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| <b>Mid-Hudson Props., Inc. v Klein</b>                                                                                                                                                                                         |
| 2016 NY Slip Op 32973(U)                                                                                                                                                                                                       |
| April 6, 2016                                                                                                                                                                                                                  |
| Supreme Court, Dutchess County                                                                                                                                                                                                 |
| Docket Number: 2015-50818                                                                                                                                                                                                      |
| Judge: James V. Brands                                                                                                                                                                                                         |
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SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT: DUTCHESS COUNTY

\_\_\_\_\_  
MID-HUDSON PROPERTIES, INC.,

Plaintiffs,

-against-

STEVEN KLEIN, MICHAEL VARBLE,  
KLEIN VARBLE & GRECO, P.C.,  
KLEIN VARBLE & ASSOCIATES, P.C., and  
JOHN DOES 1-3,Defendants.  
\_\_\_\_\_

DECISION AND ORDER

Index No.: 2015-50818

Background Facts:

Plaintiff commenced this action by filing pleadings in Supreme Court, New York County on March 6, 2014 to recover monetary and punitive damages arising from the alleged breach of a five-year lease agreement with tenants Steven Klein, Michael Varble, and Kevin Greco for the purpose of conducting the tenants' law practice under Klein Varble & Greco, P.C. ("KVG"). Said lease was later modified to reflect KVG as the tenant. KVG law firm later dissolved, and the law firm of Klein Varble & Associates, P.C. ("KVA") continued occupancy of the leased premises at issue. Notably, there is no personal guaranty on the subject lease. KVG and KVA interposed an answer with counterclaims on March 25, 2014.

Plaintiff subsequently filed amended pleadings on April 15, 2014. In pertinent part, plaintiff further alleges that KVA is essentially the 'alter ego' of the former KVG organized by its principals Michael Varble and Steven Klein for the purpose of evading payments due under the lease agreement. Plaintiff alleges that same is evidenced by KVA assuming the same clients, billing, and collection of fees as the former KVG (see Amended Complaint ¶20-¶24). The defendants interposed an answer with counterclaims on April 21, 2014.

Plaintiff previously moved in Supreme Court, New York County for a self-executing order compelling disclosure or striking defendants' answer. Defendants' cross-moved to change venue to Dutchess County. The court order dated January 23, 2015 transferred this matter to Supreme Court, Dutchess County and permitted plaintiff to renew its discovery-related motion for determination by this court.

Following the transfer to Dutchess County, plaintiff's counsel filed a Request for Judicial Intervention in May 2015. A preliminary conference order was signed by plaintiff's counsel and Michael Varble on behalf of KVA on June 22, 2015. Said order required discovery demands to be served by June 30, 2015; responses by July 30, 2015; depositions on or before August 15, 2015; and discovery to be completed by October 15, 2015.

On October 16, 2015, plaintiff filed a motion which again sought to strike defendants' answer, grant summary judgment in favor of plaintiff, or any further just relief based on defendants' failure to comply with the preliminary conference order. This court's decision and order dated February 10, 2016 directed defendants to serve discovery responses within 30 days and depositions to be conducted within 30 days thereafter, or the answer would be stricken.

At the April 4, 2016 conference, plaintiff's counsel made an oral application in court to strike the defendants' answer pursuant to CPLR §3126 and this court's prior order. Notably, a notice of appearance was never filed on behalf of any of the defendants to date. Neither Varble nor any attorneys appeared at the conference on behalf of KVG or KVA. Steven Klein appeared on his own behalf. He stated on the record in open court that he relied on a written agreement between himself and Varble which arose during the 'winding down' phase of their partnership wherein it was agreed that Varble would litigate this matter. He states that he was unaware of the lack of prosecution until receipt of the February 10, 2016 order. He presented plaintiff's counsel with documents which he stated represented complete document disclosures with the exception of the law firms' client list. Klein also stated that he and defendants should reimburse plaintiff's counsel for his attorneys fees for the conference requested to resolve the outstanding discovery issues.

#### Decision:

As regards Klein, this court finds that he has presented a reasonable excuse for his default based upon his reliance on a written agreement that Varble would prosecute this matter. Notably, Klein may have cross-claims against Varble for his breach thereof. Klein stated that he was first on notice of the default upon receipt of the February 10, 2016 order, immediately after which Klein requested a court conference in an effort to resolve discovery issues. Klein made good faith efforts to obtain the requested documents and presented same to plaintiff's counsel in open court at Klein's court appearance on his own behalf. Klein also has a potentially meritorious defense as to his personal liability for the debt, since it is undisputed that there is no personal guaranty on the lease and Klein stated that the dissolution of KVG and establishment of KVA was not intended to circumvent debtor-creditor laws but instead resulted from former partner Greco leaving KVG.

As regards Varble, the court granted a default judgment in favor of plaintiff in open court on April 5, 2016. Varble signed the preliminary conference order and received notice of this court's February 10, 2016 order. Despite the foregoing, Varble failed to proceed with discovery as per the preliminary conference order and subsequent court order, failed to oppose the prior motion filed by plaintiff, and failed to appear at the last court conference on April 5, 2016. Accordingly, it is hereby

ORDERED that plaintiff's oral application to strike any answer filed on behalf of Michael Varble is granted. Counsel shall electronically file the proposed judgment against Varble, a copy of which was submitted to Chambers. It is further

ORDERED that plaintiff's oral application to strike any answer filed on behalf of Steven Klein is denied, and it is further

ORDERED that Klein may file an amended answer asserting any defenses, counterclaims, and/or cross-claims within 15 days hereof. It is further

ORDERED that Klein shall disclose the client list demanded by plaintiff within 15 days hereof. Klein failed to meet his burden to prove a list of client names is protected as privileged (CPLR 3101[b]), attorney's work product (CPLR 3101[c]) or material prepared for litigation (CPLR 3101[d]). In so holding, the court recognizes that such information is relevant and material to establish a continuity of clients between KVG and KVA to support plaintiff's alter ego and debtor/creditor law violation claims, and such names are retrievable from court documents filed by KVG and KVA which are a matter of public record. It is further

ORDERED that depositions shall be conducted within 45 days hereof. It is further

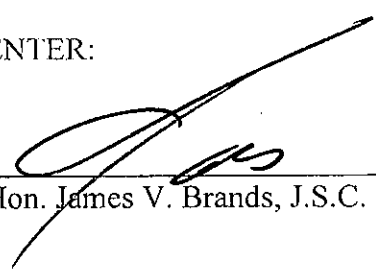
ORDERED that defendants shall reimburse plaintiff's counsel fees in the sum of \$750 for his appearance at the April 5<sup>th</sup> conference requested by defendant. It is further

ORDERED that a status conference is scheduled for May 5, 2016 at 9:15a.m.

The foregoing constitutes the decision and order of this court.

Dated: April 6, 2016  
Poughkeepsie, New York

ENTER:

  
Hon. James V. Brands, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

**When submitting motion papers to Judge Brands' Chambers, please do not submit any copies. Submit only the original papers.**