

**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY**

**PRESENT: Honorable Elizabeth H. Emerson**

\_\_\_\_\_  
JOHN HACKELING, X

Plaintiff,

-against-

**PRYOR CASHMAN SHERMAN & FLYNN  
LLP,**

Defendant.  
\_\_\_\_\_ X

**PRYOR CASHMAN LLP,**

Third-Party Plaintiff,

-against-

**RIFKIN-YOUNG FINE ARTS, INC. and  
BENJAMIN RIFKIN,**

Third-Party Defendants.  
\_\_\_\_\_ X

MOTION DATE: 4-13-12  
SUBMITTED: 5-3-12  
MOTION NO.: 002-MG; RR; RTC

**LAW OFFICES BRUCE KENNEDY, P.C.**  
Attorney for Plaintiff  
31 Greene Avenue  
Amityville, New York 11701

**PRYOR CASHMAN LLP**  
Attorneys for Defendant and Third-Party  
Plaintiff  
7 Times Square  
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Upon the following papers numbered 1-12 read on this motion to renew and reargue ; Notice of Motion and supporting papers 1-8 ; Notice of Cross Motion and supporting papers \_\_\_\_\_ ; Answering Affidavits and supporting papers 9-12 ; Replying Affidavits and supporting papers \_\_\_\_\_ ; it is,

**ORDERED** that this motion by the plaintiff for leave to renew and reargue the defendants' motion for summary judgment dismissing the complaint, which was granted without opposition by an order of this court dated February 6, 2012, is deemed a motion to vacate the plaintiff's default in opposing the prior motion for summary judgment and for leave to submit opposition thereto; and it is further

**ORDERED** that the motion is granted; and it is further

**ORDERED** that the prior motion by the defendant for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that the parties are directed to appear for a conference, which shall be held on September 27, 2012 at 11:00 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

As a defaulting party, the plaintiff's remedy is limited to vacatur of his default (*see, Matter of Kurth v Susskind*, 200 AD2d 572, 573-574). Accordingly, the plaintiff's motion for leave to renew and reargue is deemed a motion to vacate the plaintiff's default in opposing the prior motion for summary judgment and for leave to submit opposition thereto (*see, Kun Sik Kim v State St. Hospitality, LLC*, 94 AD3d 710, 711).

A party seeking to vacate an order entered upon his default in opposing a motion must demonstrate a reasonable excuse for his default and the existence of a potentially meritorious opposition to the prior motion (**Id.**). The court has discretion to accept law office failure as a reasonable excuse (*see, CPLR 2005*) when, as here, the claim of law office failure is supported by a detailed and credible explanation of the default (*see, Kohn v Kohn*, 86 AD3d 630). Moreover, the affidavit of merit proffered by the plaintiff is sufficient to defeat the defendants' motion.

The plaintiff, a certified public accountant, was retained in 1993 by the defendant law firm to provide accounting services in connection with the defendant's representation of the third-party defendants. It is undisputed that the plaintiff provided such services for two decades, ending in 2003. It is also undisputed that the defendant law firm billed the third-party defendants for the plaintiff's services and that the plaintiff was paid when the defendant law firm received payment from the third-party defendants. The third-party defendants fell behind in their payments, and the plaintiff commenced this action against the defendant law firm to recover \$115,595.12 for services rendered.

Under general agency principles, an attorney is personally liable on a contract made by the attorney on behalf of a client when the attorney enters into the contract without disclosing that he is acting for the client or when he contracts without authority to do so (1B Carmody-Wait 2d § 3:475). However, a contract made by an attorney on behalf of a client as an agent for a known principal imposes no personal liability on the attorney in the absence of an express agreement to that effect (**Id.**; *see also* 6A NY Jur 2d, Attorneys at Law § 161). In 1990, the First Department departed from this line of reasoning in **Urban Ct. Reporting v Davis** (158 AD2d 401), finding that an attorney who obtains goods or services in connection with litigation, specifically court reporting services, should be held personally liable unless the attorney expressly disclaims responsibility therefor. The First Department's rule in **Urban** was codified in General Business Law § 399-cc, which provides that an attorney who engages a reporting

service will be responsible to pay for those services except, inter alia, when the attorney expressly disclaims responsibility in writing when he orders the services (**Id.** at 125). **Urban** and General Business Law § 399-cc notwithstanding, the rule in the Second Department remains that an attorney who represents a client and who incurs expenses with third parties, other than court reporters, as an agent for a disclosed principal is not personally liable for contracts made on behalf of the client unless the attorney assumes responsibility therefor (*see*, **Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.**, 84 AD3d 122, 124-125; **Yellon v Sirlin**, 35 Misc 3d 21, 22 [App Term, 2<sup>nd</sup> Dept, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists, 2012]).

The record does not reflect that the defendant law firm was acting for an undisclosed principal. The plaintiff clearly knew that defendant law firm was acting for the third-party defendants. Thus, the defendant law firm is not liable to the plaintiff unless it assumed responsibility for payments to the plaintiff. The plaintiff acknowledges that the defendant law firm billed the third-party defendants for the plaintiff's services and paid the plaintiff only when it received payment from the third-party defendants. After the third-party defendants stopped making payments to the defendant law firm, the plaintiff agreed to wait for payment until the third-party defendants paid the defendant law firm. The court finds that, under these circumstances, the plaintiff has demonstrated that the defendant law firm assumed responsibility to pay the plaintiff for his services if and when it received payment from the third-party defendants.

The record reflects that the defendant law firm commenced an action against the third-party defendants in 2007 in the Supreme Court, New York County (Index No. 115084-2007) to recover amounts owed to both the law firm and the plaintiff. It cannot be determined from the record currently before the court whether the defendant law firm recovered or was paid any sums by the third-party defendants to which the plaintiff is entitled. Accordingly, the court finds that there is a potential issue of fact, which is sufficient to defeat the defendant's motion for summary judgment.

Contrary to the defendant's contentions, the plaintiff's claims are not time-barred. The last invoice that the defendant law firm sent to the third-party plaintiff is dated January 15, 2002. This action was commenced in 2007, within the six-year period of limitations for actions upon a contractual obligation (*see*, CPLR 213 [2]). Accordingly, the plaintiff's motion is granted, and the prior motion by the defendant for summary judgment dismissing the complaint is denied.

Dated: July 25, 2012

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J.S.C.