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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

PARHAM DELIJANI,	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 601160-11
Plaintiff,	MOTION SUBMISSION DATE: 4-27-12
-against-	MOTION SEQUENCE
LAW OFFICE OF SEAN SABETI, P.C.,	NO. 1
Defendant.	

The following papers read on this motion:

Emergency Order to Show Cause, Affirmation, and Exhibits	X
Affirmation	X
Reply Affirmation	X

Order to show cause by the defendant Law Office of Sean Sabeti, P.C. for an order, *inter alia*: (1) vacating a judgment of default entered against it dated March 23, 2012; (2) dismissing the within action pursuant to CPLR 3211; (3) designating the plaintiff's claims herein as counterclaims in a related action between the parties entitled, *Law Office of Sean Sabeti, P.C., v Parham Delijani and Joseph Delijani,* ___Misc.3d.___, Index No. 18123-11 [Supreme Court Nassau County, 2011]; and (4) imposing sanctions as against the plaintiff and his counsel pursuant to 130 NYCRR § 130-1.1.

In October, 2011, the plaintiff Parham Delijani commenced the within action against his former counsel, the defendant "Law Office of Sean Sabeti, P.C." ["the defendant"]. The plaintiff originally retained the defendant in 2009 to represent him in certain post-judgment proceedings commenced by the plaintiff's former wife which arose out of a contentiously litigated matrimonial action concluded in 2003 (Gellis Aff., Exh., "2"; Cmplt., ¶¶ 2-4; Sabeti Aff., ¶¶ 6-7).

In that prior, post-judgment proceeding, the plaintiff's former wife was attempting to, *inter alia*, modify the parties' judgment of divorce and incorporated stipulation of settlement so as to relocate the parties' children to California (*Sabeti v Delijani,* [Nassau County Index No. 18123-11], Cmplt.,¶¶ 5-6).

Among other things, the verified complaint in this action alleges that the defendant failed to provide effective and competent legal services to the plaintiff and never filed a written retainer agreement pursuant to 22 NYCRR § 1400.3, thereby entitling the plaintiff to recover some $142,386.00 in counsel fees he paid to the defendant (Gellis Aff., Exh., "2"; Cmplt., ¶¶ 2-4; 10-20).

Service of process on the defendant law firm was accomplished by delivering a copy of the summons and complaint to the Secretary of State pursuant to Business Corporation Law § 306[b][1]. Some two years earlier, however, *i.e.*, in December of 2009, the defendant had re-located its law offices, but failed to

update the file address maintained by the Department of State (Sabeti Aff., ¶¶ 44-45; Exh., "L"). Accordingly, the summons and complaint – which the defendant claims it never received – were delivered by the Secretary of State to the defendant's former address; namely, "99 Jericho Turnpike, Jericho, New York" (Sabeti Aff., ¶¶ 44-45)

Significantly, in May of 2011, the plaintiff had commenced a substantively identical, prior action against "Sean Sabeti," individually. That action, however, was dismissed by order of this Court dated September, 12, 2011, on the ground that the plaintiff had erroneously sued Sabeti in his individual capacity, instead of naming Sabeti's professional corporation as the proper, party-defendant (Order of Diamond, J., dated September 16, 2011)(*cf., Somer & Wand v Rotondi*, 219 AD2d 340, 343-344). In the prior dismissed action, the plaintiff did not serve the Secretary of State, but instead, personally served process on the defendant at his current office address, *i.e.*, "3 Grace Avenue, Great Neck, New York" (Sabeti Aff., ¶ 36).

In December of 2011 – and without knowledge that the plaintiff's action had been commenced – the defendant law firm instituted its own fee action as against both the plaintiff and the plaintiff's father, Joseph Delijani (Sabeti Aff., ¶¶ 45-46)(*see, Law Office of Sean Sabeti, P.C., v Parham Deljiani and Joseph*

Delijani, Index No. 18123-11 [Supreme Court Nassau County, 2011]). The defendant's complaint alleges, *inter alia*, entitlement to approximately $77,927.00 in the counsel fees arising out of the same, post-judgment proceedings at issue in this action (*see*, *Law Office of Sean Sebati, P.C., v Parham Deljani and Joseph Delijani,* Index No. 18123-11 [Supreme Court Nassau County, 2011])(Sabeti Aff., Exh., "M").

In March of 2012, and while the defendant's related fee lawsuit was pending, the plaintiff made application for a default judgment pursuant to CPLR 3215[g] in this action. That application was granted and resulted in a March 23, 2012 judgment, entered as against the defendant in the principal amount of $142,981.00 (Gellis Aff., Exh., "1").

