

Wong, Wong, & Assoc., P.C. v Zhang Ya

2019 NY Slip Op 33552(U)

November 21, 2019

Supreme Court, New York County

Docket Number: 655307/2018

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

INDEX NO. 655307/2018

WONG, WONG, & ASSOCIATES, P.C.,

08/21/2019,

Plaintiff,

MOTION DATE 10/02/2019

- v -

MOTION SEQ. NO. 004 005

ZHANG YA, CEFC CHINA ENERGY COMPANY LIMITED,
and CHINA ENERGY FUND COMMITTEE

DECISION + ORDER ON MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for JUDGMENT - DEFAULT

In this action to recover unpaid attorney's fees, interest and costs incurred to collect the unpaid fees, the plaintiff law firm, Wong, Wong, & Associates, P.C., moves pursuant to CPLR 3215 for leave to enter a default judgment against (1) defendant Zhang Ya, a woman who hired the firm to represent her in a criminal proceeding (MOT SEQ 005) and (2) defendant China Energy Fund Committee (China Energy), which, according to the plaintiff, employed Zhang Ya and promised to pay her legal fees (MOT SEQ 004). No opposition is submitted. The motion as to defendant Zhang Ya is granted. The motion as to defendant China Energy is denied.

By an order dated June 10, 2019, the court granted the plaintiff's motion pursuant to CPLR 308(5) to serve Zhang Ya through an electronic communication application called WeChat, and denied the plaintiff's motion for default judgment against China Energy as the plaintiff submitted an unverified complaint and an unnotarized affirmation of its managing member, both devoid of evidentiary value. The denial was without prejudice to renewal upon proper papers. Zhang did not appear or answer. The two instant motions ensued.

“On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720).” Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011). “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action.” Joosten v Gale, 129 AD2d 531, 535 (1st Dept 1987); see Martinez v Reiner, 104 AD3d 477 (1st Dept 2013); Beltre v Babu, 32 AD3d 722 (1st Dept 2006). While the “quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered.” Guzetti v City of New York, 32 AD3d 234, 236 (1st Dept. 2006). The proof submitted must establish a *prima facie* case. See Guzetti v City of New York, *supra*; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2nd Dept. 1983). As such, “[w]here a valid cause of action is not stated, the party moving for a default judgment is not entitled to the requested relief, even on default.” Green v. Dolphy Constr. Co. Inc., 187 AD2d 635, 636 (2nd Dept. 1992).

The amended complaint includes four causes of action against defendant Zhang Ya - breach of contract, account stated, unjust enrichment and quantum meruit. To establish a claim for breach of contract, a plaintiff must show the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages. See Markov v. Katt, 176 AD3d 401 (1st Dept. 2019); Harris v Seward Park Hous. Corp., 79 AD3d 425 (1st Dept. 2010). The plaintiff has met its burden on this claim by submitting, among other things, the amended complaint, proof that it served the amended complaint upon Zhang Ya through WeChat, the parties’ retainer agreement dated November 19, 2017, and an affidavit of counsel, Raymond Wong, in which he describes the legal services rendered on behalf of Zhang Ya. The plaintiff also submits invoices sent to Zhang Ya for the legal services rendered, showing an outstanding balance of \$56,264.61, as of June 13, 2018, and reflecting credit for the \$10,000 retainer fee paid, and an account of costs incurred by in collecting the unpaid fees, as provided for in the retainer agreement, showing a balance of \$24,131.61 as of September 19, 2019.

To establish a claim for an account stated, a plaintiff must show 1) the debtor agreed to pay the amount demanded upon previous business dealings, 2) the statement of account was presented to the client, and 3) the debtor accepted the account stated for a reasonable period of

time without objection. Shea & Gould v. Burr, 194 AD2d 369 (1st Dept. 1993). It is well settled that a cause of action for account stated may be established by demonstrating either partial payment or retention of bills without objection. See Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51 (1st Dept. 2004); M&R Constr. Corp. v IDI Constr. Co., 4 AD3d 130 (1st Dept. 2004). Here, plaintiff shows that Zhang Ya agreed to pay all legal fees pursuant to the terms of the retainer agreement, paid a retainer fee of \$10,000, was thereafter sent a series of invoices from November 29, 2017 through June 6, 2018, and failed to pay any of those amounts and failed to object to the invoices.

The court need not reach the remaining causes alleged against Zhang Ya - unjust enrichment and quantum meruit. In any event, as general rule, where, as here, a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). As to the quantum meruit claim, it is well settled that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., *supra* at 388.

In regard to the plaintiff's application to recover the costs incurred in collecting the unpaid fees, including additional attorney's fees, it is the established rule that such fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). Here, however, the parties' retainer agreement contains such a provision. Article 6 of the agreement requires Zhang to pay reasonable attorneys' fees "[i]n the event that it becomes necessary for [plaintiff] to engage in a legal action to collect any past due balance." Therefore, the plaintiff is entitled to collect reasonable attorney's fees and costs, and its submissions show that it is entitled to the sum of \$24,131.61.

As to the plaintiff's motion for leave to enter a default judgment against China Energy (MOT SEQ 004), the plaintiff has failed to establish its burden on any of its claims against that defendant - breach of contract, fraud, and promissory estoppel. The plaintiff asserts that defendant China Energy, through one or more of its members, made an oral agreement to pay

legal fees on behalf of Zhang Ya, who had signed a written contract obligating her to pay her own legal fees. In the amended complaint, the plaintiff alleges only that “China Energy...represented to [the plaintiff] on numerous occasions that [it] would pay Ms. Zhang’s bills pursuant to the Retainer.” In an affidavit submitted in support of the motion, Raymond Wong, a principal of the firm, alleges that he was close friends with several members of defendant China Energy who represented to him on numerous occasions that China Energy would pay Zhang Ya’s legal fees. No name, date or other detail is provided. In his own affidavit, Sanghoon Shon, an associate attorney at the plaintiff firm, simply repeats Wong’s allegations.

The claim for breach of contract against China Energy fails as an oral promise to guarantee the debt of another is unenforceable pursuant to General Obligations Law § 5-701(a)(2). Nor has the plaintiff shown, or even alleged, that the exception to that rule applies here, *i.e.* that the promise need not be in writing if it is supported by new consideration to the promisor, beneficial to the promisor, and it is the intention of the parties for the promisor to become a principal debtor primarily liable. See Martin Roofing, Inc. v Goldstein, 60 NY2d 262 (1984). Since the purported oral agreement of China Energy is barred by the statute of frauds, the plaintiff relies upon a theory of promissory estoppel to hold China Energy liable. The doctrine of “promissory estoppel may preclude enforcement of the statute of frauds if application of the statute would result in unconscionability.” Matter of Estate of Hennel, 29 NY3d 487, 404-495 (2017); see Castellotti v Free, 138 AD3d 198 (1st Dept. 2016). However, the plaintiff does not demonstrate, *prima facie*, all elements of a promissory estoppel - 1) a clear and unambiguous promise, 2) reasonable reliance on the promise, and 3) injury caused by the reliance. See MatlinPatterson ATA Holdings LLC v Federal Express Corp., 87 AD3d 836 (1st Dept. 2011). Furthermore, while the failure to pay one’s own attorney’s fees in full does unquestionably result in injury to the unpaid attorney, it cannot be reasonably argued that, under the circumstances, application of the statute of frauds as to China Energy’s purported promise to the plaintiff would be unconscionable.

Similarly, the plaintiff’s proof falls far short of establishing a *prima facie* cause of action for fraud as against defendant China Energy. To establish a claim for fraud, the plaintiff must show a misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance, and resulting injury. See Dembeck v 220 Cent. Park S. LLC, 33 AD3d 491 (1st Dept. 2006). The amended complaint lacks the necessary particularity for such a claim. See CPLR 3016(b). Furthermore, the plaintiff has not shown, or even cogently alleged,

fraudulent intent on the part of China Energy, or any basis for inferring the same. See Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553 (2009).

Therefore, even assuming that the plaintiff submitted sufficient proof of service of the amended complaint on defendant China Energy and of its default in appearing, it has failed to submit sufficient proof of the facts constituting its claims as to that defendant as required for relief under CPLR 3215(f). As such, the plaintiff's motion for leave to enter a default judgment as against China Energy is denied.

As to both motions, the plaintiff's application for punitive damages is denied.

Accordingly, and upon the foregoing papers, it is

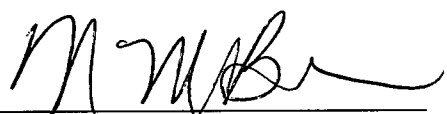
ORDERED that the plaintiff's motion for leave to enter a default judgment pursuant to CPLR 3215 as against defendant Zhang Ya (MOT SEQ 005) is granted as to the causes of action alleging breach of contract and for an account stated, without opposition, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against defendant Zhang Ya in the sum of \$56,264.61, plus statutory interest from June 13, 2018, and collection costs of \$24,131.61, with statutory interest on that sum from September 19, 2019, and it is further,

ORDERED that the plaintiff's motion for leave to enter default judgment pursuant to CPLR 3215 as against defendant China Energy Fund Committee (MOT SEQ 004) is denied in its entirety.

This constitutes the Decision and Order of the Court.

11/21/2019
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

SEQ 004
SEQ 005

CASE DISPOSED
GRANTED
GRANTED

DENIED
DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
GRANTED IN PART

OTHER
OTHER