

**Morris Duffy Alonso & Faley v ECO Bldg. Prods.,
Inc.**

2016 NY Slip Op 30559(U)

April 1, 2016

Supreme Court, New York County

Docket Number: 653521/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MORRIS DUFFY ALONSO & FALEY,

Plaintiff,

Index No. 653521/15

-against-

DECISION/ORDER

ECO BUILDING PRODUCTS, INC., DOMINION
CAPITAL, LLC and REDWOOD MANAGEMENT, LLC,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Morris Duffy Alonso & Faley (“MDAF”) commenced the instant action against defendants ECO Building Products, Inc. (“ECO”), Dominion Capital, LLC (“Dominion”) and Redwood Management (“Redwood”) seeking to recover fees for certain legal work plaintiff allegedly performed on behalf of ECO. Dominion and Redwood (hereinafter referred to as the “moving defendants”) now move for an Order pursuant to (1) CPLR §§ 3211(a)(7), (8) and 3013 dismissing the complaint; and (b) 22 NYCRR 130-1.1(a) directing plaintiff to pay their costs and expenses incurred in connection with the instant action. The moving defendants’ motion is resolved to the extent set forth below.

The relevant facts according to the complaint are as follows. In or around November 2012, defendant ECO retained plaintiff to represent its interests in various litigation and

corporate matters whereby defendant ECO promised to pay plaintiff at its hourly rate for certain legal services to be performed and certain disbursements that would be made by plaintiff. Plaintiff fully performed its obligations in that it represented ECO, rendered ECO legal services and made disbursements relative thereto from November 2012 until May 2014. However, certain legal fees are outstanding and defendant has failed to pay the amount due.

Plaintiff then commenced the instant action asserting three causes of action for breach of contract, account stated and quantum meruit against its former client, ECO, and asserting a cause of action for breach of contract against Redwood and Dominion seeking to recover the outstanding legal fees. Plaintiff bases its cause of action against Redwood and Dominion on allegations that Redwood and Dominion assumed the debt of ECO; that Redwood and Dominion are agents for ECO; that Redwood and Dominion purchased ownership interests in ECO; that Redwood and Dominion are shareholders of ECO; that Dominion assumed the debt of Redwood; and that plaintiff entered into an agreement with Redwood and ECO pursuant to which Redwood acknowledged the outstanding debt and agreed to pay it to plaintiff (the "repayment agreement").

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

The court first turns to the moving defendants' motion for an Order pursuant to CPLR §

3211(a)(8) dismissing the complaint as against Redwood on the ground that the court lacks personal jurisdiction over said defendant. It is well-settled that “[i]f plaintiff failed to properly serve defendants, all subsequent proceedings [t]herein are null and void.” *Ananda Capital Partners, Inc. v. Stav Elec. Sys. (1994) Ltd.*, 301 A.D.2d 430 (1st Dept 2003). Although a summons and complaint may be served through the mail, the plaintiff must comply with the following:

As an alternative to the methods of personal service authorized by section 307, 308, 310, 311 or 312 of this article, a summons and complaint...may be served by the plaintiff or any other person by mailing to the person or entity to be served, by *first class mail*, postage prepaid, a copy of the summons and complaint...*together with two copies of a statement of service by mail and acknowledgment of receipt in the form set forth in subdivision (d) of this section*, with a return envelope, postage prepaid, addressed to the sender.

CPLR § 312-a(a) (emphasis added). Indeed, in the event that a plaintiff fails to enclose two copies of the statement of service by mail and acknowledgment of receipt in the format required by CPLR § 312-a(d), service will be deemed defective, meaning the action was never properly commenced. *See Nagy v. John Heuss House Drop In Shelter for the Homeless*, 198 A.D.2d 115 (1st Dept 1993).

In the instant action, this court finds that the complaint must be dismissed as against Redwood on the basis of lack of personal jurisdiction as plaintiff did not comply with CPLR § 312-a(a) when it served Redwood with the summons and complaint in this case. Plaintiff alleges that it served Redwood with the summons and complaint by U.S. mail. However, Redwood has affirmed that the copy of the summons and complaint it received in Florida did not include any statement of service by mail or acknowledgement of receipt and plaintiff has not provided any evidence to the contrary. Thus, the complaint is dismissed as against Redwood.

Additionally, the moving defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint as against Dominion is granted based on the Statute of Frauds. Pursuant to GOL § 5-701(a)(2),

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:


2. Is a special promise to answer for the debt, default or miscarriage of another person.

In the present case, the court finds that the complaint must be dismissed as against Dominion pursuant to the Statute of Frauds as plaintiff has failed to even allege that a writing exists pursuant to which Dominion promised to answer for the debt of defendant ECO. Although the complaint alleges that Dominion assumed the debt of ECO and that Dominion has an ownership interest in ECO, nowhere does it allege Dominion was a party to the repayment agreement or that Dominion agreed in any separate agreement to pay plaintiff for ECO's debts, which must be in writing to be enforceable pursuant to the Statute of Frauds.

Finally, that portion of the moving defendants' motion for an Order pursuant to 22 NYCRR 130-1.1 directing plaintiff to pay their costs and expenses incurred in connection with the instant action is denied as the moving defendants have failed to provide a sufficient basis for such relief.

Accordingly, the motion is resolved as set forth herein. This constitutes the decision and order of the court.

Dated: 4/11/16

Enter: 

J.S.C.
CYNTHIA S. KERN
J.S.C.