

<b>Goddard v O'Donoghue</b>
2015 NY Slip Op 32040(U)
September 29, 2015
Supreme Court, New York County
Docket Number: 100579/2014
Judge: Lucy Billings
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS  
J.S.C.

PART 46

Index Number : 100579/2014  
GODDARD, DANIEL B.  
vs  
KEVIN SEAN O'DONOGHUE, ESQ.  
Sequence Number : 002  
DISMISS

Just  
**FILED**

OCT 16 2015

COUNTY CLERK'S OFFICE  
NEW YORK

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 2, were read on this motion to/for dismiss the complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered ~~that this motion is~~ *and adjudged that:*

*The court grants defendants' motion to dismiss the complaint and denies plaintiff's cross-motion for a default judgment pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(7) and (8), 3215(a) and (f).*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

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OCT 16 2015

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Dated: 9/29/15

Lucy Billings, J.S.C.

**LUCY BILLINGS**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

DANIEL B. GODDARD,

Index No. 100579/2014

Plaintiff

- against -

DECISION AND ORDER

KEVIN SEAN O'DONOGHUE, ESQ., and  
HELBRAUN & LEVEY, LLP,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

**FILED**

OCT 16 2015

COUNTY CLERK'S OFFICE  
NEW YORK

I. BACKGROUND

Plaintiff sues to recover damages for legal malpractice and professional negligence by defendants O'Donoghue and Helbraun & Levey, LLP, during their representation of plaintiff in a nonparty's transfer of an ownership interest in a nightclub to plaintiff. He alleges that defendants failed to confirm his full ownership of the nightclub and failed to give him documents showing his full ownership. Plaintiff further alleges that these omissions caused his loss of the nightclub's liquor license and lease and prevented him from operating the nightclub.

Defendants move to dismiss the complaint based on lack of personal jurisdiction and the complaint's failure to state a claim for legal malpractice or professional negligence. C.P.L.R. § 3211(a)(7) and (8). Plaintiff cross-moves for a default judgment. C.P.L.R. § 3215. For the reasons explained below, the

court grants defendants' motion pursuant to C.P.L.R. § 3211(a)(7) and defendant Helbraun & Levey's motion pursuant to C.P.L.R. § 3211(a)(8), but denies defendant O'Donoghue's motion pursuant to C.P.L.R. § 3211(a)(8) and plaintiff's cross-motion for a default judgment.

## II. PERSONAL JURISDICTION OVER DEFENDANTS

Plaintiff bears the burden to show that he served defendants according to statutory service requirements. Stewart v. Volkswagen of Am., Inc., 81 N.Y.2d 203, 207 (1993); Navarro v. Singh, 110 A.D.3d 497, 498 (1st Dep't 2013). Plaintiff's lack of representation in this action does not excuse his inadequate service on defendants. Jiggetts v. MTA Metro-North R.R., 121 A.D.3d 414, 414 (1st Dep't 2014).

Plaintiff's affidavit of service attests that defendant O'Donoghue was served with the summons and complaint June 3, 2014, at "110 Williams St," New York, New York, via substitute service on Patricia Sullivan and a mailing to "110 Williams St, NY, NY 10038." Aff. of Daniel B. Goddard Ex. A. See C.P.L.R. § 308(2). Plaintiff does not dispute, however, that defendants' address is 110 William Street, Suite 1410, New York, New York 10038.

Plaintiff's misspelling of William Street and omission of defendants' suite number in the mailing of the summons and complaint are minor errors in the mailing that do not render process void where "it is virtually certain" the mailing will arrive at the intended destination. Gray-Joseph v. Shuhai Liu,

90 A.D.3d 988, 989 (2d Dep't 2011). See Zwicker v. Emigrant Mortgage Co., 91 A.D.3d 443, 444 (1st Dep't 2012). Moreover, the court may disregard a "technical infirmity" in service, C.P.L.R. § 2001, as long as notice was "reasonably calculated, under all the circumstances, to apprise interested parties" of the action. Ruffin v. Lion Corp., 15 N.Y.3d 578, 582 (2010).

The mailing here was addressed to the correct street number, city and borough, state, and zip code. The minor error in the street name, where there is no "Williams" Street in zip code 10038 or even in New York, New York, and the lack of a suite number are technical infirmities. While O'Donoghue never denies receiving plaintiff's service on Patricia Sullivan at defendants' address, he nonetheless denies that he personally received the mailing. This bare denial of receipt, however, does not show that the minor infirmities in the mailing address prevented the mailing from being delivered so as to invalidate the service. Id. at 582-83. See C.P.L.R. § 308(2); Zwicker v. Emigrant Mortgage Co., 91 A.D.3d at 444; Gray-Joseph v. Shuhai Liu, 90 A.D.3d at 989. Yet, even if this denial required a hearing on whether the misspelled street name and absence of a suite number prevented delivery of the mailing, the dismissal on other grounds, discussed below, obviates any such need.

Regarding service on defendant Helbraun & Levey, LLP, plaintiff unquestionably fails to meet his burden to show that he timely served defendant limited partnership according to C.P.L.R. § 310-a. Plaintiff's affidavit of service attests that Helbraun

& Levey first was served with the summons and complaint September 22, 2014, via personal delivery to Patricia Sullivan. Nothing indicates Sullivan qualified as a person authorized to accept service under C.P.L.R. § 310-a(a). Even if she were a person permitted to be served as a substitute for a qualified person, the affidavit does not indicate that the summons and complaint were mailed to the qualified person's place of business or last known residence. C.P.L.R. §§ 308(2), 310-a(a); Bell v. Bell, Kalnick, Klee & Green, 246 A.D.2d 442, 443 (1st Dep't 1998); Green v. Gross & Levin, LLP, 101 A.D.3d 1079, 1080 (2d Dep't 2012).

Nor does plaintiff show he completed service via C.P.L.R. § 310-a's other prescribed methods: personal service on a limited liability partnership member or on the Secretary of State. C.P.L.R. § 310-a(a) and (c); N.Y. Partnership Law § 121-1505(a). Therefore, plaintiff's service September 22, 2014, on Helbraun & Levey does not confer personal jurisdiction over this defendant.

Plaintiff's second affidavit of service attests that Helbraun & Levey again was served November 6, 2014, via personal delivery to defendants' attorney Daniel Swanson and mailing to defendant limited partnership's place of business at 110 William Street, Suite 1410, New York, New York 10038, but nowhere specifies what was served. Nor does anything indicate, again, that Swanson qualified as a person authorized to accept service under C.P.L.R. § 310-a(a) or, even if he were a person permitted to be served as a substitute for a qualified person, that the

summons and complaint were mailed to the qualified person. Yet, even if this service complied with C.P.L.R. § 310-a, it was not within 120 days of plaintiff's commencement of the action May 27, 2014, which required plaintiff to complete service by September 24, 2014. C.P.L.R. § 306-b. Therefore each of plaintiff's attempts at service on Helbraun & Levey was ineffective and failed to confer personal jurisdiction over this defendant.

### III. FAILURE TO STATE A CLAIM

Upon defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7), the court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Drug Policy Alliance v. New York City Tax Comm'n, \_\_\_ A.D.3d \_\_\_, 15 N.Y.S.3d 784, 785 (1st Dep't 2015). The court may not rely on facts alleged by defendants to defeat plaintiff's claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against the defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). See Greenapple v. Capital One N.A., 92 A.D.3d 550 (1st Dep't 2012). In short, the court may dismiss the complaint based on C.P.L.R. § 3211(a)(7) only if it completely fails to state a claim. Nonnon v. City of New York, 9 N.Y.3d at 827; Leon v.

Martinez, 84 N.Y.2d at 87-88.

#### IV. THE LEGAL MALPRACTICE CLAIM

To plead legal malpractice, plaintiff must allege that defendant attorneys' negligence proximately caused plaintiff actual damages. O'Callaghan v. Brunelle, 84 A.D.3d 581, 582 (1st Dep't 2011); LaRusso v. Katz, 30 A.D.3d 240, 243 (1st Dep't 2006); Brooks v. Lewin, 21 A.D.3d 731, 734 (1st Dep't 2005); IMO Indus. V. Anderson Kill & Olick, 267 A.D.2d 10, 11 (1st Dep't 1999). Negligence in the form of legal malpractice is the failure to exercise the ordinary reasonable skill of a member of the legal profession. Darby & Darby v. VSI Intl., 95 N.Y.2d 308, 313 (2000). Plaintiff establishes proximate cause if he demonstrates that he would not have sustained ascertainable damages but for defendants' negligence. Waggoner v. Caruso, 14 N.Y.3d 874, 875 (2010); LaRusso v. Katz, 30 A.D.3d at 243; Brooks v. Lewin, 21 A.D.3d at 734.

The complaint alleges that defendants committed legal malpractice through two omissions. First, defendants failed to confirm plaintiff's 100% ownership in Unrecords, Inc., which held a nightclub license, a liquor license, and a lease for 829 Broadway, Brooklyn, New York. Second, defendants failed to produce the Amended Operating Agreement and other transactional documents detailing plaintiff's ownership of Unrecords, Inc. The complaint claims that these omissions caused his loss of the nightclub's liquor license and lease and prevented him from operating the nightclub he had purchased.

The complaint admits, however, that plaintiff held a 100% ownership interest in Unrecords, Inc. This admission demonstrates, even assuming defendants were negligent, that their negligence did not cause plaintiff to lose his ownership interest in Unrecords, Inc. Nor does plaintiff otherwise allege any causal connection between defendants' omissions and plaintiff's operation of his nightclub, his loss of the nightclub's liquor license, or his loss of the nightclub's lease. Pozefsky v. Aulisi, 79 A.D.3d 467, 467 (1st Dep't 2010); Natural Organics Inc. v. Anderson Kill & Olick, P.C., 67 A.D.3d 541, 542 (1st Dep't 2009). See Waggoner v. Caruso, 14 N.Y.3d at 875; LaRusso v. Katz, 30 A.D.3d at 243.

Helbraun & Levey's additional basis for dismissal under C.P.L.R. § 3211(a)(1), that defendant limited partnership is no longer in business, and plaintiff did not sue any successor, is unsupported by any documentary evidence that Helbraun & Levey, LLP, has ceased business. ACA Fin. Guar. Corp. v. Goldman, Sachs & Co., 25 N.Y.3d 1043, 1045 (2015); Mill Fin., LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dep't 2014). Nevertheless, the court dismisses plaintiff's legal malpractice claim and his negligence claim, which duplicates his legal malpractice claim, Garnett v. Fox, Horan & Camerini, LLP, 82 A.D.3d 435, 436 (1st Dep't 2011); Sage Realty Corp. v. Proskauer Rose LLP, 251 A.D.2d 35, 38 (1st Dep't 1998), under C.P.L.R. § 3211(a)(7).

V. PLAINTIFF'S CROSS-MOTION FOR A DEFAULT JUDGMENT

Since plaintiff's service on Helbraun & Levey was inadequate, defendant limited partnership has never defaulted. C.P.L.R. § 3215(a) and (f). Assuming plaintiff adequately served O'Donoghue, his motion to dismiss the complaint would be late, C.P.L.R. § 3012(c), which O'Donoghue excuses by claiming plaintiff failed to provide an address for service on him. Although plaintiff does not directly dispute this claim, his complaint does allege his residence address, albeit without a zip code.

C.P.L.R. § 3012(d) allows a late answer or responsive motion upon a "reasonable excuse for delay or default" and "such terms as may be just," the most critical being the absence of prejudice to plaintiff. Even if the reasonableness of O'Donoghue's excuse is questionable, his delay alone, without any demonstrated prejudice to plaintiff from the delay, is not a basis to preclude the responsive motion. Gazes v. Bennett, 70 A.D.3d 579, 579 (1st Dep't 2010); Verizon N.Y. Inc. v. Case Constr. Co. Inc., 63 A.D.3d 521, 521 (1st Dep't 2009); Cirillo v. Macy's, Inc., 61 A.D.3d 538, 540 (1st Dep't 2009); Jones v. 414 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008). See, e.g., DaimlerChrysler Is. Co. v. Seck, 82 A.D.3d 581, 582 (1st Dep't 2011).

The "terms as may be just" include a meritorious defense against plaintiff's claims. C.P.L.R. § 3012(d). Since plaintiff's claims lack merit, the court denies plaintiff's cross-motion for a default judgment. C.P.L.R. § 3215(f);

Manhattan Telecom. Corp. v. H & A Locksmith, Inc., 21 N.Y.3d 200, 203 (2013); Martinez v. Reiner, 104 A.D.3d 477, 478 (1st Dep't 2013); Utak v. Commerce Bank, 88 A.D.3d 522, 523 (1st Dep't 2011); Mejia-Ortiz v. Inoa, 71 A.D.3d 517 (1st Dep't 2010). His failure to appear for his cross-motion April 23, 2015, despite notice well in advance, is reason to deny his cross-motion as well. See, e.g., McGoldrick v. 2100 Park Assocs., 279 A.D.2d 287, 288 (1st Dep't 2001); Dominquez v. New York City Health & Hosps. Corp., 178 A.D.2d 186, 187 (1st Dep't 1991).

VI. CONCLUSION

For all the reasons set forth above, the court grants defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7) and to dismiss the claims against defendant Helbraun & Levey, LLP, pursuant to C.P.L.R. § 3211(a)(8). The court otherwise denies defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(1) and (8) and denies plaintiff's cross-motion for a default judgment pursuant to C.P.L.R. § 3215. This decision constitutes the court's order and judgment of dismissal.

DATED: September 29, 2015

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
**FILED**

OCT 16 2015