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

HON. CAROL EDMEAD

PART 35

Index Number : 116838/2005

TANGER, STEVEN

vs

FERRER, ALFRED III

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE 9/7/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 12 2006
COUNTY CLERK'S OFFICE
NEW YORK

In this legal malpractice action, plaintiff, Steven Tanger, moves pursuant to CPLR 3215 for default judgment against defendants Alfred Ferrer III and Eaton & Van Winkle, LLP (collectively, "defendants") for failure to appear, answer or otherwise respond to the Complaint.

This action arises out of defendants' representation of plaintiff and his wife in an underlying action against them for rent arrears by their landlord. The underlying action was tried in February and May 2001, resulting in a judgment against plaintiff and his wife for $328,142.13 including $5,000.00 in attorneys' fees. The Appellate Division, First Department vacated the attorneys' fees and directed the trial court to conduct a hearing to determine the proper award of attorneys' fees. After the trial court conducted a hearing, it awarded the landlord $655,241.10 in attorneys' fees. When plaintiff appealed this award, the Appellate Divison, First Department, by order dated June 21, 2005, reversed the award and remanded the matter for a new determination of attorneys' fees and recalculation of prejudgment interest. Upon motion, defendants were subsequently relieved as counsel for plaintiff and his wife in the underlying action. In connection with the motion to be relieved, plaintiff's wife was represented by Cohen Lans, LLP. The last attorneys' fees hearing occurred in February 2006, after defendant Ferrer was served with the instant Complaint. The trial court awarded the landlord $652,141.94 in attorneys' fees, and plaintiff has interposed a Notice of Appeal, dated June 28, 2006.

Dated: _____

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J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

In support of default judgment, plaintiff argues that defendants were given three extensions of time to answer the Complaint, namely January 6, 2006, February 14, 2006 and June 2, 2006, and defendants have failed to answer or enter an appearance.

In opposition, defendants argue that their failure to appear in this action was the result of law office failure. Defendants contend that prior to the attorneys' fee hearing on remand, current counsel for defendants and defendant Ferrer, met with plaintiff's current counsel to prepare for the attorneys' fee hearing.[1] Current counsel for defendants tried to reach a global resolution of the instant malpractice matter and the underlying action, and rather than expend efforts to litigate this action, plaintiff agreed to give defendants additional time to answer the Complaint while the parties negotiated toward a global settlement. Further, although the defendants' time to answer was extended to June 14, 2006, defendants' served a motion to dismiss, which was rejected by Motion Support for failure to annex a Request for Judicial Intervention. Defendants contend that this error was not discovered in time to be corrected before the July 31, 2006 return date because the rejected motion papers were returned to an employee who had left the defendants' counsel's law firm. Thus, defendants argue, their failure to appear was inadvertent and not a wilfull attempt to delay or prejudice the plaintiff. Defendants also argue that they have a meritorious defense to this action. Defendants argue that Ferrer only prepared the CPLR 3219 tenders, on which plaintiff's instant action is based, because the landlord's attorneys failed to respond to any of the settlement overtures Ferrer made on behalf of the plaintiff and his wife. Defendants maintain that the evidence will show that defendants' actions were reasonable under the circumstances. Defendants also contend that several of the acts of malpractice occurred while Ferrer was employed with other law firms, and that such other law firms will likely be impleaded.

Defendants also cross move to dismiss the complaint pursuant to CPLR 3211 (a)(7) and (10), arguing that (1) in light of the pendency of the underlying action, plaintiff has not yet sustained any actual or ascertainable damages proximately caused by defendants' negligence; and (2) the Complaint is defective because it fails to name a necessary, indispensable party, namely plaintiff's wife. In the alternative, defendants seek a stay of this action pending resolution of the underlying action or to compel plaintiff to accept an answer from defendants.

In reply, plaintiff contends that after defendants were relieved as counsel for plaintiff and his wife, plaintiff's current counsel contacted Cohen Lans, LLP on several occasions to determine whether plaintiff's wife would participate in this matter. However, Cohen Lans, LLP never responded. Also, although plaintiff extended defendants' time to answer, plaintiff never intended to adjourn indefinitely the due date for defendants' response. Further, defendants' contention that their default was the result of the departure of one of its employees lacks merit, since two other attorneys in defendants' counsel's office had been handling this matter. Thus, the departure of one employee does not provide any reasonable excuse for defendants' failure to respond to the Complaint. Plaintiff also points out that defendants' delaying tactics are further highlighted by defendants' failure to timely oppose the instant motion, and that defendants'

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[1] Plaintiff contends that given that Ferrer's participation in the underlying action and testimony during the second attorneys' fees hearing would potentially be at issue in this action, plaintiff's current counsel met with Ferrer and Ferrer's current counsel.

opposition papers should be stricken from the record. Plaintiff argues that defendants have caused a six-month delay, substantial additional legal expenses, and defendants failed to submit an affidavit of meritorious defense to this action.

Plaintiff also argues that contrary to defendants' contentions, Ferrer's testimony at the second attorneys' fees hearing in February 2006 concerned the unreasonable litigation tactics and strategy of the landlord.

Furthermore, plaintiff asserts that the Complaint adequately states a *prima facie* case of legal malpractice against defendants, and defendants failed to submit a proposed answer in support of their cross-motion. And, since counsel for plaintiff's wife failed to respond to plaintiff's counsel's inquiries as to whether she would participate in this litigation, defendants may implead her if necessary.

Analysis

At the outset, the Court notes that plaintiff's Complaint for legal malpractice is not precluded by the pending appeal of the attorneys' fees hearing, and a stay of this action pending the appeal is unwarranted. In this action, plaintiff claims that defendants improperly drafted the CPLR 3219 tenders, which the Trial Court and Appellate Division found to be invalid, and that defendants failed to file a post-trial brief. Plaintiff claims that since the tenders were invalid, the interest-abatement and cost-shifting provisions of CPLR 3219 were not triggered so as to prevent the landlord from seeking interest from the date of the tenders on the landlord's rent claim nor the costs of the underlying action. Thus, all of the alleged acts of malpractice have occurred, and the determination of whether such acts amount to malpractice is unrelated to the value of the attorneys' fees incurred by the landlord in the underlying action. Therefore, plaintiff's pending appeal of the award of landlord's attorneys' fees does not render this action premature.

As to plaintiff's motion for a default judgment, in order for plaintiff to succeed in this motion he must show that the defendants were properly served, that the defendants are in default, that the plaintiff has a meritorious cause and either that plaintiff took proceedings for the entry of judgment within one year or that her neglect to do so is excusable (*Brokaw v Cohen*, 117 Misc2d 31, 457 NYS2d 168 [Sup Ct New York County 1982]). CPLR 3215 does not require that the Court enter default judgment upon a finding of jurisdiction and a failure to appear, since some proof of liability is required to satisfy the court as to the *prima facie* case against the nonappearing defendant (*Guzetti v City of New York*, ---- NYS2d ----, 2006 WL 2291095 [1st Dept 2006] *concurring opinion, citing Joosten v Gale*, 129 AD2d 531, 535 [1987]; *see Resnick v Lebovitz*, 28 AD3d 533 [2006]).

Although plaintiff's motion is supported by an affidavit from the plaintiff, demonstrating a meritorious cause of action, and it is undisputed that defendants were properly served, are in default, and that the plaintiff's motion was filed within one year of defendants' default, the Court determines that the delay on the part of the defendants was relatively brief and the excuse for the delay was reasonable. Furthermore, the cross-motion seeking an extension of time to answer was made before entry of a default judgment, and it is arguable that defendants have a meritorious defense to this action *(see* CPLR 2004; CPLR 3012(d); *Williams v City of New York*, 85 AD2d 633 [2nd Dept 1981]) in that defendants' "selection of one among several reasonable courses of action" may not necessarily constitute malpractice (*Bernstein v Oppenheim & Co., P.C.*, 160

AD2d 428, 430, 554 NYS2d 487, *quoting Rosner v Paley*, 65 NY2d 736, 738, 492 NYS2d 13, 481 NE2d 553). Further, plaintiff has not demonstrated any legally cognizable prejudice as a result of the delay; therefore, granting leave to file a late answer is appropriate (*see Keles v Kennedy,* 238 AD2d 185, 656 NYS2d 239 [1st Dept 1997]; *Mendoza v Bi-County Paving,* 227 AD2d 302, 642 NYS2d 884 [1st Dept 1996]). Further, courts favor a determination of an action on the merits (*Price v Polisner*, 172 AD2d 422 [1st Dept 1990], *quoting Lang v French & Co.*, 48 AD2d 641). Matters should be disposed of on the merits (*Guzetti v City of New York*, ---- NYS2d ----, 2006 WL 2291095, *majority opinion*; *Eisenberg v Gerald Michaels Inc. et al.*, 58 AD2d 641 [2d Dept 1977]).

As to defendants' cross-motion to dismiss the Complaint for failure to state a cause of action, in determining such a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026) and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

To state a cause of action for legal malpractice, the plaintiff must allege facts to support allegations that the attorneys were negligent, that their negligence was the proximate cause of the plaintiff's damages, and that the plaintiff suffered actual damages as a direct result of the attorneys' actions (*Weiner v Hershman & Leicher, P.C.*, 248 AD2d 193, 669 NYS2d 583 [1st Dept 1998]). Plaintiff's Complaint sufficiently states a cause of action for legal malpractice. Contrary to defendants' contention, and accepting the allegations in the complaint as true, plaintiff arguably suffered damages of at least the additional accrued interest on the landlord's rent claim as a direct result of defendants' improper preparation of the CPLR 3219 tenders.

Further, it cannot be said that the Complaint is fatally defective for failure to name plaintiff's wife as a necessary, indispensable party. Under CPLR 1001(a), necessary parties to an action or proceeding fall into two categories: persons "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action," or "who might be inequitably affected by a judgment in the action" (*27th Street Block Ass'n. v Dormitory Authority of State of New York*, 302 AD2d 155, 752 NYS2d 277 [1st Dept 2002]). With respect to the former, non-parties are "indispensable" where the determination of the court will adversely affect their rights (*New York County Lawyers' Ass'n v State*, 192 Misc2d 424, 745 NYS2d 376 [Sup Ct New York County 2002] *citing Castaways Motel v CVR Schuyler*, 24 NY2d 120, 125, 299 NYS2d 148, 152 [1969]). With respect to the second prong of CPLR 1001(a)'s test, it is well settled that " '[t]he possibility that a judgment rendered without [the omitted party] could have an adverse practical effect [on that party] is enough to indicate joinder.' " (*27th Street Block Ass'n. v. Dormitory Authority of State of New York, supra citing Hitchcock v Boyack*, 256 AD2d 842, 844, 681 NYS2d 659, *quoting* Siegel, N.Y. Prac. § 132, at 199 [2d ed].) These compulsory joinder provisions are intended "not merely to provide a procedural convenience but to implement a requisite of due process-the opportunity to be heard before one's rights or interests are adversely affected" (*id. citing Matter of Martin v Ronan*, 47 NY2d 486, 490, 419 NYS2d 42).

CPLR 1001(b) provides that when a person who should be joined cannot because "jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party."

Defendants have not specifically argued under which section they seek dismissal based on failure to join a necessary party. Defendants merely assert that plaintiff's wife, who was also represented by defendants in the underlying action, has an interest in the outcome of this action. In any event, as the submissions indicate that plaintiff's wife was notified, albeit through her counsel, of the instant action, and that she did not respond to plaintiff's inquiry as to whether she would participate as a party plaintiff as well, it cannot be said that the effect of this action upon plaintiff's wife would be *inequitable*. Given that dismissal under CPLR 3211 (a)(10) for failure to join a necessary party is a matter of last resort (*Blank v Blank*, 222 AD2d 851, 634 NYS2d 886 [3d Dept 1995] *citing* Siegel, NY Prac § 268, at 397 [2d ed]), and plaintiff's wife is unwilling to participate in this proceeding, dismissal is unwarranted.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for a default judgment is denied, without prejudice to renew in the event defendants fail to serve and file an answer within 20 days of the date of this order; and it is further

ORDERED that defendants' cross-motion to dismiss the complaint pursuant to CPLR 3211 (a)(7) and (10) or in the alternative, for a stay of this action pending resolution of the underlying action is denied; and it is further

ORDERED that defendants' cross-motion to compel plaintiff to accept their answer is granted to the extent that defendants are granted leave to serve and file an answer within 20 days of the date of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 3, 2006, 2:15 p.m.

This constitutes the decision and order of the Court. the decision and order of the Court.

Dated 9/7/06 ENTER: _____, J.S.C.
HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE