SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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EPSTEIN BECKER & GREEN, P.C.,

Plaintiff,

INDEX NO. 158794/12

-against-

MARY CATHERINE DINUNZIO,

Defendant.

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JOAN A. MADDEN, J.:

This is an action for attorney's fees in the amount of $49,176.98. Plaintiff law firm, Epstein Becker & Green, P.C., moves for an order pursuant to CPLR 3215(b) granting a default judgment against defendant Mary Catherine Dinunzio, based on her failure to appear and answer. Defendant appears by counsel in opposition to the motion and cross-moves for an order granting leave to interpose a late answer.

As a general rule, a defendant opposing a motion for a default judgment must demonstrate a reasonable excuse for not answering and a meritorious defense to the action. See Zwicker v. Emigrant Mortgage Company, Inc, 91 AD3d 443 (1st Dept 2012); Morrison Cohen LLP v. Fink, 81 AD3d 467 (1st Dept 2011); Singh v. Gladys Towncars, Inc, 42 AD3d 313 (1st Dept 2007); ICBC Broadcast Holdings-NY, Inc v. Prime Time Advertising, Inc, 26 AD3d 239 (1st Dept 2006). Public policy, however, favors the resolution of cases on the merits, and courts have broad discretion to grant relief from pleading defaults where the defaulting party has a meritorious defense, the default was not willful and the opposing party is not prejudiced by the delay. See Pagan v. Four Thirty Realty LLC, 50 AD3d 265 (1st Dept 2008); Heskel's West 38th

Street Corp. v. Gotham Construction Co, LLC, 14 AD3d 306 (1st Dept 2005).

In determining a motion for leave to serve a late answer pursuant to CPLR 3012(d), the court considers a number of factors including the length of defendant's delay, the excuse offered for the delay, the absence or presence of willfulness, the possibility of prejudice to plaintiff, the potential merits of the defenses, and the public policy favoring the resolution of disputes on their merits. See Cirillo v. Macy's, Inc, 61 AD3d 538 (1st Dept 2009); Jones v. 414 Equities LLC, 57 AD3d 65, 81 (1st Dept 2008); Pagan v. Four Thirty Realty LLC, supra. Where as here, no default order or judgment has been entered, a showing of the potentially meritorious nature of the defenses is not an essential component of CPLR 3012(d) relief. See Empire Healthchoice Assurance, Inc. v. Lester, 81 AD3d 570 (1st Dept 2011); Jones v. 414 Equities LLC, supra; DeMarco v. Wyndham International, Inc, 299 AD2d 209 (1st Dept 2002).

In support of her cross-motion, plaintiff submits an affidavit explaining that she is an attorney, and while she was working at the firm of Lowenstein Sandler, "through my office I commenced an action against a contractor who performed faulty construction at my residence." She states that the partner she worked with at the firm, Adrian Zuckerman, and his associate, Steven Ziolowski, initially handled the lawsuit, and continued to do so when they moved to the plaintiff firm. She states that when Zuckerman "left Lowenstein he agreed with me that he would continue working on the suit while working for the Plaintiff and that in light of our past relationship and dealings he would handle the matter as accommodation to me," and that it was their "understanding that the bill related to the services would be relatively low in light of prior dealings and in light of the relatively small size of the claim (approximately $32,000)." Defendant states that during plaintiff's "handling" of the representation, I made payments to

Plaintiff through January 2012 of over $16,000 for all work performed," and submits copies of her American Express statements showing payment. She explains the case was scheduled for trial on February 21, 2012, and was settled with one defendant before trial, and an inquest was held as to the defaulting defendant.

Defendant states she did not receive any invoices from January 21, 2012 until receipt of the invoice dated May 24, 2012, and when she received the May invoice she "discovered the associate who was assigned to the matter after Mr. Ziolowski, Andrea Lawrence, billed an exorbitant amount to familiarize herself with the matter." She states "[i]t was indicated to me by Mr. Zuckerman prior to the trial, that I would not be charged for Ms. Lawrence learning the proceeding simply because Mr. Ziolowski left the Plaintiff." She explains that "[i]t appears that after Mr. Zuckerman left the Plaintiff that as part of larger dispute between Plaintiff and Mr. Zuckerman, that I along with other of his clients were being pursued for bills which in this instance seem to be excessive and unjustified in light of Mr. Zuckerman's assurances to me prior to the trial." Defendant states that when she received the May 24, 2012 invoice, "I immediately contacted the Plaintiff by phone and made it clear that I was disputing the invoice and I questioned the reasonableness of the bill alleging over $34,000 in light that the total claim in the underlying action only sought $32,000." She contacted Mr. Zuckerman and he attempted to contact Plaintiff to resolve the dispute, but "he did not have any success in dealing with the Plaintiff."

Defendant states that when she received the complaint in this action, "I reached out to Mr. Zuckerman again and he and another partner of his who had been handling my suit, Mr. Berman, tried to resolve the matter with Plaintiff." She submits copies of her email correspondence with

Berman, and Berman's email correspondence with plaintiff. She states that "[b]ased on my discussions with Mr. Berman, I had a good faith belief that Plaintiff had extended the time to answer in order to try to settle the matter instead of moving forward with the litigation as Mr. Berman indicated at a meeting with the Plaintiff that they thought the within dispute was too small to concern themselves with." She states that "judging from the last communication between Plaintiff and Mr. Berman in June 2013 just weeks before Plaintiff's present motion, it seemed that Plaintiff would get back to Mr. Berman if they wished to pursue the matter further," but "[i]nstead of getting back to Mr. Berman, Plaintiff elected to make the foregoing application" for a default judgment.

In reply, plaintiff submits an affirmation opposing defendant's cross-motion. Plaintiff argues that settlement negotiations are generally an insufficient excuse for failing to timely answer. Plaintiff also argues that defendant has not established a meritorious defense, as she does not dispute that she hired plaintiff and paid some of its bills, and she does not challenge the quality of plaintiff's work or the result.

Under the circumstances presented, the court concludes that defendant should be permitted to answer, so this matter can be resolved on the merits. This is not the usual action by a law firm against a client for unpaid legal fees. Rather, defendant an attorney herself, appears to be caught in the midst of a dispute involving her former colleague and attorney, Zuckerman, and his former firm, plaintiff. Defendant asserts Zuckerman originally agreed to represent her as an "accommodation," with his acknowledging that the bill for his services would be "relatively low" in light of their "prior dealings" and the "relatively small size" of her claim for $32,000. She also asserts that after Zuckerman moved to the plaintiff firm, he continued to represent her, and

assured her that she would not be charged for the time expended by the subsequent associate in familiarizing herself with defendant's case.

Plaintiff does not dispute that its May 24, 2012 invoice for $34,863.44, covered services provided between January and May 2012, and that no invoices were rendered for that period prior to May 24, 2012. Defendant asserts that after receiving the May 2012 invoice, she contacted both plaintiff and Zuckerman, and she again contacted Zuckerman after receiving the complaint in December 2012. At that point, Zuckerman and another attorney, Ralph Berman, began to engage in efforts to settle the matter. Defendant asserts that based on her "discussions" with Berman, she had a "good faith belief" that plaintiff "had extended the time to answer in order to try to settle the matter."

To support those assertions, defendant submits copies of emails between her and Berman, and between Berman and an attorney at the plaintiff firm, Thomas Luz, discussing settlement of the action. The earliest emails date from January 2013 and the last two emails are dated June 14, 2013. On June 14, 2013, Luz wrote to Berman asking: " Would you please remind me where we left off? I think you were exploring what your client is willing to do, but I lost track." Berman immediately responded: "I'll check. I got a bit sidetracked myself. I'll let you know Monday." Notably, that same day, June 14, 2013, plaintiff mailed additional copies of the summons and complaint to defendant pursuant to CPLR 3215(g)(3), which was a preliminary step to moving for a default judgment against defendant. Two and a half weeks later, on July 2, 2013, plaintiff made the instant motion for default judgment.

Based on the foregoing, defendant has sufficiently established a reasonable excuse for not timely answering the complaint and a meritorious defense to the action. Moreover, any delay on

defendant's part was not wilful, and plaintiff has not demonstrated any prejudice as a result of the delay. Finally, in view of the public policy favoring the resolution of cases on the merits, defendant will be permitted to serve a late answer, and plaintiff's motion for a default judgment is denied. See Cirillo v. Macy's, Inc, supra; See Jones v. 414 Equities LLC, supra; Pagan v. Four Thirty Realty LLC, supra.

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

ORDERED that defendant's cross-motion is granted, and defendant's default in not serving a timely answer is vacated, and the proposed answer annexed to the cross-motion is hereby deemed served; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on March 27, 2014 at 9:30 am, Part 11, Room 351, 60 Centre Street.

DATED: ~~February 2014~~ March 12 2014

ENTER:

J.S.C. HON. JOAN A. MADDEN
J.S.C.