

Wisselman, Harounian & Assoc., P.C. v Lelekakis

2011 NY Slip Op 31002(U)

April 7, 2011

Supreme Court, Nassau County

Docket Number: 11247/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

WISSELMAN, HAROUNIAN & ASSOCIATES, P.C.
f/k/a/ THE LAW FIRM OF JEROME A. WISSELMAN, P.C.,

TRIAL/IAS PART 32
NASSAU COUNTY

Plaintiff,

Index No.: 11247/10
Motion Seq. Nos.: 01, 03
Motion Dates: 11/15/10
12/16/10

- against -

ILIAS LELEKAKIS,

Defendant.

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion, Affidavit and Exhibit</u>	<u>1</u>
<u>Notice of Cross-Motion (Amended) & Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Affidavit in Support of Motion to Dismiss and in Opposition to Cross-Motion</u>	<u>3</u>
<u>Reply Affirmation in Support of Cross-Motion and in Opposition to Motion to Dismiss and Exhibits</u>	<u>4</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

In an action for plaintiff to recover monies alleged due and owing from defendant for providing legal representation to defendant for litigation involving a real estate matter, defendant, *pro se*, moves (Seq. No. 01) for an order dismissing plaintiff's complaint pursuant to CPLR § 3211(a)(8) on the ground that the Summons and Complaint were not properly served upon said defendant pursuant to CPLR § 308, or in any other proper manner, and the Court does not have jurisdiction over said defendant. (This is according to the Court's interpretation of the *pro se* motion papers.) Plaintiff opposes defendant's motion and cross-moves (Seq. No. 03), pursuant to CPLR §§ 2001, 2004, 2005 and 3012(d), for an order extending plaintiff's time to

serve a Reply, *nunc pro tunc*, on the grounds that plaintiff's failure to timely serve a Reply was excusable and did not in any manner prejudice or impair the rights of the defendant. Plaintiff additionally moves, pursuant to CPLR § 3211(a), for an order dismissing defendant's Counterclaim on the grounds that said Counterclaim fails to state a cause of action. Defendant opposes plaintiff's cross-motion.

In his motion to dismiss, defendant, *pro se*, argues that he was not properly served at 23-54 31st nor 24-01 31st, Astoria, N.Y. 11105. He adds that "I have answered the case on July 23, 2010. Enclosed is a copy of the Answer. I was never notified by court to appear (*sic*) on my primery (*sic*) residents (*sic*) in wich (*sic*) is 47 Dunwood Rd. Port Washington, N.Y. 11050." In his Answer, which was attached to his motion, defendant included an Affirmative Defense stating "I was not served properly at 23-54 31st Astoria, N.Y. 11105, by third party." Defendant also included a Counterclaim, to wit "[l]ost my my (*sic*) case therefore need 1,000,000- in compasation (*sic*) plus legal fees." Defendant request that the instant matter be dismissed.

In opposition to defendant's motion plaintiff states that "[o]n or about February 11, 2003 in Great Neck, New York, Defendant retained Plaintiff to perform certain work, labor and services for Defendant as his attorney in a certain litigation involving real estate concerning the premises known as '46-13 243rd Street, Douglaston, New York 11362' in the matter known as Lelekakis v. Kamamis. Defendant agreed and promised to pay Plaintiff for those services at the rates set forth in the retainer agreement, and to compensate Plaintiff for all disbursements and costs incurred through Plaintiff's representation of Defendant as well as interest on any balance not paid within thirty (30) days....Said real estate litigation involved complex issues relating to a disputed option agreement and related causes of action for specific performance, unjust enrichment and negligence, and the action entailed extensive discovery and court appearances. Plaintiff has dutifully performed all services required by said retainer agreement. Defendant paid an initial retainer fee, which was applied to initial services already rendered and initial expenses already incurred. However, Defendant failed to make payment for services thereafter actually rendered by Plaintiff, together with unrepaid (*sic*) disbursements and late charges (9% annum), in the total amount of \$126,844.90, plus accrued interest thereon, although payment has been duly and repeatedly demanded. When plaintiff requested fees to be paid into Court in order to

continue in the matter, defendant refused, discharged plaintiff and retained new counsel.”

Plaintiff commenced the instant action on June 17, 2010, by personally serving defendant with the Summons and Verified Complaint. Issue was joined on August 2, 2010. As previously mentioned, defendant’s Answer contained a Counterclaim stating “[l]ost my my (*sic*) case therefore need 1,000,000- in compasation (*sic*) plus legal fees.”

Plaintiff argues that if a malpractice counterclaim was being asserted, said counterclaim was asserted three years after the expiration of the statute of limitations. Plaintiff also submits that there is no merit to plaintiff’s counterclaim as plaintiff’s actions on behalf of defendant were “extensive and zealous.” Plaintiff contends that the defendants’s counterclaim is interposed in bad faith, simply to avoid payment of a bill for services rendered in pre-trial work for the underlying action. Furthermore, in said counterclaim, defendant sets forth no acts of negligence or malpractice whatsoever and states no cognizable cause of action of any sort.

With respect to the circumstances of its delayed Reply to defendant’s Answer, plaintiff states that it received defendant’s Answer on August 3, 2010, and, given that defendant claimed improper service, plaintiff “initially concentrated on re-serving defendant personally. In the firm’s efforts to personally serve defendant, as well as to prepare for Preliminary Conference in this matter, including a telephonic conference with Defendant in an attempt to amicably settle this matter, this office overlooked the Counterclaim and failed to reply to same.” Plaintiff notes that defendant has not taken any action on the Counterclaim and has not filed for a default judgment on said Counterclaim.

Plaintiff argues that, pursuant to CPLR § 3012(d), the Court may extend time to plead, upon such terms as may be just, for reasonable excuse of delay. Plaintiff submits that law office failure is a basis for excuse of delay or default where consistent with the interests of justice. Plaintiff contends that defendant has not been prejudiced by the delay in service of the Reply. Plaintiff states that it has a meritorious defense to defendant’s alleged Counterclaim in that defendant was properly represented by plaintiff in the underlying action and plaintiff did not cause defendant’s loss in said action. Plaintiff was discharged prior to the trial in the underlying matter and defendant actually won said trial, but lost on appeal.

In opposition to defendant’s motion, plaintiff states that defendant was initially served,

pursuant to CPLR § 308(2), with a copy of the Summons and Verified Complaint on June 17, 2010 at 3:34 p.m. at Best Bodywork located at 23-24 31st Street, Astoria, New York 11105, defendant's place of business. Cheri "Doe", the General Manager of Best Bodywork accepted service. When defendant alleged lack of service in his Answer, to avoid burdening the Court with the need for a traverse hearing, plaintiff re-served defendant with the Summons and Verified Complaint on September 15, 2010 at 47A Dunwood Road, Port Washington, New York. Plaintiff provides copies of the Affidavits of Service as exhibits to is motion papers. Plaintiff argues that controlling case law holds that a plaintiff has an absolute right to re-serve within the 120-day period for service and that proper subsequent service within the statutory period precludes any dismissal based on a prior, contested service.

In defendant's reply papers he states "[a]lthough I was not properly served with the summons and complaint the first time, I was served personally at my home the second time. I was unaware that the plaintiff had 120 days from the time they filed the summons and complaint to serve me. I was under the impression that once the service of the summons and complaint was not served properly, then they could not reserve me. Apparently, I was incorrect and do not want to waste the court's time or burden this court with the issue of the fact that I was not properly served. Obviously, I was mistaken and, therefore, will not argue that I was not properly served with the summons and complaint."

As the basis for defendant's motion to dismiss (Seq. No. 01) was that he was not properly served and the Court finds that the evidentiary proof shows that defendant was indeed properly served, with defendant himself now admitting same, defendant's motion (Seq. No. 01) is hereby denied.

Plaintiff's request in its cross-motion (Seq. No. 03) for an order extending plaintiff's time to serve a Reply, *nunc pro tunc*, is hereby granted. Plaintiff has offered a reasonable excuse for the delay, has set forth a meritorious defense to defendant's Counterclaim and has demonstrated that defendant will not be prejudiced if the Court granted said relief.

Additionally, plaintiff's further request that, pursuant to CPLR § 3211(a), defendant's Counterclaim be dismissed on the grounds that it fails to state a cause of action is also hereby granted.

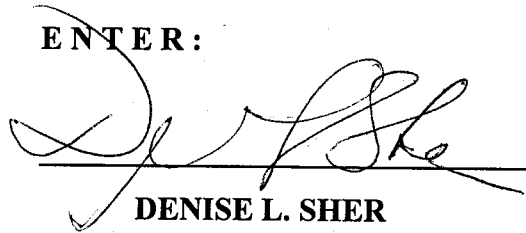
In determining a motion to dismiss pursuant to CPLR 3211(a)(7) for defendant's alleged failure to state a cause of action/to state a claim upon which relief could be granted in his

Counterclaim, the Court will afford the claim a liberal construction, accept the facts contained therein as true, accord defendant every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). Even given all of the above, defendant's Counterclaim, consisting merely of defendant's statement "[I]ost my my (*sic*) case therefore need 1,000,000- in compasation (*sic*) plus legal fees," fails to state a cause of action upon which relief can be granted. Said statement fails to allege that plaintiff has done anything wrong and therefore failed to allege malpractice or any other legal cause of action.

Accordingly, defendant's motion (Seq. No. 01) is denied and plaintiff's cross-motion (Seq. No. 03) is granted in all respects.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
April 7, 2011

ENTERED
APR 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE