

Lax v Design Quest N.Y., Ltd.
2013 NY Slip Op 31937(U)
August 14, 2013
Supreme Court, New York County
Docket Number: 105299/11
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

SUSAN and STEVEN LAX,
Plaintiffs,
-against-

DESIGN QUEST N.Y., LTD., RICHARD RUBENS,
and BARBARA RUBENS,
Defendants.

FILED

AUG 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. 105299/11
MOTION DATE 08-07-2013
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion to/for renew motion to dismiss complaint and cross-motion for a default judgment:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____ cross motion _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1 - 4</u>
<u>5 - 7, 8- 9</u>
<u>10 - 11, 12</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendants' motion pursuant to CPLR §2221[e] seeking to renew and reargue their prior motion to dismiss the complaint, and to dismiss plaintiff's third cause of action for unjust enrichment, is denied. Plaintiff's motion to enter a default judgment on the second and third cause of action asserted in the amended complaint, is denied.

Defendants seek an Order pursuant to CPLR 2221[e] seeking leave to renew and reargue their motion to dismiss the complaint pursuant to CPLR § 3211[a][7] for failure to properly state a cause of action and CPLR §3016[b], for failure to allege their claims of fraud. Pursuant to CPLR § 3211[a][1],[7] defendants also seek to dismiss plaintiff's third cause of action for unjust enrichment based on the existence of an enforceable written contract. Alternatively, defendants seek an extension of time to serve and file an answer to the amended complaint.

Plaintiffs oppose the motion and cross-move to enter a default judgment against the defendants on the first cause of action for breach of contract and second causes of action for fraudulent billing asserted in the amended complaint and for sanctions based on frivolous practice. Plaintiffs do not seek to obtain a judgment on their third cause of action for unjust enrichment.

Defendants motion to dismiss was previously granted by this Court's Decision and Order entered on January 25, 2012 (Mot. Exh. B). Plaintiffs appealed and on December 6, 2012, the Appellate Division, First Department modified the decision, reinstating plaintiff's claim for breach of contract and allowing the re-pleading of the cause of action for fraudulent billing (Cross-Mot. Exh. 5).

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

The resolution of an issue by the appellate court on a prior appeal is, "law of the case and is binding on the Supreme Court as well as the appellate court." No further examination of the issues can be made without a showing of subsequent evidence or a change in the law (*Board of Managers of the 25 Charles Street Condominium v. Seligson*, 106 A.D. 3d 130, 961 N.Y.S. 2d 152 [N.Y.A.D. 1st Dept., 2013] citing to *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D. 3d 809, 847 N.Y.S. 2d 130 N.Y.A.D. 2nd Dept., 2007)).

Defendants are seeking to renew a motion to dismiss that was based on the complaint before it was modified, and apply it to the Amended Complaint. The December 6, 2012 decision of the Appellate Division, First Department, is law of the case. Defendants arguments were previously made before the Appellate Division and rely on documentation that existed at the time of the motion and appeal, but was not produced. Defendants have not established the existence of subsequent evidence or a change in the law. There is no basis to renew the prior motion to dismiss before this Court.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (*Leon v. Martinez*, 84 N.Y. 2d 83, 84 N.Y. 2d 83, 614 N.Y.S., 2d 972, 638 N.E. 2d 511 [1994]).

Unjust enrichment is a quasi-contract claim that only applies in the absence of an express written agreement (*Zolotar v. New York Life Ins. Co.*, 172 A.D. 2d 27, 576 A.D. 2d 850 [N.Y.A.D. 1st Dept., 1991]). A party is not precluded from asserting both breach of contract and quasi-contract causes of action when there is a, "bona fide dispute as to the existence of a contract or the contract does not cover the dispute in issue" (*Joseph Sternberg, Inc. v. Walber 36th Street Associates*, 187 A.D. 2d 225, 594 N.Y.S. 2d 144 [N.Y.A.D. 1st Dept., 1993]). Plaintiff may assert a claim for both breach of contract and for unjust enrichment where the defendant prevented performance of a written agreement or money is owed outside the scope of the agreement (*Loheac, P.C. v. Children's Corner Learning Center*, 51 A.D. 3d 476, 857 N.Y.S. 2d 143 [N.Y.A.D. 1st Dept., 2008]).

Defendants seek to dismiss the third cause of action for unjust enrichment asserted for the first time in the amended complaint, because of the existence of the written agreement. The Appellate Division, First Department determined that there was a potential oral contract modifying the written agreement. The oral modification is the basis for the first cause of action for breach of contract. There is a basis for plaintiff's third cause of action for unjust enrichment, the money alleged to be owed may be outside scope of the oral modification. The documentation submitted by defendants does not utterly refute the potential basis for the cause of action.

Plaintiffs served the amended complaint on January 21, 2013 and by stipulation extended defendants' time to answer until April 4, 2013. Defendants' attorneys then

moved to be relieved as counsel. On April 3, 2013, this Court granted the motion and stayed the action for forty-five (45) days (Mot. Exh. E). Defendants' new counsel made this motion, without serving an answer to the amended complaint.

A timely motion to dismiss a cause of action, "...extended the time to respond to other causes of action as well." (Chagnon v. Tyson, 11 A.D. 3d 325, 783 N.Y.S. 2d 29 [N.Y.A.D. 1st Dept., 2004] and De Falco v. JRS Confectionary, 118 A.D. 2d 752, 500 N.Y.S. 2d 143 [N.Y.A.D. 2nd Dept., 1996]).

A motion for default judgment, can be denied based on the defendant's demonstration of a meritorious defense and reasonable excuse for failure to serve a timely answer (Stein v. DKA Restaurant, 297 A.D. 2d 563, 747 N.Y.S. 2d 157 [N.Y.A.D. 1st Dept. 2002] citing to, Higgins v. Bellet Constr. Co., 287 A.D. 2d 277, 731 N.Y.S. 446 [N.Y.A.D. 1st Dept. 1990]). Failure may be excused where there is a showing of lack of prejudice to the plaintiff from the delay (Keller v. Merchant Capital Portfolios, LLC, 103 A.D. 3d 532, 962 N.Y.S. 2d 48 [N.Y.A.D. 1st Dept., 2013]). A defendant does not have to serve a formal motion for leave to serve a late answer, if it has clearly stated a basis for the relief in opposition to the motion for a default judgment (Fried v. Jacob Holding, Inc., 2013 N.Y. Slip Op. 0555 [N.Y.A.D. 2nd Dept., 2013]).

Plaintiffs contend that the cross-motion for a default judgment on the first and second causes of action for breach of contract and fraudulent billing, should be granted. Defendants' motion to renew is not a motion to dismiss and does not extend the time to answer. The relief sought by the defendants concerning dismissal of the unjust enrichment claim is timely, but in all other respects they are in default. Defendants have not served any Answer in this action. Defendants have not sought a further extension of time to answer by obtaining plaintiffs' consent, or moved by Order to Show Cause for an extension of time. The cross-motion for a default judgment on the first and second causes of action should be granted.

Defendants claim that pursuant to CPLR 3211[f], denial of the motion to dismiss on the cause of action for unjust enrichment, extends the time to answer by ten days. To the extent that their time is extended to answer on the cause of action for unjust enrichment, it should also be extended on the first and second causes of action. Defendants have stated meritorious defenses based on the documentation submitted to disprove plaintiffs causes of action.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party. CPLR §8106 permits the Court in its discretion to award costs to a party, the imposition of sanctions requires a pattern (Sarkar v. Pathak, 67 A.D. 3d 606, 889 N.Y.S. 2d 184 [N.Y.A.D. 1st Dept. 2009])

Plaintiffs claim that defendants knew or should have known that there was no basis for this motion and that sanctions should be issued for frivolous practice.

Defendants contend the claims asserted in the motion are not frivolous. They are legitimately based on the belief that the amended complaint does not state proper causes of action.

This Court finds the defendants have not stated a basis to renew and reargue their prior motion to dismiss based on law of the case. Defendants have not stated a basis to dismiss the third cause of action for unjust enrichment. The cause of action for breach of contract is based on an alleged oral modification and not the written agreement.

Plaintiffs have not established a basis to obtain a default judgment on the first and second causes of action. Defendants have stated a basis to extend their time to answer, even though a motion was not made seeking to do so. The time to answer was extended by stipulation and this action was stayed. Plaintiffs will not be prejudiced by the extension of time to serve an answer. New counsel for the defendants has had limited time to answer the amended complaint after the action was stayed. Defendants have stated potential meritorious defenses in their motion papers. Plaintiffs have not established a basis to obtain sanctions for frivolous motion practice or a pattern of frivolous behavior.

Accordingly, it is ORDERED that the defendants' motion pursuant to CPLR §2221[e] seeking to renew and reargue their prior motion to dismiss the complaint, and to dismiss plaintiff's third cause of action for unjust enrichment, is denied; and it is further,

ORDERED, that plaintiff's motion to enter a default judgment on the second and third cause of action asserted in the amended complaint, is denied; and it is further,

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this Order with notice of entry; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon the Clerk of the Trial Support Office (Room 158) who is directed to restore this case to the calendar and schedule a preliminary conference, and it is further,

ORDERED that counsel are directed to appear for a preliminary conference in IAS Part 13, Room 210 at 71 Thomas Street, on October 23, 2013 at 9:30am.

FILED

AUG 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 14, 2013

ENTER:

**MANUEL J. MENDEZ
J.S.C.**



MANUEL J. MENDEZ,
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

ROBERT J. BROWN
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