

Robert G. Smith, PLLC v Azoulay
2022 NY Slip Op 33056(U)
September 8, 2022
Supreme Court, New York County
Docket Number: Index No. 656298/2022
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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ROBERT G. SMITH, PLLC

Plaintiff,

- v -

LEAH AZOULAY,

Defendant.

-----X

INDEX NO. 656298/2022

MOTION DATE _____

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for EXTEND - TIME.

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion (MS001) by plaintiff for a default judgment is granted and the motion (MS002) by defendant to vacate her default is denied.

Background

Plaintiff contends that it represented defendant in connection with a matrimonial action from May 2012 through February 2020 and that defendant last made a payment for these legal services in November 2017. Plaintiff contends that \$120,299.05 is owed.

It now moves for a default judgment against defendant.

Defendant did not oppose the motion and instead made a separate application to *inter alia* “remove the purported default” and for a 40-day extension of time to oppose plaintiff’s motion.

She claims that she has been diligent and has responded in this action. She claims that service was defective because she actually lives in Minnesota and moved away from Manhattan two years ago. She argues that the billing statements show multiple discrepancies and apparent double billing that should compel the Court to deny the motion. Defendant also insists that she objected to plaintiff's billing statements in writing.

In opposition, plaintiff characterizes defendant's opposition as mere hearsay and it wants judgment to be awarded in its favor.

Discussion

As an initial matter, the Court observes that plaintiff seeks summary judgment against defendant although defendant never filed an answer. However, plaintiff included a "for such other and further relief clause" in its notice of motion and therefore, the Court will consider the motion as one for a default judgment. Moreover, defendant's order to show cause seeks to vacate her default and so it is clear what the issues are.

Plaintiff established it is entitled to a judgment against defendant through the submission of its bills and its affirmation in support (plaintiff is appearing self-represented). And the affidavit of service uploaded establishes that defendant was properly served. "An affidavit of service constitutes prima facie evidence of proper service" (*Ocwen Loan Servicing, LLC v Ali*, 180 AD3d 591, 591, 119 NYS2d 474 [1st Dept 2020], lv to appeal dismissed, 36 NY3d 1046 [2021]).

The burden then shifted to defendant to raise a sufficient opposition to the motion. In her motion, defendant only submits an affirmation from her attorney—there is nothing from defendant herself. Therefore, her claims about improper service are without merit. Moreover,

defendant cannot raise a meritorious defense, either through improper service or on the merits, solely through an attorney's affirmation. That defendant claims she objected to various legal bills in writing is not an argument that can be asserted only by her attorney in this motion. Without an affidavit from the defendant herself, she cannot defeat plaintiff's motion or win her motion.

The Court also observes that in defendant's motion, counsel for defendant requested more time to oppose plaintiff's motion based on defendant's purported illness, her attorney's vacation from August 25 through September 18, and a trial her attorney has scheduled in Nassau County. Nothing was attached to substantiate these concerns. Plus, the opposition acknowledges that Ms. Azoulay appeared remotely on July 21, 2022 before a matrimonial judge. In other words, on this record, there is no basis to find that defendant's illness rendered her completely incapacitated and incapable of drafting an affidavit whatsoever.

And these excuses ignore the fact that this case was commenced in May 2022 and defendant's attorney filed a notice of appearance on June 13, 2022 (NYSCEF Doc. No. 5). That timeline suggests that defendant had more than enough time to answer, make a motion, or make a motion for an extension of time to answer or move. Instead, defendant's counsel waited until after plaintiff made the instant motion in August 2022 to raise concerns about her ability to reach her client.

Accordingly, it is hereby

ORDERED that the motion (MS001) by plaintiff is granted to the extent that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of

\$120,299.05 plus interest from March 1, 2020 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the motion (MS002) by defendant is denied.

<u>9/8/2022</u>			
DATE		ARLENE P. BLUTH, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☐ GRANTED IN PART	☒ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE