

Gelwan v de Ratafia
2022 NY Slip Op 33985(U)
November 18, 2022
Supreme Court, New York County
Docket Number: Index No. 654862/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 654862/2021

LLOYD A. GELWAN,

Plaintiff,

MOTION SEQ. NO. 001

- v -

GEORGES-LUCIEN DE RATAFIA, A/K/A LUCIEN DE RATAFIA, A/K/A LUCIEN DERATAFIA, A/K/A GEORGES-LUCIEN DERATAFIA, A/K/A GEORGES LUCIEN DE RATAFIA, A/K/A GEORGES LUCIEN DERATAFIA, A/K/A GEORGE DE RATAFIA, A/K/A GEORGE DERATAFIA, A/K/A GEORGE RATAFIA, AMANDA NELSON, IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF GLENN BACKER

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

In this action by plaintiff Lloyd A. Gelwan seeking to recover for unpaid attorneys' fees, defendant Georges-Lucien de Ratafia, A/K/A Lucien de Ratafia A/K/A Lucien Deratafia, A/K/A Georges-Lucien Deratafia A/K/A Georges Lucien de Ratafia A/K/A Georges Lucien Deratafia A/K/A George de Ratafia A/K/A George Deratafia A/K/A George Ratafia ("de Ratafia") moves, inter alia, pursuant to CPLR 3211(a)(4), to dismiss the complaint based on the fact that there is another action pending between the parties. Plaintiff opposes the motion and cross-moves, pursuant to CPLR 2004, for an extension of time to oppose de Ratafia's motion. Plaintiff also cross-moves pursuant to CPLR 3215 for a default judgment against de Ratafia. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action, commenced by the filing of a summons and complaint on August 10, 2021, arises from defendants' alleged failure to compensate plaintiff for legal services he provided. Doc. 1. Plaintiff served de Ratafia with process at three different addresses in August 2021. Docs. 2, 3 and 4. The affidavits of service were filed with this Court on September 1, 2021. Docs. 2, 3 and 4. On November 12, 2021, de Ratafia moved, inter alia, pursuant to CPLR 3211(a)(4), to dismiss the complaint, asserting that, in an action previously filed in this Court and to the undersigned, *Gelwan v de Ratafia, et al*, New York County Ind. No. 654525/16 ("the prior action"), plaintiff had asserted virtually identical allegations. Docs. 6-21.

The prior action was commenced by summons with notice and a demand for a complaint in August 2016. Prior Action, Docs. 1 and 2. Although there is no indication in NYSCEF that plaintiff served de Ratafia with the summons with notice, de Ratafia demanded a complaint from plaintiff on or about September 20, 2016. Prior Action, Doc. 9. In October 2016, plaintiff moved to extend his time to serve the complaint in the prior action. Prior Action, Doc. 4. By order entered May 8, 2017, this Court granted plaintiff's motion and directed him to file the complaint within 30 days. Prior Action, Doc. 32. By stipulation dated May 5, 2021, the parties agreed that plaintiff's time to file an amended complaint was extended until June 11, 2021 and defendants' time to answer the amended complaint or move to dismiss was extended until July 20, 2021. Prior Action, Doc. 79. The parties then stipulated that de Ratafia's time to answer or move against the amended complaint was extended until July 27, 2021. Prior Action, Doc. 83. On July 27, 2021, plaintiff moved to further amend the complaint. Prior Action, Doc. 104. By order dated January 11, 2022, this Court granted plaintiff's motion. Prior Action, Doc. 149. On February 26, 2022, de Ratafia

and codefendant Diane Ackroyd moved to dismiss the complaint in the prior action pursuant to CPLR 3211(a)(1) and (a)(7). Prior Action, Docs. 178-184. The said motion is still pending.

In support of his motion, de Ratafia argues, inter alia, that the captioned action must be dismissed because there is an identical action pending between the parties. Doc. 8. de Ratafia asserts that, although he was never served with process in the prior action, plaintiff has alleged in the complaint in the captioned action and in the prior action that he was served with process in the prior action. Doc. 8. Thus, maintains de Ratafia, plaintiff cannot argue that there is not a prior action pending between them. In the alternative, de Ratafia argues that, if the complaint in the captioned action is not dismissed, his time to answer the same should be extended. Doc. 8. He also asserts that the captioned action should be stayed pending the outcome of the prior action. Doc. 8. Finally, de Ratafia asserts that plaintiff must be sanctioned because his conduct in commencing the captioned action while the prior action was still pending was frivolous. Doc. 8.

In opposition, plaintiff argues that de Ratafia's motion to dismiss pursuant to CPLR 3211(a)(4) must be denied since it is untimely, that no stay of this action is warranted, and that he should not be subject to sanctions. Docs. 29 and 33. By a separate cross motion pursuant to CPLR 2004, plaintiff seeks to extend by one day his time to oppose de Ratafia's motion to dismiss. Docs. 34-35. In support of the cross motion, plaintiff claims that his delay in opposing the motion was caused by health problems. Doc. 35. By a second cross motion, plaintiff moves for a default judgment against de Ratafia based on his failure to answer the complaint herein. Docs. 37-38.

