

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice.

TRIAL/IAS PART 4
NASSAU COUNTY

NECON CORP.,

Plaintiffs,

-against-

STEPHEN WEINBERG & MAGOT REICHE
WEINBERG,

Defendants.

ORIGINAL RETURN DATE: 07/08/09
SUBMISSION DATE: 07/22/09
Index No. 002040/09

MOTION SEQUENCE #1

The following papers read on this motion:

Order to Show Cause.....	1
Affidavit in Opposition	2
Reply Affidavit.....	3

Defendants move pro se for an order dismissing the action and voiding/cancelling the mechanic's lien. Plaintiff opposes the motion.

The instant action was brought for breach of contract and to foreclose on a mechanic's lien. The complaint alleges that the sum of \$21,125.00 is due and owing to plaintiff from defendants for construction performed at premises 34 Cathay Road, East Rockaway, New York.

Although defendants do not allege the grounds for dismissal, it appears that they move pursuant to CPLR 3211(a)(1) that plaintiffs' cause of action for breach of contract is barred by documentary evidence relying on the contract. "To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (citations omitted)" (*Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept. 2001]).

That is not the case here. Defendants admit that there is \$4,000.00 due under the terms of the contract but dispute that the sum of \$21,125.00 is due. Plaintiff contends that it is entitled to be paid for extras demanded by defendants which benefitted them.

Plaintiff's request for a default judgment against Margot Reiche Weinberg will not be considered by the court in that no motion for the relief requested has been made. Moreover, the answer of defendants clearly indicates that the "defendants Stephen Weinberg and Margot Reiche Weinberg, respectfully show[s]."

Defendants interposed their answer on or about March 24, 2009. The answer contained an affirmative defense that the court lacks personal jurisdiction. Such objection is waived unless a motion for judgment on that ground is made within sixty (60) days after service of the pleading (CPLR 3211(e)). The order to show cause is dated June 22, 2009 (Phelan, J.).

Based upon all of the foregoing, defendants' motion is denied.

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held. The parties or their counsel are directed to appear on September 24, 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.

This decision constitutes the order of the court.

Dated: 8-13-09

~~HON THOMAS P. PHELAN~~

~~THOMAS P. PHELAN, J.S.C.~~

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Stephen Weinberg and
Margot Reiche Weinberg
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East Rockaway, New York 11518

ENTERED

AUG 19 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**