DePetris & Bachrach, LLP v Srour
2010 NY Slip Op 33936(U)
January 7, 2010
Sup Ct, New York County
Docket Number: 111194/2008E
Judge: Paul G. Feinman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
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DEPETRIS & BACHRACH, LLP,
Plaintiff,

Index Number 111194/2008E

against

Mot. Seq. No. 009

CLAUDIA SROUR, CHARLES B. MANUEL, JR., SHIBOLETH LLP, EZEQUIEL NASSER and JACQUES NASSER,
Defendants.
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DECISION AND ORDER

For the Plaintiff:
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For Defendant E. Nasser:
Shiboleth LLP
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Efiled papers considered in review of this motion for a default judgment:

Papers	Efile Document Number
Notice of Motion and Affidavits Annexed	119, 119-1, 119-2, 119-3, 119-4
Memorandum of Law in Support	120, 121-1, 121-2, 121-3, 121-4, 121-5
Memorandum of Law in Opposition	124
Affirmation of E. Nasser	125
Memorandum of Law in Reply	127
Affidavit of E. Nassser	129
Affirmation of S. Kleinlerer and Exhibits	131-1 - 134-5
Affidavit of. E. Nasser	135
Transcript of June 16, 2010 Argument	138

PAUL G. FEINMAN, J.:

In this action to recover legal fees, plaintiff seeks to enter a default judgment pursuant to CPLR 3215 against defendant Ezequiel Nasser. Nasser opposes the motion, without conceding that the court has obtained personal jurisdiction over him. For the reasons set forth below, the motion is denied.

Plaintiff DePetris & Bachrach ("D&B") is a law firm. According to the complaint, defendant Claudia Srour retained D&B to represent her in connection with her status as a

potential witness in civil litigation between her employer, Merrill Lynch, and her key customers, members of the Nasser family, including defendant Ezequiel Nasser, Srour's romantic partner (Doc. 121-1 [Compl. ¶¶ 13-19]).[1] The Nassers sought Srour's testimony and cooperation in proceedings brought against them by Merrill Lynch to attach their personal assets. Due to the conflict of interest, defendant attorney Charles Manuel, and his firm Shiboleth, LLP, representing Jacques Nasser, referred Srour to D&B.

On April 15, 2008 Srour signed a written retainer agreement with plaintiff law firm, paid a retainer fee of $25,000 and agreed that she might be called upon to make additional advances toward legal fees and disbursements upon exhaustion of the retainer or other advances (Doc. 121-3 [Mot. Ex. C]). Plaintiff alleges that it almost immediately expressed concern to attorney Manuel and the Shiboleth firm over the amount of time asked of it by the Nasser family to assist them in their defense through its representation of Srour (Doc. 121-1 [Compl. ¶ 26]). Shiboleth attorney Richard Wender expressed confidence that the Nasser family would want to help pay the fees (Id.). Plaintiff devoted significant time to its representation of Srour (Compl. ¶ 28). On about April 23, 2008, during a conference call with attorney Manuel, plaintiff's attorneys again expressed concern that the "frequent requests" by Manuel and Shiboleth, along with voluminous document to review, were causing mounting legal fees, to which Manuel reiterated that he "believed" the Nasser family members would gladly pay Srour's legal fees (Compl. ¶ 32). On about April 25, 2008, Manuel informed plaintiff's attorney that he had spoken with Ezequiel Nasser who assured him that the Nasser family would be willing to pay her legal fees (Compl. ¶ 34). On May 1, 2008, Manuel was advised by plaintiffs that Srour's legal fees then totaled about

[1]References to exhibits and motion papers are to the e-filing document number assigned by the NYSEFS.

