

Korangy Publ., Inc. v Miceli

2010 NY Slip Op 30895(U)

April 9, 2010

Supreme Court, New York County

Docket Number: 110327/08

Judge: Martin Shulman

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4-19-10

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

MARTIN SHULMAN

PRESENT: _____ J.S.C. _____

PART 1

Index Number : 110327/2008

KORANGY PUBLISHING

INDEX NO. 110327/08

vs

MICELI, MATTHEW

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. 002

OTHER _____

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 A-D

1

Answering Affidavits - Exhibits _____

2

Replying Affidavits - Exh. A

3, 4

Notice of Cross-Motion - Exh. A - I
Answering Aff. - Exh. A - H, Replying Aff.

5, 6

Cross-Motion: Yes No

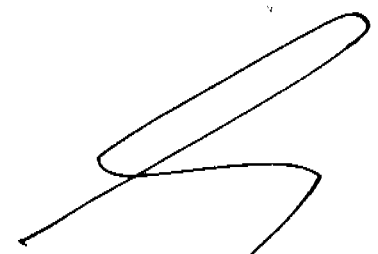
7, 8, 9, 10

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

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

FILED
APR 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 9, 2010


MARTIN SHULMAN 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 1

-----X
KORANGY PUBLISHING, INC., d/b/a "THE REAL
DEAL,"

Plaintiff,

Index No.: 110327/08

-against-

DECISION/ORDER

MATTHEW MICELI and JET SET ELITE,
Defendants.

-----X
HON. MARTIN SHULMAN, J.S.C.:

FILED
APR 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this employment action, plaintiff Korangy Publishing, Inc. ("plaintiff" or "KPI") moves to "reinstate" its complaint,¹ which this court dismissed without prejudice by short form order dated October 20, 2009 (the "order") based upon plaintiffs' counsel's failure to appear for scheduled compliance conferences on two (2) occasions. See Exh. D to Motion. Defendant Matthew Miceli ("defendant" or "Miceli") opposes the motion and cross-moves for a default judgment on his three (3) counterclaims. Plaintiff opposes the cross-motion.

KPI's remaining cause of action against Miceli² alleges breach of an employment contract between Miceli and "The Real Deal" ("TRD")³ whereby TRD hired Miceli as an account manager (the "employment contract"). Miceli is also the owner of co-defendant JSE. Plaintiff claims that defendant used TRD's facilities to further JSE's business at

¹ More precisely and as defendant's counsel notes, KPI seeks to vacate its default and the court will treat the motion as such.

² By decision and order dated February 27, 2009 (Exh. C to Motion), this court *inter alia* dismissed the complaint as against co-defendant Jet Set Elite ("JSE") and dismissed all but the first cause of action for breach of contract as to Miceli.

³ Plaintiff is a magazine publisher and TRD is one of its magazines.

the expense of TRD. Miceli quit his job at TRD due to a dispute over the amount of commissions owed to him.

KPI's Motion

In support of its motion KPI claims law office failure for its failure to appear at compliance conferences on July 14, 2009 and October 20, 2009. Plaintiff argues that its cause of action for breach of contract is meritorious in light of this court's prior determination that this cause of action was sufficiently pleaded to withstand defendant's pre-answer motion to dismiss.

Miceli counters that the motion is woefully deficient because it only summarily claims excusable default (law office failure) with no supporting facts. Defendant further cites the lack of an affidavit of merit and disputes KPI's implied argument that the burden of proof on this motion to vacate a default is the same as that on a motion to dismiss. Miceli argues the sole cause of action for breach of contract lacks merit because plaintiff offers no evidentiary proof of its unspecified damages.

In reply, plaintiff's counsel explains that his firm failed to appear on October 20, 2009 due to an unintentional scheduling error. As to the lack of an affidavit of merit, plaintiff's counsel attaches a copy of his client's affidavit in opposition to Miceli's prior motion to dismiss, claiming it could be construed as a verified pleading and used in lieu of an affidavit of merit. Finally, plaintiff's counsel argues that, in the interest of justice, KPI should be permitted to litigate its claim and defend against the counterclaims on the merits, without being penalized for its counsel's inadvertent default.

An application to vacate an order of default may be granted, if the movant can establish that his or her default was excusable and that he or she has a meritorious

cause of action or defense to the action. See *Barasch v. Micucci*, 49 N.Y.2d 594, 599 (1980); CPLR 5015(a). A determination of what constitutes a reasonable excuse for a default lies within the court's sound discretion. *Perellie v. Crimson's Restaurant, Ltd.*, 108 A.D.2d 903, 904 (2d Dept. 1985).

This court finds that plaintiff fails to establish both a reasonable excuse for its default and a meritorious cause of action. Counsel only summarily states that their default was due to law office failure in incorrectly calendaring the October 20, 2009 conference date. No detailed explanation is given for the failure to appear on two successive occasions. See *Grezensky v. Mount Hebron Cemetery*, 305 A.D.2d 542 (2d Dept. 2003)(movant must set forth detailed factual allegations explaining reason for default).

In any event, KPI fails to establish that it possesses a meritorious cause of action against Miceli for breach of the employment contract. Putting aside the fact that no affidavit of merit is submitted, the proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach and resulting damages. See, e.g., *Gordon v Dino De Laurentiis Corp.*, 141 A.D.2d 435 (1st Dept 1988). Plaintiff wholly fails to address the damages portion of its breach of contract cause of action.

That this court previously sustained the breach of contract cause of action on a motion to dismiss is of no moment. In determining defendant's prior motion to dismiss, this court deemed the complaint's allegations to be true and resolved all inferences reasonably flowing therefrom in plaintiff's favor. *Caron v. Hargro Fabrics*, 91 N.Y.2d 362 (1998); *Marini v. D'Atolio*, 162 A.D.2d 391 (1st Dept. 1990). An analysis of a claim's

merits for purposes of vacating a default entails further inquiry on the court's part and requires a more detailed showing on the movant's part. For all of the above reasons, plaintiff's motion to vacate its default must be denied.

Miceli's Cross-Motion

Miceli asserts three (3) counterclaims for breach of contract; damages pursuant to Labor Law ("LL") §198 for plaintiff's failure to pay defendant his wages and commissions; and violation of LL §215 (retaliation). The cross-motion is granted as to liability and the matter shall be set down for an inquest to determine the amount of Miceli's damages and attorney's fees. At the inquest, KPI may contest the amount of damages defendant seeks. Plaintiff's claim that it paid defendant commission overpayments totaling \$4,926.00 may be raised at that time.

Accordingly, it is hereby

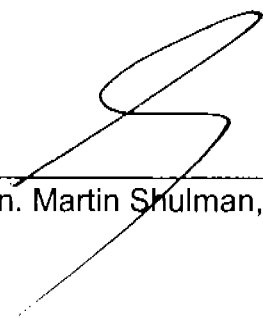
ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that defendant Miceli's cross-motion is granted to the extent that an inquest for the assessment of damages is directed as to defendant's counterclaims; and it is further

ORDERED that, on or before May 18, 2010, plaintiff shall file with the Clerk of the Trial Support Office a copy of this decision and order with notice of entry and a note of issue and shall pay the appropriate fee, and said Clerk is directed thereupon to place this matter on the appropriate calendar for the assessment herein above directed.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
April 9, 2010



Hon. Martin Shulman, J.S.C.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE