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

PRESENT: Tolub Justice PART 15

Cohen Lans, LLP

INDEX NO. 601819/08

MOTION DATE

- v -

MOTION SEQ. NO. 002

Litow, Patricia Byrn

MOTION CAL. NO.

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

	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

IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

COUNTY CLERK'S OFFICE NEW YORK

MAR 30 2009

FILED

Dated: 3/24/09

WALTER B. TOLUB 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 ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART
----------X
COHEN LANS, LLP,

Plaintiff,

-against-

PATRICIA BYRN LITOW,

Defendant.
----------X

Index No.
601819/08

WALTER TOLUB, J.:

Defendant pro se Patricia Byrn Litow moves to vacate an order granting a default judgment against her, dated November 26, 2008, in favor of plaintiff Cohen Lans, LLP (the Law Firm).

Facts

In January 2005, defendant retained the Law Firm to represent her against her former husband in a divorce action, entitled *Litow v Litow* (Sup Ct, NY County, index no. 350179/04 [the Divorce Action]). The Law Firm represented her throughout the Divorce Action, including at the trial conducted before the Hon. Laura Drager during late January and early February 2006, and during certain post-trial proceedings. In April 2006, after alleged difficulties arose between the parties, the Law Firm moved to be relieved as defendant's counsel. The Law Firm's motion was granted, and a charging lien was granted to the Law Firm in the amount of $115,575.65 (the Divorce Action, Orders dated August 2, 2006 & November 17, 2006, Drager, J.). Defendant's former husband paid $75,000 of these fees, leaving a

balance of $40,175.65. Pursuant to a So Ordered Stipulation, Kenneth David Burrows, Esq. (Burrows), counsel for defendant's former husband, is currently holding $40,175.65 in escrow as security for payment of the balance due from defendant to the Law Firm for the charging lien pending a court order or agreement of the parties herein (the Divorce Action, So Ordered Stipulation executed by Burrows, defendant and the Law Firm dated 2/27/07).

The Law Firm commenced the instant action to recover legal fees in the amount of $62,751.08, consisting of $40,175.65, which remains unpaid under the charging lien, and an additional $22,575.43, which had not yet been rendered when the lien was imposed. The complaint asserts two causes of action: breach of contract (first) and account stated (second). Since defendant failed to appear or answer the pleadings in this action, the Law Firm moved for a default judgment against defendant. The Law Firm's application was granted by this court on default on November 26, 2008 (the Order). Defendant now moves to vacate the Order.

Discussion

CPLR §5015 (a) provides that a party may be relieved from an order for "excusable default" (CPLR §5015 [a] [1]). A party seeking to vacate a default under this provision must establish both a reasonable excuse for its delay in appearing and answering the complaint, and a potentially meritorious defense to the

action (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138 [1986]; *JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362 [1st Dept 2008]).

Here, defendant does not dispute service of the summons and verified complaint in June 2008, or that she failed to answer or otherwise appear in the action. Her proffered excuses relate to the reasons she was allegedly unable to timely file her opposition papers to the Law Firm's underlying motion for a default judgment. She claims she believed that the instant action was going to be handled by the judge in the Divorce Action, and that it was not until October 23, 2008, that she learned that it was before another judge. She maintains that she was out of town from November 6-13; that she was unable to prepare response papers on time for the return date of November 18, 2008, and that it was not until December 2, 2008, that she attempted to file her response to the underlying motion, but was advised that a default judgment had already been entered.

While these proffered excuses concern why defendant failed to timely respond to the underlying motion, they fail to provide any excuse for her default in appearing or timely answering the instant action, which is necessary to vacate the default judgment (*see JP Morgan Chase Bank, N.A.*, 57 AD3d 362, *supra*). Moreover, the underlying record demonstrates that, at defendant's request, the Law Firm consented to several extensions, which provided her

with over three months to interpose an answer to the complaint.

Additionally, defendant fails to set forth the existence of a potentially meritorious defense to the action. Defendant argues that the Law Firm can not bring the instant action for legal fees because it obtained a charging lien and because of the establishment of an escrow account in the Divorce Action. Defendant's argument is without merit. An attorney who obtains a charging lien, in an action in which he or she was formerly attorney of record, does not waive the right to commence a plenary action to recover legal fees for services rendered in the underlying action (*see Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218 [1st Dept 1997]; *Salans Hertzfeld Heilbronn Christy & Viener v Between the Bread East, Inc.*, 290 AD2d 381 [1st Dept 2002]). The charging lien provides a security against the funds created in the underlying action (*Chadbourne & Park, LLP v AB Recur Finans*, 18 AD3d 222 [1st Dept 2005]), while recovery in the plenary action would be enforceable against all of the client's assets (*see, id.*). Therefore, although the Law Firm obtained a charging lien in the Divorce Action, it is not precluded from bringing the instant action. Additionally, the Law Firm not only seeks to recover those fees covered by the charging lien, i.e., services billed as of March 31, 2006 (*see* the Divorce Action, Order dated 11/17/06), but, also those subsequently rendered from April 1, 2006 through September 25, 2006, prior to the execution

of the order granting it leave to withdraw as defendant's attorney in the Divorce Action (*see id.*).

