

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 19 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 4-11-03

Submission Date: 11-5-03

Motion Sequence No.: 006,007/MOT D

ELIA ALY LIZZA and MARISA LIZZA,
Plaintiff,

COUNSEL FOR PLAINTIFF

Gervase Vellone, Esq.

1101 Stewart Avenue

Garden City, New York 11530

- against -

COUNSEL FOR DEFENDANT

(for MCM Ironworks)

Ronald Cohan, Esq.

353 West 56th Street

New York, New York 10019

**AANITRON SYSTEMS, INC., ALL TYPE
MASON CONSTRUCTION CORP.,
ALPINE PLUMBING, BRYANT AIR
CONDITIONING CONTRACTORS, DEER
PARK STAIR BUILDING AND
MILLWORK CO., INC., F & D
CONTRACTORS, FLO-RITE GUTTER
CO., RON GIBBONS SWIMMING
POOLS, INC., ISLAND WIDE
MECHANICAL SYSTEMS, INC., MCM
IRON WORKS, PRECISION TILE &
MARBLE, INC., PRIMO FLOORING,
INC., ANGELO PUTRONI, R & B
DRYWALL CORP., G. ROMA ROOFING
CO., INC., SANTOS CONSTRUCTION
PROGRESS, INC., STARK CARPET,
ANDREW STELWACH, WINDOWRAMA,
LABRIOLA FURNITURE, and ANTHONY
LABRIOLA,**

(for Putroni & Purino)

Caprtola & Doddato, Esqs.

2C Hillside Avenue

Williston Park, New York 11596

(for Anthony Labriola)

Entwistle & Capucci, Esqs.

400 Park Avenue

New York, New York 10171

(for All Type Mason Construction)

Hofman & Behar, Esqs.

94 Second Street

Mineola, New York 11501

Defendants.

(for G. Roma Roofing Co. Inc.,)

Lustig & Hermer, Esqs.

2100 Deer Park Avenue

Deer Park, New York 11729

x

**(for Flo Rite Gutters)
Siben & Siben, Esqs.
90 East Main Street
Bayshore, New York 11706**

**(for Ron Gibbons Swimming Pools)
Schwartz, Licitra, Esqs.
1475 Franklin Avenue
Garden City, New York 11530**

ORDER

The following papers were read on Plaintiff's motion for leave to enter a default judgment against Defendants MCM Iron Works, Labriola Furniture, Santos Construction Progress, Inc., Primo Flooring, Inc. and R & B Drywall Corp. to amend the caption and to correct the name of Labriola Furniture and for counsel fees, and the cross-motion of Defendant MCM to vacate its default:

Notion of Motion dated March 10, 2003;
Affidavit of Marisa Lizza sworn to on March 10, 2003;
Affidavit of Genevieve Lane Lo Presti, Esq. sworn to on March 7, 2003;
Notice of Cross-motion dated May 2, 2003;
Affirmation of Ronald Cohen, Esq. dated May 2, 2003;
Affidavit of Guiseppe Montemali sworn to on April 30, 2003.

INTRODUCTION

Plaintiffs Elia Aly Lizza and Marisa Lizza ("Lizza") move for leave to enter a default judgment against the Defendants MCM Ironworks, ("MCM"), Labriola Furniture, ("Labriola"), Santos Construction Progress, Inc. ("Santos"), Primo Flooring, Inc. ("Primo"), R & B Drywall Corp. ("R& B"); to amend the caption to change the name of Labriola Furniture to Louis Labriola Furniture; and for counsel fees.

Defendant MCM cross-moves for an order vacating its default, requiring Plaintiff to serve a complaint, severing the action against MCM dismissing the action brought by

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the Plaintiff Elia Aly Lizza, and dismissing the conspiracy, fraud and breach of fiduciary claims.

Lizza and MCM have stipulated to permit MCM to appear in the action and interpose an answer. As a result, MCM has withdrawn its cross motion. The stipulation also renders Lizza's motion moot as to MCM.

Lizza has since voluntarily discontinued the action against the Defendants Primo and R&G.

BACKGROUND

In 1996, Lizza entered into an agreement with Angelo Pironi, Pironi Estates at Woodbury, Pironi Development Company and/or Pironi Builders, Inc. (collectively "Pironi") pursuant to which Pironi agreed to construct a custom one-family home for Lizza.

Pironi performed some of the construction and supervised all of the construction work at the premises during the period 1996 through 1999. Lizza's claims against Pironi arising from this construction are the subject of a separate action.

Lizza retained the various Defendants in this action upon the recommendation of Pironi as sub-contractors to perform portions of the construction work. Lizza alleges that they fully complied with the contract with Pironi and the subcontractors.

Lizza sets forth a litany of problems relating to this construction arising from (1) the failure of Pironi and the Defendants in this action to construct the premises in accordance with the plans and specifications; (2) the use of defective or substandard

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materials; (3) the use of materials other than those set forth in the plans and specifications or required by the contracts; and (4) shoddy, defective or substandard construction and workmanship.

Labriola was to provide high quality cabinets for installation at the premises. Lizza asserts that the cabinets delivered by Labriola were made of pressed board. Lizza also claims that these cabinets fell off the hinges and had to be repaired.

Santos was to install and spackle the sheetrock and wallboard and construct the fireplace. Lizza asserts that the fireplace is uneven and that the sheetrock was not properly installed or spackled.

This action was commenced on December 17, 2001 by filing of a summons with notice with the County Clerk, Nassau County. The notice on the summons indicates that Lizza is seeking to recover damages in the sum of \$15,000,000.00 for breach of contract, fraud, breach of warranty, conspiracy, breach of fiduciary duty, breach of guarantee and negligence.

The summons with notice was served upon Santos on February 20, 2002 by serving the Secretary of State as statutory agent for the corporation. See, Business Corporation Law §306.

The summons with notice was served upon Labriola pursuant to Business Corporation Law §307 on April 10, 2002. Business Corporation Law §307 permits a foreign corporation not authorized to do business in New York which is subject to the jurisdiction of the courts in New York to be served by serving the Secretary of State.

Santos and Labriola have not appeared in this action. Their time to do so has not been extended by written or oral stipulation or by Court order.

DISCUSSION

CPLR 3215(a) permits the Plaintiff to enter a default judgment against a Defendant who has failed to appear in an action. The application for leave to enter a default judgment must be made within one year of the default. CPLR 3215(c).

An application for leave to enter a default judgment must be supported by proof of service of the summons and complaint or summons with notice, an affidavit of facts made by a person with actual knowledge of the facts constituting the claim and proof of the default. CPLR 3215(f). See also, Siegel, *New York Practice* 3rd §295.

Santos was served on February 20, 2002 by serving the Secretary of State as statutory agent for the corporation. Santos, therefore, had 30 days after it was served to appear by filing a notice of appearance or moving against the summons with notice. CPLR 320(a). Santos defaulted when it failed to appear by March 20, 2002.

A motion is made when the notice of motion is served. CPLR 2211. Lizza's motion for a default judgment was made on March 10, 2003, when the motion papers were served. Therefore, the motion was made within one year of Santos' default. The motion is unquestionably timely in regard to Labriola since Labriola was served on April 10, 2002.

The motion is supported by an affidavit of Marisa Lizza in which she details the general problems with the construction and the specific problems resulting from the

work performed by or materials furnished by Labriola and Santos.

Since the time for Santos and Labriola to appear or move as against the summons with notice has expired and such time has not been extended by stipulation or court order, said Defendants are in default.

Since Lizza has demonstrated merit to the claim, Plaintiff should be granted leave to enter a default judgment against said Defendants.

Where the amount of damages claimed on the default is not a sum certain or an amount which can be calculated with certainty, the court must set the matter down for a hearing on the issue of damages. CPLR 3215(a) and (b). See also, Siegel, *New York Practice 3rd* §293. In this case, Lizza has offered no proof of damages in the papers submitted in support of their application for a default judgment. Therefore, the matter should be set down for a hearing on the issue of damages.

Since the action will have to be tried on the issue of liability and damages with regard to the Defendants who have appeared in this action, the action against Santos and Labriola must be severed and the hearing on the issue of damages against Santos and Labriola will be held at the same time that the trial against the remaining appearing Defendants.

CPLR 2001 permits a the Court to correct a mistake or irregularity upon such terms as may be just if a substantial right of a party is not prejudiced. In this circumstance, Plaintiff seeks to amend the caption to reflect to proper name of the Defendant as Louis Labriola Furniture. The court may correct or amend the caption of

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an action to reflect the proper name of a party provided that the party has not been prejudiced by the correction and should have been aware from the outset that the party was improperly named. Covina v. Alside Aluminum Supply Co., 42 A.D.2d 77 (4th Dept. 1973). See also, JCD Farms, Inc. v. Juul-Nielson, 300 A.D. 2d 446 (2nd Dept. 2002); Frankart Furniture Staten Island, Inc. v. Forest Mall Assocs., 159 A.D. 2d 322 (1st Dept. 1990). In this case, there is no prejudice demonstrated. The invoice issued by Labriola which is attached to the motion papers clearly identified the job to which the material was furnished, the items to be furnished and the Defendants proper name. Labriola is in default. It cannot and did not claim that it will incur any prejudice by permitting the caption to be amended to reflect its proper name. Therefore, the motion to correct the caption must be granted.

The party who prevails in an action may not recover legal fees from the losing party unless an award of legal fees is authorized by statute, court rule or agreement between the parties. Hooper Assocs. Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487 (1989); and In re Hayvesky, 302 A.D.2d 524 (2nd Dept., 2003).

Lizza does not set forth any statute or court rule which would provide for the award of legal fees nor do they provide a copy of any agreement which provides for the award of legal fees. Therefore, Lizza's application for legal fees must be denied.

Accordingly, it is,

ORDERED, that Plaintiffs' motion for leave to enter a default judgment against the Defendants Santos and Labriola is **granted**; and it is further,

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ORDERED, that the action against said Defendants is severed and set down for a hearing on the issue of damages at the time of the trial of the action against the appearing Defendants; and it is further,

ORDERED, that a copy of this order with notice of entry shall be served upon the Defendants Santos and Labriola by mailing a copy thereof to them at the address set forth in the notice of motion by certified mail, return receipt requested and regular mail with certificate of mailing and upon the attorneys for the parties who have appeared in this action pursuant to CPLR 2103(b)(2); and it is further,

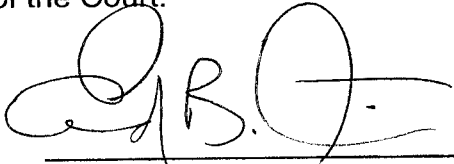
ORDERED, that the caption of the action shall be amended and corrected to reflect the proper name of the Defendant Labriola Furniture as Louis Labriola Furniture; and it is further,

ORDERED, that Plaintiffs' motion for legal fees is **denied**; and it further,

ORDERED, that the attorneys for the parties are directed to appear for a conference before the Court on March 5, 2004 at 9:30 AM.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
February 6, 2004



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

FEB 11 2004

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**