In further support of his motion and in opposition to plaintiff's cross motion for an extension of time, de Ratafia argues that plaintiff's cross motion is untimely; that he is entitled to an extension of time to answer; and that sanctions against plaintiff are warranted since he "fil[ed the captioned] action just in case [the prior] action is dismissed." Doc. 43.

In reply, plaintiff further asserts that he is entitled to a default judgment against de Ratafia. Doc. 44.

LEGAL CONCLUSIONS

de Ratafia's Motion to Dismiss

CPLR 3211(a)(4) allows for dismissal “in the court’s discretion when ‘there is another action pending between the same parties for the same cause of action in a court of any state or the United States’” (*Malay v City of Syracuse*, 25 NY3d 323, 330 [2015]). Thus, “[t]his provision is permissive, not mandatory” (*HH Trinity Apex Invs. LLC v Hendrickson Props. LLC*, 2020 NY Slip Op 30947[U], *7 [Sup Ct, NY County 2020] [Borrok, J.]).

Initially, as plaintiff asserts, de Ratafia’s motion to dismiss is untimely. The affidavits of service were filed with this Court on September 1, 2021. Docs. 2, 3 and 4. Since substituted service was used to effectuate process on de Ratafia, service was complete on September 11, 2021, 10 days after the affidavits of service were filed with this Court (see CPLR 308[2]). Thus, de Ratafia had until October 11, 2021 to answer the complaint or to move to dismiss (see CPLR 320[a]). However, de Ratafia did not move to dismiss until November 12, 2021. Doc. 6.

Even assuming, arguendo, that the motion was timely, it would be denied. As noted above, de Ratafia filed a motion to dismiss in the prior action. If that application is denied, then plaintiff’s claims against de Ratafia will be litigated in the prior action, which was commenced five years before the captioned action. However, if his application is granted, then plaintiff’s claims against him will need to be litigated in the captioned action. Therefore this Court, in its discretion, declines to dismiss the captioned action.

Alternatively, de Ratafia moves to extend his time to answer the complaint in the event this action is not dismissed. Doc. 6. A motion to dismiss extends a defendant’s time to answer the

complaint “until ten days after service of notice of entry of the order” deciding the motion (CPLR 3211[f]). Since de Ratafia’s motion to dismiss is denied, his time to answer is thus extended accordingly by statute.

Since it is unclear at this juncture whether the claims against de Ratafia in the prior action will be dismissed, the branch of de Ratafia’s motion seeking a stay pending the outcome of the prior action is granted, with the exception of permitting de Ratafia to answer the complaint in accordance with CPLR 3211(f). This will best serve the interests of judicial economy and avoid the possibility of inconsistent results.

This Court disagrees with de Ratafia’s argument that plaintiff’s actions rose to the level of frivolous conduct warranting sanctions.

Plaintiff’s Cross Motions

Plaintiff’s cross motions are denied. Initially, the cross motions are procedurally improper. Plaintiff’s cross motion against de Ratafia should have contained his opposition to de Ratafia’s motion. However, plaintiff filed opposition to de Ratafia’s motion in addition to filing a cross motion seeking to extend his time to oppose the said application. This procedural error was then compounded when plaintiff filed a second cross motion, for a default judgment, as against de Ratafia.

In any event, plaintiff’s cross motion to extend his time is denied as moot since this Court considered his opposition to de Ratafia’s motion. Additionally, although de Ratafia’s motion to dismiss was untimely, the filing of his application was a clear manifestation of his intent to participate in the action, and the granting of a default against him would violate the strong public policy in favor of resolving cases on the merits.

Accordingly, it is hereby:

ORDERED that the branch of the motion by defendant Georges-Lucien de Ratafia, A/K/A Lucien de Ratafia A/K/A Lucien Deratafia, A/K/A Georges-Lucien Deratafia A/K/A Georges Lucien de Ratafia A/K/A Georges Lucien Deratafia A/K/A George de Ratafia A/K/A George Deratafia A/K/A George Ratafia seeking to dismiss the complaint is denied; and it is further

ORDERED that the branch of de Ratafia’s motion seeking to extend his time to answer is extended in accordance with CPLR 3211(f); and it is further

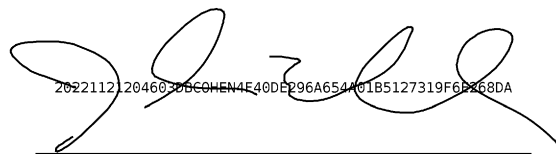
ORDERED that the branch of de Ratafia’s action seeking a stay pending the outcome of *Gelwan v de Ratafia, et al*, New York County Ind. No. 654525/16, is granted, with the exception of permitting de Ratafia to answer the complaint in the captioned action in accordance with CPLR 3211(f); and it is further

ORDERED that the branch of de Ratafia’s motion seeking sanctions against plaintiff is denied; and it is further

ORDERED that plaintiff’s cross motion seeking to extend his time to oppose de Ratafia’s motion to dismiss is denied; and it is further

ORDERED that plaintiff’s cross motion seeking a default judgment against defendant de Ratafia is denied.

11/18/2022
DATE


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DAVID B. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
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	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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