

Capetola & Divins, P.C. v Leavy
2025 NY Slip Op 35555(U)
January 30, 2025
Supreme Court, Nassau County
Docket Number: Index No. 610097/2024
Judge: Christopher T. McGrath
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. CHRISTOPHER T. McGRATH

Justice.

-----X
CAPETOLA & DIVINS, P.C.,

Plaintiff,

-against-

DANIEL LEAVY,

Defendant.
-----X

IAS/TRIAL PART 28

INDEX NO. 610097/2024

MOTION NO.: 002

SUBMITTED: 11/12/2024

DECISION & ORDER

The e-filed documents for Motion Sequence 002, listed by NYSCEF document numbers “23,” through “43,” have been read and considered on these motions.

Plaintiff law firm, Capetola & Divins, P.C. (hereinafter “C&D”) moves for an Order granting the following relief: 1) pursuant to CPLR §3215, directing that a default judgment be entered in favor of Plaintiff as against Defendant, Daniel Leavy, (hereinafter “Leavey”) in the full amount requested in Plaintiff’s Complaint dated June 10, 2024; and alternatively, 2) pursuant CPLR §3212 for summary judgment on all causes of action based on Account Stated, Breach of Contract, or pled alternatively, Quantum Meruit and Unjust Enrichment.

Facts and Procedural History

C&D commenced the instant action against Leavey because of Leavey’s alleged failure to pay outstanding attorneys’ fees and costs to C&D in the sum \$59,594.03.03 plus nine percent (9%) interest from June 10, 2024 pursuant to a retainer agreement. Leavey’s ex-wife instituted a post-judgment divorce action against Leavey in the Supreme Court of New York, County of Nassau, under Index No.:2023232/2016 (hereinafter referred to as the “Divorce Action”). Leavey retained C&D to represent his interests in the Divorce Action on or about December 13, 2022. To retain C&D, Leavey executed a written contract pursuant to 22 NYCRR§1400 on or about December 13, 2022.

Default Judgment

On a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof

of the facts constituting the cause of action, and proof of the defendant's default. (*See* CPLR §3215[f]; *see also*, *L & Z Masonry Corp. v. Mose*, 167 A.D.3d 728, 729 [2d Dept 2018]). To demonstrate the facts constituting the cause of action, the plaintiff need only submit sufficient proof to enable a court to determine if the cause of action is viable. (*See Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70–71, 760 N.Y.S.2d 727, 790 N.E.2d 1156; *Clarke v. Liberty Mut. Fire Ins. Co.*, 150 A.D.3d 1192, 1194, 55 N.Y.S.3d 400). Here, C&D satisfied all of the requirements for demonstrating its entitlement to enter a default judgment.

To successfully oppose a motion for leave to enter a default judgment based on the failure to appear or timely serve an answer, a defendant must demonstrate a reasonable excuse for its default and the existence of a potentially meritorious defense. (*See Gershman v. Midtown Moving & Storage, Inc.*, 123 A.D.3d 974, 975 [2d Dept. 2014]). “Where the defendant fails to demonstrate a reasonable excuse for its default, the court need not consider whether the defendant possesses a potentially meritorious defense to the action. ‘[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.’ (*Rosenzweig v. Gubner*, 194 A.D.3d 1086, 1088, 149 N.Y.S.3d 200 [internal quotation marks omitted]).” (*Lancer Ins. Co. v. Fishkin*, 211 A.D.3d 719, 721 [2d Dept. 2022]).

C&D’s Contentions

C&D maintains that pursuant to the executed Retainer Agreement, Leavey was provided with monthly invoices delineating the services and costs associated therein. C&D maintains that the total outstanding amount on these invoices is \$59,594.03. C&D further contends that Leavey was given invoices for work performed and Leavey routinely made partial payments on these invoices. C&D maintains that Leavey did not object to the work performed or the amount of the invoices. On or about May 9, 2024, upon the request of C&D, Leavey sought new counsel and a Consent to Change Attorney was executed. C&D states upon execution of the Consent to Change Attorney, Leavey was presented with his final billing invoices. C&D demanded full payment from Leavey, who did not respond. C&D maintains that its counsel reached out to Leavey’s new counsel seeking payment from Leavey which went unanswered.

In response to the motion, Leavey electronically filed opposition *pro se*; however, the filing was untimely as it was submitted only after the submission date of the motion. The motion was marked fully submitted on November 12, 2024, and Leavey electronically filed his opposition on

November 26, 2024. On November 20, 2024, C&D electronically filed a letter on NYSCEF, asking the court to deem the instant motion fully submitted on November 12, 2024, without opposition.

Service

Although C&D had difficulty serving Leavey, C&D ultimately was advised of Leavey's new address, which was at an apartment complex. On August 15, 2024, C&D issued a Subpoena Duces Tecum to the management group of the apartment complex where Leavey now resides seeking an exact apartment number. On August 30, 2024, the apartment complex responded to C&D's subpoena and indicated that Leavey resides at apartment 302. On September 3, 2024, C&D sent Leavey notice pursuant to CPLR §3120 and mailed the subpoena response to Leavey. After three attempts to serve Leavey at his address, Leavey was served on August 20, 2024 at his address by affixing a copy of the Summons, Complaint, Amended Summons, and Notice of Electronic filing to his door. On September 25, 2024, in an envelope marked "personal and confidential" Leavey was sent formal notice of his impending default, a copy of the Summons and Complaint, and Amended Summons, and was given notice that if C&D did not have communications with Leavey, C&D would be filing a motion seeking default judgment against him.

Discussion

A party moving for default judgment under CPLR §3215 must submit the following: (i) proof of service of the Complaint; (ii) proof of the facts constituting the claim; and (iii) proof of the defaulting defendant's failure to appear or answer. (*See Todd v. Green*, 122 A.D.3d 831 [2d Dept. 2014]; CPLR §3215[f]). C&D satisfied these requirements.

While courts generally allow pro se litigants some leeway in the presentation of their case, pro se litigants must still abide by court procedures and calendars. (*See Stoves & Stones, Ltd. v. Rubens*, 237 A.D.2d 280, 280 [2d Dept. 1997]). Even if Leavey's opposition was timely filed, Leavey failed to provide a reasonable excuse for his delay in answering. In light of the fact that Leavey's failed to provide a reasonable excuse, this Court need not consider whether Defendant provided the existence of a potentially meritorious defense. (*See Lancer Ins. Co. v. Fishkin*, 211 A.D.3d 719, 721 [2d Dept. 2022]).

An award of an attorney's fees pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services rendered. (*See People's*

United Bank v. Patio Gardens III, LLC, 143 A.D.3d 689, 691, 38 N.Y.S.3d 262). “In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation.” (*Citicorp Tr. Bank, FSB v. Vidaurre*, 155 A.D.3d 934, 935 [2d Dept. 2017] [internal citations omitted]). “While a hearing is not required in all circumstances, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered.” (*People's United Bank v. Patio Gardens III, LLC*, 143 A.D.3d at 691, 38 N.Y.S.3d 262 [internal quotation marks omitted]). “There must be a sufficient affidavit of services, detailing the hours reasonably expended. . . .and the prevailing hourly rate for similar legal work in the community.” (*Citicorp Tr. Bank, FSB v. Vidaurre*, 155 A.D.3d 934, 935 [2d Dept. 2017]).

Accordingly, based upon this record, C&D's application for a default judgment is hereby **granted as to liability only**. A hearing is required to ascertain the reasonable value of legal services rendered. This matter is hereby set down for an inquest on **February 28, 2025 at 9:00am**.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

Any relief not specifically granted or addressed is hereby **denied**.

This constitutes the Decision and Order of this Court.

Dated: January 30, 2025
Mineola, New York


HON. CHRISTOPHER T. McGRATH
J.S.C.

ENTERED

Feb 04 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE