

Singer v Adler

2010 NY Slip Op 33439(U)

December 13, 2010

Sup Ct, NY County

Docket Number: 104279/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C.
Justice

PART 10

Index Number : 104279/2010
SINGER, STEPHEN SAYRE
VS.
ADLER, JOEL A.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 3
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

DEC 15 2010

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/13/10

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

DEC 15 2010

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

NEW YORK
COUNTY CLERK'S OFFICE

Stephen Sayre Singer

Plaintiff (s),

-against-

Joel A. Adler

Defendant (s).

DECISION/ ORDER
Index No.: 104279/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Notice of Motion, JAA Aff. Affirm., exhibits.....	1
JAA Memo of Law,	2
Pltf Notice of X-Motion, SSS Aff.....	3

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

This action is based upon claims for legal services rendered by plaintiff, Stephen Sayre Singer, to defendant, Joel A. Adler. Adler brings a pre-answer motion to dismiss the verified complaint against him on the basis that it is barred by the statute of limitations and alternatively, he is a "French person" and a New York Court does not have personal jurisdiction over him, pursuant to Article 14 of the Civil Code of the Republic of France. Both parties are attorneys at law and each is self represented in this action.

Background

Plaintiff is a New York licensed attorney who performed legal services for defendant, while defendant was domiciled in New York State, beginning in 1991 and continuing through 2001. Plaintiff represented defendant on a number of matters, initially by commencing a malpractice action against defendant's former matrimonial attorney and then by defending defendant against the matrimonial attorney's suit for unpaid fees. Plaintiff subsequently represented Defendant in a real estate partnership dispute and in connection with post-matrimonial matters. Defendant is a former resident of New York State, and is currently domiciled in the Republic of France.

The following is alleged by plaintiff in his complaint:

Plaintiff has made numerous requests to defendant that he make timely payment for the legal services rendered to defendant. Throughout the period that plaintiff performed legal services for defendant, and after their attorney/client relationship ended, plaintiff repeatedly requested that defendant settle his account.

Although plaintiff refrained from demanding payment for the period of December 5, 2002 through July 28, 2005, this forbearance was because defendant had filed for Bankruptcy. Thus, the automatic stay provisions under 11 U.S.C. §362, prevented plaintiff from attempting to recover monies owed to him. However, defendant's bankruptcy petition was dismissed on July 28, 2005, and defendant's debts were not discharged.

Following the termination of defendant's bankruptcy action, plaintiff resumed his efforts to collect on the debts owed to him by defendant. Defendant made a partial payment in January, 2006 in the amount of \$12,515. In subsequent communications

between the parties in 2006, defendant continued to acknowledge the debt, and alluded to future payment as a result of partnership distributions, the resolution of tax issues, and other monies he anticipated receiving, including an inheritance.

In 2007, defendant wished to engage plaintiff to enforce a judgment. Plaintiff, however, was unwilling to perform new services because he had not been paid for previous services rendered. There was a complete breakdown in the parties' relationship, with defendant indicating that he would not pay plaintiff the outstanding fees owed.

On September 23, 2009, plaintiff mailed defendant the record of his account, which included a statement of the fees due for legal services due from November, 2002. The record of account was for a principal amount of \$76,160.30, and with the accrual of interest, plaintiff claimed a total outstanding balance due of \$233,175.59. Receipt of the bill was acknowledged by defendant on October 11, 2009. In plaintiff's cross-motion, he includes additional interest that accrued on the debt, from October, 2009 through the end of August, 2010, for a total sum due of \$274,668.94.

In his complaint, plaintiff asserts four causes of action, including breach of contract, account stated, agreed charges for late payment and unjust enrichment.

Defendant's Motion to Dismiss

Defendant submits an affirmation in lieu of a sworn affidavit, and sets forth all his factual claims in his memorandum of law.

He states that plaintiff committed malpractice in connection with the underlying divorce action and stated he did not pay plaintiff's legal fees because of purported malpractice.

Defendant seeks to dismiss on the basis of two separate arguments. First, defendant argues that the statute of limitations for a contract action under CPLR § 213 is six years, and since plaintiff ceased representing him in 2001, this action is time barred. Next, defendant argues that as a "French person" he is not subject to New York law, but that the French Civil Code controls.

Plaintiff's Cross-Motion

Plaintiff cross-moves in for entry of a default judgment under CPLR § 3215, or alternatively for summary judgment under CPLR § 3211(c) on its second cause of action, for an account stated. Plaintiff moves for entry of judgment on the balance due to him from defendant, with additional interest from September, 2009 through August, 2010, with a total amount due of \$274,668.94.

Discussion

Defendant's Motion to Dismiss

Notwithstanding that the motion to dismiss was interposed late, the court will consider the issues raised on their merits.

Statute of Limitations

The statute of limitations applicable to a contract action is six years. CPLR § 213(2). Under CPLR § 304, an action is commenced when the summons and complaint are filed. Plaintiff filed the summons and complaint on April 1, 2010. Plaintiff claims his cause of action accrued on October 1, 2001, when plaintiff completed his last legal work for defendant. Defendant does not dispute this.

Where a party files for bankruptcy, the automatic stay provision of 11 U.S.C. § 362(6) tolls the statute of limitations. Defendant's Bankruptcy petition filed in United

States Bankruptcy Court for the Southern District of New York on December 5, 2002, created an automatic stay, which prevented plaintiff from commencing an action against defendant. 11 U.S.C. § 362(6). Where a stay prevents the commencement of an action, "the duration of the stay is not part of the limitations period." Zuckerman v. 234-6 W. 22 Street Corp., 167 Misc.2d 198 (Sup Ct. NY Co. 1996). CPLR § 204(a).

Therefore, defendant's bankruptcy petition, filed on December 5, 2002, which was discharged on July 28, 2005, tolled the statute of limitations for a period of approximately two years and seven months. Tacking on an additional two years and seven months to the limitations period gives way to the result that plaintiff's claim would not expire until the end of May, 2010. Therefore, plaintiff's claim, filed in April, 2010, was timely.

Part Payment as Acknowledgment of Debt

Even if plaintiff's claim was brought more than six years after the breach of contract, defendant made a partial payment. It is well established law that payment or partial payment of a debt is considered an acknowledgment of the debt and a promise to pay the balance remaining. Thus, a claim that would otherwise be time barred because it extends beyond the expiration of the statute of limitations may be revived, and the running of the statute of limitations starts anew when partial payment is made. Carlos Land Co. v. Root, 122 N.Y.S.2d 650, (4th Dept. 1953). Where an attempt is made to renew the running of the statute of limitations, the payment must be made under circumstances amounting to "an absolute and unqualified acknowledgment by the debtor, so that a promise to pay the balance may be inferred, and indicate an intent

that it shall be so taken by the creditor." Scott v. Palmer, 273 N.Y. 471 (1936).

According to plaintiff, and not disputed by defendant, the parties exchanged emails and written letters indicating that defendant's partial payment was made with the purpose of reducing his debt to plaintiff. Therefore, defendant's partial payment of the debt, in the amount of \$12,515, in January, 2006, is an acknowledgment of the debt and a renewed promise to pay the outstanding amount due. This action was commenced within six years of January, 2006.

Jurisdiction over Defendant

Defendant generally claims there is no personal jurisdiction over him because he is a "French person." Whether this argument pertains to long arm jurisdiction or service of process, it fails.

CPLR § 302 provides that a court may assert jurisdiction over a non-domiciliary when the non-domiciliary "transacts any business within the state" and the cause of action arises out of that business. See CPLR 302 (a)(1). In order to have personal jurisdiction over a defendant, it is essential that the suit against the non-domiciliary have some "articulable nexus" to the business transacted. See McGowan v. Smith, 52 NY2d 268, 272 (1981).

The basis of plaintiff's complaint, premised on plaintiff's performance of legal services for defendant, and the non-payment of legal fees, while defendant was domiciled in New York, amounts to "transaction of business within the state" and has an "articulable nexus" to the business transacted, specifically the provision of legal services. Therefore, personal jurisdiction over defendant is proper. Defendant's

subsequent move to France does not preclude plaintiff from commencing a cause of action against him in New York.

Defendant is not contesting service upon him, and the claims against him arose while he was living in New York. Further, he cites no legal authority supporting his defense that a non-domiciliary cannot be sued in New York for entering into a agreement made while living in New York. Additionally, defendant availed himself of the privileges and protections of United States law by maintaining his status as an attorney admitted to the New York State Bar and by commencing a bankruptcy petition in the United States Bankruptcy Court.

Defendant's motion to dismiss on the basis of the statute of limitations as well as lack of personal jurisdiction, is therefore denied.

Defendant's Failure to Serve an Answer

Plaintiff claims that defendant is in default because he failed to timely answer the complaint, and instead belatedly moved to dismiss. Defendant was personally served with the complaint, in France, pursuant to the requirements of the Hague Convection, on May 5, 2010. Defendant did not answer or appear within the 20 day time period required under the CPLR. Instead, on July 28, 2010, after plaintiff had served defendant by mail with the summons in connection with his application for a default judgment, defendant interposed a belated motion to dismiss. Even after plaintiff's cross-motion was brought, defendant did not seek the court's permission to extend his time and/or excuse his default.

Therefore, defendant's inaction, through his failure to answer or appear in the action within 20 days as per the CPLR, constitutes default. The court finds, however,

that the default is *de minimis*. Given the court's preference to make determinations on the merits, and there being no prejudice to plaintiff by granting defendant an extension of time, the court grants defendant twenty days to interpose an answer from the date of service of this decision with notice of entry. If defendant fails to interpose an answer in accordance herewith, the motion for a default judgment may be renewed.

Conclusion

In accordance with the foregoing,

It is hereby:

ORDERED that defendant's motion to dismiss is denied, and it is further

ORDERED that plaintiff's cross-motion for default judgment is denied, and it is further

ORDERED that defendant shall have twenty days from the date of service of this decision with notice of entry to serve an answer, and it is further

ORDERED that any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

FILED

DEC 15 2010

Dated: New York, New York

December 13, 2010

NEW YORK
COUNTY CLERK'S OFFICE

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.