

Murashkovsky v Adamo d.o.o.

2013 NY Slip Op 30150(U)

January 22, 2013

Sup Ct, New York County

Docket Number: 602552/07

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**
Justice

PART 39

Index Number : 602552/2007
MURASHKOVSKY, SOPHIA
vs
ADAMO D.O.O.
Sequence Number : 004
REARGUMENT/RECONSIDERATION

INDEX NO. 602552/07
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

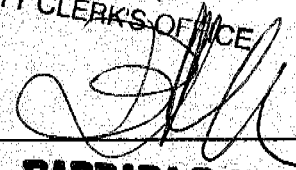
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN 25 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/22/13


_____, J.S.C.
BARBARA R. KAPNICK

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----x

SOPHIA MURASHKOVSKY,

Plaintiff,

-against-

ADAMO d.o.o. and JADRAN ADAMOVIC,

Defendants.

-----x

BARBARA R. KAPNICK, J.,

DECISION/ORDER

Index No. 602552/07
Motion Seq. No. 004

FILED

JAN 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

Background

Plaintiff Sophia Murashkovsky ("Murashkovsky") commenced this action in or about July 27, 2007 to recover monies allegedly due from defendants ADAMO d.o.o. and Jadran Adamovic ("Adamovic") for her work, labor, services and ideas in connection with the production of an art catalog entitled "Essence of Life". Plaintiff claims that commencing in or about 2004 and ending in or about 2006, at the behest of the defendants, she did extensive work as Literary Director for "Essence of Life", which was to be a collection of essays about Central and Eastern European contemporary artists, based on interviews with the artists, that would be used and distributed as part of an exhibition in museums in Russia, Hungary, the Czech Republic and Slovenia. Plaintiff maintains that she expected to be paid \$35,000 for her work on the project.

By Decision/Order dated December 6, 2007, this Court granted plaintiff's motion for a default judgment and an inquest and assessment of damages on default, and an inquest was held on February 11, 2008, at which there was no appearance on behalf of either of the defendants. Counsel for plaintiff stated on the record at the inquest that defendant Adamovic had been served, but that he had refused service of the summons, and instead had contacted plaintiff to request that she withdraw the case, which plaintiff testified to, as well.

Plaintiff also testified that defendant hired her to work as co-editor and to conduct interviews with artists for the catalog, which was to be produced in various languages. In addition to the interviews, plaintiff claims her work included translations and writing essays. Plaintiff had requested \$35,000 for her work although there was no written contract for that sum. She testified that defendant agreed to this price by telling her that she would be paid "accordingly". After the inquest, the Court granted judgment against defendant Adamovic in the sum of \$35,000 with interest from July 15, 2006 plus costs and disbursements. The action against ADAMO d.o.o. was discontinued on the record. Judgment was entered accordingly on February 27, 2008.

An Order to Show Cause was first brought by defendant *pro se* in 2012 to vacate the default judgment entered against him. The motion was granted by Decision/Order of this Court dated June 27,

2012 "on the condition that Adamovic post a bond in the amount of \$10,000 US dollars on or before July 18, 2012". The Court further provided that if Adamovic was unable to post the bond, the matter would be referred to a Special Referee to determine "whether defendant Jadran Adamovic has shown that his default in not answering or appearing in this action is an excusable default and that he has a meritorious defense to the Complaint."¹

Defendant Adamovic has now moved pursuant to CPLR 2221(d) to reargue, and pursuant to CPLR 2221(e) to renew, this Court's decision of June 27, 2012. Defendant is requesting dismissal of the case in its entirety, stating that this request was not addressed at the June 27, 2012 hearing, and additionally states that there is new evidence that was not available at the time of the June 2012 hearing that necessitates a re-examination of the Court's decision.

Defendant offers the following arguments in defense of his motion: 1) plaintiff was fully compensated for her work on the catalog; 2) plaintiff falsely claimed playing a larger role in the realization of the catalog than she did; 3) defendant was not in the United States after July 2007, so his default was not willful; 4) plaintiff had an 'ulterior motive' as to the timing of when she commenced this case, as it halted his negotiations with the

¹ Defendant was not able to post the bond, so the case was referred to a Referee. Apparently, defendant did not appear at the hearing and that will be dealt with in conjunction with plaintiff's motion to confirm the Referee's Report (mot. seq. no. 005), currently returnable in Room 130 on February 13, 2013.

Guggenheim Museum to arrange an exhibition; and 5) there is a question of jurisdiction, as the project was realized in Europe.

Defendant claims that plaintiff accepted compensation of \$12,500 for her work from ADAMO d.o.o. and signed receipts to that effect, and that there is no evidence of coercion, based on the fact that plaintiff continued to work on the project. He also claims that the sum of \$35,000 was fabricated by plaintiff and her lawyers, and was never discussed by him with plaintiff.

In addition, defendant raises the issue of the existence of a Slovenian contract that he allegedly had with plaintiff, but plaintiff testified that she couldn't read or write in Slovenian. The statement offered by Simon Frntic, the accountant for ADAMO d.o.o. , allegedly detailing plaintiff's work with him and his work to help get her an official work permit in Slovenia, has no evidentiary value and doesn't go to the issue of whether defendant has a meritorious defense or a reasonable excuse for his default in answering plaintiff's Complaint or opposing her motion for a default judgment.

Defendant also disputes the actual scope of plaintiff's work on the catalog, and provides a letter from Darko Pokorn, on behalf of New Collectivism, a design company in Ljubljana, Slovenia, who allegedly worked closely with Adamovic on the concept of the catalog and its realization.

He alleges that plaintiff "was not included on any level on the layout of the catalogue [, but that h]er role was to transcribe and shape some of the interviews conducted by Mr. Adamovic into essay form for the catalogue." He claims that the catalog went to print late because plaintiff did not meet her deadlines, that her texts were not of the caliber expected and proofreaders had to be brought in to correct both the English and Russian texts. This letter could raise some issues as to whether defendant has a meritorious defense to plaintiff's Complaint, but should have been produced at the Referee's hearing on that issue, so plaintiff could respond.

Defendant further claims that there was no willful default and that he did respond to the original summons, but was out of the United States from July 2007 until 2011, although plaintiff claims that the summons was served on defendant, both in Slovenia and in New York.

There is also no proof submitted by defendant, other than speculation, that plaintiff commenced this action in July 2007 to halt his negotiations with the Guggenheim Museum because it would compete with the exhibit of plaintiff's relatives, who are featured artists in the catalog.

Finally, defendant asserts that jurisdiction would be proper in Slovenia as the contracts and work were executed there. In any event, he requests that any further motions be done on submission, and not require his presence in New York, since he does not have the funds to travel here for this case.

Based on the receipts documenting that plaintiff was paid \$12,500 and that the scope of her work was limited to that for which she was already compensated, defendant asks that the case be dismissed in its entirety.

In opposition, plaintiff argues that the motion is meritless as a motion to reargue in that it fails to identify "matters of fact or law allegedly overlooked by or misapprehended by the court". Plaintiff asserts that it is also meritless as a motion to renew, because it fails to offer "new facts not offered on the prior motion" and only sets forth irrelevant facts that fail to offer "reasonable justification for the failure to present such facts on the prior motion".

Since a motion to vacate a judgment on the ground of excusable default pursuant to CPLR 5015(a)(1) must be brought within one year after entry of judgment, which would have been March 8, 2009, defendant instead moved pursuant to CPLR 5015(a)(3), contending

that plaintiff had perpetrated a fraud in obtaining the judgment. Specifically, defendant alleged that plaintiff falsely testified at the inquest that defendant failed to pay her for the work she performed for the catalog. He claimed to have proof showing she had been paid, but plaintiff submitted an affidavit refuting his proof, contesting the validity of the alleged contract and denying that she was paid.

Again, these affidavits and exhibits would be appropriate for an evidentiary hearing which this Court directed to be held before deciding whether or not to grant defendant's motion to vacate his default.

CPLR 2221(d)(2) provides that "[a] motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *William P. Pahl Equip Corp. v Kassis*, 182 AD2d 22 (1st Dep't 1992), *lv disp in part, den in part* 80 NY2d 1005 (1992), *rearg den* 81 NY2d 782 (1993) (internal citation omitted); *see also Foley v Roche*, 68 AD2d 558 (1st Dep't 1979).

This Court did not overlook or misapprehend the "receipts" submitted by defendant Adamovic as part of his original motion to vacate to prove that Murashkovsky was fully compensated for her work. Instead, since plaintiff disputes defendant's interpretation of the facts, the Court sent the case out for an evidentiary hearing.

Moreover, defendant's argument that Murashkovsky had an "ulterior motive" in commencing her lawsuit when she did is a new argument not previously raised on the original motion. This argument also has no bearing on whether plaintiff's testimony at the inquest in February 2008 was fraudulent. Moreover, there is nothing in the emails annexed to defendant's moving papers which even suggests that the Guggenheim Museum ever knew about plaintiff's lawsuit against defendant or stopped negotiations with defendant for his exhibit because of its pendency.

In addition, defendant's argument as to jurisdiction is also a new argument which is inappropriate for a motion to reargue.

As to the renewal aspect of this motion, CPLR 2221(e) provides that a motion for leave to renew "(2) shall be based upon new facts not offered on the prior motion that would change the prior

determination" and "(3) shall contain reasonable justification for the failure to present such facts on the prior motion."

Aside from the fact that none of the statements submitted by defendant are properly sworn, they have no direct bearing or relevance to plaintiff's motion to vacate the judgment. Nor has defendant offered any reason that these letters could not have been obtained and submitted to the Court on the prior motion. This is also true for the new arguments defendant has made for the first time on this motion.

Accordingly, for all the reasons set forth herein, defendant's motion to renew and/or reargue the Decision/Order of this Court dated June 27, 2012 is respectfully denied.

This constitutes the decision and order of this Court.

Dated: January 22, 2013


BARBARA R. KAPNICK
J.S.C.

FILED

JAN 25 2013

NEW YORK
COUNTY CLERK'S OFFICE

