

**David Kaminsky & Assoc., P.C. v Zozo
Rest. Ltd.**

2008 NY Slip Op 30554(U)

February 26, 2008

Supreme Court, New York County

Docket Number: 0109772/2007

Judge: Jane S. Solomon

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

PRESENT: HON. JANE S. SOLOMON

PART 55

Index Number : 109772/2007

DAVID A.KAMINSKY & ASSOCIATES

INDEX NO. 109772/2007

vs

ZOZO RESTAURANT LTD.

MOTION DATE 2 - 25 - 2008

Sequence Number : 001

MOTION SEQ. NO. 001

DEFAULT JUDGEMENT

MOTION CAL. NO. _____

_____ were read on this motion to/for default judgment

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

PAPERS NUMBERED	
1 - 3	
4 - 7	
8 - 10	

Answering Affidavits — Exhibits _____

Replying Affidavits _____


Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/26/08


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

DAVID KAMINSKY & ASSOCIATES, P.C.,

INDEX NO. 109772/2007

Plaintiff,

-against-

ZOZO RESTAURANT LTD. and KOSTA LOLIS
a/k/a KOSTAS LOLIS,

DECISION and ORDER

Defendants.

-----X

JANE S. SOLOMON, J.

FILED
FEB 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

In this action for legal fees, plaintiff David A. Kaminsky & Associates, P.C. ("Plaintiff") moved for default judgment against defendants Zozo Restaurant Ltd. ("Zozo Restaurant") and Kosta Lolis a/k/a Kostas Lolis ("Lolis"), for \$40,354.43 plus interest. Defendants appeared and cross-moved to dismiss the Complaint or, in the alternative, to compel plaintiff to accept service of their Answer. On January 18, 2008, I issued an Interim Decision which denied Plaintiff's motion, and deemed defendants' Answer, which appeared as Exhibit D to their cross-motion, served. The Interim Decision also converted the cross-motion to one for summary judgment and invited further submissions pursuant to CPLR § 3211(c). The time to do so has passed and the motion is ripe for decision as follows.

On or about July 13, 2006, Zozo Restaurant and Plaintiff executed a Retainer Agreement regarding Plaintiff's services as counsel to Zozo Restuarant in certain matters relating to a dispute between Zozo Restaurant and its then landlord. Lolis signed the Agreement in his capacity as president of Zozo Restaurant, and David A. Kaminsky ("Kaminsky") signed on behalf of Plaintiff. The Retainer Agreement has a provision for non-payment of legal fees, stating:

If fees are not timely paid, no further services shall be provided and the attorney shall move to withdraw as attorney of record, the cost of which shall be billed to the client. In the event of any fee or other dispute that comes to be litigated in court, both sides waive trial by jury, and you the Client, shall be responsible for all costs incurred by David A. Kaminsky & Associates, P.C. in connection with such litigation, including reasonable attorney's fees. If David A. Kaminsky & Associates, P.C. is required to commence collection activities against you, the client, for non-payment of fees, you will be responsible for all legal fee costs including but not limited to attorney's fees, whether spent by David A. Kaminsky & Associates, P.C. in furtherance of collections efforts or any member of his office or other counsel hired by David A. Kaminsky & Associates, P.C. in connection with such collection efforts, or Court costs, in any related expenses incurred in connection with the collection of legal fees that are due to David A. Kaminsky & Associates, P.C.

Plaintiff represented Zozo Restaurant pursuant to the Retainer Agreement from July 2006 through April 2007. Together

with its motion for default judgment, Plaintiff submits copies of invoices for its services, all addressed to "Zozo Restaurant c/o Kosta Lolis 17-85 215th Street, Bayside, NY 11360." There is no indication in any invoice that Lolis was a party to the litigation. Plaintiff alleges that defendants are jointly liable under the Retainer Agreement and have refused to pay a balance of \$38,642.42. Plaintiff further contends that on or about May 8, 2007, it sent defendants a letter by regular mail, as well as a copy by First Class Mail and Certified Mail return receipt requested, notifying them of their right to arbitrate a dispute over attorneys fees. Plaintiff states that the letter sent via First Class Mail and Certified Mail went unclaimed, but that the letter sent by regular mail was not returned to Plaintiff. Defendants never responded to this letter nor applied for arbitration.

Plaintiff commenced this action on or about July 16, 2007, alleging (1) breach of contract for defendants' failure to pay fees pursuant to the Retainer Agreement and (2) legal fees in relation to its collection efforts. The Affidavit of Service for Zozo Restaurant indicates that the Summons and Complaint were served by delivering a copy of the same to the New York Secretary of State on July 24, 2007. The Affidavit of Service for Lolis indicates that the Summons and Complaint were served on him by

leaving a copy of the same with "'JOHN SMITH' REFUSED NAME (DOORMAN)," a person of suitable age and discretion at Lolis's usual place of abode within the state, 17-85 215th Street, Apt. 14B, Bayside, NY 11360.

Lolis alleges that he resided in Florida at the time of this purported service, and therefore, neither he nor Zozo Restaurant received notice of this action, preventing them from serving an Answer on Plaintiff before they attempted to do so on October 1, 2007. He also contends that Plaintiff's Affidavit of Non-Military Service is defective as it is written by Kaminsky and is therefore self-serving. On or about October 5, 2007, Plaintiff notified defendants' counsel by letter that it would not accept service of the Answer because it was late, and that it had previously filed a motion for default judgment. Because cases should be tried on the merits, this court's Interim Decision deemed defendants' Answer served on plaintiffs.

Lolis's unpersuasive arguments regarding proper service notwithstanding, there is no basis for personal liability against him. He signed the Retainer Agreement solely in his capacity as the president of Zozo Restaurant, and there is no allegation that he signed a personal guarantee or otherwise would be liable for Zozo Restaurant's legal bills. Thus, upon searching the record, the action must be dismissed as to him.

With respect to the restaurant, Plaintiff has submitted invoices showing \$38,642.42 in unpaid legal fees for work it performed pursuant to the Retainer Agreement. The invoices provide the time incurred by various lawyers and include specific details of the work performed. Although the Answer flatly denies the Complaint, defendants have not submitted any evidence to show that these invoices were either paid or objected to at any time. Moreover, service of the Complaint was proper under Business Corporation Law § 306. Lolis's argument that service through the Secretary of State could not reach Zozo Restaurant "as a practical matter," because the Secretary of State's address for the restaurant is his New York address and he was in Florida when service was attempted, is wholly without merit. It was the corporation's responsibility to update the official records to ensure that it would receive notice, and Plaintiff is entitled to rely on State filings. Thus, Plaintiff is entitled to summary judgment against its client Zozo Restaurant in the amount of \$38,642.42, together with interest at the statutory rate from July 3, 2007.

Plaintiff's second cause of action, however, must be dismissed. Although the Retainer Agreement contains a provision permitting Plaintiff to seek legal fees in the connection with collection costs, it has no "reciprocal allowance for attorneys'

fees should the client prevail, [and is therefore] fundamentally unfair and unreasonable. Aside from its lack of mutuality, the clause, even if not so designed, has the distinct potential for silencing a client's complaint about fees for fear of retaliation for the nonpayment of even unreasonable fees ... and is, therefore, unenforceable." Ween v. Dow, 35 A.D.3d 58, 63-64 (1st Dep't 2006) (internal citations omitted).

Accordingly, it hereby is


ORDERED that Plaintiff's motion for default judgment is denied; and it further is

ORDERED that defendants' cross-motion is granted to the extent of dismissing the Complaint as against Lolis, and is otherwise denied; and it further is

ORDERED that the Complaint as to Lolis is severed and dismissed, and pursuant to CPLR § 3212(b), Plaintiff is granted summary judgment against Zozo Restaurant in the amount of \$38,642.42, with interest at the statutory rate from July 3, 2007, and with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: February 26, 2008

ENTER:



JANE S. SOLOMON

J.S.C.

FILED
FEB 29 2008
NEW YORK
COUNTY CLERKS OFFICE