

**Huang v Spinnell**

2020 NY Slip Op 31093(U)

April 27, 2020

Supreme Court, New York County

Docket Number: 160188/2019

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

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**INDEX NO.** 160188/2019

AMBER HUANG,

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

ANDREW SPINNELL and LAW OFFICES OF ANDREW J. SPINNELL,

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISS.

In this action by plaintiff Amber Huang sounding, inter alia, in breach of contract, defendants Andrew Spinnell and Law Offices of Andrew J. Spinnell move, pursuant to CPLR 3211(a)(7), 3211(e), and 3012(b), to dismiss this action. Defendants also move, pursuant to 22 NYCRR § 130-1.1, for sanctions against plaintiff. Plaintiff opposes the motion. After considering the parties' contentions and reviewing the relevant statutes and case law, the motion is decided as follows.

This action was commenced by the filing of a summons with notice by plaintiff on October 21, 2019. Doc.1. The summons with notice reflected that the action sounded in breach of contract, misappropriation of legal fees for which

no services were rendered, harassment, discrimination, “[d]eceive property” [sic], and emotional distress. Docs. 1, 6.

On October 23, 2019, defendants served plaintiff’s attorney with a notice of appearance and demand for a complaint within 20 days pursuant to CPLR 3012(b). Docs. 2, 8. Plaintiff filed a complaint without court leave on December 6, 2019, 44 days after service of the demand for the complaint. Doc. 13. The crux of the complaint was that defendants wrongfully charged plaintiff \$400 for a legal consultation without providing her with any services. Doc. 13.

CPLR 3012(b) provides, in pertinent part, as follows:

**(b) Service of Complaint Where Summons Served Without Complaint.**

If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of Rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint . . . The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision.

Whether to dismiss an action pursuant to CPLR 3012(b) is a matter of discretion for the court. *See Hernandez v Chaparro*, 95 AD3d 745 (1<sup>st</sup> Dept 2012). In order to avoid dismissal, plaintiff is required to demonstrate a reasonable excuse for the delay and a meritorious claim. *See Barasch v Micucci*, 49 NY2d 594, 599 (1980); *see also Stevens v Stevens*, 165 AD2d 780, 781 (1st Dept 1990).

This Court finds that, under the circumstances of this case, the complaint must be dismissed pursuant to CPLR § 3012(b). There is no dispute that the complaint was untimely. Since the demand for a complaint was served on October 23, 2019, the complaint had to be served within 20 days, or by November 12, 2019. However, the complaint was not filed until December 6, 2019, 24 days after the deadline to serve it expired.

Neither plaintiff nor her attorney proffer a reasonable excuse for the delay in filing the complaint. Although defendant's attorney represents that he "was suffering from side effects of a surgery which kept him out of work for a while" (Doc. 14), this conclusory claim is unsubstantiated by medical documentation and fails to specify exactly when counsel was allegedly unable to work. Doc. 14. Additionally, the contention by plaintiff's counsel that he was not served with a demand for a complaint (Doc. 14 at par. 5) is belied by the affidavit of service filed by defendants. Doc. 2.

Since plaintiff has failed to establish a reasonable excuse for the delay in filing the complaint, there is no need to address the merits of the claim. In any event, however, the affidavit submitted by plaintiff does not address the merits of her claim but rather consists of personal attacks on defendants. Moreover, even if the complaint were not dismissed pursuant to CPLR 3012(b), it would be

dismissed pursuant to CPLR 3211(a)(7) since the allegations therein are conclusory and fail to state a cause of action.

This Court denies that branch of defendants' motion seeking to impose sanctions pursuant to 22 NYCRR § 130-1.1 since they have not established that the conduct of plaintiff or her attorney was frivolous.

The remaining contentions are without merit or need not be addressed given the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendants Andrew Spinnell and Law Offices of Andrew J. Spinnell seeking to dismiss the complaint is granted, and the motion is otherwise denied; and it is further

ORDERED that within twenty days of entry, defendants Andrew Spinnell and Law Offices of Andrew J. Spinnell shall serve a copy of this order, with notice of entry, upon all parties and upon the Clerk of this Court and the Trial Support Office in accordance with efilings protocols; and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties the Clerk or this Court is directed to enter judgment dismissing the complaint in its entirety against defendants Andrew Spinnell and Law Offices of Andrew J. Spinnell; and it is further

ORDERED that this constitutes the decision and order of the court.

4/27/2020  
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER  
 FIDUCIARY APPOINTMENT  REFERENCE

CHECK IF APPROPRIATE: