

Goldberg Weprin Finkel Goldstein LLP v Shapolsky
2010 NY Slip Op 31404(U)
May 26, 2010
Sup Ct, NY County
Docket Number: 116712/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____
J.S.C.
Justice

PART 10

Index Number : 116712/2009
GOLDBERG WEPRIN FINKEL
vs.
SHAPOLSKY, GRANT
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

JUN 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/27/10


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
GOLDBERG WEPRIN FINKEL GOLDSTEIN
LLP, f/k/a GOLDBERG WEPRIN & USTIN LLP,

Plaintiff,

-against-

GRANT SHAPOLSKY,

Defendant.
-----x

Decision/Order

Index No.: 1106712/09
Seq. No. : 001

Present:

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

FILED
JUN 07 2010

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's n/m [§ 3215] w/CRC affirm, CRC affid, exhs 1

Numbered

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

This is an action for breach of contract, quantum meruit, and account stated.

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 defendant Grant Shapolsky ("Shapolsky"). Plaintiff is a law firm and is representing itself in this matter.

This motion has been submitted to the court on default, though due proof of service on defendant has been filed. Plaintiff served the summons and complaint on a person of suitable age and discretion on December 7, 2009 and mailed a copy to the same address on December 8, 2009 (CPLR § 308[4]). Plaintiff has also complied with the additional notice requirements of CPLR § 3215[g][3][i] by mailing a copy of the summons and complaint to the defendant on December 30, 2009, more than twenty (20) days before seeking entry of a judgment on default.

Despite such notice and additional notice, defendant has not appeared, answered the complaint, or moved. His time to do so has expired and this motion is brought within one year of his default.

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 complaint and through the sworn affirmation and affidavit of merit of Christopher R. Clarke, Esq., who states he is associated with plaintiff and is familiar with the facts surrounding the claim.

Plaintiff asserts three causes of action against defendants for breach of contract, quantum meruit, and account stated. Plaintiff claims that at the request of defendants, plaintiff provided legal services for defendant at its customary hourly rates. Plaintiff alleges that defendant owes plaintiff a balance \$36,751.75 for legal services through

[* 4]
August 2008 and that although it demanded payment by defendant, defendant failed to reimburse plaintiff for such services.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2d Dept. 1990). A written letter of engagement or a retainer agreement provides *inter alia* the scope of legal services to be rendered and explains how attorney's fees and billing will accrue. NY Rules of Court § 1215.1. Plaintiff's services do not fall under any exceptions, as the fee charged is greater than \$3,000.00 and there is no claim that the plaintiff's services were of the same general kind as previously rendered and paid for by the client. NY Rules of Court § 1215.2.

Plaintiff failed to provide the court with a written letter of engagement or retainer agreement evidencing the terms of any contract between plaintiff and defendant. Plaintiff has, therefore, not established the elements of a *prima facie* cause of action for breach of contract.

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 A.D.2d 868 (3d Dept. 1993), *lv. denied* 82 N.Y.2d 660 (1993). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 A.D.3d 610 (3d Dept. 2005).

Based on the foregoing, plaintiff has established a *prima facie* cause of action for account stated against the defendant. Plaintiff has provided detailed statements dated October 5, 2006; September 5, 2007; March 26, 2008; and August 21, 2008 regarding

* 5]
legal services for four different real estate transactions where plaintiff represented defendant.

Accordingly, plaintiff's first cause of action for breach of contract is severed and dismissed. Plaintiff is entitled to entry of default judgment against the defendant on its third cause of action for account stated. Plaintiff's second cause of action for quantum meruit is duplicative of its third and is hereby severed and dismissed.

Plaintiff is, therefore, entitled to a balance of \$36,751.75, plus interest at the statutory rate, from September 1, 2009, the date of defendant's breach.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendant, Grant Shapolsky, is granted on the third cause of action for account stated; and it is further

ORDERED that the first and second causes of action for breach of contract and quantum meruit are hereby severed and dismissed; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff and against defendant in the sum of thirty-six thousand seven hundred fifty-one dollars and seventy-five cents (\$36,751.75); and it is further

ORDERED that interest shall run from September 1, 2009, at the statutory rate; and it is further


ORDERED that any requested relief not expressly addressed herein has

[* 6]
nonetheless been considered by the court and is denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
May 26, 2010

So Ordered:



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

FILED
JUN 07 2010
NEW YORK
COUNTY CLERK'S OFFICE