

**Rider, Weiner & Frankel, P.C. v Krug**

2010 NY Slip Op 31472(U)

June 11, 2010

Sup Ct, Orange County

Docket Number: 3157-2009

Judge: Lewis Jay Lubell

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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF ORANGE**

-----X

RIDER, WEINER & FRANKEL, P.C.,

Plaintiff(s),

-against -

GAYLE KRUG,

Defendant(s).

-----X

**LUBELL, J.**

**DECISION/ORDER**

Index No.3157-2009

Motion Date: 3/26/10

The following papers were considered in connection with this motion by plaintiff for an order pursuant to CPLR 3215(a) directing the entry of judgment in favor of the plaintiff Rider, Weiner & Frankel, P.C. and against defendant Gayle Krug for the relief demanded in the verified complaint, upon the ground that defendant defaulted in pleading, and for such other relief as the Court deems proper, and cross-motion by defendant for an Order pursuant to CPLR §2221 for leave to renew or reargue Defendant's October 15, 2009 Motion to Extend Defendant's Time to Answer which was denied by this Court's January 10, 2010 Decision & Order:

**PAPERS**

**NUMBERED**

Motion/Affirmation/Exhibits A-D	1
Affirmation in Opposition/Affirmation/Exhibit	2
Cross-Motion/Affirmation/Affidavit/Exhibits A-G	3
Affirmation in Support/Affidavit	4

This is an action by plaintiff law firm, Rider, Weiner & Frankel, P.C., against defendant Gayle Krug for breach of contract, unjust enrichment and account stated in connection with legal services alleged rendered to her as the successor trustee of her late husband's estate.

By Decision & Order of September 21, 2009, the Court denied defendant's motion for an Order pursuant to CPLR §3211(a)(2) dismissing the action for lack of subject matter jurisdiction or, alternatively, an Order pursuant to CPLR §§510 and 511 changing the

place of trial from the County of Orange to the County of Rockland. Therein, the Court also denied, on procedural grounds, defendant's application, made for the first time in reply papers, that she be granted an extension of time to serve and file an answer. Denial was without prejudice to "whatever further, proper and timely application either party may deem appropriate."

Thereafter, by Decision & Order of January 15, 2010, the Court denied defendant's CPLR §3012 application for an extension of time to interpose her answer. Upon doing so, the Court stated:

Here, even if the Court were to find that there exists a reasonable excuse for the default, the motion must be denied for want of a showing of a meritorious defense since defendant has failed to come forward with a sufficient factual showing in proper form of the facts establishing same (see CPLR 3215[f]; Gagen v. Kipany Prods., 289 A.D.2d 844, 845, 735 N.Y.S.2d 225 [2001]). Defendant's reliance on her proposed verified answer is wholly inadequate. More particularly, and not by way of limitation, the conclusory contention in the sixth affirmative defense contained in defendant's proposed verified answer that the fees charged were "unreasonable", without more, does not constitute the requisite showing.

These motions follow.

Defendant's Motion to Renew/Reargue:

Defendant's motion to "renew and/or reargue" her motion for an extension of time to interpose an answer is denied on procedural grounds as untimely (see, CPLR §§2215) and for failure to "identify separately and support separately each item of relief sought" (CPLR §2221[f]) and, as well, on the merits.

Plaintiff's motion for leave to reargue is denied for failure to persuade the Court that it overlooked or misapprehended the facts or misapplied the law, or for any other reason, mistakenly arrived at its determination to the extent reargument is sought.

Renewal is denied upon the grounds that the Court is not satisfied that any asserted new facts could not have been earlier presented to the Court for its consideration or that there is an adequate excuse advanced for same.

Plaintiff's Motion for a default judgment:

Plaintiff's motion for a default judgment against defendant on the first cause of action for breach of contract and the second cause of action for unjust enrichment is granted.

The motion is denied, however, as it relates to the third cause of action, for an account stated.

In order to grant a default judgment on an account stated cause of action, the moving party must "file proof of service of the summons and the complaint . . . proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." McKinney's CPLR § 3215(f). Proof of the facts constituting the claim may be placed before the Court by way of an affidavit of merits (see, State v. Williams, 44 A.D.3d 1149, 1151-52) or, alternatively, by means of a verified complaint.

Here, Plaintiff relies on its verified complaint. Verified Compl., ¶ 16-20. While the verified complaint sets forth the total amount owed to Plaintiff by the Defendant, it does not assert such necessary allegations as when and what bills were forwarded to Defendant. Verified Complaint, at ¶ 19; See Grossman v. APF Group, Inc., 26 Misc.3d 1209(A) [Sup. Ct, NY Cty, 2009] [summary judgment denied]). In contract, it merely alleges in a conclusory manner that Plaintiff submitted "its invoice for the legal services it rendered to defendant setting forth the nature of the services, disbursements incurred on defendant's behalf, and the amounts due pursuant to the parties' agreement and the plaintiff's usual and customary rates." Verified Complaint, at ¶ 18. See also, Citibank (SD) v. Goldberg, 24 Misc.3d 143(A) [App Term, 2009] [summary judgment denied on account stated where plaintiff's supporting affidavit "did not set forth any facts as to the specific monthly statements allegedly mailed to defendant"]. More is required (see, Star Video Entertainment, LP v. J & I Video Distributing, Inc., 268 A.D.2d 423 [2 Dept., 2000] [sufficient showing made in summary judgment context where evidence established that plaintiff sent "certain invoices" to defendant . . . ]; Grossman v. West 26th Corp., \_\_\_9 Misc.3d 414, 801 N.Y.S.2d 727, 728 [Civil Ct. City of NY, 2005] [plaintiff must submit, in either their affidavit or verified complaint, "the days or hours worked" in addition to "the nature of the work performed and the amount billed]). As such, the motion is denied to the extent that it relates to the cause of action for an account stated.

Based upon the foregoing, it is hereby

ORDERED, that plaintiff's motion for order pursuant to CPLR

3215(a) directing the entry of judgment in favor of the plaintiff Rider, Weiner & Frankel, P.C. and against defendant Gayle Krug for the relief demanded in the verified complaint is granted as to the first cause of action for breach of contract and the second cause of action for unjust enrichment, but is denied as the third cause of action for an account stated; and, it is further

ORDERED, that defendant's cross-motion for an Order pursuant to CPLR §2221 granting leave to renew or reargue Defendant's October 15, 2009 Motion to Extend Defendant's Time to Answer is denied; and, it is further

ORDERED, that the parties are directed to appear before the Court on July 13, 2010 at 9:00 AM for a settlement conference and, if necessary, to schedule the inquest to address the issue of damages on the breach of contract and unjust enrichment causes of action.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Goshen, New York  
June 11, 2010

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**HON. LEWIS J. LUBELL, J.S.C.**

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