Hebrew Home for the Aged at Riverdale v Ginsberg
2022 NY Slip Op 31888(U)
June 9, 2022
Supreme Court, New York County
Docket Number: Index No. 157301/2020
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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HEBREW HOME FOR THE AGED AT RIVERDALE,

Plaintiff

Index No. 157301/2020

-against-

DECISION AND ORDER

LILLIAN GINSBERG and IRA GINSBERG a/k/a IRA M. GINSBERG,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants Lillian Ginsberg and her son Ira Ginsberg to recover damages for breach of a contract and for an account stated arising from an alleged agreement that the parties entered for plaintiff to provide nursing care services to Lillian. Plaintiff also sued Ira for tortious interference with the contract and a constructive trust on his property, but discontinued those claims, as well as plaintiff's request for attorney's fees, October 27, 2020. NYSCEF Doc. 12. Plaintiff now moves for a default judgment on plaintiff's remaining claims. C.P.L.R. § 3215. For the reasons explained below, the court denies plaintiff's motion and dismisses this action.

II. TIMELINESS

A. Lillian Ginsberg

Plaintiff never moved to substitute Lillian's estate for Lillian pursuant to C.P.L.R. §§ 1015 and 1021, even though Lillian died April 29, 2017, more than three years before plaintiff commenced this action, and almost five years before plaintiff filed this motion. Aff. of Ira Ginsberg Ex. A. Because plaintiff failed to substitute Lillian's estate "within a reasonable time" since the commencement of this action, the court dismisses the action against Lillian. C.P.L.R. § 1021.

B. Ira Ginsberg

Plaintiff served the summons and complaint on Ira by substitute service September 24, 2020, with the required follow-up mailing September 25, 2020, and filed an affidavit of service October 1, 2020, Aff. of Eric P. Schuster Ex. C, at 2, so that service was complete October 11, 2020, C.P.L.R. § 308(2), allowing Ira until November 10, 2020, to answer the complaint. C.P.L.R. § 3012(c). Although Ira never answered, before his answer was due, on October 27, 2020, plaintiff prematurely applied to the Clerk of the Court for a default judgment. The Clerk refused to enter a judgment and returned the application. NYSCEF Doc. 6; C.P.L.R. § 3215(a).

Plaintiff then filed its current motion February 11, 2022. Plaintiff maintains that its current motion is timely under

C.P.L.R. § 3215(c) because plaintiff filed its first application within one year after Ira's default, and the delay in filing this motion resulted from excusable law office failure and the COVID-19 pandemic. Ira contends that C.P.L.R. § 3215(c) requires the complaint to be dismissed because plaintiff did not file the current motion within one year after the Clerk's prior rejection.

"If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed." C.P.L.R. § 3215(c). Ira defaulted when he failed to answer the complaint by November 10, 2020. C.P.L.R. § 3012(c). Thus plaintiff had until November 10, 2021, to move for a default judgment. Plaintiff's initial application to the Clerk October 27, 2020, however, was not "within one year after the default," because Ira did not default until after November 10, 2020.

Plaintiff filed its current motion after Ira defaulted, but 15 months later, February 11, 2022. Even were the court to consider plaintiff's first application for a default judgment timely, plaintiff's prolonged delay after the Clerk's rejection demonstrates plaintiff's disinterest in pursuing this action. Plaintiff's inaction over this period is tantamount to abandonment of plaintiff's claims. C.P.L.R. § 3215(c).

Plaintiff also provides no reasonable excuse for plaintiff's

delay in filing the current motion. Ventura v. Chhabra, 195 A.D.3d 433, 434 (1st Dep't 2021); Zayas v. Montefiore Med. Ctr., 188 A.D.3d 551, 552 (1st Dep't 2020); Wells Fargo Bank, N.A. v. Martinez, 181 A.D.3d 470, 439 (1st Dep't 2019). Plaintiff's attorney insists that a former employee's departure during the COVID-19 pandemic caused the delay, because that associate was handling this motion, and the pandemic made it difficult for plaintiff's attorney to find a new associate to take over. Plaintiff's attorney fails to explain, however, why he did not simply work on the motion himself. Law firm turnover, even during the pandemic, does not justify his own inaction after November 10, 2020. Thus the court dismisses this action pursuant to C.P.L.R. § 3215(c). Even if plaintiff's motion is timely, however, the court also denies the motion because plaintiff's claims lack merit, further demonstrating the absence of "sufficient cause . . . why the complaint should not be dismissed." Id. See Selective Auto Ins. Company of N.J. v. Nesbitt, 161 A.D.3d 560, 560 (1st Dep't 2018).

III. BREACH OF A CONTRACT

Plaintiff contends that Ira guaranteed payment for plaintiff's services to Lillian, which plaintiff provided, and for which Ira failed to pay. Aff. of Carl Wilner ¶¶ 15-23. Ira acknowledges that he previously met with plaintiff, but maintains that he refused to sign the guaranty agreement that plaintiff

presented at their meeting and undertook no responsibility for Lillian's debt, which her Medicare benefits covered. Ginsberg Aff. ¶¶ 76-80.

Under New York General Obligations Law § 5-701(a)(2), an agreement to pay another person's debt must be in writing. Avilon Automotive Group v. Leontiev, 194 A.D.3d 537, 539 (1st Dep't 2021). Plaintiff points to no written agreement between the parties, nor refutes Ira's contention that he never entered any such agreement. Absent any written agreement, Ira owes no obligation to pay plaintiff for its past services to Lillian. Therefore plaintiff fails to demonstrate its prima facie claim for breach of a contract.

IV. ACCOUNT STATED

Plaintiff insists that its invoices establish an account stated, because plaintiff mailed the invoices to Ira and he failed to object to them within a reasonable time. Katsky Korins LLP v. Moskovits, 198 A.D.3d 566, 567 (1st Dep't 2021); LePatner Project Solutions LLC v. 320 W. 115 St., 192 A.D.3d 507, 508 (1st Dep't 2021); Law Off. of Mark S. Helweil v. Karambelas, 190 A.D.3d 560, 560 (1st Dep't 2021); Schlam Stone & Dolan LLP v. Toussie, 188 A.D.3d 582, 583 (1st Dep't 2020). Yet plaintiff fails to establish that it actually transmitted the invoices to Ira. Carl Wilner, plaintiff's Vice President of Finance, attests on February 10, 2022, that he has "three or more years of

experience in my position." Wilner Aff. ¶ 4. Although Wilner's uncertainty about his own tenure is peculiar, the only reasonable interpretation of his open-endedness is that he had three years of experience when he signed his affidavit and anticipated that he would hold the same position into the future. The invoices are dated November 16, 2018, which predates Wilner's employment in his current position, so he could not have personally mailed the invoices unless he held a prior position with plaintiff, which he does not indicate.

Wilner also fails to show that the invoices actually were mailed according to plaintiff's regular business mailing procedures in November 2018. U.S. Bank Trust, N.A. v. Stewart, 193 A.D.3d 473, 473 (1st Dep't 2021); U.S. Bank Trust, N.A. v. Calhoun, 190 A.D.3d 625, 626 (1st Dep't 2021); Wells Fargo Bank, N.A. v. Merino, 173 A.D.3d 491, 491 (1st Dep't 2019); HSBC Bank USA v. Rice, 153 A.D.3d 443, 444 (1st Dep't 2017). His affidavit that plaintiff mailed the invoices in the ordinary course of business does not establish his personal knowledge of plaintiff's regular mailing procedures in November 2018. Wilner provides no details that show his familiarity with how the invoices were generated and then mailed or delivered in November 2018. Neither does Wilner identify exactly when plaintiff mailed the invoices, nor would he be competent to do so if he was not employed by plaintiff then. Morrison Cohen Singer & Weinstein, LLP v.

Brophy, 19 A.D.3d 161, 162 (1st Dep't 2005). Thus plaintiff fails to demonstrate its prima facie claim for an account stated.

Perhaps more importantly, "an account stated 'cannot be used to create liability where none otherwise exists.'" Cushman & Wakefield, Inc. v. Kadmon Corp., LLC, 175 A.D.3d 1141, 1142 (1st Dep't 2019) (quoting DL Marble & Granite Inc. v. Madison Park Owner, LLC, 105 A.D.3d 479, 479 (1st Dep't 2013)). Since the invoices are for Lillian's debt, plaintiff must point first to a written guaranty agreement by Ira to justify the alleged transmission of the invoices to him. N.Y. Gen. Oblig. Law § 5-701(a)(2); Avilon Automotive Group v. Leontiev, 194 A.D.3d at 539. Again, without a guaranty agreement signed by Ira, plaintiff fails to show its entitlement to a default judgment.

V. PLAINTIFF'S REMAINING CLAIMS

Since plaintiff discontinued its claims for tortious interference with a contract, a constructive trust, and attorney's fees October 27, 2020, NYSCEF Doc. 12, plaintiff may not revive those claims simply because the Clerk returned plaintiff's initial application.

VI. CONCLUSION

As explained above, the court denies plaintiff's motion for a default judgment because plaintiff failed to prove either of its prima facie claims, C.P.L.R. § 3215(f), and dismisses this

action because the motion is untimely. C.P.L.R. § 3215(c). This decision constitutes the court's order and judgment of dismissal.

DATED: June 9, 2022

LUCY BILLINGS, J.S.C.