$66,000, and Manuel explained that the Nasser brothers planned to pay Srour's legal expenses directly to plaintiff but structure it as a loan to Srour, and that the money would be paid in about a week (Compl. ¶ 38). On about May 23, 2008, Manuel stated in a telephone conversation that he had spoken with both Nasser brothers and they had agreed to pay a total of $75,000 for Srour's legal fees, with each paying half the amount (Compl. ¶ 39). Manuel stated the issue would be revisited in June, if additional payments would be needed (Id.). Therefore, plaintiff continued to work on behalf of its client without obtaining additional payment from her although during this time Srour was paid about $200,000 by Merrill Lynch in April 2008 for outstanding commissions owed to her (Compl. ¶ 41).

By decision dated May 2, 2008, the court in the Merrill Lynch matter vacated the temporary restraining order and attachments sought by that company against its property, a ruling in favor of the Nasser family (Doc. 121-1 [Compl. ¶ 42]). On May 22, 2008, three days after meeting with the Nasser brothers and attorney Manuel, Srour sent an email to Bachrach stating that plaintiff was to cease working on her behalf, and that she was "no longer in a position to afford [legal] fees" since she was laid off by Merrill Lynch (Doc. 121-1 [Compl. ¶ 49]; Doc. 121-5 [Srour email to Bachrach]). This communication was allegedly part of a plan by Ezequiel Nasser, with the assistance of attorney Manuel and defendant Srour, all three of whom met together, to avoid paying plaintiff the legal fees owed to it (Compl. ¶ 44, 48). Defendant Manuel subsequently admitted to an attorney with D&B that he had also advised Jacques Nasser not to wire any funds to plaintiff's account, on the basis that Srour was considering retaining new counsel and would need money for that purpose ([Compl. ¶ 50]).

Plaintiff prepared and mailed Srour a bill dated May 27, 2008, indicating that after application of the retainer fee, she owed legal fees in the amount of $62,964.76 (Doc. 121-1

[Compl. ¶ 52]; Doc. 121-4 [May 27, 2008 letter, itemized bill]). None of the amount owed has been paid. Instead, Ezequiel Nasser, along with Manuel and Srour, manufactured various fraudulent grounds based in part on defamatory statements, in an attempt to show that plaintiff is not entitled to its fee (Compl. ¶¶ 51-54).

Plaintiff commenced this action on August 15, 2008, by filing a summons and complaint (Docs. 2; 121-1). The complaint names plaintiff's former client Claudia Srour, attorney Charles Manuel and Shiboleth LLP, and the two Nasser brothers. According to the complaint, defendants Ezequiel and Jacques Nasser are citizens and residents of Brazil. As against Ezequiel Nasser, the complaint currently alleges breach of contract (second cause of action), promissory estoppel (third cause of action), tortious interference with contractual obligation (sixth cause of action), and tortious interference with attorney-client relationship and payment of legal fees (seventh cause of action).[2]

Defendant Ezequiel Nasser never answered the complaint which, according to the affidavit of service dated November 10, 2008, was served on October 28, 2008, by substituted service on the housekeeper of the East 59th Street apartment in which Nasser and Srour live, and then mailed to Nasser at the 59th Street address which was his last known address, and as well to a business address on Park Avenue and to an address in Sao Paolo, Brazil (Doc. 15). Nasser's time to answer has expired.

Plaintiff moves for a default judgment against Ezequiel Nasser and an inquest on damages (Doc. 119). Nasser, who is represented on the motion by co-defendant Shiboleth LLP,

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[2]By previous decision and order entered on June 3, 2009, the eighth cause of action was dismissed as against all parties (Doc. 98, 101), and its dismissal was upheld on appeal (*DePetris & Bachrach, LLP v Srour*, 71 AD3d 460 [1st Dept. 2010]).

submits opposition to the extent of arguing in sum that he was never served with process (Doc.125).

Under CPLR 3215 (f), an application for a judgment by default must include: (i) proof of service of the summons and complaint or notice served under CPLR 305(b); (ii) proof of the claim; and (iii) proof of default (see Siegel, New York Practice, § 295 [4th ed. 2005]). A mere denial of service is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service (*Facey v Heyward*, 244 AD2d 452, 453 [2d Dept. 1997]). While defendant's failure to answer the complaint constitutes admissions of the factual allegations therein, plaintiff must nonetheless demonstrate that it has a prima facie cause of action (*Gagen v Kipany Productions Ltd.*, 289 AD2d 844, 845 [3d Dept. 2001]). Moreover, "some proof of liability is required to satisfy the court as to prima facie validity of the uncontested cause of action. The standard of proof is not stringent, amounting only to some first hand confirmation of the facts" (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept. 1987]).

1. Proof of Service of Process

Plaintiff submits a copy of the affidavit of the process server, Jolantyna Cagney, who served copies of the summons and complaint on both Ezequiel Nasser and Claudia Srour by service on their housekeeper at the 59th Street apartment (Doc. 119-1 [Mot. Ex. A]). Cagney's affidavit states that on October 22, 2008, she was informed by the building's doorman that Nasser was "away in Brazil" and only the housekeeper was home. The housekeeper informed Cagney that Nasser and Srour were expected back in New York on October 27, 2008. On October 27, 2008, Cagney again attempted service, but the housekeeper told her that Nasser and Srour had been delayed and would return to New York on October 28. Cagney returned on the 28th in the afternoon, but no one was home. When she returned at about 8:40 p.m., the

housekeeper was home and stated that Nasser and Srour were not home "at this moment" and she did not know what time they would return. Cagney then left the documents with the housekeeper as a person of suitable age and discretion to deliver to both Nasser and Srour. On November 4, 2008, Cagney mailed copies of the documents to Nasser at the 59th Street address, and to a business located on 375 Park Avenue in New York, and an address in Sao Paolo, Brazil (Doc. 119-1).

Previously, Srour had challenged the sufficiency of the service of process upon her, claiming that she had relocated back to Brazil in July 2008 and, during subsequent visits to New York would stay at her sister's or a friend's place, and had not received the documents. A traverse hearing was held on June 2, 2009 (Doc. 119-3 [Transc.]). After testimony by Srour, her sister Deborah Srour, a friend Sheila Szymonowicz and the process server, the court found the process server to be a credible witness and that her testimony concerning the statements by the housekeeper were truthful (Doc. 119-3; p. 25). The court found that since the apartment was furnished and staffed with a housekeeper, and since the process server was informed by both the doorman and the housekeeper that defendants Srour and Ezequiel Nasser were away in Brazil but soon expected to be back, that the apartment was Srour's dwelling and usual place of abode when she was in New York (Doc. 119-3; pp. 24-29). The court emphasized that one can have more than one place of abode, and it need not be a primary residence to satisfy requirements of CPLR 308(2) (Doc. 119-3; p. 28).

In the instant motion, plaintiff argues that Nasser stayed at the apartment with Srour every time he was in New York. It notes that the process server was admitted into the building at 59th Street and never told that the apartment in question was not the residence or usual place of abode for either Srour or Ezequiel Nasser. The doorman in the building specifically informed the

process server that Nasser was at that time "away in Brazil," which indicates that it was understood that Nasser would return. Plaintiff also argues that the copy of summons and complaint mailed to Ezequiel Nasser at the 59th Street apartment was never returned as non-deliverable (DePetris Aff. in Supp. ¶ 9 [Doc. 119]).

At oral argument, Nasser's attorney pointed out that the traverse hearing previously conducted was limited to the question of whether defendant Srour had been properly served; he argues that Ezequiel Nasser cannot be deemed to be subject to jurisdiction on the basis of the court's findings concerning Srour (Doc. 138 [Transcript pp. 7-8]). Nasser, who appears solely to oppose the motion, claims in his affidavit that he never received nor had seen a copy of the summons and complaint, and that any papers delivered to the 59th Street apartment were never shown to him (E. Nasser Aff. ¶¶ 1-3 [Doc. 135]).[3] He further claims that the address of the 59th Street apartment is not his residence nor his usual place of abode (E. Nasser Aff. ¶ 4). He states that while he has his own apartment in New York where he has spent "significant amounts . . . of [his time] for over 20 years," his principal residence is in Brazil and he is a Brazilian citizen (E. Nasser ¶ 4). Notably, his affidavit does not disclose the address of this apartment, and offers nothing other than his unsubstantiated statement to rebut the credible evidence that he is known to spend regular time, when in New York, at the 59th Street apartment belonging to Srour.[4]

Where the affidavit of a process server indicates that a defendant was served in accordance with the CPLR, it will constitute prima facie evidence of proper service, and a

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[3]Nasser timely efiled an amended affidavit affixed with the stamp of a New York State notary, resolving earlier procedural objections raised by plaintiff.

[4]Nasser states that the Park Avenue business address was closed in June 2008, and that the copies of the summons and complaint mailed there in October 2008 were never forwarded to him (E. Nasser Aff. ¶ 5).

defendant challenging the service must specifically rebut the contents of the affidavit and substantiate his or her denial of receipt (*Sando Realty Corp. v Aris*, 209 AD2d 682 [2d Dept. 1994]). Mere denial of receipt is insufficient to rebut that presumption of proper service (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]). Defendant's contention that he did not receive any copies of the summons and complaint is not buttressed with any proof. His reliance on *Burkhardt v Cuccuzza*, 81 AD2d 821 (2d Dept. 1981) is misplaced, as in that case service of the summons and complaint was made at the apartment of the "former" girlfriend of the plaintiff who stayed there once or twice a week but actually resided with his mother and sister. Similarly, reliance on *Empire of America Realty Credit Corp. v Smith*, 227 AD2d 931 (4th Dept. 1996), is equally unpersuasive.

Here, the process server was found at the hearing on traverse, to be "wholly credible," and although not asked specifically about Ezequiel Nasser, her testimony included information about his known presence in the 59th Street building and in Srour's apartment and the manner in which process, determined to be sufficient, was served on Srour. Since both Srour and Ezequiel Nasser were served with process in the same circumstances, and Ezequiel Nasser has failed to adequately challenge the presumption that the apartment 15AB is his usual place of abode in New York or that he did not, in fact, actually receive the documents left with the housekeeper and thereafter mailed, the court finds that Nasser fails to raise any question of fact requiring a hearing on process (*see Manhattan Savings Bank v Kohen,* 231 AD2d 499, 500 [2nd Dept. 1996], *lv denied* 91 NY2d 802 [1997] [holding that conclusory denial of service is insufficient to challenge the veracity or content of the affidavit of the process server, and did not mandate a hearing]). Plaintiff therefore has established that Ezequiel Nasser was properly served with process and that the court has personal jurisdiction.

2. Proof of Claim

In support of its claim, plaintiff annexes a copy of the complaint, the retainer agreement, and the itemized billing records (Docs. 121-1, 121-3, 121-4) as well as affidavits by its attorneys Marion Bachrach, Esq. and Ronald DePetris, Esq. (Docs. 121, 119).

1. Breach of Contract (Second cause of action)

The complaint alleges breach of an oral promise by both Nasser brothers, as articulated through their attorney, Manuel, to each pay half of the legal fees incurred by Srour (Doc. 121-1 [Compl. ¶¶ 32-40]). It is well settled that an oral promise to guarantee the debt of another is unenforceable under the Statute of Frauds (General Obligations Law § 5-701 [a][[2]). However, under an exception to the statute, the promise need not to be in writing if it is supported by new consideration moving to the promisor and beneficial to the promisor, and the promisor has become in the intention of the parties primarily liable (*Carey & Assoc. v Ernst*, 27 AD3d 261, 263 [1st Dept. 2006]). The courts require that the new consideration be tangible and directly beneficial to the promisor in order to fall under this exception (*Carey & Assoc.*, citing *Martin Roofing, Inc. v Goldstein*, 60 NY2d 262, 266 [1983]I *cert. denied* 466 U.S. 905 [1984]). Here, the complaint alleges that the Nassers and their attorney sought the cooperation of Srour, and deemed her cooperation important to the course of their litigation against Merrill Lynch, such that their assumption of the legal fees could be understood to be valuable consideration.

2. Promissory Estoppel (Third cause of action)

To establish a cause of action sounding in promissory estoppel, the complaint must allege a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on the promise (*Rogers v Town of Islip*, 230 AD2d 727, 727 [2d Dept. 1996], citation omitted). The complaint alleges that plaintiff was

promised by attorney Manuel on behalf of the Nasser brothers that they would together pay $75,000 toward Srour's legal fees after the amount of the retainer fee had been spent, and that plaintiff relied on this promise to its detriment. Although the complaint does not allege that without this promise, plaintiff would have ceased working on behalf of its client, it does sufficiently allege a promise, plaintiff's reliance on the promise, and fees generated and as yet unpaid.

3. Tortious Interference with Contractual Obligation and Tortious Interference with Attorney-Client Relationship and Payment of Legal Fees (Sixth and Seventh causes of action)

The sixth cause of action alleges that defendants Srour, Manuel, and Ezequiel Nasser acted in concert to induce Jacques Nasser not to make his half of the payment of legal fees due D&B, and that Jacques Nassser did not pay his portion of the legal fees due. The seventh cause of action alleges that Ezequiel Nasser and attorney Manuel, interfered with the attorney-client relationship between plaintiff and Srour by devising a scheme based on fraudulent statements and documents, to make it seem that plaintiff was not owed any additional legal fees.

In order to establish a cause of action against Ezequiel Nasser for tortious interference with D&B's contractual relations with Jacques Nasser, plaintiff must show that there was a valid contract between Jacques Nasser and D&B and that such contract would not have been breached "but for" the defendants' intentional conduct (*Washington Ave. Assoc. v Euclid Equip. Inc.*, 229 AD2d 486, 487 [2d Dept. 1996]). Similarly, to establish a cause of action for tortious interference with the attorney-client relationship, plaintiff must show the existence of a valid agreement between itself and its client. Plaintiff must support the allegations with more than mere speculation (*Burrowes v Combes*, 25 AD3d 370, 373 [1st Dept.], *lv denied* 7 NY3d 704 [2006]). As noted above, the complaint sufficiently makes out a claim of an oral agreement

between Jacques Nasser and D&B, and that Manuel, as part of defendants' scheme to defraud plaintiff, had advised Jacques Nasser not to pay his portion. The complaint also alleges that attorney Manuel admitted that he had met privately with Srour and Ezequiel Nasser in May 2008 to discuss "discuss several issues relating to the civil litigation and payment of plaintiff law firm's legal fees," and that about three days after this meeting, Srour directed plaintiff to discontinue representing her as she had been fired from her job (Compl. ¶¶ 48, 49 [Doc. 121-1]). Thereafter, Ezequiel Nasser, with Manuel, allegedly assisted Srour in attempting to establish false grounds to excuse her decision not to pay what she owed, including making written statements that plaintiff had not represented her interests but pursued its own monetary interests, and had "sold her out" to the Nassers (Compl. ¶¶ 52-54). The allegations are sufficient to establish both causes of action.

3. Proof of Default

Plaintiff's affidavits and the court records, as well as by defendant's affidavits and his attorneys' affirmations, establish that Ezequiel Nasser did not answer the complaint, and has appeared only to dispute jurisdiction. In the interest of justice and to conserve judicial resources, plaintiff's motion is denied to the extent that defendant Ezequiel Nasser shall have 30 days from the date of entry of this decision and order, to serve his answer, and upon his timely failure to serve and file his answer, plaintiff shall renew its motion which shall be granted. It is

ORDERED that the motion is denied; and it is further

ORDERED that Ezequiel Nasser shall serve and efile his answer within 30 days from the date of entry of this decision and order.

This constitutes the decision and order of the court.

Dated: January 7, 2010
New York, New York

J.S.C.