

**Gainey McKenna & Egleston v Ridrodsky & Long,
P.A.**

2018 NY Slip Op 32060(U)

August 21, 2018

Supreme Court, New York County

Docket Number: 655706/2017

Judge: Debra A. James

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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: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

GAINEY MCKENNA & EGLESTON,

Plaintiff,

- v -

RIDRODSKY & LONG, P.A.,

Defendant.

INDEX NO. 655706/2017

MOTION DATE 08/21/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 33, 34, 35

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 002) 8, 9, 10, 11, 12, 13, 27, 28, 29, 30, 31, 32, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for DISMISSAL

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for a default judgment on its causes of action for a declaratory judgment or breach of contract (Motion Sequence Number 001) is DENIED, without prejudice to plaintiff making a motion upon proper papers in accordance with CPLR § 3215(f); and it is further

ORDERED that the motion of defendant to dismiss the complaint pursuant to CPLR 3211(a)(7) (Motion Sequence Number 002) is DENIED.

DECISION

Motion for Default Declaratory Judgment

Although defendant has not met the requirements of demonstrating a reasonable excuse and meritorious defense that would entitle it to a vacatur of its default pursuant to CPLR 5015(a)(1), defendant is correct that even an unopposed motion for a default judgment must comply with CPLR § 3215(f), which requires that the movant provide proof of the claim in an affidavit. While it is true that if verified by the party¹, a pleading is equivalent to an affidavit (see Travis v Allstate Ins Co, 280 AD2d 394 [1st Dept 2001]), plaintiff failed to set forth proof of its claim for breach of contract by way of its verified complaint, as argued by defendant.

In fact, the complaint alleges that there was no contract between the parties herein, and that defendant performed no services on behalf of the parties' mutual client, Justin Tuttleman. Alternatively, and inconsistently, plaintiff also alleges that it "paid [defendant] for the services rendered to Mr. Tuttleman the same approximate percentage of its lodestar that [plaintiff] received", "[defendant] claimed that it is

¹Where the attorney is a party, he must sign such pleading under oath before a notary public. See CPLR 2106(a). Here, attorney Egleston is a party, but did not sign the complaint before a notary public, a technical defect.

entitled to one-half of the total legal fees earned by [plaintiff] on behalf of the services rendered to Mr. Tuttleman and in the combined derivative matters"; but "[defendant] did not perform one-half of the services rendered to Mr. Tuttleman and in the combined derivative matters". Such allegations are insufficient to prove a claim for breach of contract, as they lack any assertion that such breach resulted in any damages to plaintiff, an essential element of such cause of action. See Menon v Kennedy, 24 AD2d 849(1st Dept 1965). As plaintiff has not set forth proof of its claim for breach of contract, it is not entitled to a default judgment on such claim. See Giordano v Berisha, 45 AD3d 416, 417 (1st Dept 2017).

As to plaintiff's application that the court issue a declaratory judgment that there was no contract between the parties (presumably either oral or written), defendant is correct that plaintiff has not met the threshold requirement under CPLR 3215(f) that would entitled it to such relief, even were such motion unopposed. As cited by defendant, the Appellate Division, Fourth Department in Dole Food Company, Inc. v Lincoln General Insurance Company, 66 AD3d 1493 (2009), stated:

"A default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary that plaintiff[s] establish their entitlement to the declaration sought (Merchants Ins

Co of NH v Long Is Pet Cemetery, 206 AD2d 827[1994]
[internal quotation marks omitted]".

See also Hertz Vehicles, LLC v Best Touch PT, PC, 162 AD3d 617
(1st Dept 2018).

Motion to Dismiss Complaint

"In view of defendant's failure to demonstrate a reasonable excuse for [its] default, we need not determined whether [it] demonstrated a potentially meritorious defense". US Bank Assn v Brown, 147 AD3d 428, 429-430 (1st Dept 2017). Without vacatur of its default, defendant is not entitled to dismissal of the complaint, given that plaintiff moved for a default judgment within one year of defendant's default. See Praino v Times Square Trucking Corp, 53 AD2d 574 (1st Dept 1976).

8/21/2018
DATE


DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	