

**Davidoff Hutcher & Citron LLP v Kushner**

2024 NY Slip Op 30258(U)

January 17, 2024

Supreme Court, New York County

Docket Number: Index No. 653234/2021

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 42**

*Justice*

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DAVIDOFF HUTCHER & CITRON LLP,  
  
Plaintiff,

**INDEX NO.** 653234/2021

**MOTION DATE** 10/11/2023

**MOTION SEQ. NO.** 002

- v -

DAVID KUSHNER, JEFFREY MESHEL, WAYNE  
STURMAN, PARADIGM CREDIT CORP., PARADIGM  
CAPITAL GROUP, LLC, PARADIGM CAPITAL FUNDING  
LLC, MERCURY CREDIT CORP., PARADIGM CF CORP.  
F/K/A MERCURY CAPITAL CORP., PARADIGM MONROE  
CENTER III LLC, PARADIGM EXCHANGE LLC,  
EXCHANGE PARTNERS GROUP LLC, PCF EXCHANGE  
LLC, PARADIGM ELIZABETH, LLC, PARADIGM EAST  
HANOVER LLC, EAST HANOVER PARTNERS LLC,  
TULIPAN INDURSKY & SONS LLC, NOMG LIMITED  
PARTNERSHIP,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 103, 104  
were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

In this action to collect unpaid legal fees, the court, by an order dated April 12, 2023,  
denied the plaintiff’s motion pursuant to CPLR 3215 for leave to enter a default judgment  
against certain non-answering defendants (MOT SEQ 001), finding that the plaintiff failed to  
establish “sufficient cause” for its failure to seek that relief within one year of the alleged default  
as required by CPLR 3215(c). The plaintiff now moves, unopposed, pursuant to CPLR 2221(e),  
to renew its prior motion for default judgment (MOT SEQ 002).<sup>1</sup> The motion to renew is granted,  
and upon renewal, the prior motion for leave to enter a default judgment is likewise granted.

Pursuant to CPLR 2221(e), a motion for leave to renew “shall be based upon new facts  
not offered on the prior motion that would change the prior determination or shall demonstrate

<sup>1</sup> The plaintiff also moves to reargue the prior motion pursuant to CPLR 2221(d). However, because the motion to  
renew is granted, the motion for relief under CPLR 2221(d) is moot.

that there has been a change in the law that would change the prior determination.” CPLR 2221(e)(2). A “change in the law” is a “new pronouncement of the law governing th[e] case.” Spierer v Bloomingdale’s, 59 AD3d 267, 267-68 (1<sup>st</sup> Dept. 2009). The plaintiff has demonstrated such a change in the law.

At the time that the plaintiff’s original motion was fully submitted on November 21, 2022, First Department case law directed that the one-year period in which to seek a default judgment based on a defendant’s failure to respond to an amended complaint “should be measured from the default in responding to the original, not the amended, complaint.” MTGLQ Invs., L.P. v Shay, 190 AD3d 527, 528 (1<sup>st</sup> Dept. 2021) (“MTGLQ”). The plaintiff filed its original complaint on May 17, 2021, and its amended complaint on October 18, 2021. Based on the dates that they were served, the defaulting defendants’ responses to the original complaint were variously due in June, July, and August 2021.<sup>2</sup> Consequently, the one-year period in which the plaintiff was required to move for a default judgment had run as to all of the defaulting defendants by early August 2022, over a month before the plaintiff filed its motion for default judgment on September 30, 2022.

However, on April 6, 2023, just six days before the court’s April 12, 2023 order denying the plaintiff’s original motion, the First Department issued its decision in NYCTL 2017-A Tr. v Ghiselli, 215 A.D.3d 427 (1<sup>st</sup> Dept. 2023). There, the First Department changed the law set forth in MTGLQ, holding that where an amended complaint is served prior to the expiration of the one-year period in which a plaintiff is required to move for a default judgment based on a defendant’s default in responding to the original complaint, “the service of the amended complaint . . . restart[s] the clock on plaintiffs’ one-year period in which to move for a default judgment.” Id. at 428-29. The First Department expressly distinguished its holding in MTGLQ, explaining that “unlike in MTGLQ, plaintiffs’ service of the amended complaint in this case, several months before the expiration of their time in which to move for a default based on [defendant’s] failure to respond to the original complaint, could not have been an attempt to

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<sup>2</sup> The plaintiff contends that, pursuant to a stipulation of the parties, the defaulting defendants’ responses to the original complaint were in fact not due until October 1, 2021. The court need not address this contention, however, because the plaintiff has demonstrated a change in the law that would change the prior determination even if the earlier response dates are employed.

“cure a failure to timely move for a default in responding to the original complaint,” since no such failure existed when the amended complaint was served. Id.

Applying this change in the law to the present case, the plaintiff filed the amended complaint in October 2021, and variously served it on the defaulting defendants in January and February 2022, well before the expiration in August 2022 of the one-year period to move for a default judgment based on the defaulting defendants’ default in responding to the original complaint. As such, “the service of the amended complaint . . . restarted the clock on plaintiffs’ one-year period in which to move for a default judgment.” Id. at 429. The plaintiff’s filing, in September 2022, of its motion for a default judgment based on the defaulting defendants’ failure to respond to the amended complaint, was thus well within the required one-year period, which would have run out as to all the defaulting defendants in February 2023. Accordingly, the plaintiff’s motion to renew is granted. Upon renewal, the court also grants the plaintiff’s motion pursuant to CPLR 3215 for leave to enter a default judgment against defendants David Kushner, Paradigm Credit Corp., Paradigm Capital Group, LLC, Paradigm Capital Funding LLC, Mercury Credit Corp., Paradigm CF Corp. f/k/a Mercury Capital Corp., Paradigm Monroe Center III LLC, Paradigm Exchange LLC, Exchange Partners Group LLC, PCF Exchange LLC, Paradigm Elizabeth, LLC, Paradigm East Hanover LLC, East Hanover Partners LLC, Tulipan Indursky & Sons LLC, and NOMG Limited Partnership (the “defaulting defendants”).

“On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party’s default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720 [2<sup>nd</sup> Dept. 2008]).” Atlantic Cas. Ins. Co. v RJNJ Serv., Inc., 89 AD3d 649, 651 (2<sup>nd</sup> Dept. 2011). “CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action [see 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22–3215.27].” Joosten v Gale, 129 AD2d 531, 535 (1<sup>st</sup> Dept. 1987); see Martinez v Reiner, 104 AD3d 477, 478 (1<sup>st</sup> Dept. 2013); Beltre v Babu, 32 AD3d 722 (1<sup>st</sup> Dept. 2006); Atlantic Cas. Ins. Co., 89 AD3d at 651. The proof submitted must establish a *prima facie* case. See Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983). To prove proper service, the movant must also comply with the additional mailing requirements of CPLR 3215(g).

In support of its motion, the plaintiff submits affidavits of service for the summons and complaint, as well as the amended complaint, as to each of the defaulting defendants; affidavits of service for the additional notices sent to the applicable defaulting defendants pursuant to CPLR 3215(g); the affidavit of Michael D. Katz, an attorney at the plaintiff law firm, attesting to the legal services the plaintiff performed for the defendants, the amounts billed for those services, the defendants' acceptance of those bills without objection, and the unpaid balance on those bills that remains outstanding; copies of the bills/statements the plaintiff sent to the defendants for legal services rendered, dated from November 30, 2015, through October 19, 2020; and a copy of the "Tabs3 Client Ledger Report" for the defendants evidencing the legal fees, costs, and expenses billed to the defendants by the plaintiff, partial payments made, and the amount of the outstanding balance that remains due.

The proof establishes, *prima facie*, the cause of action for an account stated, *i.e.* that the defendants "received [and] retained without objection" the invoices sent to it by the plaintiff. Scheichet & Davis, P.C. v Nohavicka, 93 AD3d at 478 (1<sup>st</sup> Dept. 2012), *quoting* Gamiel v Curtis & Reiss-Curtis, P.C., 60 AD3d 473, 474 (1<sup>st</sup> Dept. 2009). It is well settled that a cause of action for account stated may be established by demonstrating either partial payment or retention of bills without objection. See Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51 (1<sup>st</sup> Dept. 2004); M&R Constr. Corp. v IDI Constr. Co., 4 AD3d 130 (1<sup>st</sup> Dept. 2004). Both are shown here. Even though they do not include a written letter of engagement or retainer agreement, evidence of a written agreement is not needed to establish the *prima facie* validity of the plaintiff's claim for account stated. See Carling v Peters, 170 AD3d 482 (1<sup>st</sup> Dept. 2019); Frechtman v Gutterman, 140 AD3d 538, 538 (1<sup>st</sup> Dept. 2016); see also 22 NYCRR 1215.1. Moreover, having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

The plaintiff's submissions are thus sufficient to demonstrate, *prima facie*, that it performed legal services for the defendants, for which it billed the defendants \$725,632.75 in legal fees and \$24,008.06 in costs and expenses; those bills were accepted by the defendants without objection; and partial payment was made in the amount of \$155,000, leaving an outstanding balance due of \$594,640.81. This outstanding balance was further reduced by

\$150,000 due to a pair of settlement agreements reached with the answering defendant, Wayne Sturman, and Jeffrey Meshel, who was named as a defendant in the original complaint but was removed as a defendant in the amended complaint, leaving an outstanding balance of \$444,640.81 that the plaintiff now seeks to recover from the defaulting defendants.

The court need not reach the remaining causes of action of the complaint.

The plaintiff's request for attorney's fees is denied as an improper request for fees on fees. "[A]n award of fees on fees must be based on a statute or agreement." Sage Realty Corp. v Proskauer Rose LLP, 288 AD2d 14, 15 (1<sup>st</sup> Dept. 2001). Since clear and unambiguous contractual or statutory language permitting fees on fees is absent here, no such award is warranted. See 546-522 West 146<sup>th</sup> Street LLC v Arfa, 99 AD3d 117 (1<sup>st</sup> Dept. 2012); Sage Realty Corp. v Proskauer Rose LLP, *supra*.

Nor is there any agreement in the record to support the plaintiff's request for 12% contractual interest. Rather, statutory interest of 9% is awarded from May 30, 2018. While interest may be computed "from the earliest ascertainable date the cause of action existed", where, as here, "damages were incurred at various times", interest may be computed "upon all of the damages from a single reasonable intermediate date." CPLR 5001(b). Since the unpaid invoices span a five-year period just prior to commencement of the action, the date that approximates 2 1/2 years from the first unpaid invoice is June 1, 2018. See Maurice Kassimir & Assocs., P.C. v Omri, 189 AD3d 581 (1<sup>st</sup> Dept. 2020); Solow Mgmt. Corp. v Tanger, 43 AD3d 691 (1<sup>st</sup> Dept. 2007).

Accordingly, it is

ORDERED that the plaintiff's motion, pursuant to CPLR 2221(e), to renew its prior motion for leave to enter a default judgment against the defaulting defendants and, upon renewal, pursuant to CPLR 3215, for leave to enter a default judgment, is granted, without opposition; and it is further

ORDERED that the Clerk of the court shall enter a money judgment in favor of the plaintiff and against defendants David Kushner, Paradigm Credit Corp., Paradigm Capital Group, LLC, Paradigm Capital Funding LLC, Mercury Credit Corp., Paradigm CF Corp. f/k/a Mercury Capital Corp., Paradigm Monroe Center III LLC, Paradigm Exchange LLC, Exchange Partners Group LLC, PCF Exchange LLC, Paradigm Elizabeth, LLC, Paradigm East Hanover LLC, East Hanover Partners LLC, Tulipan Indursky & Sons LLC, and NOMG Limited Partnership, jointly and severally, in the sum of \$444,640.81; plus costs and statutory interest from June 1, 2018, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

1/17/2024  
DATE

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

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: