

**Ellenoff Grossman & Schole, LLP v Paulsen**

2011 NY Slip Op 32028(U)

July 20, 2011

Supreme Court, New York County

Docket Number: 104483/2009

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Index Number : 104483/2009  
ELLENOFF GROSSMAN & SCHOLE, LLP  
vs.  
PAULSEN, JOHN  
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

**FILED**

Upon the foregoing papers, It is ordered that this motion

JUL 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 7/20/11

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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  
ELLENOFF, GROSSMAN AND SCHOLE, LLP,

Plaintiff,

-against-

JOHN PAULSEN AND DHRU DESAI,

Defendant.  
-----X

**Decision/Order**

Index No.: 104483/2009  
Seq. No.: 001

**Present:**

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

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

**FILED**

**Papers**

**JUL 21 2011**

**Numbered**

Pltf's n/m [§ 3215] w/RK affirm, exhs ..... 1

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

This is an action for a breach of contract, account stated and quantum meruit. Plaintiff, Ellenoff Grossman & Schole, LLP ("EGS") moves, pursuant to CPLR § 3215, for an order directing the Clerk of the Court to enter a default judgment in its favor and against the Defendants, John Paulsen ("Paulsen") and Dhru Desai ("Desai"). Paulsen and Desai were duly served in accordance with CPLR § 308. Desai was personally served with the summons and verified complaint on April 6, 2009 pursuant to CPLR § 308(1). Paulsen was served through his wife, Kelly Paulsen, a person of suitable age and discretion at his residence on April 8, 2009. Service on Paulson was completed when plaintiff mailed another copy of the summons and verified complaint on April 15, 2009 pursuant to CPLR § 308(2). Plaintiff complied with the additional notice requirements of CPLR 3215(g)(3)(i) by mailing a copy of summons and verified

complaint to Paulsen and Desai, on or about December 29, 2009, at least twenty days before seeking entry of judgment.

Despite such notice and additional notice, neither defendant has appeared in this action or answered the complaint. Defendant's time to do so has expired and has not been extended by the court. This motion was also served on defendants but they have not interposed any opposition. Therefore, the defendants have defaulted in this action and the motion will be considered without opposition.

Plaintiff is entitled to a default judgment against the defendants, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3rd Dept. 2001). In a default action, the complaint only needs to present enough facts to prove a viable case of action, and the default serves as admittance of the allegations. Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 (2003). Judgment by default requires an affidavit or a verified complaint of the facts to support the claim. Zelnick v. Biderman Industries, U.S.A., Inc., 242 A.D.2d (1st Dept. 1997); CPLR § 3215 (f). Default judgments not entered within one year should be dismissed unless there is a sufficient cause found in a reasonable excuse and demonstrated in the merits of the action. Iorizzo v. Mattikow, 25 A.D.3d 762 (2nd Dept. 2006); CPLR § 3215(c). A documented history of negotiations between the parties can serve as a reasonable excuse because it shows plaintiff had not abandoned the action. Iorizzo, supra.

#### Facts Presented

The following facts have been established by the plaintiff in the summons and verified complaint and through the sworn affirmation of Richard P. Kaye, a partner of

plaintiff. Plaintiff asserts three causes of action against Paulsen and Desai, they are: breach of contract (COA1); account stated (COA2); and quantum meruit (COA3). Plaintiff claims that Paulsen and Desai entered into a Retainer Agreement with EGS for legal services in September 2006 ("Retainer Agreement"). Only Paulsen signed the Retainer Agreement, but plaintiff asserts Desai also accepted the legal service fees by later signing the Forbearance and Settlement Agreement (See decision, *infra*). The Retainer Agreement stated EGS would work on behalf of Paulsen and Desai at its standard hourly rate for lawyers and legal assistants and that EGS would be paid for the legal services and any disbursements EGS incurred on behalf of Paulsen and Desai. The Retainer Agreement also stated payment on the invoices had to be made within thirty days of receipt and any challenges to the bill should be brought up during that time frame.

Plaintiff performed legal services for Paulsen and Desai after the Retainer Agreement was executed, in two separate actions ("Aspatuck Action" and "Mosaic Action"). Plaintiff alleges Paulsen and Desai owed \$32,046.74 for legal services rendered in the Aspatuck Action and \$115,741.23 for legal services rendered in the Mosaic Action. Plaintiff acknowledges Paulsen and Desai made one \$20,000 payment around January 22, 2007, toward services rendered in the Aspatuck Action, thereby reducing the total unpaid legal fees due and owing to \$147,787.97.

On April 1, 2009, EGS commenced this lawsuit against Paulsen and Desai for breach of contract, account stated and quantum meruit. Shortly after service, the plaintiff and defendants entered the Forbearance and Settlement Agreement ("Settlement Agreement"), dated April 15, 2009. In the Settlement Agreement, EGS

acknowledged receipt of one \$5,000 payment made on behalf of Paulsen and Desai on April 13, 2009. The parties agreed that defendants owed the plaintiffs the unpaid sum of \$142,787.97. It was also agreed that the amount owed would be paid in five (5) installment payments and a final balance payment, without interest. The agreement also provides for the imposition of interest on the unpaid sum from the date of commencement of this action.

In connection with the Settlement Agreement, Paulsen and Desai agreed and were required to sign Confessions of Judgment which, in the event of a default in payment, would be filed with the Supreme Court, New York County. Paulsen and Desai, however, never signed nor delivered the Confessions of Judgment to EGS. Paulsen and Desai only paid the first two payments due under the Settlement Agreement (\$5,000 in May of 2009 and \$10,000 in June of 2009), but, thereafter, stopped making any further payments. The payments they made reduced the unpaid balance due to \$127,787.97.

Plaintiff is not pursuing a breach of contract claim based upon the Settlement Agreement, but is seeking relief based on the underlying claim set forth in the complaint. In support of its motion, plaintiff has presented e-mails addressed to a partner of EGS, Richard Kaye, spanning from June 2010 to December 2010, in which a business associate of Paulsen and Desai repeatedly promised payment if EGS would not file default judgment. Plaintiff did continue forbearance during this time, however plaintiff alleges no such payment was received.

Plaintiff now seeks the entire remaining unpaid balance of \$132,787.97, reduced to \$127,787.97, with interest from August 14, 2009, which is thirty days after the final invoice was sent to Paulsen and Desai.

Discussion

The elements for a breach of contract cause of action are: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform and (4) resulting damage. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986). Based on the foregoing, plaintiff has established a cause of action for breach of contract against the defendants. Plaintiff has demonstrated the formation of a contract by presenting the Retainer Agreement in which EGS and Paulsen agreed upon the exchange of legal services for payment. Desai did not sign the Retainer Agreement, but he later signed the Settlement Agreement, in which he acknowledged the legal fees rendered. Plaintiff has also presented evidence of its performance of legal services on behalf of Paulsen and Desai and evidence of how defendants did not fulfill their obligations under the contract to pay the legal fees. Damages resulted in a financial loss to the plaintiff.

The COA2 is for an account stated. 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). When a party receives and retains monthly statements without objecting this creates a debt enforceable by account stated. Chemical Bank v. Kaufman, 142 A.D.2d 526 (1st Dept. 1988). When a party retains bills without objection or makes a partial payment, it may create an account stated. Morrison Cohen Singer and Weinstein, LLP v. Waters, 13 A.D.3d 51 (1st Dept. 2004).

Based on the foregoing, plaintiff has established a cause of action for account stated against the defendant. Plaintiff has provided detailed monthly statements from

October 2006 to September 2008 and August 2009 regarding the Mosaic and Aspatuck Actions. There is no record of the defendants having disputing the billed amounts, and the defendants made a partial payment to the account. Receiving bills without objection and making a partial payment creates an account stated. See Morrison.

The COA3 is for quantum meruit, which is not available because plaintiff has an adequate remedy at law. See Mary Matthews Interiors, Inc. v. Levis, 208 A.D.2d 504 (2nd Dept. 1994).

Plaintiff now seeks to recover the entire unpaid balance of \$132, 787.97 with interest. Plaintiff has provided a reasonable excuse for the delay of default judgment. The parties were engaged in continued negotiations. See Iorizzo. Plaintiff entered into a Settlement Agreement, which failed, and then continued forbearance because of negotiations with a representative for Paulsen and Desai. Plaintiff has established the merits of the cause of COA1 and COA2. Id. Accordingly, the motion for entry of a default judgment against Paulsen and Desai for breach of contract and account stated is granted. Plaintiff is entitled to a money judgment in the amount of \$127,787.97 at the statutory interest rate of 9% from August 14, 2009 pursuant to CLPR § 5001(b) and CPLR § 5004.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion is granted; and it is further

**ORDERED** that on the first and second causes of action, the clerk shall enter a money judgment in favor of plaintiff, Ellenoff Grossman & Schole LLP, against defendants, John Paulsen and Dhru Desai, individually and severally, in the principal


amount of one hundred twenty-seven thousand seven hundred eighty-seven dollars and ninety-seven cents (\$127,787.97), with costs and disbursements as taxed by the court and plaintiff should have expected thereby; and it is further

**ORDERED** that interest shall run from August 14, 2009; 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 shall constitute the decision and order of the court.

Dated: New York, New York  
July 20, 2011

So Ordered:   
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**

JUL 21 2011

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