial Corp.'s answer, (3) dismissing Imperial Corp.'s counterclaims with prejudice, and (4) scheduling an inquest to determine

damages and attorneys' fees (see CPLR § 3215 [governing default judgements]). Imperial Corp. makes no appearance and submits no opposition.

If a defendant fails "to appear, plead or proceed to trial of an action reached and called for trial . . . the plaintiff may seek a default judgment against [the defendant]" (CPLR § 3215 [a]). Generally, the proponent of a default judgment, shall file proof of (1) service of the summons and the complaint, of (2) the facts constituting the claim, and of (3) the default and the amount due (See CPLR § 3215 [f]). Further, where the non-appearing defendant is a corporation, the proponent of a default judgment shall also submit "an affidavit [of] additional service of the summons by first class mail [on] the defendant at its last known address at least twenty days before the entry of judgment" (CPLR 3215 [g] [4] [ii])

Here, plaintiff submits proof that it properly served Imperial Corp. with the summons and complaint and with the requisite additional notice (see NYSCEF Doc. No. 80, affidavit of service, dated September 5, 2024). Further, plaintiff submits proof of the facts constituting the claim (see NYSCEF Doc. No. 79, affidavit of Albert Gurakuq Gjonbalaj, dated May 16, 2024, p 3-5).

However, as plaintiff does not seek a sum certain, an inquest is required for proof of damages (see Arent Fox Kintner

Plotkin & Kahn, PLLC v Lurzer GmbH, 297 AD2d 590, 590 [1st Dept 2002] [providing "a default judgment may be determinative of liability but not the amount of damages to be awarded, unless there can be no dispute as to the amount due, the amount sought being a 'sum certain'"; Reynolds Secs. v. Underwriters Bank & Trust Co., 44 NY2d 568 (1978); see also CPLR § 3215(a)].

The inquest shall be limited to damages from the subject breach of contract and shall not include a hearing on attorneys' fees. "Under the American Rule, a prevailing party in litigation generally may not recover attorney's fees from the losing party" (Sage Sys., Inc. v. Liss, 39 NY3d 27, 29 [2022], citing Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989]). No such recovery is permissible absent statute, agreement, or contract, containing "'unmistakably clear' language" permitting a successful party to payment of attorneys' fees (Sage Sys, Inc., 39 NY3d at 31 [emphasis added], quoting Hooper, 74 NY2d at 492).

Here, plaintiff relies on paragraph 33 of the subcontracts at issue, to support its contention of entitlement "to recover 'all collections costs and attorneys' fees' incurred in connection with a breach of the subcontracts" (see NYSCEF Doc. No. 74, affirmation in support of motion, p 9; see NYSCEF Doc. No. 79, affidavit of Albert Gurakuq Gjonbalaj, p 3-5; see also

NYSCEF Doc. No. 40, Subcontracts p 5, 26, 51). The dispositive and clear language of said paragraphs read:

"If [the parties engage in arbitration and a party challenge] . . . the Arbitrator's decision . . . in the State Court and such challenge is thereafter rejected, by appeal or otherwise, the prevailing Party shall be entitled to its reasonable attorneys' fees and expenses for such proceeding(s)"

(NYSCEF Doc. No. 40, Subcontracts p 5, 26, 51 [emphasis added]).¹

This case presents no such challenge and no such prevailing party.

Accordingly, it is

ORDERED that plaintiff UA BUILDERS CORP.'s motion for default judgment against defendant IMPERIAL GENERAL CONSTRUCTION CORP. is granted to the limited extent that defendant is found liable for breach of contract and the matter shall be set down for an inquest on damages, and the motion is denied to the

¹ Paragraph 33 in each subcontract states in full: "In the event of a claim or dispute arising out of the Work called for in this Agreement, Contractor or the Subcontractor, may, by written notice to the other, seek to resolve such claim, or dispute as follows: within ten (10) days of such written notice, a meeting shall take place between no less than one principal of Contractor or Contractor's Project Manager, and the Subcontractor, wherein an attempt shall be made in good faith to resolve the claim or dispute. If the disagreement is not resolved during this initial meeting, one or more additional meetings shall promptly be held until such time as the matter is resolved. If a principal of either Contractor or the Subcontractor declares an impasse between the parties with regard to the claim or dispute, then the claim or dispute shall be resolved by arbitration in accordance with JAMS rules for the administrative appointment of an arbitrator. The decision rendered by the Arbitrator shall be final and judgment may thereafter be entered upon it in the Supreme Court of the State of New York. The Arbitrator's decision may only be challenged upon grounds as provided in applicable State law. If a challenge to the Arbitrator's decision is made by a party in the State Court and such challenge is thereafter rejected, by appeal or otherwise, the prevailing Party shall be entitled to its reasonable attorneys' fees and expenses for such proceeding(s). The venue for any arbitration proceeding pursuant to this Agreement shall be conducted in the County of New York, State of New York. This provision shall not apply to third-party claims for contribution and indemnity" (NYSCEF Doc. No. 40, Subcontracts p 5, 26, 51 [emphasis added]).

extent that plaintiff seeks an award of attorneys' fees; it is further

ORDERED that this matter is scheduled for an inquest of damages in room 574, Part 42, at 111 Centre Street New York, NY 10013, on March 10, 2025 at 11:00 A.M.; and it is further

ORDERED that defendant IMPERIAL GENERAL CONSTRUCTION CORP.'s answer and counterclaims are stricken, pursuant to 22 NYCRR § 202.27, without prejudice; it is further

ORDERED that, within ten (10) days of this order, plaintiff UA BUILDERS CORP., shall serve a copy of this Order, with notice of entry, by overnight mail, return receipt requested, on defendant IMPERIAL GENERAL CONSTRUCTION CORP., and shall also file such notice via NYSCEF; and it is further

ORDERED that plaintiff shall file with the court proof of such service, by affidavit or affirmation, prior to the inquest date.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

12/11/2024

DATE

Emily Morales-Minerva

EMILY MORALES-MINERVA, JSC

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: