

**Cutone v Kennedy**

2016 NY Slip Op 31689(U)

August 2, 2016

Supreme Court, New York County

Docket Number: 150958/2015

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

-----X  
LEONARDO CUTONE, CUTONE & COMPANY  
CONSULTANTS, LLC.,

Plaintiffs,

**DECISION/ORDER**  
**Index No. 150958/2015**

-against-

DANIEL KENNEDY, ENERXIA, LLC.

Defendants.

-----X  
HON. CYNTHIA KERN, J.:

Plaintiffs Leonardo Cutone (“Cutone”), individually, and as the Principal of Cutone & Company Consultants, LLCA, d/b/a LCA Associates (“LCA”) commenced the instant action seeking to recover damages arising out of an alleged breach of an agreement between the parties. Plaintiffs now move for an Order (1) restoring their motion for summary judgment, which was filed in May 2015 (“motion sequence 001”), to the court’s calendar for resolution; (2) pursuant to CPLR § 3212 granting plaintiffs’ motion for summary judgment; or, in the alternative, (3) granting plaintiffs a default judgment against defendants based on their failure to respond to motion sequence 001 and their failure to comply with discovery obligations; and (4) awarding plaintiffs attorney’s fees and costs. Defendants Daniel Kennedy (“Kennedy”) and Enerxia, LLC (“Enerxia”) oppose the motion and cross-move for an Order dismissing the action on the ground that defendants were not properly served with the summons and complaint. For the reasons set forth below, plaintiffs’ motion is granted in part and denied in part and defendants’ cross-motion is denied.

The relevant facts are as follows. Plaintiff Cutone is an engineer and the principal of LCA, a company that provides engineering energy consulting services and products to buildings in Manhattan. In or around January 2011, the parties entered into a Value Added Reseller Agreement pursuant to which defendant Enerxia would act as a broker for clients to engage plaintiffs’ services and purchase plaintiffs’ energy-saving products and whereby Enerxia was to

be paid a fee based on a percentage of monthly revenues earned by plaintiffs from clients that defendant Kennedy obtained for plaintiffs (the "Agreement").

In or around January 2015, plaintiffs commenced the instant action against defendants asserting claims for breach of contract and breach of the duty of loyalty arising out of defendants' alleged breach of the Agreement. Specifically, plaintiffs allege, *inter alia*, that Kennedy was disruptive and unprofessional, that he breached the non-competition and non-solicitation clauses of the Agreement, that he wrongfully obtained and kept certain documents belonging to plaintiffs and that his work product was sub-par. In or around April 2015, defendants interposed an answer which included affirmative defenses and a counterclaim for \$200,000 based on money allegedly owed to defendants under the Agreement and attorney's fees. Thereafter, plaintiffs served defendants with their discovery demands along with a notice to take Kennedy's deposition on May 13, 2015. Kennedy allegedly failed to respond to the requested discovery and failed to appear for the deposition.

Thereafter, plaintiffs filed motion sequence 001 which sought an Order (1) pursuant to CPLR § 3212 granting them summary judgment as to liability based on Kennedy's admissions as to defendants' liability in a settlement agreement allegedly signed by the parties; (2) pursuant to CPLR § 3124 compelling defendants to comply with outstanding discovery; (3) pursuant to CPLR § 3126 imposing sanctions against defendants should defendants continue to refuse to produce the requested discovery and to ignore the deposition notice; (4) pursuant to CPLR § 3126 imposing a temporary restraining order forbidding defendants from continuing to violate the non-competition and non-solicitation clauses in the Agreement; (5) pursuant to CPLR § 3211(a)(1) and 3212 dismissing defendants' counterclaim based on a release allegedly signed by Kennedy on behalf of himself and Enerxia; and (6) pursuant to CPLR § 3211(a)(7) denying defendants' request for dismissal of the complaint.

It does not appear that the court ever received a copy of motion sequence 001. When the court was notified that such motion was pending, it attempted to contact plaintiffs' attorney to find out the status of the motion but was unable to reach plaintiffs' counsel. Thus, in an Order dated April 11, 2016, almost a year after motion sequence 001 was filed, this court Ordered the motion "marked as abandoned due to the court's inability to reach counsel."

The court first turns to defendants' cross-motion to dismiss the action on the ground that they were not properly served with the summons and complaint and finds that the cross-motion must be denied on the ground that defendants have waived such objection. Pursuant to CPLR § 3211(e), "an objection that the summons and complaint...was not properly served, is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading...." Here, defendants raised the objection that the summons and complaint were not properly served in their answer, which was served on April 4, 2015. However, defendants' cross-motion to dismiss on that ground was not brought until June 20, 2016, over a year after defendants' time to do so had already expired.

The court next turns to that portion of plaintiffs' motion for an Order restoring motion sequence 001 to the court's calendar and finds that it must be granted based on plaintiffs' counsel's representation to the court that the reason why he was unable to be reached when contacted by the court with regard to that motion was that he moved offices while the motion was pending.

The court next turns to that portion of plaintiffs' motion for an Order granting motion sequence 001. As an initial matter, those portions of motion sequence 001 for an Order compelling defendants to comply with outstanding discovery and imposing sanctions against defendants should defendants continue to refuse to produce the requested discovery and to ignore the deposition notice will be resolved at oral argument before the court on September 20, 2016 at 9:30 a.m.

Further, that portion of motion sequence 001 for an Order imposing a temporary restraining order forbidding defendants from continuing to violate the non-competition and non-solicitation clauses in the Agreement is denied without prejudice with leave to bring as an Order to Show Cause. It is well-settled that a request for a temporary restraining order must be brought by Order to Show Cause and not by Notice of Motion. *See* Siegel, *New York Practice*, § 330 (Fifth Edition, 2011)("A plaintiff who wants a TRO does not use the ordinary motion-on-notice procedure to bring on the application for a preliminary injunction, but rather an order to show cause, and it's the order to show cause that includes the TRO.")

Additionally, that portion of motion sequence 001 for an Order granting plaintiffs summary judgment as to liability based on a Settlement Agreement signed by defendant Kennedy is denied. Specifically, the Settlement Agreement at issue merely refers to Kennedy's admission that he obtained copies of certain documents and confidential information belonging to plaintiffs; states that Kennedy and Enerxia have destroyed all of said documents; and that they will cease and desist from ever directly or indirectly utilizing the documents for any purpose whatsoever. However, such Settlement Agreement is insufficient as a basis for granting plaintiffs summary judgment as to liability as it does not establish a breach of the Agreement or a breach of the duty of loyalty as a matter of law.

However, that portion of motion sequence 001 for an Order dismissing defendants' counterclaim for \$200,000 for money allegedly owed to defendants by plaintiffs under the Agreement and for attorney's fees is granted based on the General Liability Release of Claims (the "Release") signed by defendants dated November 19, 2013. Specifically, the Release provides, in pertinent part, as follows:

Daniel Kennedy, individually, and Enerxia, LLC..., for and in consideration of the payment to me of \$32,605.43, the receipt and sufficiency of which is hereby acknowledged, do hereby release and forever discharge Cutone & Company Consultants, LLC... from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, which we ever had, now have or may hereafter have, arising out of or in any way relating to any and all injuries and damages of any and every kind, nature, and description to both person and property, including without limitation, any and all injuries and damages now existing or that may develop in the future, as a result of or in any way relating to the following:

1. Termination of All Services provided by Enerxia

It is understood and agreed that this payment is made and received in full and complete settlement and satisfaction the causes of action, claims and demands mentioned herein; that this Release contains the entire agreement between the parties; and that the terms of this Agreement are contractual and not merely a recital. Furthermore, this Release shall be binding upon the undersigned....

As the Release makes clear, the defendants have released and discharged plaintiffs from any and all claims whatsoever relating to the termination of the services provided by Enerxia. As defendants' counterclaim seeks to recover money damages for funds allegedly owed to defendants for their work performed under the Agreement, defendants may not maintain such a claim.

Further, that portion of plaintiffs' motion for a default judgment against defendants based on their failure to comply with outstanding discovery will be resolved at oral argument before the court on September 20, 2016 at 9:30 a.m.

Finally, that portion of plaintiffs' motion for costs and attorneys' fees is denied as without basis.

Accordingly, it is hereby

ORDERED that defendants' cross-motion to dismiss the action is denied; and it is further

ORDERED that plaintiffs' motion to restore motion sequence 001 to the court's calendar is granted; and it is further

ORDERED that upon restoration, that portion of motion sequence 001 which seeks a temporary restraining order is denied without prejudice with leave to bring by Order to Show Cause; and it is further

ORDERED that upon restoration, that portion of motion sequence 001 which seeks to compel defendants to comply with outstanding discovery and sanctions against defendants for their failure to comply with discovery will be addressed at oral argument on September 20, 2016; and it is further

ORDERED that upon restoration, that portion of motion sequence 001 which seeks summary judgment as to liability based on the Settlement Agreement signed by defendant Kennedy is denied; and it is further

ORDERED that upon restoration, that portion of motion sequence 001 which seeks summary judgment dismissing defendants' counterclaim based on the Release is granted; and it is further

ORDERED that that portion of plaintiffs' motion for a default judgment against defendants based on defendants' failure to comply with outstanding discovery will be addressed at oral argument on September 20, 2016; and it is further

ORDERED that plaintiffs' request for attorney's fees and costs is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference and oral argument on the remaining portions of the instant motion in Part 55 on September 20, 2016 at 9:30 a.m. This constitutes the decision and order of the court.

DATE : 8/2/16

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