According to Sean Sabeti – the defendant law firm's principal – prior to early April of 2012, he had no knowledge of this action or that a judgment of default had been entered therein (Sabeti Aff., ¶¶ 46-47). More particularly, Sabeti claims that on April 5, 2012, he received a mailed package from plaintiff's counsel in which the subject default judgment was enclosed (Sebati Aff., ¶¶ 49-50, 58). According to Sabeti, some two months earlier in February of 2012 – and after his law firm was already in technical default – he received certain materials from the

plaintiff's counsel relating to the defendant-law firm's pending fee action, but plaintiff's counsel never mentioned the subject lawsuit (Sabeti Aff., ¶¶ 46-47, 50).

After learning in April of 2012, that the default judgment had been entered, the defendant promptly moved by order to show cause and voluminous supporting papers to, *inter alia,* vacate the judgment and dismiss the within action.

Upon the record before the Court, the defendant's motion should be granted in part to the extent indicated below.

It is settled that "service of process on a corporate defendant by serving the summons and complaint on the Secretary of State pursuant to Business Corporation Law § 306 is valid service" (*Shimel v 5 S. Fulton Ave. Corp.*, 11 AD3d 527 *see also*, *Perkins v 686 Halsey Food Corp.*, 36 AD3d 881 *cf.*, *Peck v Dybo Realty Corp.*, 77 AD3d 640; *Yellow Book of N.Y., Inc. v Weiss*, 44 AD3d 755). Moreover, the failure to maintain a current address with the Secretary of State is generally not an excuse for a default under CPLR 5015[a][1](Castle v Avanti, Ltd., 86 AD3d 531; *Peck v Dybo Realty Corp.*, *supra*, 77 AD3d 640; *Perkins v 686 Halsey Food Corp.*, *supra,* 36 AD3d 881; *Franklin v. 172 Aububon Corp.*, 32 AD3d 454, 455).

Nevertheless, CPLR 317 "permits a defendant who has been 'served with a summons other than by personal delivery" to seek relief from a default upon a

showing that it did not receive actual notice of the summons in time to defend and has a meritorious defense'" (*Franklin v 172 Aububon Corp., supra*, 32 AD3d 454, 455, *quoting from*, CPLR 317 *see generally, Eugene Di Lorenzo v. Dutton Lbr. Co.*, 67 NY2d 138, 141–142 [1986]; *Wassertheil v. Elburg, LLC*, 94 AD3d 753; *Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080; *Fleisher v Kaba*, 78 AD3d 1118, 1119; *Cohen v Michelle Tenants Corp.*, 63 AD3d 1097, 1098; *Franklin v. 172 Aububon Corp., supra*, 32 AD3d 454, 455; *Rios v. Starrett City, Inc.*, 31 AD3d 418).

"A defendant moving for vacatur of a default under CPLR 317 need not establish a reasonable excuse for the delay in answering or appearing" (*Franklin v. 172 Aububon Corp., supra,* 32 AD3d at 454 *see, Wassertheil v. Elburg, LLC*, 94 AD3d 753; *Clover M. Barrett, P.C. v. Gordon*, 90 AD3d 973).

The decision whether to set aside a default rests in the sound discretion of the Supreme Court (*Pimento v. Rojas,* 94 AD3d 844; *Westchester Medical Center v. AIU Ins. Co.*, 40 AD3d 847; *Calderon v 163 Ocean Tenants Corp.*, 27 AD3d 410).

Here, the defendant has established its entitlement to vacatur of its default pursuant to CPLR 317 (*see, Cohen v Michelle Tenants Corp., supra*, 63 AD3d 1097, 1098; *Fleisher v Kaba, supra,* 78 AD3d 1118, 1119; *Franklin v. 172*

Aububon Corp., *supra*, 32 AD3d 454, 455). More specifically, the record establishes that service was made by delivery of process to the Secretary of State rather than by personal delivery (*see, Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., supra,* at 142; *Fleisher v Kaba*, *supra*; *Chen v Michelle Tenants Corp.*, *supra*, 63 AD3d 1097). The defendant has also asserted that the address on file with the Secretary of State at the time was incorrect (*Newman v. Old Glory Real Estate Corp.*, 89 AD3d 599 *cf.*, *Thas v. Dayrich Trading, Inc.*, 78 AD3d 1163, 1164).

Further, there is no evidence that the defendant's conduct was willful or dilatory (*Toll Brothers, Inc. v. Dorsch*, 91 AD3d 755, 756; *Calderon v 163 Ocean Tenants Corp.*, *supra*, 27 AD3d 410, 411), or that it was in any sense "deliberately attempt[ing] to avoid notice of the action" (*Girardo v. 99-27 Realty, LLC*, 62 AD3d 659, 660 *see*, *Eugene Di Lorenzo v. Dutton Lbr. Co.*, *supra*, 67 NY2d 138, 141–142) – an inference belied by defendant's timely interposed opposition to the plaintiff's prior action.

Nor does the record suggest that the defendant was at the time, aware of its "failure to designate a new registered agent for service or that an old address was on file with the Secretary of State" (*Tselikman v. Marvin Court, Inc.*,33 AD3d 908, 909; *Hon-Kuen Lo v Gong Park Realty Corp.*, 16 AD3d 553; *Grosso v MTO Assoc. Ltd. Partnership*, 12 AD3d 402, 403). Notably, the evidence submitted

indicates that the plaintiff was aware at the time of the defendant's actual place of business (*see, Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., supra,* at 141; *Tselikman v. Marvin Court, Inc., supra*; *Hon-Kuen Lo v Gong Park Realty Corp.*, 16 AD3d 553, *supra*)(Sabeti Aff., ¶ 36, 43; Reply Aff., ¶ 65).

The defendant's submissions also adequately alleged facts sufficient to demonstrate potentially meritorious defenses to the plaintiff's claims (*Fleisher v. Kaba, supra*, 78 AD3d 1118, 1119; *Girardo v. 99-27 Realty, LLC, supra*, 62 AD3d at 660; *Franklin v. 172 Aububon Corp., supra,* 32 AD3d 454). Considering the defendant's promptness in moving to vacate (*Wonder Works Const. Corp. v. RCDolner, LLC*, 44 AD3d 526), the relatively short delay which ensued (*Vinny Petulla Contracting Corp. v. Ranieri*, 94 AD3d 751), and the "strong public policy" favoring resolution of actions on their merits (*Fuentes v. Virgil*, 88 AD3d 643), the Court agrees that the defendant's motion to vacate should be granted.

The Court alternatively notes that the plaintiff's January 24, 2012, affidavit of additional mailing pursuant to CPLR 3215[g], omits the statutory recital that the summons and complaint were mailed to the defendant by "first class mail" (Gellis Aff., Exhs., "6", "7")(*see,* CPLR 3215[g][4][i]; *Schilling v Maren Enters.*, 302 AD2d 375 *see also, Balaguer v 1854 Monroe Ave. Hous. Dev. Fund Corp.*, 71 AD3d 407; *Admiral Ins. Co. v. Marriott Intern., Inc.*, 67 AD3d 526; *Bunch v.*

Dollar Budget, Inc., 12 AD3d 391; *Rafa Enters. v. Pigand Mgt. Corp.*, 184 AD2d 329).

However, upon favorably viewing and accepting as true, the facts alleged in the plaintiff's complaint (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Bokhour v. GTI Retail Holdings, Inc.*, 94 AD3d 682), the Court agrees that the averments made are sufficient at this early juncture to withstand a motion to dismiss pursuant to CPLR 3211 (*see also, Feldman v Finkelstein & Partners, LLP,* 76 AD3d 703; *Uzzle v. Nunzie Court Homeowners Ass'n, Inc.*, 70 AD3d 928, 929; *Malik v Beal*, 54 AD3d 910; *Gelfand v Oliver*, 29 AD3d 736). Additionally, and among other things, the complex thicket of allegations and claims advanced by the defendant, not all of which are relevant to the issues between the parties, nonetheless implicate factual issues which are not appropriately resolved on a motion pursuant to CPLR 3211(*see*, *Bokhour v. GTI Retail Holdings, Inc.*, 94 AD3d 682).

Further, "at this CPLR 3211 motion stage" (*Held v. Kaufman*, 91 NY2d 425, 433 [1998]), a plaintiff is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (*see, Stuart Realty Co. v. Rye Country Store, Inc.*, 296 AD2d 455, 456; *Paulsen v. Paulsen*, 148 AD2d 685, 686), since "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v. Goldman, Sachs*

& Co., 5 NY3d 11, 19 [2005]; *Knutt v. Metro Intern., S.A.*, 91 AD3d 915, 916). The Court notes that 22 NYCRR § 1400.3 – which requires attorneys in matrimonial and/or domestic relations matters to execute and file written retainer agreements – has been applied to post-judgment enforcement matters (*see, Meirowitz v Cohn*, ___Misc.3d___, 2010 WL 4348274, at 3 [Supreme Court, Nassau County, 2010] *see also*, 22 NYCRR § 1400.1 ["This part shall apply to * * * any action or proceeding * * * for divorce * * * or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings"] *cf., Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 60-62).

That branch of the motion which is, in effect, for a pre-answer order consolidating the within action with the defendant's pending fee action, is denied with leave to renew after issue has been joined (*see*, Siegel, *New York Practice* [5th ed.], § 128, at 228).

Lastly, in the exercise of its discretion, the Court finds that the imposition of a sanction is unwarranted (*see generally, Gelobter v. Fox,* 90 AD3d 832, 833; *Haase v. DelVecchio,* 90 AD3d 756, 757; *Dime Sav. Bank of New York, FSB v. Zangiacomi*, 225 AD2d 515). However, both counsel are cautioned and reminded that the Court expects full compliance with its Part rules, the Uniform Rules applicable to this proceeding, and the Rules of Professional Conduct.

The Court has considered the parties' remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED the order to show cause by the defendant Law Office of Sean Sabeti, P.C., is granted to the extent that the judgment entered March 23, 2012 is vacated, and the defendant's motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 31, 2012

STEVEN M. JAEGER, A.J.S.C.