

Chen v Romona Keveza Collection LLC
2021 NY Slip Op 31799(U)
May 28, 2021
Supreme Court, New York County
Docket Number: 153413/2020
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON

PART

IAS MOTION 42EFM

Justice

-----X

INDEX NO. 153413/2020

JOSEPH CHEN, JOSEPH CHEN, INC., DINA KOZLOVSKA,

MOTION DATE 5-18-2021

Plaintiffs,

MOTION SEQ. NO. 002

- v -

ROMONA KEVEZA COLLECTION LLC, ROMONA KEVEZA
ONE ROCK, LLC, ROMONA KEVEZA 1 ROCK
LLC, ROMONA KEVEZA

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for

JUDGMENT - SUMMARY

I.BACKGROUND

The plaintiffs in this action, a photographer and a model, sought to recover payment for services rendered to the defendants and was improperly withheld in violation of the “Freelance Isn’t Free Act” (New York City Admin. Code §20-928). By an order dated March 4, 2021, the court granted in part the defendants’ pre-answer motion to dismiss the complaint, directed the remaining defendant, Romona Keveza Collection LLC, to file an answer within 30 days of the date of that order, and directed the parties to appear for a preliminary/settlement conference on May 5, 2021 (MOT SEQ 001). No answer was filed within 30 days. A full month after the deadline, on May 5, 2021, minutes before the start of the court-ordered conference, defense counsel uploaded an answer on the NYSCEF system. Inasmuch as there was no timely answer filed, no discovery was directed by the court.

In an order dated May 5, 2021, the court stated that, since counsel for the defendant failed to conduct himself in a professional, respectful and civil manner towards opposing

counsel and the court's Principal Court Attorney at the May 5, 2021, conference, he and opposing counsel were to appear for a conference with the court on May 13, 2021, to discuss his conduct and possible sanctions pursuant to 22 NYCRR 130-1.1. The plaintiffs were directed to file any motion for leave to file a default judgment within 30 days, and that time has not yet elapsed. Thereafter, counsel for the defendant purported to file an amended answer, which was even more untimely than the prior untimely answer. That filing is a nullity and certainly incapable of curing the prior default.

Prior to the conference of May 13, 2021, opposing counsel submitted unsolicited affirmations describing an offending course of conduct toward both attorneys over a period of time and toward the court's Principal Court Attorney at the conference. In response, counsel submitted an affirmation conceding much of the offensive conduct, including an e-mail message sent to plaintiffs' counsel on May 6, 2021, promising to "scorch the earth below your feet" if an accusation was made against him. That message was followed by the warning "Understand? Guide yourself accordingly." Defendant's counsel, just several years out of law school, repeatedly referred to opposing counsel, a highly regarded attorney with years of experience in trial and appellate courts, in a dismissive manner in communications and during a court conference, and demanded that her co-counsel "control your young associate who clearly did not have a firm grasp of New York motion practice", notwithstanding his own misapprehension of New York law. At the May 13 conference, defendant's counsel then inexplicably insisted to the court that he had acted appropriately and was merely "attacking issues." Further, his combative and disrespectful demeanor directed at the court were consistent with the previously reported conduct.

At the May 13, 2021, conference, the defendant's counsel was also reminded that he had defaulted in failing to file an answer within 30 days as per the court order dated March 4, 2021, and that he had, in fact, challenged the court's Principal Court Attorney at the prior conference to "default me" when she raised the issue of untimeliness. As noted in the court's

May 5, 2021, order, “No stipulation or motion for an extension of time was filed. Nor was any proof of service of the answer on the plaintiff filed.” And none was filed even after the lapse was brought to his attention.

The court reserved decision on the issue of sanctions.

Notwithstanding the above and the procedural posture of the case, issue not being joined and no discovery having been conducted, counsel for the defendant filed a motion for summary judgment on May 18, 2021, seeking dismissal of the complaint as against the remaining defendant based upon affirmative defenses. The plaintiff opposes the motion as procedurally improper and without merit.

The motion is denied.

II. DISCUSSION

A. Summary Judgment

In its first sentence, CPLR 3212(a) expressly provides that a motion for summary judgment only “after issue has been joined” and before the date set by the court after which no motion can be made. Given the clear language of the statute, it is well settled that a “motion for summary judgment may only be made after joinder of issue.” Cremosa Food Co., LLC v Amella, 164 AD3d at 1300 (2nd Dept. 2018). Stated otherwise, absent joinder of issue, the court has “no power to grant summary judgment under CPLR 3212.” Republic Natl. Bank of New York, v Luis Westin, Inc., 107 AD2d 581, 582 (1st Dept. 1985). Indeed, it is well settled that “the rule prohibiting the grant of summary judgment prior to joinder of issue is strictly adhered to (City of Rochester v Chiarella, 65 NY2d 92, 201; see Alro Bldrs. & Contrs.v Ckicken Koop, 78 AD2d 512; Siegel, NY Prac §279).” Leff v Leff, 182 AD2d 401, 402 (1st Dept. 1992); see also Fargo v Watertown Educ. Assoc., 175 AD2d 633 [error to grant summary judgment before joinder of issue per CPLR 3212(a)]; Vern Norton, Inc. v State of New York, 27 AD2d 13, 14 (3rd Dept.

1966) [summary judgment unavailable where issue not joined]. As such, the summary judgment motion is procedurally improper.

Further, as correctly observed by the plaintiff in opposition to the motion, even if the defendant had filed the answer timely, the assertion therein of counterclaims required a response from the plaintiff for issue to be joined on those counterclaims. As further observed by the plaintiff, on this motion, the defendant merely reasserts the same unsuccessful arguments made in his prior motion to dismiss, which is law of the case. See generally Martin v City of Cohoes, 37 NY2d 162 (1975).

B. Sanctions for Frivolous Conduct

In light of the circumstances set forth herein and in the court's prior orders, the affirmations and other filings of the parties, and the conferences held, the court imposes sanctions on the defendant's counsel for frivolous conduct pursuant to Section 130-1.1 of the Rules of the Administrative Judge (22 NYCRR 130-1.1)

22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against . . . a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c). "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under

which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of . . . the party.” Id.

Upon applying this standard, the court concludes that the defendant’s counsel has engaged in frivolous conduct within the meaning of the statute and is thus subject to the sanction provisions of the statute, and that the sanction of attorney’s fees is most appropriate. The defendant’s counsel shall pay the attorney’s fees incurred by the plaintiff for appearances made on May 5, 2021, May 13, 2021, and in regard to this motion. All counsel appearing for the plaintiff may submit affirmations regarding the fees and any supporting documents within 30 days on NYSCEF.

III. CONCLUSION

Accordingly, it is

ORDERED that the defendant’s motion for summary judgment is denied, and it is further

ORDERED that the defendant’s counsel, having engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1, shall pay the plaintiff’s attorney’s fees as set forth herein, and it is further

ORDERED that counsel for the plaintiff may submit to the court by NYSCEF affirmations and any supporting documents in regard to attorney’s fees within 30 days.

This constitutes the Decision and Order of the court.


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

5/28/2021

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

☒

DENIED

☒

NON-FINAL DISPOSITION

GRANTED IN PART

☐

OTHER