O'Connell v Aris
2015 NY Slip Op 32721(U)
June 26, 2015
Supreme Court, Westchester County
Docket Number: 69292/2014
Judge: Orazio R. Bellantoni
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the 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.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

TERENCE O'CONNELL,

Plaintiff(s),

- against -

JORAM J. ARIS,

Defendant(s).

ORDER
Index No.: 69292/2014
Motion Date: 4/8/15

Plaintiff moves for an order, granting a default judgment against defendant.

The following papers were read:

Notice of Motion, Affirmation, Affidavit, Exhibits (6), Affidavit of Service	1-10
Affidavit in Opposition, Exhibits (4), and Affidavit of Service	11-16
Affirmation in Reply, Exhibits (4), and Affidavit of Service	17-22

On November 5, 2014, plaintiff commenced the instant action by filing a summons and complaint. On January 13, 2015, plaintiff filed an affidavit of service, indicating that plaintiff effectuated service of process on defendant on January 12, 2015. Now, plaintiff moves for the entry of a default judgment against defendant.

CPLR 3215 provides that "[o]n any application for judgment by default, the applicant shall file proof of service of . . . a summons and notice served . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party" (*see* CPLR 3215 [f]). The purpose of the latter requirement is "to enable the court to determine that a viable cause of action exist[s]" (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]).

In support of the motion, plaintiff proffers affidavits from plaintiff and plaintiff's counsel. Plaintiff's affidavit is largely conclusory, but attaches the verified complaint, the Court's decision in a related action (*i.e.*, *O'Connell v. O'Connell*, Index No. 552/2009),

and proof of service in this action. The affidavit of plaintiff's counsel supplies the facts relevant to the service of process on defendant.

In opposition, defendant avers that he served an answer on plaintiff on March 14, 2015. Defendant asserts that he is a member of the New York State Organized Militia and that his time was "occupied and monopolized in a months-long lead-up to a March 14, 2015 Commander's Conference and Dining-In." Next, defendant takes issue with the fact that plaintiff failed to list *O'Connell v. O'Connell*, Index No. 552/2009 as a related case on the RJI (*i.e.*, Request for Judicial Intervention) filed along with this motion. Regarding the related action, defendant contends that a hearing was held in that action on the issue of whether defendant had been discharged for cause and that defendant has moved to vacate the default decision from that action. Further, defendant asserts that the instant action is based on that default decision.

CPLR 320 provides that a "defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after service of the summons" (*see* CPLR 320 [a]). Here, plaintiff served defendant on January 12, 2015. Thus, defendant's time to appear expired on February 2, 2015. Defendant did not appear.

The Second Department has explained that "[a] defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when opposing a motion for leave to enter judgment upon its failure to appear or answer and moving to extend the time to answer or to compel the acceptance of an untimely answer" (*see Lipp v Port Auth. of New York and New Jersey*, 34 AD3d 649, 649 [2d Dept 2006]). Here, defendant has failed to provide a reasonable excuse for his default. Defendant's assertion that his time was somehow monopolized by a conference associated with the New York State Organized Militia is too vague to constitute a reasonable excuse. As defendant has failed to establish a reasonable excuse, the Court need not address the defendant's contentions regarding whether he had a potentially meritorious defense to the action (*see McNally v McNally*, 127 AD3d 943 [2d Dept 2015]).

Notwithstanding this fact, plaintiff's right to recover upon defendant's default "requires that the plaintiff state a viable cause of action" (*see Beaton v Tr. Facility Corp.*, 14 AD3d 637, 637 [2d Dept 2005]). Thus, the Court must determine whether plaintiff has stated a viable cause of action before the default judgment may be entered.

According to the complaint, plaintiff retained defendant to represent him in *O'Connell v. O'Connell*, Index No. 552/2009, which was a partition action relating to real property located at 15 Locust Lane, Bronxville, New York (Partition Action). Plaintiff alleges that the parties agreed that defendant would perform certain legal services and charge plaintiff a certain amount of money in connection with the Partition Action.

Plaintiff alleges that, during the Partition Action, he agreed to a settlement proposal, but defendant failed to timely communicate his agreement to his adversary, which ultimately required plaintiff to settle for less money and to hire new counsel to correct various mistakes made by defendant. In addition, plaintiff alleges that defendant has engaged in unethical conduct in the Partition Action and in an action that defendant commenced in the Supreme Court, Bronx County under Index Number 309866/2012.

The complaint alleges seven causes of action. Plaintiff's first cause of action is for breach of contract. There, plaintiff alleges the existence of a contract, a breach thereof, and resultant damages. As such, plaintiff's first cause of action alleges a viable cause of action (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]). Plaintiff's second cause of action is for legal malpractice. There, plaintiff alleges that defendant did not possess the necessary knowledge, skill and understanding necessary for handling the subject action and that, as a result, plaintiff sustained actual damages. As such, plaintiff's second cause of action alleges a viable cause of action (*see Carrasco v Pena & Kahn*, 48 AD3d 395, 396 [2d Dept 2008]).

Turning to plaintiff's third through seventh causes of action, the papers submitted are insufficient to establish viable causes of action. Plaintiff's third cause of action alleges that defendant violated various provisions of the Rules of Professional Conduct. Although an attorney's violation of the Rules of Professional Conduct may constitute evidence of malpractice, such a violation does not, in itself, give rise to a private cause of action against the attorney or law firm (*see DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 814 [2d Dept 2011]). The Court also notes that this cause of action may be duplicative of the first and/or second causes of action. As such, plaintiff's third cause of action fails to allege a viable cause of action.

Plaintiff's fourth cause of action alleges that defendant commenced a frivolous action against plaintiff in the Supreme Court, Bronx County under Index Number 309866/2012 and then engaged in further frivolous conduct prior to the dismissal of that action. If, as plaintiff alleges, defendant commenced a frivolous action against plaintiff and engaged in frivolous conduct during the course of that action, plaintiff's remedy lies in that action and not in a second plenary action (*cf. N. Shore Envtl. Solutions, Inc. v Glass*, 17 AD3d 427, 427 [2d Dept 2005]). As such, plaintiff's fourth cause of action fails to allege a viable cause of action.

Plaintiff's fifth cause of action alleges that defendant violated Judiciary Law § 487. Although a private cause of action lies for violations of Judiciary Law § 487, such an action requires an allegation that the subject attorney intended to deceive the Court or a party to the action (*see Moormann v Perini & Hoerger*, 65 AD3d 1106, 1108 [2d Dept 2009]). Here, plaintiff fails to allege that defendant engaged in such conduct. The Court also notes that this cause of action may be duplicative of the first and/or second causes of action. As such, plaintiff's fifth cause of action fails to allege a viable cause of action.

Plaintiff's sixth cause of action seeks a permanent injunction, enjoining defendant from pursuing any arbitration proceeding against plaintiff or from filing any other action against plaintiff for legal fees related to the work allegedly performed for plaintiff in the matter of *O'Connell v. O'Connell*, Index No. 552/2009. In order to properly plead a cause of action for a permanent injunction, a party must plead that the opposing party is presently violating a right or is threatening an imminent violation, that the party has no adequate remedy at law, that the party will suffer irreparable harm absent the injunction, and that the balance of equities tip in her favor (*see Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]). Here, although plaintiff has alleged that irreparable harm will result, there are no factual allegations to support this conclusion. As such, plaintiff's sixth cause of action fails to allege a viable cause of action.

Plaintiff's seventh cause of action alleges that defendant has violated unidentified rules, statutes and regulations of the Office of Court Administration and Judiciary Law § 487. To the extent that this claim is based on Judiciary Law § 487, it is duplicative of the fifth cause of action and, as such, fails to state a viable cause of action. To the extent that this claim is based on the violation of unidentified rules, statutes and regulations of the Office of Court Administration, the claim is insufficiently plead to determine whether it is a viable cause of action or merely duplicative. As such, plaintiff's seventh cause of action fails to allege a viable cause of action.

Based on the foregoing, plaintiff's motion for the entry of a default judgment is granted as to plaintiff's first and second causes of action and denied as to the remaining causes of action. Plaintiff is directed to serve a copy of this order with notice of entry upon defendant within 20 days hereof. The parties are directed to appear in the Settlement Conference Part, Room 1600, at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York for a conference on August 4, 2015 at 9:15 a.m. in order to schedule a date for an inquest on damages. This order will be electronically filed.

Dated: June 26, 2015
White Plains, New York

Horazio R. Bellantoni
HON. HORAZIO R. BELLANTONI
Justice of the Supreme Court

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