

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

**TRIAL/IAS PART 5
NASSAU COUNTY**

**METROSEARCH REAL ESTATE AND CREDIT
SERVICES, INC.,**

Plaintiff(s),

-against-

**PRESTIGE LAND SERVICES, LLC, JB & ML
LAND SERVICES, LLC, MICHAEL LAPORTA
and PRESTIGE LAND SERVICES, INC.,**

Defendant(s).

**ORIGINAL RETURN DATE:08/28/08
SUBMISSION DATE: 08/28/08
INDEX No.: 8121/08**

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion..... 1

Plaintiff's unopposed motion for an order declaring defendants in default and setting this matter down for an inquest on the issue of damages is granted as to defendants, Prestige Land Services, LLC, JB & ML Land Services, LLC and Prestige Land Services, Inc. (the "corporate defendants"), and denied, without prejudice to renewal, as to defendant, Michael Laporta (the "individual defendant"). The mere fact that a motion is unopposed has been specifically rejected as a basis for overlooking the failure to submit *prima facie* evidence of valid service. *See, generally, Rivera v. Laporte*, 120 Misc. 2d 733, 466 N.Y.S.2d 606 (Sup. Ct., N.Y. Co. 1983).

Plaintiff seeks to recover damages on the first cause of action for breach of contract, on the second cause of action for quantum meruit, on the third cause of action for unjust enrichment, and on the fourth cause of action for costs and legal fees.

The summons and verified complaint were served upon defendants, Prestige Land Services, LLC nka JB & ML Land Services, LLC, Prestige Land Services, Inc. and JB & ML Land Services, LLC, by service upon the Secretary of State on May 16, 2008. The affidavits of service were filed in the Nassau County Clerk's Office on May 22, 2008. The time for the corporate defendants to appear and answer has expired.

The summons and verified complaint was served upon the individual defendant on July 2, 2008, pursuant to CPLR 308(2). The affidavit of service was filed with the Nassau County Clerk's

Office on July 15, 2008. CPLR 308(2) provides, in pertinent part, as follows: "proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing." Service was not complete until July 25, 2008. The individual defendant's time to appear or answer did not expire until thirty (30) days thereafter. This motion was made on July 17, 2008, prior to the expiration of the individual defendant's time to appear or answer.

Accordingly, this matter is referred to the Calendar Control Part (CCP) for an inquest on the issue of damages as to the corporate defendants, Prestige Land Services, LLC, JB & ML Land Services, LLC and Prestige Land Services, Inc., to be held on October 14, 2008, at 9:30 a.m.

Plaintiff shall file a Note of Issue, provided none has been previously filed, together with a copy of this order, with the Nassau County Clerk and shall serve copies of same, together with proof of payment of any fees, upon the Calendar Clerk of this Court within twenty (20) days of the date of this order.

The directive with respect to the inquest is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer (JHO), or a Court Attorney/Referee, as he or she deems appropriate. A JHO or Court Attorney/Referee shall not be used, however, unless said JHO or Court Attorney/Referee has the power to hear and determine, and not merely hear and report (see CPLR Article 43).

The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the inquest.

Plaintiff is further directed to serve a copy of this order upon the corporate defendants by certified mail, return receipt requested, at least ten (10) days before the inquest date.

To insure that this action does not languish as to the individual defendant, Michael Laporta, a Preliminary Conference shall be held.

Plaintiff and individual defendant, Michael Laporta, are directed to appear on October 14, 2008, at 9:30 a.m. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order. Movant is directed to serve a copy of this order, together with a copy of the Request for Judicial Intervention (RJI), upon the individual defendant, Michael Laporta, forthwith upon receipt of a copy of same from any source and to thereafter provide proof of such service upon chambers.

Appearance at said Preliminary Conference is excused only if plaintiff has previously filed a renewal motion for a default judgment against the individual defendant, Michael Laporta.

This decision constitutes the order of the court.

Dated: 9-19-08

ENTERED

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

SEP 29 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

RE: METROSEARCH REAL ESTATE v. PRESTIGE, et al.

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