Defendant also contends that the RJI is inaccurate since the Law Firm did not indicate therein that there was a related case, or that there was a prior motion with respect to legal fees in the Divorce Action. Defendant argues that such information could have resulted in the instant action being referred to the judge in the Divorce Action, pursuant to CPLR 2217 (a). CPLR 2217 (a) provides that "any motion may be referred to a judge who decided a prior motion in the action." While the damages sought both in the prior motion and in the instant action are based on fees rendered for legal representation in the Divorce Action, the relief sought in the prior motion in the Divorce Action is distinct from the relief sought in this action. A judgment in the Divorce Action would be enforceable only against the escrow account, while a judgment in the instant action would be enforceable against all defendant's assets (*see Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, *supra*). Furthermore, as previously noted, an attorney who obtains a charging lien in one action may commence a separate action for recovery of the same fees (*see id.*). The mere fact that the Law Firm moved for a charging lien in the Divorce Case does not result in making the Divorce Action between defendant and her former husband a related case to the instant action by the Law Firm for the recovery of

legal fees. In view of the foregoing, there is no basis, under CPLR §2217 (a), for referring the instant action to the judge in the Divorce Action, or to consider the two actions related. Therefore, defendant's argument that the RJI was inaccurate and should result in the dismissal of the Law Firm's action is without merit.

Defendant further complains of the alleged inexperience of Deborah E. Lans (Counsel) from the Law Firm which represented defendant in the Divorce Action. Defendant claims that Counsel's alleged execution of stipulations on behalf of defendant in the Divorce Action, which defendant claims she was unaware of, and the manner in which Counsel handled the submission of defendant's post-trial brief were inadequate. Defendants allegations are denied by Counsel. However, even assuming arguendo that defendant's assertions were true, defendant fails to set forth how Counsel's alleged inexperience or actions in the Divorce Action resulted in any damages, or affords a basis for a defense to the Law Firm's action (to establish a claim for legal malpractice or breach of fiduciary duty, a plaintiff must demonstrate, inter alia, the existence of damages that were directly caused by the attorney's misconduct [*see Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423 (1st Dept 2007); *see also, Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 (1st Dept 2004)]).

Moreover, the Law Firm established a prima facie cause of action for an account stated against defendant, as it was required to do in its application for a default judgment against defendant (CPLR 3215 [f]; *see also Joosteen v Gate*, 129 AD2d 531 [1st Dept 1987]). "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other" (*Shea & Gould v Burr, III*, 194 AD2d 369, 370 [1st Dept 1993], *quoting Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [4th Dept 1979]). The receipt and retention of an account, without objection within a reasonable time, gives rise to an actionable account stated (*see, Bartning v Bartning*, 16 AD3d 249 [1st Dept 2005]; *see also Biegem v Paul K. Rooney, P.C.*, 269 AD2d 264 [1st Dept], *lv denied* 95 NY2d 761 [2000]).

In the underlying motion, the Law Firm submitted an affirmation by Counsel alleging sufficient facts supporting the account stated claim, the retainer agreement in January 2005 executed by defendant in which she agreed to pay the Law Firm for services rendered, and the detailed invoices it provided to defendant for services rendered and expenses incurred on her behalf from February 2005 through September 2006 (Underlying Motion for Default Judgment, Counsel's affirmation dated 10/15/08; the Law Firm's Exhibit A to underlying motion,

documents attached to verified complaint dated 6/18/08).

Defendant acknowledges executing the retainer agreement, and does not deny receiving the statements reflecting the amount requested in the complaint by the Law Firm. While defendant characterizes the fees sought as "exorbitant" (Defendant's affidavit dated 12/17/08, ¶ 17), there is no indication in the record that she made any specific objections concerning the invoices (*see Morrison, Cohen, Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355 [1st Dept 2001]). Rather, defendant states that she asked Counsel to wait until she received her portion of the marital assets before pursuing enforcement of the charging lien. She requested the delay, claiming that she had been representing herself in the Divorce Action since the time that the Law Firm was relieved as her counsel and has been unable to finalize the distribution of the marital assets therein. Defendant fails to set forth any basis that obligated the Law Firm to defer collection of the outstanding legal fees. Thus, defendant fails to raise a plausible defense to the Law Firm's cause of action for an account stated.

In the absence of any showing by defendant of a reasonable excuse for her default in appearing and answering the complaint, and a potentially meritorious defense to the action (*see, JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362, *supra*), the application to vacate the default is denied.

[* 10]

Accordingly, it is

ORDERED that defendant's application to vacate the order granting a default judgment against her is denied.

Dated: 3/26/09

ENTER:

Walter B. Tolub J. S. C.