

**Grossbach, Grossbach, Tramaglini & Hayes, P.C. v  
Tovar**

2024 NY Slip Op 35508(U)

September 20, 2024

Supreme Court, Westchester County

Docket Number: Index No. 67037/2023

Judge: Gretchen Walsh

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK  
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

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GROSSBACH, GROSSBACH,  
TRAMAGLINI & HAYES, P.C.

Plaintiff,

- against -

Index No. 67037/2023

Motion Seq. No. 1

Motion Date: 7/12/2024

DAVID TOVAR,

Defendant.

-----X  
WALSH, J.

The following e-filed documents, listed in NYSCEF under document numbers 4-10 were read on this motion (“Motion Seq. No. 1”) by Plaintiff Grossbach, Grossbach, Tramaglini & Hayes, P.C. (“GGT&H” or “Plaintiff”) for an order pursuant to CPLR 3215 granting a default judgment against Defendant David Tovar (“Defendant” or “Tovar”).

Defendant has failed to submit opposition to the motion despite having been served with same. Upon the foregoing papers and for the reasons stated herein, Plaintiff’s motion shall be denied without prejudice and with leave to renew.

**FACTS AND PROCEDURAL HISTORY**

The following facts are taken from Plaintiff’s Summons and Complaint (NYSCEF Doc. No 1 [the “Complaint”]).

This action arises from the Defendant’s purported nonpayment of fees owed to Plaintiff for legal services rendered to Defendant (Complaint at ¶¶ 1-3). Defendant asserts that, “[p]ursuant to Part 137: Attorney Client Fee Dispute Resolution Program, Plaintiff served Notice of Client’s Right to Arbitrate a Dispute Over Attorney’s Fees by Certified Mail Return Receipt Requested, and Defendant failed to respond thereto” (*id.* at ¶ 4). Specifically, Plaintiff asserts that “Defendant retained Plaintiff to represent [Defendant] in an Internal Revenue Service Audit, whereby Defendant promised to pay Plaintiff, a law firm, at its hourly rates for certain professional services

to be performed and disbursements made on [Defendant's] behalf" (*id.* at ¶ 5).<sup>1</sup> Plaintiff asserts that it fully performed its obligations under this agreement, and in its representation and rendering of legal services, "Defendant incurred fees in the total sum of \$37,786.96" (*id.* at ¶¶ 6-7). Plaintiff states that: (1) it gave Defendant a "courtesy credit" in the amount of \$3,350 on June 20, 2018; (2) Defendant thereafter made payments totaling \$26,660 to Plaintiff; (3) a payment labelled "Check No. 1655" for the amount of \$5,000.00 was returned for insufficient funds, and accordingly Plaintiff received a total of \$21,660.00 in payments from Defendant; and (4) based upon the partial payment, there remains a balance due of \$12,776.96 representing the fair and reasonable value of the services provided yet unpaid (*id.* at ¶¶ 8-9).

The Complaint asserts: (1) a First Cause of Action for Unjust Enrichment; (2) a Second Cause of Action for Account Stated; and (3) a Third Cause of Action for Quantum Meruit. Regarding the First Cause of Action, Plaintiff states that "[d]espite repeated requests for payment, Defendant has failed and refused to pay his outstanding obligation to Plaintiff" and, accordingly, Defendant "has been unjustly enriched" (*id.* at ¶ 10). As such, Plaintiff asserts that it "has been damaged in the amount of \$12,776.96, plus statutory interest and costs" (*id.* at ¶ 11).

### **PLAINTIFF'S CONTENTIONS**

With its motion for default judgment, Plaintiff submits the affirmation of Christopher S. Tramaglini, Esq. ("Tramaglini") in support, dated June 11, 2024 (*see* NYSCEF Doc. No. 5 ["Tramaglini Aff."]), along with attached exhibits (NYSCEF Doc Nos 6-8).

Tramaglini affirms that the present action is "brought for payment of fees for professional services rendered to the Defendant," which "was commenced by the filing of a Summons and Verified Complaint on September 19, 2023" (Tramaglini Aff. at ¶¶ 2-3)<sup>2</sup>. He further affirms that "Defendant has failed to appear in the above-entitled action . . . [and] has not served an Answer or moved with respect to the Verified Complaint herein and the time within which to do so has expired" and, accordingly, Defendant "is now in default in pleading" (*id.* at ¶¶ 5-8). Tramaglini explains that the Complaint has been submitted in place and instead of an affidavit of the facts constituting the claim (*id.* at ¶ 8). Tramaglini further asserts that an additional copy of the Summons and Complaint was served upon Defendant via first class mail, in a sealed envelope marked "PERSONAL & CONFIDENTIAL," on February 16, 2024, in compliance with CPLR 3215 (*id.* at ¶ 9).

### **DISCUSSION**

#### **A. Standard of Review Pursuant to CPLR 3215**

Pursuant to CPLR 3215(f), "[a]n applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim,

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<sup>1</sup> Plaintiff's Summons and Complaint incorrectly lists two paragraphs as "4" – accordingly, the second paragraph labelled "4" in the Summons and Complaint will be referred to as "5", the paragraph labelled "5" will be referred to as "6", etc.

<sup>2</sup> As discussed *infra*, despite Plaintiff's assertions, the Complaint in this action is not verified.



and proof of the defaulting defendant's failure to answer or appear'" (*Lancer Ins. Co. v Fishkin*, 211 AD3d 719, 720 [2d Dept 2022], quoting *Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 806 [2d Dept 2020]; see also *Atlantic Cas. Ins. Co. v RJNJ Serv. Inc.*, 89 AD3d 649 [2d Dept 2011]). Here, Plaintiff has demonstrated proper service of the Summons and Complaint Service based on the Affidavit of Service indicating that the Summons and Complaint and Notice of Electronic Filing was served on Defendant via personal service at his residence at 24 Hunt Terrace, Greenwich CT 06831 at approximately 7:20 P.M. on October 4, 2023 pursuant to CPLR 308(1), as well as via first class mail, in a sealed envelope marked PERSONAL & CONFIDENTIAL, not indicating on the outside that the communication was from an attorney, addressed to Defendant at the 24 Hunt Terrace, Greenwich CT 06831 address, pursuant to CPLR 3215 (NYSCEF Doc Nos. 2-3; see also *TD Banknorth, N.A. v Olsen*, 112 AD3d 1169 [3d Dept 2013]; *The Bank of New York Mellon v Miletti*, 2014 N.Y. Slip Op. 31887[U] [Sup Ct, Suffolk County 2014] [Affidavit of personal service leads to a presumption of proper service under CPLR 308(1)]; *Tayne Law Group, P.C. v Barnes* 2023 WL 11867813 [N.Y. Sup Ct, Suffolk County 2023] ["When a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt"])).

"To demonstrate the facts constituting the claim, the movant need only submit sufficient proof to enable a court to determine if the claim is viable" (*Lancer Ins. Co.*, 211 AD3d at 721). "A verified complaint may be used as [an] affidavit of the facts constituting the claim, but it must allege 'enough facts to enable a court to determine that a viable cause of action exists'" (*Triangle Props. 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010] [citations omitted]).

Here Plaintiff has not demonstrated the facts constituting the claim. While Plaintiff asserts that the Complaint is verified, the Complaint is missing any verification which states, in effect, "that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes to be true" (CPLR 3021; see also *Henriquez v Purins*, 245 AD2d 337, 338 [2d Dept 1997] ["Accordingly, in the absence of either a verified complaint or an affidavit by [the party seeking default], leave to enter a default judgment pursuant to CPLR 3215 should not have been granted"]; *Bellino v Doromet, Inc.*, 82 Misc 3d 1239[A] [Sup Ct, New York County 2024] [unverified complaint ineligible for consideration on default motion]).<sup>3</sup> Accordingly, Plaintiff has not submitted sufficient proof demonstrating its entitlement to default judgment against Defendant.

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<sup>3</sup> The Court notes that Plaintiff has also not demonstrated that the requisite Notice of Client's Right to Arbitrate a Dispute Over Attorney's Fees had been properly served on Defendant (hereinafter "Notice"). Under 22 NYCRR Part 137, "[e]xcept in limited circumstances, where an attorney commences an action to recover a fee, the attorney must provide written notice by certified mail or by personal service of the client's right to elect to arbitrate and must allege in the complaint

### CONCLUSION

Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by Plaintiff Grossbach, Grossbach, Tramaglini & Hayes, P.C. for a default judgment against Defendant David Tovar is denied without prejudice and with leave to renew within 30 days of the date of this Decision and Order; and it is further

ORDERED that in the event Plaintiff fails to renew its motion within said 30 days, this action shall be deemed dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

September 20, 2024

E N T E R:

  
HON. GRETCHEN WALSH, J.S.C.

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that the client received notice of his or her right to pursue arbitration and did not file a timely request to arbitrate or that the dispute is not otherwise covered by the rules governing the resolution of attorney-client fee disputes by arbitration” (*Pascazi Law Offices, PLLC v Pioneer Nat. Pools, Inc.*, 136 AD3d 878, 878 [2d Dept 2016], *lv dismissed* 27 NY 3d 1047 [2016]; *see also Gary Friedman, P.C. v O’Neill*, 115 AD3d 792 [2d Dept 2014]). “A plaintiff’s failure to provide the defendant with written notice of his or her right to elect to submit the fee dispute to arbitration, and the failure to allege in the complaint that the defendant received such notice and did not file a timely request for arbitration, or that fee dispute arbitration is inapplicable to the matter for specified reasons, requires dismissal of the complaint” (*Zisholtz & Zisholtz, LLP v Mandel*, 165 AD3d 1312, 1315 [2d Dept 2018], *quoting Pascazi Law Offices, PLLC* 136 AD3d at 878-879). Here, there is no affidavit of service supporting the timing of Plaintiff’s alleged service of the Notice or any postal records reflecting service by certified mail and the sole support for the alleged service of the Notice is a general statement found in paragraph 4 of the unverified Complaint that the Notice had been served by certified mail return receipt requested and that Defendant failed to respond, without any details as to the Notice’s compliance with all of the requirements of 22 NYCRR § 137.6, including not only that the form was proper, but also proof of the mailing by certified mail and that Plaintiff waited the requisite 30 days before bringing this action).

**APPEARANCES**

GROSSBACH, GROSSBACH, TRAMAGLINI & HAYES, P.C.

By: Christopher S. Tramaglini, Esq.

Attorneys for Plaintiff

660 White Plains Rd, Ste 350

Tarrytown, NY 10591