

Reem Contr. v Altschul & Altschul

2016 NY Slip Op 30059(U)

January 12, 2016

Supreme Court, New York County

Docket Number: 104202/2011

Judge: Kelly O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
REEM CONTRACTING, JONA SZAPIRO,
REEM PLUMBING, STEVEN STEIN,

Plaintiffs,

- against -

ALTSCHUL & ALTSCHUL, MARK ALTSCHUL, ESQ.,
CORY DWORKIN, ESQ.,

Defendants.
-----X

DECISION AND
ORDER

Index No. 104202/2011

Mot. Seq. 004, 005, 006,
007, 008

KELLY O'NEILL LEVY, J.:

The court issues the following consolidated decision on five motions in this legal malpractice action. In motion sequence 004, Plaintiffs Reem Contracting, Jona Szapiro, Reem Plumbing, and Steven Stein move for an Order, pursuant to CPLR 3215, directing that a default judgment be entered against Defendants Altschul & Altschul, Mark Altschul, Esq., and Cory Dworkin, Esq. Defendants cross-move for dismissal under CPLR 3215 or a traverse hearing pursuant to CPLR 308(2).

Plaintiffs further move for sanctions and attorneys' fees based on Defendants' alleged meritless reargument of certain issues (Mot. Seq. 005); to substitute the Estate of Steven Stein in place of Steven Stein as plaintiff (Mot. Seq. 006); to strike Defendants' answer for failure to timely file an answer (Mot. Seq. 007); and for a protective order (Mot. Seq. 008).

The motions are granted in part and denied in part for the reasons set forth below.

Procedural History

Plaintiffs commenced this action for legal malpractice alleging that the Defendants inadequately and incompetently represented them in a prior ERISA action before the District Court for the Southern District of New York (the "ERISA Matter").

On April 7, 2011 Plaintiff filed a summons and verified complaint and on April 21, 2011, personally served Defendants' law firm. Defendants failed to file their answer within the thirty days required by CPLR 3012(c). The Plaintiff then consented to Defendants serving a late answer, which defendants failed to do. Thereafter, on December 22, 2011, Plaintiffs filed their first motion for default judgment. Defendants cross-moved to dismiss Plaintiffs' legal malpractice claim for improper service of process.

On May 30, 2012, the court (Singh, J.) denied Defendants' motion to dismiss after finding service proper. The court further denied Plaintiffs' first motion for default judgment finding that the allegations in the complaint taken with the verification in the petition were insufficient to make out a claim for malpractice. Defendants subsequently appealed the denial of the motion to dismiss. On May 20, 2014, the Appellate Division, First Department unanimously affirmed the trial court's decision, finding that Defendants were properly served on April 21, 2011. On January 30, 2015, Plaintiffs filed a second motion for default judgment. Shortly thereafter, Defendants filed their answer and cross-motion and requested discovery. Plaintiffs filed several additional motions. Each is discussed below.

Motion for Default Judgment (Mot. Seq. 004)

To succeed on a motion for default judgment, the plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defendant's default in answering or appearing. *See* CPLR 3215(f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dep't 2008). To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action. *Atlantic Cas. Ins. Co. v. RJNJ Svcs, Inc.*, 89 A.D.3d 649, 651 (2d Dep't 2011). It is well-settled that courts prefer to have cases decided on the merits rather than by default. *Smith v. Dacca Taxi*, 222 A.D.2d 209, 211 (1st Dep't 1995).

In support of their motion for default judgment, Plaintiffs submit the Order of the First Department dated May 20, 2014 with notice of entry; and various exhibits, including the summons with notice, verified complaint, proof of service, and the expert report of Stanley A. Epstein, Esq. dated January 21, 2015 as well as a transcript of proceedings in the ERISA Matter dated May 6, 2008, decision of Hon. Carol B. Amon dated March 31, 2009 in the ERISA Matter granting plaintiffs summary judgment against Reem Plumbing & Heating Corporation, Steven Stein, and Jona Szapiro; and the record on appeal to the U.S. Court of Appeals for the Second Circuit on the ERISA Matter.

“To establish a prima facie case of legal malpractice, plaintiffs must establish that they would have been successful in the underlying action.” *Abramovich v. Harris*, 227 A.D.2d 1000, 1000 (4th Dep’t 1996). In support of their motion, Plaintiffs submit the report of Stanley A. Epstein, Esq. dated January 21, 2015, who in an unsigned letter, opined that in their representation of the plaintiffs in the ERISA action, the defendants failed to exercise the ordinary reasonable skill and knowledge required by counsel in such matters and that but for defendants’ negligence, the plaintiffs would not have been held liable. Here, the expert report submitted was not in the form of an affidavit and an affidavit of Mr. Epstein with certification of merit were submitted for the first time only in plaintiffs’ reply brief.¹ In his decision denying plaintiffs’ first motion for default judgment (May 30, 2012), Justice Singh noted

It’s well settled that a verified complaint or an affidavit of merit is necessary for the court to enter a default judgment. In this case based on the record before this court no affidavit of merit. All I have is a verified complaint, a complaint verified by a party and I have reviewed the complaint and I find that the complaint the allegations in the complaint taken with the verification are insufficient to make out a claim for malpractice. (Trans. at 22).

¹ Well after oral argument, on or about November 16, 2015, Plaintiffs delivered to the court several copies of a letter application for leave to file a supplemental letter brief which includes a certification of merit and expert report of Stanley Epstein. Defendants opposed the application. As the submissions constitute an unauthorized sur-reply and sur-sur reply, the court declines to consider them.

That determination is the law of the case, *see Glynwill Investments, N.V. v. Shearson Lehman Hutton*, 216 A.D.2d 78, 79 (1st Dep't 1995), and without any additional support from plaintiffs in admissible form submitted in a timely manner, the court denies the motion for default judgment. *See Courtney v. Port Authority of NY and NJ*, 34 A.D.3d 716, 718 (2d Dep't 2006)(motion court properly exercised its discretion in declining to consider an untimely expert affidavit submitted after an identical expert affirmation had already been submitted), *Ho v. Brackley*, 69 A.D.3d 533, 534 (1st Dep't 2010)(motion court properly declined to consider sur-reply affirmation of legal expert).

Defendants cross-move for dismissal of the action, asserting, among other things, that there is a conflict of interest between plaintiffs Reem Contracting and Plaintiff Szapiro and Plaintiff Reem Plumbing and Plaintiff Steven Stein and that Plaintiffs failed to substitute the Estate of Steven Stein following the death of Mr. Stein. They further move for a traverse hearing. The court finds dismissal inappropriate and denies the cross-motion in its entirety. Defendants have failed to establish a conflict of interest that would disqualify plaintiffs' counsel, Mandelbaum Salsburg, from representing the Reem plaintiffs. *See generally Abselet v. Satra Realty*, 85 A.D.3d 1406, 1407 (3d Dep't 2011). Furthermore, as set forth more fully below, defendants have not shown that plaintiffs' delay in moving to substitute for Steven Stein prejudiced them as they had not yet answered at the time of Mr. Stein's death. The portion of the cross-motion seeking a traverse hearing is denied. In its Order dated May 20, 2014, the First Department affirmed Justice Singh's decision and order and found defendants' denial of proper service unavailing. As that determination is binding on this court, the court denies Defendants' request for a traverse hearing.

Motion for Sanctions and Attorneys' Fees (Mot. Seq. 005)

Plaintiffs further move for sanctions and attorneys' fees based on Defendants' alleged meritless reargument of certain issues, including the denial of a traverse hearing. The

movants' request for sanctions and fees associated is denied as there has been no showing that Respondent's conduct rose to the level of frivolous justifying the imposition of sanctions pursuant to 22 NYCRR Part 130. *See Global Events LLC v. Manhattan Center Studios, Inc.*, 123 A.D.3d 449, 450 (1st Dep't 2014).

Motion to Substitute Plaintiff (Mot. Seq. 006)

On October 28, 2012, plaintiff Steven Stein died. His wife Maxine Stein was appointed executor of the estate on November 30, 2012. Plaintiffs move to substitute the estate of Steven Stein in place of Steven Stein as plaintiff (Mot. Seq. 006) over two years later. Defendants argue that plaintiffs took an unreasonably long time after Mr. Stein's death to move for the substitution. Plaintiffs do not dispute that they failed to make a timely substitution following Mr. Stein's death. However, given the absence of any showing that defendants have been prejudiced by the delay and in light of the court's preference to adjudicate matters on their merits, the court grants the motion to substitute the estate for the deceased plaintiff. *See Johnson v. Trivedi*, 41 A.D.3d 1259, 1260 (4th Dep't 2007).

Motion to Strike Answer (Mot. Seq. 007)

Plaintiffs further move, pursuant to CPLR 3126, to strike defendants' answer for willfully failing to timely answer the complaint as is required under CPLR 3012. The court finds that the answer was indeed filed late. However, it is undisputed that there have been significant delays by both sides in this action with plaintiffs failing to file affidavits of service of the summons and complaint or substitute the estate of Steven Stein for Steven Stein in a timely manner. Accordingly, the court denies plaintiffs' motion to strike defendants' answer without prejudice to renew should defendants fail to comply with discovery deadlines as this action proceeds.

Motion for Protective Order (Mot. Seq. 008)

Finally, Plaintiffs seek a protective order, pursuant to CPLR 3103(a), to prevent them from being compelled to respond to Defendants' interrogatories and document requests filed on February 12, 2015, limiting the number of interrogatories to 25, and finding that the deposition of plaintiff Jona Szapiro should not be taken at all or relieving Mr. Szapiro from providing all documents related to plaintiffs' claims.

Pursuant to Local Rule 10, "prior to making a discovery motion, counsel shall consult one another in a good faith effort to resolve any discovery disputes (see Uniform Rule 202.7)."² Plaintiffs concede here that they have not submitted an affidavit describing a good faith effort to resolve the dispute, arguing that such an affirmation is not applicable due to defendants' untimely request for discovery. The court finds that reason unavailing. In light of plaintiffs' failure to show that a good faith effort was made and the omission of the objectionable interrogatories and document requests as an exhibit to the motion, the court denies the motion. *See Cerreta v. N.J. Trans. Corp.*, 251 A.D.2d 190, 191 (1st Dep't 1998).

The court has considered the remainder of the arguments in the aforementioned motions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for default judgment (mot. seq. 004) is denied and defendants' cross-motion is denied; and it is further

ORDERED that plaintiffs' motion for sanctions and attorneys' fees (mot. seq. 005) is denied; and it is further

ORDERED that plaintiffs' motion to substitute THE ESTATE OF STEVEN STEIN in place and in stead of STEVEN STEIN, deceased, (mot. seq. 006) is granted and the caption is so amended; and it is further

² Available at http://www.nycourts.gov/courts/ljd/suptmanh/Uniform_Rules.pdf

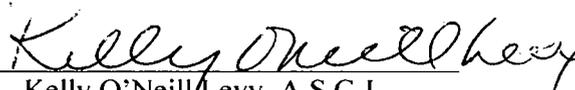
ORDERED that plaintiffs' motion to strike defendants' answer (mot. seq. 007) is denied; and it is further

ORDERED that plaintiffs' motion for a protective order (mot. seq. 008) is denied; and it is further

ORDERED that discovery shall recommence forthwith and the parties shall appear for preliminary conference on February 24, 2016 at 10:00 a.m.

This constitutes the decision and order of the court.

Date: January 12, 2016
New York, New York



Kelly O'Neill Levy, A.S.C.J.

HON. KELLY O'NEILL LEVY