

**Robinson Brog Leinwand Greene Genovese &
Gluck, P.C. v Basch**

2017 NY Slip Op 30166(U)

January 26, 2017

Supreme Court, New York County

Docket Number: 161793/2015

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

ROBINSON BROG LEINWAND GREENE
GENOVESE & GLUCK, P.C.,

INDEX NO. 161793/2015
MOTION DATE 12/07/2016
MOTION SEQ. NO 003
MOTION CAL. NO _____

Plaintiff,

-against-

DAVID BASCH,

Defendant.

The following papers, numbered 1 to 9 were read on this motion to vacate a default judgment, and motion for contempt and to comply.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4; 5 - 7</u>
Answering Affidavits — Exhibits _____	<u>8 - 9</u>
Replying Affidavits _____	

Cross-Motion: Yes No

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

Upon a reading of the foregoing cited papers, it is ordered that Defendant's motion under Motion Sequence No. 003 to vacate the default judgment and squash the subpoena is denied. Plaintiff's motion under Motion Sequence No. 004 is granted as stated herein.

Plaintiff commenced this action on November 16, 2015 asserting various causes of action including breach of contract and account stated for unpaid legal fees and disbursements. (Mot. 3 Exh. 1). Issue was joined on December 16, 2015. (Mot. 3 Exh. B). Plaintiff moved for partial summary judgment on the account stated claim and to dismiss the affirmative defenses on April 11, 2016. (See NYSCEF Doc #'s 22-26). Defendant did not oppose the motion.

By amended order on May 26, 2016 this Court granted Plaintiff's motion for partial summary judgment and dismissed Defendant's affirmative defenses on default. (Mot. 3 Exh. E). Thereafter, Plaintiff filed a Proposed Judgment and Bill of Costs. (Opp. Exh. G). A Judgment with Notice of Entry was entered against Defendant by the Clerk of this Court on August 10, 2016. (Mot. 3 Exh. F). Plaintiff served Defendant with a Subpoena Ad Testificandum and Duces Tecum with Restraining Notice to Judgment Debtor on August 15, 2016. (Mot. 3 Exh. F).

Defendant now moves to: (1) vacate this Court's Amended Order dated May 26, 2016; (2) vacate the Judgment entered on August 10, 2016; (3) Quash the Subpoena, and; (4) restore this action to the Court's calendar.

Defendant argues that he did not oppose Plaintiff's summary judgment motion because he was never served with it, and that he was not aware of this motion until he was served with Notice of Entry of the Judgment dated August 10, 2016. That he never received email notification or any other written notification from Plaintiff or the Court regarding the motion, or the Judgment. That he is unfamiliar with e-filing and e-courts as a pro se litigant, and that the NYSCEF system lacks an Affidavit of Service

from Plaintiff showing proof of service of the summary judgment motion on Defendant.

Defendant contends that his defenses in this action are set forth in his Answer. That after the attorney who was working with Defendant left Plaintiff's firm, Defendant requested that any work being done on his behalf cease. That the legal work billed to Defendant was performed after he advised Plaintiff to cease performing legal services on his behalf, that he does not believe any of the billed work was actually performed, and that he objected to the legal bills on countless occasions in 2012.

Plaintiff opposes the motion arguing that by Defendant consenting to e-filing after serving his Answer via NYSCEF, the Defendant is then also subjected to service of any subsequent papers or interlocutory Orders through NYSCEF. Plaintiff attaches copies of the Confirmation Notices and the NYSCEF Notification emails, reflecting Defendant's e-mail account as was provided when he filed his Answer, confirming service of the (1) summary judgment motion (Opp. Exh. B), (2) the NYSCEF Notification providing the motion sequence number, the assigned Judge, and the return date of the motion (Opp. Exh. D), (3) the Amended Order dated May 26, 2016 with Notice of Entry (Opp. Exhs. E & F), (4) the Proposed Judgment and Bill of Costs (Opp. Exh. G), and (5) the Judgment with Notice of Entry (Opp. Exhs. H & I).

Plaintiff also contends that he e-mailed courtesy copies of the summary judgment motion to Defendant on April 11, 2016 (Opp. Exh. C), and that Plaintiff also sent e-mails on September 1, 2016 and September 7, 2016 to the same e-mail address reminding Defendant of his obligations under the subpoena.

Plaintiff also argues that Defendant fails to assert a meritorious defense. That Defendant simply referring to his Answer, and simply claiming that he disputed the billing without identifying the bill, statement or time entry that he objected to, when he objected to it, and to whom he made the objection, is not enough to successfully oppose an account stated claim. Plaintiff also contends that Defendant's actions are frivolous, and requests that the Court impose sanctions on Defendant for reimbursement of actual expenses reasonably incurred and reasonable attorney's fees resulting from Defendant's frivolous conduct.

CPLR § 5015(a)(1) allows the court to vacate a default judgment where a party asserts a reasonable excuse for the default and raises a potentially meritorious claim. "Assessment of the sufficiency of the excuse proffered for the delay and the adequacy of the merit of the action are consigned to the sound discretion of the court" (Bengal House Ltd. v 989 3rd Ave., Inc., 118 A.D.3d 575, 576, 988 N.Y.S.2d 586 [1st Dept., 2014]).

Defendant has failed to establish a reasonable excuse for his default in opposing Plaintiff's motion for partial summary judgment. Defendant consented to NYSCEF's electronic filing system when he filed his Answer in response to the Complaint and provided an e-mail address for e-filed documents. Thereafter,

Defendant consented to being served with any interlocutory documents through e-filing. “Where parties to an action have consented to e-filing, a party causes service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically...the electronic transmission of the notification shall constitute service of the document on the e-mail service addresses identified therein...” (See 22 NYCRR §202.5-b(f)(2)(ii)). Plaintiff provides copies of the NYSCEF notifications evidencing service upon Defendant, and, therefore, Defendant has failed to establish a reasonable excuse for not opposing Plaintiff’s summary judgment motion.

Furthermore, Defendant has not established that he has any potentially meritorious defenses warranting vacatur of the Order granting partial summary judgment.

Plaintiff also moves under Motion Sequence No. 004: (1) pursuant to CPLR §2308(a), Judiciary Law §753, CPLR §5210, and CPLR §5251 to punish Defendant for civil contempt for violating the subpoena; (2) pursuant to CPLR §§3124, 5223, and 5224 compelling Defendant to comply with the subpoena by producing all subpoenaed documents and to appear for a deposition, and; (3) ordering Defendant to pay Plaintiff’s costs and fees, including attorneys’ fees incurred in connection with the post-judgment disclosure and with this application.

Plaintiff contends that pursuant to the Subpoena served on Defendant on August 15, 2016 (Mot. 4 Exhs B & C), Defendant was to produce documents by September 6, 2016, and appear for a deposition on September 9, 2016. That as a courtesy Plaintiff e-mailed Defendant on September 1, 2016 to remind him of his obligations under the Subpoena (Mot. 4 Exh. D), and that Defendant ignored this e-mail. That Plaintiff again e-mailed Defendant on September 7, 2016, notifying him that he was in default in responding to the Subpoena (Mot. 4 Exh. E), and that Defendant again ignored the e-mail. That thereafter Defendant filed a frivolous and untimely Notice of Appeal, and a frivolous motion seeking to vacate this Court’s May 26, 2016 Amended Order. Plaintiff contends that these actions taken by Defendant were to defeat, impair, impede and prejudice Plaintiff’s rights in obtaining Defendant’s responses to the Subpoena.

Plaintiff moves pursuant to CPLR §2308(a), however the Subpoena it served on Defendant was not a Judicial Subpoena. Therefore, CPLR §2308(b) provides in part that “...if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply.”

CPLR §5251 provides in relevant part that “[r]efusal or willful neglect of any person to obey a subpoena or restraining notice issued... shall each be punishable as a contempt of court.”

CPLR §3124 provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article...the party seeking disclosure may move to compel compliance or a response.” CPLR §5223 provides that “[a]t any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.”

CPLR §5224 provides for the service of a subpoena, in the enforcement of a money judgment, to require the judgment debtor to produce documents and appear for a deposition.

Defendant does not oppose Plaintiff’s motion.

Accordingly, it is hereby ORDERED that Defendant’s motion to vacate this Court’s Amended Order dated May 26, 2016, vacate the Judgment entered on August 10, 2016, and quash the Subpoena Ad Testificandum addressed to Defendant dated August 10, 2016, is denied, and it is further,

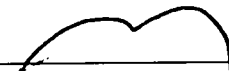
ORDERED, that Plaintiff’s motion is granted without opposition, and it is further,

ORDERED, that Defendant is held in contempt of Court and may purge his contempt by appearing for a deposition at the offices of Barrister Reporting Service, 80 Broad Street, 5th Floor, New York, New York 10004 on a date to be provided by Plaintiff, and at this deposition Defendant is to answer all questions within his knowledge that is within the scope of post-judgment disclosure, and it is further,

ORDERED, that Defendant is to comply with the subpoena and produce all documents according to the Subpoena dated August 10, 2016, within twenty days of service of a copy of this Order with Notice of Entry upon Defendant.

ENTER:

Dated: January 26, 2017



MANUEL J. MENDEZ **MANUEL J. MENDEZ**
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE