SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART** **36**

Justice

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CASTLE VIEW ADJUSTERS, LLC,
Plaintiff,

- v -

STACI MANDOLA and KRISTA SELIG,
Defendants.

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INDEX NO. 650481/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for **DISMISSAL**.

In this action, plaintiff seeks damages based on breach of contract (first cause of action) and quantum meruit (second cause of action) against defendants for an alleged unpaid amount due for preparing, presenting, and adjusting an insurance claim with defendant Staci Mandola's ("Mandola") insurance carrier, pursuant to a contract. Plaintiff claims that it is entitled to ten (10%) percent of the full insurance payment settlement and that the insurance carrier issued payment to defendant Staci Mandola, in excess of $145,789.00. (NYSCEF Doc. No. 1, *summons and complaint, ¶6-10*). Therefore, plaintiff is seeking $15,000.00 in damages, together with interest thereon from March 1, 2020, attorneys' fees and costs and disbursements of this action, after alleging that no part of the payment has been paid although duly demanded.

Krista Selig ("Selig"), *pro se*, is the only defendant who has appeared in this action, and she denies plaintiff's allegations and asserts several affirmative defenses including that, this court lacks jurisdiction over this matter (first affirmative defense); that plaintiff, through its representative, coerced her to sign the agreement under duress (second affirmative defense); that plaintiff has unclean hands (third affirmative defense); that plaintiff filed this action to "shakedown" Selig (fourth affirmative defense); and that service of process was defective (fifth affirmative defense).

Selig now moves the court, pursuant to CPLR 3212, for summary judgment dismissing the action against her, with prejudice; a default judgment on her counterclaims; and dismissal of the complaint in its entirety pursuant to CPLR 306-b. Although Selig construes her affirmative defenses as counterclaims, a review of the record does not reflect that she asserts any counterclaims. She avers in her affidavit that while her sister, Mandola, was away, there was a water flooding incident in Mandola's apartment, and Selig contacted Mandola's insurance company about same. (NSCEF Doc. No. 9, *Selig affidavit, ¶10*). Selig claims her sister's insurance company sent a company to mitigate said flood damage. Selig asserts that thereafter, plaintiff's representative came to her apartment and, under coercion and duress, had her sign a retainer agreement to "represent" her sister in the process of claims, remediation, and insurance

payment (*id.*, at ¶12, 17). Selig similarly claims that plaintiff informed the insurance company that it was stopping work but nevertheless received money from the insurance company, which must be returned. Selig argues that the instant action was previously filed in a different New York court but was later discontinued and re-filed in this court and, thus, that this action is nothing more than a "shakedown". Furthermore, she avers that the affidavit of service of David Klienberg ("Kleinberg"), plaintiff's process server, contains misrepresentations because a review of the security footage at her dwelling reveals that service of process was not attempted during the dates and times alleged therein. She further claims that a different court has found a statement by David Klienberg to be untruthful as demonstrated by a decision and order from Delaware, which is attached as an exhibit to her affidavit as Exhibit 5. (*id.*, at ¶23-24).

In opposition, plaintiff argues that this matter is not ripe for disposition through summary judgment, and cross-moves seeking an extension of time, pursuant to CPLR 3012(d), to file a late reply to Selig's answer. Plaintiff argues it has a reasonable excuse for the delay insofar as its attorney inadvertently failed to file a reply due to a medical crisis requiring surgical intervention. (NYSCEF Doc. No. 16, *plaintiff's cross-motion and opposition*). As to the meritorious defense prong, plaintiff argues that Selig's first affirmative defense fails because this court has jurisdiction over this action pursuant to CPLR 509, and that Selig's second affirmative defense fails because she fails to tender proof showing how plaintiff coerced her to sign the agreement. Plaintiff likewise denies the third affirmative defense claim that plaintiff has unclean hands, and also argues that the current action was started in order to effectuate service upon Mandola, and not to threaten and harass Selig as alleged. Plaintiff maintains that the previous action which was started in New York Supreme Court in New York County on July 28, 2020, was discontinued after it was unsuccessful in effectuating process of service upon Mandola. Plaintiff also rejects the claim of improper service, arguing that, despite repeated requests, Selig has not shared the alleged security footage referred to in her claim. (*id.*, at pg. 4-5).

Plaintiff further argues that this matter is not ripe for summary judgment because issues of fact exist. Specifically, Selig's claim that plaintiff did not offer any services warranting payment is rebutted by plaintiff's principal, Anthony Reitano ("Reitano"), whose sworn statement indicates that plaintiff arranged for a plumber and that it only stopped providing the services in question after it was informed that the services were no longer required. (NYSCEF Doc. No. 26, *Reitano affidavit*.) In addition, plaintiff sets forth that the exhibit Mandola references to argue that the process server is not truthful is not a decision and order and does not constitute proof against the process server. Plaintiff asserts that the question about whether process of service was properly effectuated on Selig should be decided at an evidentiary hearing, and further, that contrary to Selig's contention, the insurance company paid plaintiff only the undisputed amount and the disputed amount is still outstanding.

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but

cannot [now] be stated" (CPLR 3212 [f]; *see Zuckerman*, 49 NY2d at 562). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (see *Zuckerman*, 49 NY2d at 562.)

As an initial matter, the court is required to address the jurisdictional question raised. It appears Selig is moving under CPLR 3211(a)(8) for lack of jurisdiction. Her argument is that this court lacks jurisdiction because the action is in New York County which has no nexus to either defendant or the location where documents were signed. (NYSCEF Doc. No. 9, *Selig affidavit*, ¶16). Here, both plaintiff and Mandola are residents of the State of New York, and it is well-settled that "New York's Supreme Court is a court of original, unlimited and unqualified jurisdiction"; thus, "it is competent to entertain all causes of action" (*HSBC Guyerzeller Bank AG v Chascona N.V.*, 42 AD3d 381, 384 [1st Dept 2007].) Furthermore, plaintiff may commence an action in any county of New York, pursuant to CPLR 509. Therefore, this court has jurisdiction over this matter.

Moreover, this court finds that Selig has failed to establish *prima facie* entitlement to summary judgment. Selig does not tender proof evincing how plaintiff's representative coerced her into signing the retainer agreement, and her conclusory allegations that the instant action is meant only to harass her is insufficient to warrant dismissal of plaintiff's claims. As to the argument regarding service of process, this court notes that, although Selig maintains that there is video proof rebutting service of process in this case, she nevertheless fails to proffer the same in support of this contention. Selig also fails to submit sufficient proof demonstrating the absence of any material issues of fact that plaintiff received payment for services not performed. The court notes that Selig attaches a retainer agreement bearing the signature "for Staci" but this likewise does not demonstrate the absence of all material issues of fact as to whether Selig represented that she had the authority to sign on her sister's behalf.

Assuming, *arguendo*, the burden shifts to plaintiff to raise an issue of fact, this court finds that defendant meets this burden. Plaintiff rebuts Selig's claim that she signed the retainer agreement for the purpose of "representing" her sister in the process of claims, and that it was paid for services not rendered. Reitano affirms that Selig represented that she had the authority to sign the retainer agreement, and he further avers that plaintiff arranged for a plumber and asbestos assessment and only stopped rendering services when it was informed that the services were no longer needed. (NYSCEF Doc. No. 26, *Reitano affidavit*). Reitano avers that plaintiff was paid ten (10%) percent of the initial payment for the undisputed dwelling damage pursuant to the retainer agreement, but that he believes defendants received further settlement amounts based on plaintiff's services rendered, and therefore, that plaintiff is entitled to ten (10%) percent of those additional settlement amounts. As to the claim that service of process was defective, plaintiff presents the affidavits of Klienberg and Juan Figueroa, the process servers herein, corroborating plaintiff's position that service of process was duly effectuated. Plaintiff challenges the claim that the instant action was started to harass Selig, arguing that the previous action was discontinued, and the instant action was commenced to effectuate service upon Mandola. Therefore, Selig's summary judgment motion seeking dismissal of the action is denied.

Addressing now plaintiff's cross-motion seeking an extension of time to respond to Selig's counterclaims, the court denies the motion as moot since Selig's affirmative defenses are mischaracterized as counterclaims. Under CPLR 3011, a plaintiff is not required to respond to affirmative defenses and this court has not ordered plaintiff's reply. (*Albin v First Nationwide Network Mortg. Co.*, 248 AD2d 417, 419 [2d Dept 1998]; *Treeforms, Inc. v Action Audio, Inc.*, 102 AD2d 920, 920 [3rd Dept 1984].) Based on the foregoing, that branch of Selig's motion seeking a default judgment on her affirmative defenses is denied as moot. All remaining arguments and requests have been considered and are either without merit or need not be addressed given the findings above. It is hereby

ORDERED that defendant Krista Selig's summary judgment motion is denied in its entirety; and it is further

ORDERED that plaintiff's cross-motion motion seeking an extension of time, pursuant to CPLR 3012(d), to file a late reply to Krista Selig 's answer is denied as moot; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

ORDERED that the parties are directed to appear remotely for a preliminary conference on August 9, 2023, details which shall be provided no later than August 7, 2023.

This constitutes the decision and order of this court.

July 6, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:							
	CASE DISPOSED		NON-FINAL DISPOSITION				
	GRANTED	X	DENIED		GRANTED IN PART		OTHER