

Manno v Hayes Law Practice, PLLC
2018 NY Slip Op 34600(U)
July 3, 2018
Supreme Court, Kings County
Docket Number: Index No. 520104/16
Judge: Edgar G. Walker
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At an IAS Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of July, 2018.

P R E S E N T:

HON. EDGAR G. WALKER,

Justice.

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SALVATORE A. MANNO AND PATRICIA A. MANNO,
Plaintiffs,

- against -

Index No. 520104/16

HAYES LAW PRACTICE, PLLC, PATRICK J. HAYES,
ESQ., STUART A. KLEIN, ESQ., 1023 38TH STREET REALTY
LLC, ALNOUR ASSOCIATE, CONSULTING
ENGINEERING P.C., SILVERCUP SCAFFOLDING 1 LLC,
AND US DEMCO OF BROOKLYN INC.,

Defendants.

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The following papers numbered 1 to 16 read on the motions herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2, 3-4,5-6,7-9</u>
Opposing Affidavits (Affirmations) _____	<u>10, 11, 12</u>
Reply Affidavits (Affirmations) _____	<u>13, 14, 15, 16</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants Hayes Law Practice, PLLC and Patrick J. Hayes, Esq. (collectively, Hayes) move, pursuant to CPLR 3211 (a) (7), to dismiss plaintiffs' Salvatore A. Manno and Patricia A. Manno's (plaintiffs) complaint against him. Defendant 1023 38th Street Realty LLC (defendant 1023) moves, pursuant to CPLR 3211 (a) (5), to

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dismiss plaintiffs' complaint against it on the grounds of res judicata and the expiration of the statute of limitations. Defendant 1023 further moves, pursuant to 22 NYCRR 130-1.1, for sanctions against Hayes as well as plaintiffs' current counsel, Effimia Soter, Esq. Defendant Stuart A. Klein, Esq. (Klein) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint and all cross claims asserted against him. Plaintiff's cross-move, pursuant to CPLR 3215, for a default judgment in favor of plaintiffs against defendant 1023, Silvercup Scaffolding 1 LLC (Silvercup), and US Demco of Brooklyn, Inc. (Demco).

Background Facts and Procedural History

In or about 2006, plaintiffs purchased a two-story residential home located at 1021 38th Street in Brooklyn, New York (plaintiffs' premises). In or about 2008, defendant 1023 purchased property located at 1023 38th Street, which abutted plaintiffs' property (the 1023 premises). In this regard, the structures on the abutting properties shared a party wall. According to the instant complaint, in or about June of 2010, defendant 1023 "illegally and without obtaining proper permits had commenced demolition specifically to the roof area as well as interior demolition and/or general abandonment" of the structure on its property. Plaintiffs allege that this demolition work caused severe damage to the interior and structural integrity of their premises and also created a mold condition. The complaint further alleges that, in or about June of 2012, defendant 1023 performed additional illegal demolition work on the 1023 premises including the removal of all roofing material down to the wood decking, as well as interior demolition. According to the complaint, this demolition work

caused extensive water damage throughout plaintiffs' premises and defendant 1023 was issued two violations by the New York City Department of Buildings (DOB) in connection with the work. Plaintiffs' complaint also alleges that, in or about August of 2014, while a DOB stop work order was in effect, defendant 1023 commenced the full demolition of the 1023 premises, thereby exposing the party wall to the elements. According to plaintiffs' complaint, this demolition "created a dangerous condition in that power lines traveled to Plaintiffs' house were left exposed; failed to insulate Plaintiffs' exterior walls from the cold, wind, rain water; allowed mold and mildew to exist."

The complaint further alleges that, in or about January of 2013, while the aforementioned events were transpiring, plaintiffs retained Klein to represent them with respect to the property damages they sustained and/or reach an out of court settlement with defendant 1023. Thereafter, Klein met with representatives from defendant 1023, but was unable to secure any good faith offers whereby the plaintiffs would be compensated for the property damages that they sustained. In June of 2013, the three-year statute of limitations expired on any claims arising out of the alleged property damages sustained by plaintiffs in June of 2010. According to the complaint, Klein failed to inform plaintiffs regarding the necessity of commencing a lawsuit prior to the expiration of the statute of limitations and, on or about May 1, 2014, abandoned plaintiffs' matter.

On or about April 25, 2015, plaintiffs retained Hayes in order to commence a legal action to recover for the property damages as well as alleged personal injuries they sustained

as a result of the demolition work carried out by defendant 1023 on the abutting property. On or about May 26, 2015, Hayes filed a verified complaint on behalf of plaintiffs against defendant 1023 as well as Silvercup, Demco, and defendant Alnour Associate, Consulting Engineering P.C. (Alnour). However, Hayes failed to file a summons with the complaint. The complaint itself alleged that, on or about June 3, 2010, the defendants illegally and without obtaining proper permits performed extensive demolition to the roof area and interior of the 1023 premises, and that this work directed water into plaintiffs' premises, which thereby caused severe damage to the interior and structural integrity of their home.¹

After being served with the complaint, defendant 1023 and Silvercup moved to dismiss the action on the grounds that the three-year statute of limitations had expired. In this regard, the moving defendants noted that the complaint itself alleged that the damages caused by the demolition work first manifested themselves on June 3, 2010 and the action was not commenced until May of 2015. On September 16, 2015, in response to the motion to dismiss, Hayes (on behalf of plaintiffs) filed an amended summons and amended complaint. On or about October 10, 2015, Hayes cross-moved for leave to file the amended complaint. Notably, the amended complaint was identical to the original complaint except the amended complaint alleged the demolition work that caused water to enter plaintiffs' premises occurred on June 3, 2012 as opposed to June 3, 2010.

¹The complaint also alleged that the DOB issued violations to the defendants on June 22, 2012 and that the defendants commenced a full demolition of the 1023 premises in August, 2014.

In a decision and order dated February 2, 2016, this court denied plaintiffs' cross motion and granted defendants 1023 and Silvercup's motion to dismiss the complaint. In so ruling, the court found that plaintiffs failed to file a summons with the original complaint on May 26, 2015. The court further found that, in the absence of a summons, plaintiffs' filing of the complaint on May 26, 2015 was insufficient to commence the action and that the action was not commenced until September 16, 2015, when the amended summons and complaint were filed. Under the circumstances, the court ruled that plaintiffs' claims were time-barred regardless of whether they accrued on June 3, 2010 or June 3, 2012.²

On or about November 14, 2016, plaintiffs commenced the instant action which asserts legal malpractice, breach of fiduciary duty, and punitive damages claims against Hayes and Klein. The complaint also asserts various causes of action against defendant 1023, Alnour, Silvercup, and Demco, including claims for property damage, personal injuries, loss of rental income, and trespass. Underlying all of plaintiffs' claims is the allegation that three separate incidents occurring in June of 2010, June of 2012, and August of 2014 resulted in new and distinct property damage to plaintiffs' premises. In this regard, plaintiffs' claims against defendant 1023, Alnour, Silvercup, and Demco are based upon the August 2014 incident. Plaintiffs' claims against Hayes are based upon his alleged failure to timely commence an action to recover for the damages arising out of the June 2012 incident.

²In an order dated May 13, 2016, the court granted Alnour's motion to dismiss plaintiffs' action against it on statute of limitations grounds.

Finally, plaintiffs' claims against Klein are based upon his alleged failure to timely commence an action to recover for the damages arising out of the June 2010 incident. The instant motions are now before the court.

Hayes' Motion to Dismiss

Hayes now moves to dismiss plaintiffs claims against him pursuant to CPLR 3211 (a) (7) for failure to state a claim. In particular, Hayes maintains that plaintiffs cannot prove that his alleged malpractice in failing to timely commence an action on their behalf proximately caused their injuries inasmuch as, at the time he was retained by plaintiffs' in April 2015, their claims were already time-barred under the applicable three-year statute of limitations. In support of this argument, Hayes points to the original complaint in the initial action, which was verified by plaintiff Salvatore A. Manno. In this regard, Hayes notes that Mr. Manno admitted in this pleading that the damages to his premises first manifested themselves on June 3, 2010. Hayes further points to case law which holds that, when property damages arise out of negligent construction work on an adjacent property, any cause of action that the property owner might have accrued when the damages first becomes visible or otherwise apparent. Finally, Hayes argues that plaintiffs cannot contend that the damages in 2010 were distinct and different from the damages sustained in 2012 since both the original complaint and amended complaint in the initial action allege that the damages were continuing and consisted of the same water damage and mold which caused severe damage to the interior and structural integrity of plaintiffs' premises.

In further support of his motion, Hayes argues that, even if plaintiffs have a viable malpractice claim against him, their breach of fiduciary duty claim must be dismissed since it is duplicative and redundant of their malpractice claim and does not allege any independent intentional tort. Finally, Hayes maintains that plaintiffs' claim for punitive damages must be dismissed since a review of the allegations in their complaint demonstrates that it plainly lacks the requisite allegations of egregious conduct or moral turpitude necessary to support a claim for punitive damages.

In opposition to Hayes' motion, plaintiffs argue that they sustained distinct damages as a result of three different events. Plaintiffs further contend that, inasmuch as the damages that they sustained in June 2012 were distinct and different from the damages that they sustained in 2010, their claims arising out of the 2012 damages were not time-barred at the time they retained Hayes in April 2015. Thus, plaintiffs maintain that they have a viable malpractice claim against Hayes inasmuch as his failure to file a summons along with the complaint in May 2015 ultimately led to the dismissal of their action. In particular, plaintiffs note that by the time Hayes filed a summons in September 2015, the statute of limitations had run on their claims arising out of the June 2012 damages. Plaintiffs further argue that the fact that the original complaint failed to distinguish between the 2012 and 2010 incident and damages was the result of Hayes' malpractice in failing to grasp the facts of this case from the beginning of his legal representation.

In further opposition to Hayes' motion to dismiss, plaintiffs argue that they have a viable breach of fiduciary duty claim against Hayes. In particular, plaintiffs contend that, when faced with the motion to dismiss the complaint in the initial action, Hayes put his own interests first by trying to cover up his errors and omissions and by making a material misrepresentation to the court that a summons was properly filed. Plaintiffs also argue that their punitive damages claim against Hayes should be permitted to proceed at this time given his grossly incompetent handling of plaintiffs' claim as it relates to the 2012 property damage.

“On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), ‘the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail’” (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681 [2017], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Further, “the factual allegations in the pleading must be deemed true, and the petitioner must be afforded the benefit of every favorable inference” (*Matter of Palmore v Board of Educ. of Hempstead Union Free Sch. Dist.*, 145 AD3d 1072, 1073 [2d Dept 2016]). “Nevertheless, bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true” (*Gawrych*, 148 AD3d at 681[internal citations and quotation marks omitted]).

“In a legal malpractice action, a plaintiff must show that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney’s breach of this professional duty caused the plaintiff’s actual damages” (*Offman v Katz*, 89 AD3d 909, 909-910 [2011], [internal quotations omitted]).

Here, the allegations in plaintiffs’ complaint adequately state a claim for legal malpractice against Hayes. In particular, the complaint alleges that plaintiffs retained Hayes in April of 2015 to commence an action for damages that they sustained in June of 2012. The complaint further alleges that Hayes’ failure in May of 2015 to file a summons with the original complaint resulted in the dismissal of their claims on statute of limitations grounds. Stated otherwise, the complaint alleges that, but for Hayes’ failure to file the summons, their claims arising out of the damages they sustained in June of 2012 would not have been dismissed. Inasmuch as the failure to file a summons when commencing an action clearly constitutes a breach of professional duty, the complaint states a cause of action for legal malpractice.

In determining that plaintiffs have stated a claim for malpractice against Hayes, the court finds no merit to his argument that the pleadings in the prior action establish that the statute of limitations expired on the plaintiffs’ underlying claims before he was retained inasmuch as the statute of limitations began to run in June of 2010. In this regard, it is true that a claim for property damages asserted against an adjoining landowner generally accrues

when the damages first become apparent (*Public Serv. Mut. Ins. Co., v 341-347 Broadway, LLC*, (96 AD3d 473 [2012])). Further, although the original complaint in the prior action alleged that the underlying damages occurred in June of 2010, Hayes himself subsequently filed an amended complaint alleging that the damages occurred in 2012 and also filed cross motion papers in which he indicated that the “correct date” of the cause of action was June 3, 2012 as opposed to June 22, 2010. Under the circumstances, Hayes motion to dismiss plaintiffs’ malpractice claim against him is denied.

Turning to plaintiffs’ breach of fiduciary duty claim against Hayes, it is well-settled that a breach of fiduciary duty claim that arises from the same facts as a legal malpractice cause of action and does not allege distinct damages must be dismissed as duplicative of the malpractice claim (*Lewis, Brisbois, Bisgaard & Smith, LLP v Law Firm of Howard Mann*, 141 AD3d 574, 576 [2016]; *Comprehensive Mental Assessment & Med. Care, P.C. v Gusrae Kaplan Nusbaum, PLLC*, 130 AD3d 670, 672 [2015]). Here, plaintiffs’ breach of fiduciary duty claim against Hayes is based upon the same facts as their malpractice claim and does not allege any distinct damages. Accordingly, plaintiffs’ breach of fiduciary duty claim against Hayes must be dismissed.

With respect to plaintiffs’ punitive damages cause of action, in order to support such a claim, a plaintiff must allege “a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations” (*Stewart v Berger*, 137 AD3d 1103, 1105 [2016] [internal quotations omitted]).

Thus, only the most egregious conduct on the part of an attorney will support a punitive damages claim. Indeed, in and of itself, the conversion of a former client's escrow funds are insufficient to sustain a claim for punitive damages (*Gamiel v Curtis & Reiss, P.C.*, 16 AD3d 140, 141 [2005]). Here, the allegations in the complaint are clearly insufficient to state a claim for punitive damages against Hayes. Accordingly, this cause of action must be dismissed against Hayes.

Klein's Motion to Dismiss

Klein moves to dismiss plaintiffs' action and all cross claims against him pursuant to CPLR 3211 (a) (1) and (7). In so moving, Klein maintains that the uncontroverted evidence in this case establishes that plaintiffs do not have any viable claims against him. In this regard, Klein notes that plaintiffs' claims against him are based solely on his alleged failure to timely file a summons and complaint to recover for the damages that they sustained in June 2010. However, according to Klein, evidence in the form of the amended verified complaint and cross motion papers in the prior proceeding, as well as plaintiff Salvatore Manno's own affidavit, establish that plaintiffs did not sustain any damages until June of 2012 and that Hayes is solely responsible for failing to commence a timely action to recover for these damages. In support of this argument, Klein notes that, although the original complaint in the prior action alleged that the property damage to plaintiffs' premises occurred in June of 2010, plaintiffs subsequently filed an amended verified complaint which alleged that the damages actually occurred in June of 2012. Further, plaintiffs filed cross motion

papers in the prior action which represented that the June 2010 damages date set forth in the original complaint was a pleading error subject to correction under CPLR 3025. Finally, Klein points to Salvatore Manno's October 9, 2015 affidavit in which he unambiguously states that "[d]efendants, on or about June 3, 2012 and onward failed to maintain the [1023 premises]" and that, "[i]n any event the damages were caused on or about June 3, 2012." According to Klein, the representations in the verified amended complaint, cross motion papers, and Mr. Manno's affidavit constitute judicial admissions which require the dismissal of plaintiffs' claims against him. As a final matter Klein argues that plaintiffs' remaining claims against him must be dismissed inasmuch as the breach of fiduciary duty claim is duplicative of plaintiffs' malpractice claim and the allegations in the complaint are insufficient to support a punitive damages claim.

In opposition to Klein's motion, plaintiffs' initially contend that the motion should be denied as untimely inasmuch as it was made after Klein interposed an answer. Further, plaintiffs argue that they have a viable claim against Klein based upon his failure to commence an action to recover for the damages that they sustained in June 2010 inasmuch as the complaint alleges that the 2010 damages were distinct and separate from the 2012 damages. In addition, plaintiffs argue that the position that they took in the prior action does not preclude them from claiming that damages also occurred in 2010. In particular, plaintiffs note that the doctrine of judicial estoppel would only apply had they been successful in the prior action. Here, the court dismissed plaintiffs' prior action. Finally, plaintiffs contend that

they have stated a claim against Klein for breach of fiduciary duty as well as punitive damages.

As an initial matter, it is clear that Klein's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) is untimely. In this regard, a motion made under CPLR 3211 (a) (1) must be made "before service of the responsive pleading is required" (CPLR 3211 [e]). Here, Klein already interposed an answer at the time he made the instant motion to dismiss (*Bowes v Healy*, 40 AD3d 566 [2007]). However, to the extent that he moves pursuant to CPLR 3211 (a) (7), Klein's motion is timely inasmuch as a motion to dismiss for failure to state a claim may be made at any time (*see* John R. Higgitt, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:49). Moreover, courts are permitted to consider evidentiary material in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010]). Further, when a party submits evidence in support of a motion to dismiss pursuant to both CPLR 3211 (a) (1) and (7), the court may consider the evidence under CPLR 3211 (a)(7) even though the request for dismissal under CPLR 3211 (a)(1) is untimely (*Skywest, Inc., v Ground Handling, Inc.*, 150 AD3d 922, 923-924 [2017]). When evidence is submitted in support of a CPLR 3211 (a)(7) motion, the criterion then becomes whether the plaintiff has a cause of action, not whether the complaint states a cause of action (*Sokol*, 74 AD3d at 1181-1182). If the evidence demonstrates that a material fact claimed in the complaint is not a fact at all, then the motion to dismiss will be granted (*Skywest, Inc.*, 150 AD3d at 923). Under the circumstances, Klein may rely upon

evidentiary submissions including the verified amended complaint, the cross motion papers, and Manno's affidavit from the previous action in support of his CPLR 3211 (a) (7) motion to dismiss.

Statements made by a party or his/her attorney in pleadings, motion papers, affidavits, or depositions in another judicial proceeding are deemed to be informal judicial admissions and are admissible against the party (*Matter of Liquidation of Union Indem. Ins. Co. of New York v American Centennial Ins. Co.*, 89 NY2d 94, 103 [1996]). Although not conclusive, such admissions are sufficient to make a prima facie showing of entitlement to summary judgment (*Wenger v DMR Realty Mgt. Inc.*, 90 AD3d 647, 648-649 [2011]). Similarly, when they flatly contradict material allegations in a complaint, judicial admissions will result in the dismissal under CPLR 3211 (*New Greenwich Litigation Trustee, LLC v Citco Fund Services*, 145 AD3d 16, 25 [2016]; *Morgenthau & Latham v Bank of New York Co., Inc.*, 305 AD2d 74, 79 [2003]).

Here, plaintiffs' malpractice claim against Klein is dependent upon the factual allegations in their complaint that they suffered damages in June of 2010, and that these damages were separate and distinct from the damages that they sustained in June of 2012. However, these claims are flatly contradicted by plaintiffs' judicial admissions in the prior action. In particular, although plaintiffs now claim that the 2010 damages were separate and distinct from the 2012 damages, the original and amended complaints contain the exact same language regarding the nature and circumstances of the damages, and the only difference

between the two complaints is that the damage occurrence date has been changed from June 3, 2010 to June 3, 2012.³ Further, in his affirmation in support of the cross motion, Mr. Hayes represented that the correct date of the cause of action was June 3, 2012. Finally, in his affidavit in support of the cross motion, Mr. Manno unambiguously stated that “the damages were caused on or about June 3, 2012.” Mr. Manno further averred that “on or about June 3, 2012 and onward” the defendants failed to maintain the [1023 premises] including the roof, which allowed water to enter plaintiffs’ premises. In addition, Mr. Manno stated that this water damaged the structural integrity of plaintiffs’ premises and caused a mold and mildew condition. These are the same exact damages that plaintiffs’ instant complaint now alleges occurred in June of 2010.

Under the circumstances, since it is clear from plaintiffs’ own judicial admissions in the prior proceeding that plaintiffs’ premises did not sustain separate and distinct damages in 2010, plaintiffs’ malpractice cause of action against Klein is dismissed pursuant to CPLR 3211 (a) (7).

Given the courts’ finding regarding the date of the damages, plaintiffs’ breach of fiduciary duty and punitive damages claims against Klein must also be dismissed. The court further notes that, even if plaintiffs’ malpractice claim against Klein had not been dismissed, their breach of fiduciary duty and punitive damages claims would have to be dismissed for the same reasons that these causes of action were dismissed against Hayes. In particular,

³The fact that the original and amended complaint both allege a June 3rd accrual date also suggests that the 2010 year cited in the original complaint was a mistake.

plaintiffs' fiduciary duty claim is duplicative of their malpractice claim and the allegations in the complaint are insufficient to support a claim for punitive damages against Klein. As a final matter, given the dismissal of plaintiffs' claims against Klein, Alnour's cross claim for common-law indemnification/contribution must be dismissed.

Defendant 1023's Motion to Dismiss

Defendant 1023 moves to dismiss plaintiffs' complaint against it pursuant to CPLR 3211 (a) (5). In particular, defendant 1023 contends that plaintiffs' claims against it are barred by the doctrine of res judicata and on statute of limitations grounds inasmuch as the court determined in the prior action that plaintiffs' claims are time-barred. In support of this contention, defendant 1023 maintains that plaintiffs' claim in the instant complaint that the damages sustained in 2014 were separate and distinct from the damages sustained in 2012 could have been raised in the prior action which was commenced in 2015 (i.e., after the 2014 damages were sustained). In addition, defendant 1023 contends that the 2014 damages alleged in the complaint are the same as the 2012 damages and therefore, plaintiffs' claims accrued more than three years prior to the commencement of this action.

In opposition to defendant 1023's motion, plaintiffs argue that the motion must be denied as untimely under CPLR 3211 (e). In particular, plaintiffs note that under the statute, defendant 1023 was obligated to move to dismiss before service of the responsive pleading was required. Here, the summons was served on the Secretary of State on November 23, 2016. Thus, under CPLR 320, defendant 1023 was required to move to dismiss with 30 days

of that date. However, defendant 1023 did not file its motion to dismiss until March 23, 2017 and it never sought an extension of time to interpose an answer or file a motion to dismiss. Accordingly, plaintiffs argue that the motion is untimely. In any event, plaintiffs argue that defendant 1023's motion is without merit. In particular, plaintiffs argue that the doctrine of res judicata does not apply inasmuch as a summons was not filed with the complaint in the previous action, which rendered this action a nullity.

CPLR 3211 (e) provides that, “[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in [CPLR 3211 (a)].” Further, although this statute provides that a motion made under CPLR 3211 (a) (2), (7) or (10) may be made at any time, no such allowance is made for a motion made under CPLR 3211 (a) (5). Thus, a motion to dismiss pursuant to CPLR 3211 (a) (5) must be “made prior to the time by which the defendant was required to serve an answer” (*McGee v Dunn*, 75 AD3d 624, 625 [2010]). Here, plaintiff has submitted an affidavit of service indicating that defendant 1023 was served with a summons and complaint via the Secretary of State on November 23, 2016. Thus, by operation of CPLR 320, defendant 1023 had 30 days from that date to serve an answer or make a motion to dismiss. However, defendant 1023 did not move to dismiss the complaint until four months after service of the summons and complaint. Furthermore, defendant 1023's motion failed to request an extension of time to answer or appear. Under the circumstances, defendant 1023's motion to dismiss is denied as untimely.

(*Archer v Motor Vehicle Accident Indem. Corp.*, 118 AD3d 5, 11 [2014]; *McGee*, 75 AD3d at 625).⁴

Defendant 1023's Motion for Sanctions

Defendant 1023 moves for sanctions, court costs, and attorney's fees against plaintiffs, plaintiffs' current counsel, as well as Hayes. In support of this branch of its motion, defendant 1023 contends that plaintiffs' instant action against it is frivolous inasmuch as the court previously dismissed all claims against it. Further, defendant 1023 argues that plaintiffs' present claims that they sustained separate and distinct damages in 2014 are contradicted by their own sworn statements in the prior action. Finally, defendant 1023 argues that it is entitled to sanctions against Hayes inasmuch as he commenced an admittedly time-barred action for damages allegedly sustained by plaintiffs in June of 2010.

"Pursuant to 22 NYCRR 130-1.1, sanctions and/or costs may be imposed against a party or the party's counsel for frivolous conduct" (*Congregation Ahavas Moishe, Inc. v Katzoff*, 134 AD3d 934 [2014]). Turning first to defendant 1023's motion for sanctions against Hayes, the conduct which forms the basis for this claim took place during the prior action which was dismissed by the court. Accordingly, defendant 1023 waived any claim for sanctions against Hayes by failing to seek this relief during the prior action. In any event, Hayes' conduct in the prior action does not warrant sanctions. Specifically, the allegation in the original complaint that the damages accrued in 2010 was the result of a mistake and/or

⁴The court notes that, unlike Klein, defendant 1023 has not moved pursuant to CPLR 3211 (a) (7).

confusion rather than any deliberate conduct on Hayes' part. Further, although plaintiffs' instant claims against defendant 1023 may ultimately fail based upon the doctrine of res judicata, it cannot be said that these claims are frivolous. Accordingly, that branch of defendant 1023's motion which seeks sanctions is denied.

Plaintiffs' Cross Motion for a Default Judgment

Plaintiffs cross-move for a default judgment against Silvercup, Demco, and defendant 1023. In support of their cross motion, plaintiffs note that none of these defendants have interposed an answer to the complaint and the time for doing so has now expired. Plaintiffs further submit a sworn affidavit of merit by plaintiff Salvatore Manno. In addition, plaintiffs submit affidavits of service indicating that the defendants were served through the Secretary of State pursuant to Section 303 of the Limited Liability Company Law. Finally, plaintiffs submit copies of notice letters, along with affidavits of mailing, indicating that the additional service of the summons and complaint required under CPLR 3215 (g) (4) had been made after service via the Secretary of State.

In opposition to plaintiffs' cross motion for a default judgment against it, defendant 1023 argues that plaintiffs failed to comply with the requirements of CPLR 3215 (g) (4) and CPLR 317. Specifically, defendant 1023 notes that CPLR 3215 (g) (4) (ii) requires additional service of the summons and complaint along with a notice that service had been made pursuant to Business Corporation Law § 306 (b). Here, the letter sent to defendant 1023 failed to specifically state that service had been effectuated pursuant to Business

Corporation Law § 306 (b). Under the circumstances, defendant 1023 argues that the cross motion for a default judgment must be dismissed since service was not properly effectuated. Defendant 1023 also argues that the cross motion should be denied inasmuch as it clearly has a meritorious defense to plaintiffs' claims based upon statute of limitations grounds and the doctrine of res judicata. Further, defendant 1023 claims that, since it was served via the Secretary of State, under CPLR 317, it need not show a reasonable excuse for its delay in responding to plaintiffs' action. In any event, defendant 1023 argues that it has a reasonable excuse for its delay in appearing in this action due to the "sheer shock" that plaintiffs would commence this action after the previous action was dismissed.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default in answering or appearing" (*Roy v 81E98th KH Gym, LLC*, 142 AD3d 985 [2016]). Here, it is undisputed that the subject defendants have defaulted in answering plaintiffs' complaint. Further, plaintiffs' have submitted proof of the facts constituting their claims by submitted an affidavit of merit by Mr. Manno. Finally, plaintiffs have submitted proof of service of the summons and complaint as well as proof of the additional service required under CPLR 3215 (g) (4). Under the circumstances, plaintiffs are entitled to a default judgment against Silvercup, Demco, and defendant 1023 (*Archer*, 118 AD3d at 11).

In so ruling, the court finds no merit to defendant 1023's argument that service was defective under CPLR 3215 (g) (4) (ii) inasmuch as the notice letter did not specifically state that service had been made pursuant to "that provision." In particular, the letter in question stated that service had previously been made through the Secretary of State. Further, the affidavit of service through the Secretary of State was attached to the notice letter and this affidavit specifically stated that service had been made pursuant to section 303 of the Limited Liability Company Law.⁵ Furthermore, while it is clear that defendant 1023 has a meritorious defense against the action under the doctrine of res judicata, this alone does not provide a basis for denying the cross motion for a default judgment (*Archer*, 118 AD3d at 12). Under CPLR 317, defendant 1023 is also required to demonstrate that it did not receive notice of the summons in time to defend (*Unifiller Sys. Inc. v Melita Corp.*, 127 AD3d 961, 962 [2015]). Here, defendant 1023 does not even allege that it failed to receive timely notice of the summons. Further, defendant 1023's purported "sheer shock" that it had been sued again does not constitute a reasonable excuse for failing to answer the complaint. As a final matter, the court notes that defendant 1023 has not moved for an extension of time to answer the complaint. Under the circumstances, plaintiffs' cross motion for a default judgment against Silvercup, Demco, and defendant 1023 is granted without prejudice to the defendants moving to vacate said default upon making the required showing under CPLR 5015 (a).

⁵Inasmuch as defendant 1023 is a limited liability company, service through the Secretary of State was made pursuant to Limited Liability Company Law § 303 as opposed to Business Corporation Law § 306 (b).

Summary

In summary, the court rules as follows: Hayes' motion to dismiss is denied with respect to plaintiffs' malpractice claim and granted with respect to plaintiffs' breach of fiduciary duty and punitive damages claims. Klein's cross motion to dismiss plaintiffs' complaint and all cross claims against it is granted. Defendant 1023's motion to dismiss the complaint pursuant to CPLR 3211 (a) (5) and for sanctions against Hayes and plaintiffs is denied. Plaintiffs cross motion for a default judgment against Silvercup, Demco, and defendant 1023 is granted.

This constitutes the decision and order of the court.

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