

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D33060  
O/kmb

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Argued - October 14, 2011

MARK C. DILLON, J.P.  
THOMAS A. DICKERSON  
CHERYL E. CHAMBERS  
ROBERT J. MILLER, JJ.

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2010-03012  
2010-04979  
2010-05033  
2010-05035  
2010-09343

DECISION & ORDER

Donald Felix, respondent, v Law Office of  
Thomas F. Liotti, appellant.

(Index No. 8395/07)

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Thomas F. Liotti, Garden City, N.Y., for appellant.

Donald Felix, Stormville, N.Y., respondent pro se.

In an action to recover damages for breach of contract, the defendant appeals (1) from a judgment of the Supreme Court, Nassau County (Lally, J.), dated December 23, 2009, which, upon an order of the same court (Diamond, J.), dated June 30, 2008, denying, inter alia, its motion for summary judgment dismissing the complaint and, upon searching the record, awarding summary judgment to the plaintiff on the issue of liability, and upon a decision of the same court (Lally, J.), dated October 28, 2009, made after an inquest on the issue of damages, is in favor of the plaintiff and against it in the principal sum of \$13,333.34, (2), as limited by its brief, from so much of an order of the same court (Lally, J.) dated February 18, 2010, as denied that branch of its motion which was pursuant to CPLR 4404(b) to set aside the judgment, (3) from an order of the same court (Lally, J.) dated April 23, 2010, which granted that branch of the plaintiff's motion which was to amend the judgment to include taxation of an additional allowance of \$300 in costs pursuant to CPLR 8201(3), (4) from an order of the same court (Lally, J.), also dated April 23, 2010, which denied its motion pursuant to CPLR 2201 to stay enforcement of the judgment, and (5) from so much of an order of the same court (Diamond, J.) dated September 17, 2010, as denied its motion pursuant to CPLR 5015(a)(3) to vacate the order dated June 30, 2008, denying, inter alia, its motion for summary

December 6, 2011

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FELIX v LAW OFFICE OF THOMAS F. LIOTTI

judgment dismissing the complaint and, upon searching the record, awarding summary judgment to the plaintiff on the issue of liability, and denied its motion pursuant to CPLR 6301 and 6313 to restrain the plaintiff from enforcing or assigning the judgment.

ORDERED that the judgment dated December 23, 2009, is affirmed; and it is further,

ORDERED that the order dated February 18, 2010, is affirmed insofar as appealed from; and it is further,

ORDERED that the appeal from the first order dated April 23, 2010, granting that branch of the plaintiff's motion which was to amend the judgment dated December 23, 2009, to include taxation of an additional allowance of \$300 in costs, is dismissed as abandoned; and it is further,

ORDERED that the second order dated April 23, 2010, denying the defendant's motion pursuant to CPLR 2201 to stay enforcement of the judgment dated December 23, 2009, is affirmed; and it is further,

ORDERED that the order dated September 17, 2010, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

Pursuant to a May 28, 2002, retainer agreement, the defendant was required to perform three tasks for the plaintiff in exchange for an attorney's fee in the sum of \$20,000. The defendant failed to perform two of the three agreed-upon tasks, despite having been paid in full. The plaintiff informed the defendant by letter dated February 8, 2006, that he was discharging the defendant for cause, and sought the return of any unearned fees. The defendant denied the plaintiff's request for the return of any unearned fees, prompting the plaintiff to file a pro se complaint alleging breach of contract. Based on the evidence that the defendant had not performed all of the agreed upon tasks under the terms of the retainer agreement, the Supreme Court, inter alia, denied the defendant's motion for summary judgment dismissing the complaint and, upon searching the record, awarded summary judgment to the plaintiff on the issue of liability. Following an inquest on damages, the Supreme Court entered judgment in favor of the plaintiff and against the defendant in the principal sum of \$13,333.34.

On appeal, the defendant provides no valid basis for reversing the judgment. It is clear that the defendant made a promise to perform, but there was no subsequent performance with respect to two of the three tasks that formed the basis for the \$20,000 attorney's fee (*see Reidy v Martin*, 77 AD3d 903; *Henry v Brenner*, 271 AD2d 647, 647-648; *Kaplan v Sachs*, 224 AD2d 666, 667). All of the defendant's contentions in support of reversal, including that it substantially complied with the terms of the retainer agreement, that the Supreme Court miscalculated damages, that the two Supreme Court Justices involved in this action should have recused themselves, that the plaintiff lacked standing, and that the plaintiff improperly filed successive motions for summary judgment, are without merit.

Additionally, the Supreme Court properly denied the defendant's motion to vacate the order, inter alia, awarding summary judgment to the plaintiff on the issue of liability. "A motion pursuant to CPLR 5015(a)(3) based upon alleged fraud or misconduct of an adverse party must be made within a 'reasonable time'" (*Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080, 1082, quoting *Bank of N.Y. v Stradford*, 55 AD3d 765, 765; *Sieger v Sieger*, 51 AD3d 1004, 1006). The defendant's motion pursuant to CPLR 5015(a)(3) was not made within a "reasonable time" and, in any event, the defendant's contentions in support of the motion are without merit.

Furthermore, there is no merit to the defendant's contention that the Supreme Court should have stayed enforcement of the judgment pursuant to CPLR 2201 (*see Inner City Telecom. Network v Sheridan Broadcasting Network*, 260 AD2d 257, 258). The defendant also failed to support its contention that it was entitled to a restraining order pursuant to CPLR 6301 and 6313.

The defendant's remaining contention is without merit.

DILLON, J.P., DICKERSON, CHAMBERS and MILLER, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court