

**KML Assoc., P.C. v Lawrence M. Kamhi, M.D., P.C.**

2010 NY Slip Op 31028(U)

April 22, 2010

Supreme Court, New York County

Docket Number: 602076/08

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

J.S.C.

PART 10

PRESENT:

Index Number : 602076/2008

KML ASSOCIATES, P.C.

vs

KAMHI, LAWRENCE M., M.D. P.C.

Sequence Number : 003

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

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**

APR 28 2010

NEW YORK COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

APR 22 2010

Dated: \_\_\_\_\_

\_\_\_\_\_  
HON. JUDITH J. GISCHE 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 10

-----X  
KML ASSOCIATES, P.C.,

Plaintiff,

-against-

LAWRENCE M. KAMHI, M.D., P.C. and  
LAWRENCE M. KAMHI, individually,

Defendants.

**Decision/Order**

Index No.: 602076/08

Seq. No. : 003

Present:

Hon. Judith J. Gische  
J.S.C.

**FILED**

APR 28 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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Recitation, as required by CPLR 2210(a), of the papers considered in the review of this (these) motion(s):

**Papers**

Pltf's motion [§3215; §2004] w/PWS affirm, SK affid, exhs . . . . .1

**Numbered**

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*Upon the foregoing papers, the decision and order of the court is as follows:*

Plaintiff has asserted causes of action for breach of contract, conversion and fraud. Plaintiff now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in its favor and against the defendants Lawrence M. Kamhi, M.D., P.C. (the "Professional Corporation") and Lawrence M. Kamhi, individually ("Kamhi"). This is a renewed motion for a default judgment pursuant to CPLR § 2004.

This action was commenced with the filing of a summons and verified complaint on July 15, 2008. Though plaintiff has provided proof of service of the summons and verified complaint on both defendants, neither have answered or appeared in this action and their time to do so has expired. It has not been extended by the court. Therefore, defendants have defaulted in appearing in this action and answering the complaint.

## Discussion

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). A default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom (Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 [1st Dept. 1984]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1997); and CPLR § 3215 (f)] or a complaint verified by a person with actual knowledge of the facts surrounding the claim [Hazim v. Winter, 234 A.D.2d 422 (2d Dept. 1996); and CPLR § 105 (u)].

The following facts have been established by the plaintiff in the summons and verified complaint and through the sworn affidavit of Mihaela I. Vladutiu, M.D., a gastroenterologist and an owner of plaintiff, and the affidavit of Linda Siriani ("Siriani"), the business manager of plaintiff.

Plaintiff asserts causes of action against defendants for breach of contract, conversion, and fraud. Plaintiff generally alleges in its verified complaint that on November 9, 2004, the plaintiff, Kamhi, and the Professional Corporation entered into a written agreement (the "Agreement"). Plaintiff is a medical center that engages in the practice of gastroenterology and the Professional Corporation is an independent contractor (defined as such in the Agreement). Pursuant to the Agreement, the Professional Corporation was to perform anesthesia services to plaintiff's patients for a one year period from November 1, 2004 through October 31, 2005.

The Agreement, which is signed by Kamhi on behalf of the Professional Corporation and plaintiff, provides, in relevant part as follows:

5. The Independent Contractor guarantees that he will personally administer anesthesia care [at plaintiff's offices] three days per week and shall guarantee anesthesia coverage by a qualified anesthesia provider on the remaining days.

6. The Independent Contractor agrees to permit his anesthesia services, or those of his employees, to be billed through "KML Medical Associates, P.C., Lawrence Ottaviano, MD, President . . ."

In order to state a cause of action for breach of contract, the pleading must allege the existence of a valid and enforceable agreement, due performance by plaintiff, and a failure of performance by defendant, resulting in damages (*see Furia v Furia*, 116 A.D.2d 694, 695 [2d Dept. 1986]).

Plaintiff claims that Kamhi was obligated, but failed to appear at plaintiff's offices to perform anesthesia services from October 12, 2005 to October 21, 2005. Plaintiff's allege further that the defendants did not provide "alternate anesthesia coverage," and that defendants did not submit bills to plaintiff for the anesthetic services Kamhi did perform. These allegations form the basis for plaintiff's alleged breach of contract claim against defendants. These facts establish the claims in the complaint and plaintiff's entitlement to entry of a default judgment against the Professional Corporation based on the Agreement.

Kamhi, however, did not sign the Agreement in his individual capacity, nor did he personally guarantee the Professional Corporation's obligations under the Agreement. Although plaintiff has established that Kamhi is in default, plaintiff has not set forth a

*prima facie* breach of contract cause of action against him individually.

Where claims of tort are based on the same facts that underlie the contract claim and is not collateral to the contract, and no damages are alleged that would not be recoverable under a contract matter of damages, then such a cause of action should be dismissed as duplicative. J.E. Morgan Knitting Mills, Inc. v. Reeves Bros., Inc., 243 A.D.2d 422 (1st Dept. 1997). Since plaintiff's third and fourth cause of action (conversion and fraud) are redundant of its first and second cause of action, seeking the same damages, they are hereby severed and dismissed. See Novelty Crystal Corp. v. PSA Institutional Partners, L.P., 49 A.D.3d 113 (2d Dept. 2008).

The motion for entry of a default judgment is, therefore, granted on default against the Professional Corporation for breach of contract. Plaintiff seeks \$50,000 on the first cause of action and \$127,272 on each of the second, third, and fourth causes of action, together with interest from November 1, 2005, costs and disbursements. Siriani states that plaintiff has not received payment for the anesthesia administered in 169 cases. In order to determine how much is due and owing to plaintiff, it is necessary to review information from approximately 21 insurance companies. While plaintiff submits lists containing this information, it is impossible for the court to determine plaintiff's damages without an inquest. The court, therefore, refers the issue of what plaintiff may recover from Lawrence M. Kamhi, M.D., P.C. for its damages to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff, KML Associates, P.C.'s, motion is granted as to its first and second causes of action, and that KML Associates P.C., is entitled to a default judgment against defendant, Lawrence M. Kamhi, M.D., P.C.; and it is further

**ORDERED** that plaintiff's third and fourth causes of action are severed and dismissed; and it is further

**ORDERED** that plaintiff's motion for a default judgment against defendant, Lawrence M. Kamhi, individually, is hereby denied; and it is further

**ORDERED** that all issues regarding damages are to be decided at an inquest is hereby referred to a Special Referee to hear and determine; and it is further

**ORDERED** that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the Court.

Dated: New York, New York  
April 22, 2010

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
APR 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE