

Davidoff Malito & Hutcher, LLP v Sharma

2008 NY Slip Op 32782(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 100740/07

Judge: Carol R. Edmead

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

PRESENT: CAROL EDMEAD
J.S.C.
Justice

PART 35

Davidoff Malito & Hutcher LLP

INDEX NO. 100740/2007

MOTION DATE 8/22/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Amba Sharma and Realm, LLC.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

Cross-Motion: Yes No

OCT 08 2008

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision hereby

COUNTY CLERK'S OFFICE
NEW YORK

ORDERED that motion by plaintiff Davidoff Malito & Hutcher, LLP for default judgment as against defendants Amba Sharma and Realm, LLC, is granted solely on the issue of liability; and it is further

ORDERED that the matter is set down for an inquest on damages; and it is further

ORDERED that the parties shall appear in Part 40, located at 60 Centre Street, New York, New York, Room 242, before J.H.O. Ira Gammerman on November 20, 2008 at 9:30 a.m. for an assessment of damages against defendants Sharma and Realm; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendants within 20 days of entry; and it is further

ORDERED that within 20 days of the date of this order, plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

This constitutes the decision and order of the court.

Dated: 10/06/08

[Signature]
CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

DAVIDOFF MALITO & HUTCHER, LLP,

Plaintiff,

Index No. 100740/07

-against-

DECISION/ORDER

AMBA SHARMA and REALM, L.L.C.

Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Davidoff Malito & Hutcher, LLP (“plaintiff”) moves for an order declaring the answer of the defendants Amba Sharma (“Sharma”) and Realm, L.L.C. (“Realm”) (collectively “defendants”) a nullity due to its untimeliness under CPLR § 3012, and to subsequently enter a default judgment in plaintiff’s favor. Alternatively, plaintiff moves for an order pursuant to CPLR § 3212 granting plaintiff summary judgment against defendants for the sum of \$9,610.08 plus interest on a theory of either account stated or unjust enrichment.

Background

The following facts are undisputed.

On July 21, 2004, plaintiff and defendant Sharma entered into a Retainer Agreement (“Agreement”) which, according to the language of the Agreement, served to retain plaintiff as special counsel to Sharma and to his business entities in connection with Sharma’s proposed development of property located in Westchester County, New York. Relevant sections of the agreement read as follows:

This letter...shall serve as the retainer for Davidoff Malito & Hutcher LLP (the “Law Firm”) to represent you and your related entities as special counsel in

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NEW YORK

connection with the proposed development of property located at Saxon Woods Road.... Our representation shall include (i) negotiation with the City of White Plains to conclude and settle outstanding land use issues and (ii) assistance in the preparation of an application to the Westchester County Industrial Development Agency for Inducement in connection with the financing of the project through the use of Triple Tax Exempt Industrial Revenue Bonds, negotiations with potential Bond Purchasers, review and negotiation of all relevant Agency and Bond Documentation, preparation of attorney opinion letters and all other activities necessary to close this transaction.

In consideration of said legal services: in connection with parenthetical (i) above, you have agreed to pay a fee of \$50,000; \$10,000 upon execution of this agreement and the remaining \$40,000 payable upon conclusion* of our discussions with White Plains. In connection with parenthetical (ii) above, you have agreed to pay an additional fee of \$50,000, payable as follows: \$10,000 immediately following conclusion of our activities under parenthetical (i) above, \$10,000 due upon approval of Inducement and Financing Resolutions by the Agency, and the remaining \$30,000 and disbursements at the closing.

* Permission to build ALF on adjoining Scarsdale building lot and all necessary permits required from city of White Plains [handwritten]

Should this project be abandoned or our services no longer required for any reason whatsoever, you will be billed for time incurred at this firm's normal hourly rates....

On or about July 5, 2006, plaintiff ceased representation of defendant. According to plaintiff, defendant Sharma informed plaintiff that plaintiff's services were no longer required. Sharma's affidavit was ambiguous on this point, but acknowledged that he contacted the plaintiff with concerns about the project's slow progress prior to being billed by the plaintiff. On July 12, 2006, plaintiff sent Sharma a bill for \$69,610.08 for services rendered, calculated according to plaintiff's hourly rate. Having received no response, on October 20, 2006, plaintiff sent a demand notice letter to defendants and a copy of defendants' rights, including the right to arbitration of the fee dispute.

On January 20 and 30, 2007, plaintiff served a summons and complaint upon defendant

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Sharma pursuant to section 3012(c) and defendant Realm pursuant to section 3012(a). Not having received a timely answer as required by CPLR §§ 3012(a) and (c) (and without defendants having moved this Court for leave to file a late answer under CPLR § 3012(d)), plaintiff submitted a statement for judgment to the Clerk for entry of judgment against defendants.

Before an entry of judgment was granted or denied, on June 22, 2007, plaintiff's attorney received defendants' answer, which included counterclaims and affirmative defenses. On June 25, 2007, plaintiff submitted a notice of rejection of the defendants' answer, based on its untimeliness. Plaintiff then responded to defendants' counterclaims on July 9, 2007, asserting the affirmative defense that defendants' answer was untimely and thus a legal nullity.

Plaintiff's Contentions

Plaintiff contends that defendants owe plaintiff a sum of \$69,610.08 in unpaid legal fees plus interest accruing from October 20, 2006, for services rendered by plaintiff on defendants' behalf.

Plaintiff contends that judgment should be awarded in its favor because defendants Sharma and Realm failed to timely answer plaintiff's complaints served, respectively, on January 20 and 30, 2007. Because defendants did not move for leave to file a late answer pursuant to CPLR § 3012(d), plaintiff contends that the answer, which was served 121 days late on June 20, 2007, is a nullity, thus warranting a default judgment in its favor.

Alternatively, plaintiff contends that it is entitled to summary judgment on the grounds of

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either an account stated or unjust enrichment.¹

Defendants' Contentions

In opposition, defendants' attorney, David Zaslavsky ("Zaslavsky"), asserts that plaintiff's contention that defendants' untimely answer entitles plaintiff to judgment lacks merit. Zaslavsky contends that the proper relief in such a situation would have been a motion for default judgment, which, Zaslavsky asserts, the plaintiff did not enter. Further, Zaslavsky contends that, even if a default judgment had been entered against defendants, they would have been able to vacate such a claim by presenting both a meritorious claim and reasonable excuse for the delay. Zaslavsky asserts that defendant Sharma was delayed in filing his answer because he had been traveling when he was served and was unable to retain an attorney in a timely manner.²

Plaintiff's Reply

In reply, plaintiff addresses defendants' affirmative defenses and counterclaims, and reiterates that defendants' answer was untimely and thus a nullity.³

Analysis

Under CPLR §§ 3012(a) and (c), defendants are required to answer a complaint within 20 or 30 days from the date of service, respectively. If more time is needed, under section 3012(d), defendants may request additional time to answer or move to compel plaintiff to accept the answer. Under 3012(d), courts have discretion to permit a late answer if defendants provide a

¹ In light of this Court's finding that defendants' answer is a nullity, as discussed below, plaintiff's contentions regarding the merits of its causes of action are not discussed.

² The defendants' contentions regarding the merits of their defenses and counterclaims will not be discussed because the Court finds their answer to be a nullity, as discussed below.

³ Plaintiff's arguments in reply regarding the merits of the case will not be discussed.

reasonable excuse for the delay and a meritorious claim:

Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

(CPLR § 3012[d]). Thus, while there is a well-established policy preference to have cases heard on their merits (*Picinic v Seatrains Lines, Inc.*, 117 AD2d 504, 508, 497 NYS2d 924, 927 (1st Dept 1986)), a court has discretion to allow an untimely answer only when the defendant demonstrates a reasonable excuse for the late answer and a meritorious defense. While there is no clear definition of “reasonable excuse” provided by case law or legislation, when there is apparent negligence behind the delay, the actions of attorneys are generally given more leeway than those of the defendants in an attempt to avoid punishing the defendant for the actions of his or her attorney (*see e.g., Leary v Pou Pouné*, 273 AD2d 8, 8, 708 NYS2d 108, 109 [1st Dept 2000], *Barajas v Toll Brothers, Inc.*, 247 AD2d 242, 243, 669 NYS2d 35, 36 [1st Dept 1998]; *Ackerson v Stragmaglia*, 176 AD2d 602, 604, 575 NYS2d 44, 47 [1st Dept 1991]; *Ganvey Merchandising Corp., v Knudsen Elevator Corp.*, 169 AD2d 518, 518, 564 NYS2d 374, 375 [1st Dept 1991]; *see also Charming Shoppes, Inc., v Overland Construction, Inc.*, 186 Misc 2d 293, 296, 717 NYS2d 860, 862 (Sup Ct Monroe County 2000, Stander, J.) [“This court cannot and will not extend the statutory provision allowing an excuse for a delay or default from law office failure to also include actions of the defendant.”]).

In this case, however, the defendant’s attorney merely provided a sole, conclusory basis for the delay: that defendant was traveling when served and was therefore unable to retain an attorney in a timely manner. To meet his burden under 3012(d), defendant must go beyond a vague and conclusory assertion and provide details sufficient to establish a reasonable excuse

(see *Perez v New York City Hous. Auth.*, 47 AD3d 505, 505-506, 850 NYS2d 75, 76 [1st Dept 2008] [“The conclusory and perfunctory claim of law office failure asserted by plaintiff’s attorney...does not constitute a reasonable excuse...”]; see also *Achampong v Weigelt*, 240 AD2d 247, 248, 658 NYS2d 606, 607-08 [1st Dept 1997]). Here, defendants failed to provide any explanation as to how service upon Sharma while traveling caused the four-month delay. “Traveling” in and of itself does not constitute a basis for a delay in answering a summons and complaint. Defendants failed to provide any dates or location of Sharma’s travel, any steps taken to retain an attorney prior to the date the answer was served, or what obstacles Sharma faced in attempting to retain an attorney during the four-month period. Therefore, defendants failed to establish a reasonable excuse for their delay.

Since defendants failed to provide a reasonable excuse for their untimely answer, it is unnecessary for the Court to consider the merits of their defense (see *Time Warner City Cable v Tri State Auto, Inc.*, 5 AD3d 153, 153, 772 NYS2d 512, 513 [1st Dept 2004], *lv dismissed* 3 NY3d 656, 816 NE2d 569, 782 NYS2d 696 [2004]; *Hyundai Corp. v The Republic of Iraq*, 20 AD3d 56, 63, 794 NYS2d 327, 333 [1st Dept 2005]; see also *Ortiz v Santiago*, 303 AD2d 1, 9-10, 757 NYS2d 521, 524-25 [1st Dept 2003]).

Accordingly, the motion by plaintiff Davidoff Malito & Hutcher, LLP for default judgment as against defendants Amba Sharma and Realm, LLC, is warranted on the issue of liability.

Conclusion

Based on the foregoing, it is hereby

ORDERED that motion by plaintiff Davidoff Malito & Hutcher, LLP for default

* 8]
judgment as against defendants Amba Sharma and Realm, LLC, is granted solely on the issue of liability; and it is further

ORDERED that the matter is set down for an inquest on damages; and it is further


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This constitutes the decision and order of the court.

Dated: October 6, 2008



Hon. Carol Robinson Edmead, J.S.C.

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