

Yorkson Legal Inc. v Shapiro
2018 NY Slip Op 31599(U)
July 13, 2018
Supreme Court, New York County
Docket Number: 155512/2017
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

YORKSON LEGAL INC.,

Plaintiff,

-against-

MITCHELL C. SHAPIRO, ESQ.,

Defendant.

Index No. 15512/2017
DECISION/ORDER
Motion Seqs. 001, 002

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant’s motion to dismiss the complaint and plaintiff’s cross-motion for summary judgment (motion sequence 001); and plaintiff’s motion to strike defendant’s notice of rejection and defendant’s cross-motion to hold plaintiff in contempt and for sanctions (motion sequence 002).

Papers

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Whimfheimer & Whimfheimer LLP, New York (Michael C. Whimfheimer of counsel), for plaintiff.

Mitchell C. Shapiro, New York, pro se defendant.

Gerald Lebovits, J.

This court consolidates motion sequences 001 and 002 for disposition.

Plaintiff, Yorkson Legal, Inc., brings this action under Limited Liability Company Law § 704 against defendant Mitchell Shapiro to recover fees for legal-recruiting service rendered by plaintiff to Shapiro Tamir Legal Group PLLC (STLG). Before STLG’s dissolution in December 2014, defendant was one of STLG’s principals and managing members. (NY St Cts Elec Filing [NYSCEF] Doc No. 1 at 2, ¶¶ 7-8.) Defendant moves to dismiss the complaint based on res judicata under CPLR 3211 (a) (5) and failure to state a claim on which relief may be granted under CPLR 3211 (a) (7).

Plaintiff, engaged in a legal recruiting business, entered a contract with STLG in 2012 to provide support and assistance to STLG’s legal practice. (NYSCEF Doc No. 1 at 1, ¶ 9; Doc No. 15, at 2.) Before STLG encountered financial difficulties resulting in its dissolution in December

2014, plaintiff had provided \$400,000 worth of services to STLG, of which \$58,994.51 was outstanding when STLG was dissolved. (NYSCEF Doc No. 1 at 3, ¶ 11-12.)

In 2015, plaintiff brought its first action to recover the outstanding amount before this court (Barry R. Ostrager, J.), naming both STLG and Shapiro as defendants. Defendant Shapiro moved to dismiss under CPLR 3211 (a) (1) and (7).

Justice Ostrager granted a default judgment for STLG in the amount of 71,404.98 but denied defendant Shapiro’s motion to dismiss with regard to defendant’s personal liability to STLG’s financial obligations to plaintiff; the court found disputed issues of material. (See NYSCEF Doc No. 7.) Defendant Shapiro appealed the judgment as to his personal liability. The First Department reversed. It ordered the motion court to dismiss the case in defendant’s favor. The Court found that “[p]laintiff’s claim that Shapiro agreed to personally guarantee the obligations of and payments due from the defendant Law Group ... was refuted by the documentary evidence.” (*Yorkson Legal Inc. v Shapiro*, 138 AD3d 563, 563 [1st Dept 2016].)

Claiming that new evidence, plaintiff brings this action. The supposed new evidence includes an allegedly unlawful payment of \$97,000 by STLG to defendant and a transfer of two paintings belonging to STLG to a third party before STLG’s dissolution. The payment and transfer, plaintiff alleges, violated the Limited Liability Company Law § 704, because the payment and transfer reduced STLG’s funds that could otherwise have been used to pay off its debt to plaintiff. (See NYSCEF Doc No. 1 at 3, ¶ 20; Doc No. 24 at 3, ¶ 8.) Plaintiff seeks a judgment of \$71,404.98 against defendant Shapiro personally.

Defendant moves under sequence 001 to dismiss the case based on res judicata under CPLR 3211 (a) (5) and for the failure to state a claim upon which relief may be granted under CPLR 3211 (a) (7).

Claiming that defendant failed to deny the allegations with regard to the asset transfers before STLG’s dissolution, plaintiff cross-moves for summary judgment.

In support of its cross-motion, plaintiff filed on March 7, 2018, exhibits showing the allegedly unlawful asset transfers. The submission of the papers was three-months past the return date scheduled by the notice of motion. Defendant thereafter served and filed a notice to reject the late submissions. Plaintiff files a motion to strike the notice of rejection (motion sequence 002) and defendant cross-moves to hold plaintiff in contempt and for sanctions for those alleged late submissions.

Motion Sequence 001

Defendant’s motion to dismiss is granted. Plaintiff fails to state a claim upon which relief may be granted. Because plaintiff’s claim is rejected on this ground, this court will not discuss defendant’s motion to dismiss based on res judicata. Plaintiff’s cross-motion for summary judgment is denied.

In determining whether a complaint should be dismissed for the failure to state a claim, this court “give[s] the pleadings a liberal construction, accept[s] the allegations as true and accord[s] the plaintiffs every possible favorable inference.” (*Chanko v Am. Broad. Companies Inc.*, 27 NY3d 46, 52 [2016].)

In the instant case, plaintiff alleges in the complaint that because Limited Liability Company Law § 704 requires assets of a limited liability company to be distributed to creditors before its dissolution and STLG failed to comply with this rule, defendant is liable in his personal capacity for the services fees in question. (NYSCEF Doc No. 1 at 3, ¶16.) In light of the liberal manner in which causes of action are examined for CPLR (a) (7) purposes, this court accepts as true and accurate plaintiff’s allegations concerning the asset transfers before STLG’s dissolution.

Although Limited Liability Company Law § 704 provides guidance about how assets of a limited liability company should be distributed before its dissolution, it does not authorize a creditor to sue a company’s managing member personally alleging that the member distributed assets in violation of this section.

Limited Liability Company Law § 609 provides for liability of members, managers, and agents to a company’s creditors only when an individual member specifically assumed personal liability through the limited liability company’s articles of organization and the member consented in writing to the provision or consented or voted for the adoption of such a provision. Because plaintiff fails to explain how it meets the requirements under § 609, it fails to establish a necessary legal connection between the alleged § 704 violation and defendant’s personal liability to the debt. Therefore, plaintiff’s claim is dismissed for failure to state a claim upon which relief may be granted.

Because plaintiff has not stated a viable cause of action, plaintiff’s cross-motion for summary judgment is denied. Also, a motion for summary judgment is pre-mature at this stage, where defendant has not yet filed an answer.

Motion Sequence 002

Plaintiff’s motion to strike the notice of rejection is granted; defendant’s cross-motion to hold plaintiff in contempt and for sanctions is denied.

On March 7, 2018, plaintiff filed papers, numbered 31 through 34 in the NYSCEF system, to show that there were transfers of assets from STLG to defendant and some third-party before STLG’s dissolution in violation of the Limited Liability Company Law. Defendant rejected the papers on the ground that they were untimely filed — more than three months past the return date set in the notice of motion, scheduled on November 24, 2017. (NYSCEF Doc No. 36 at 3, ¶ 2.) Plaintiff filed motion sequence 002 to strike that rejection.

Plaintiff justifies the submission on the ground that the papers were timely filed seven days before the return date set for oral arguments, which was originally scheduled on March 21 and later advanced to March 14, 2018.

To give a liberal reading to plaintiff's complaint, the court has accepted these alleged late submissions in rendering this decision. the court deems the plaintiff's papers in question as properly submitted. Defendant's cross-motion to hold plaintiff in contempt and for sanctions is inappropriate. Defendant's cross-motion is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss (motion sequence 001) is granted and the case is dismissed and plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion to strike (motion sequence 002) the notice of rejection is granted and defendant's cross-motion to hold plaintiff in contempt and for sanctions is denied; and it is further

ORDERED that defendant serve a copy of this decision and order on plaintiff and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: July 13, 2018


J.S.C.

HON. GERALD LEBOVITS
J.S.C.