

Gibson v Castillo

2022 NY Slip Op 32712(U)

August 11, 2022

Supreme Court, New York County

Docket Number: Index No. 154827/2021

Judge: David B. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 154827/2021

CATHERINE GIBSON,

Plaintiff,

- v -

MOTION SEQ. NO. 007, 008 & 009

JOSE CASTILLO, MARIA CASTILLO, 526 WEST 158TH STREET HOUSING, DEVELOPMENT FUND CORP., and JOHN DOES 1-4,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 109, 110, 111, 115, 122

were read on this motion to/for DEFAULT JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 008) 112, 113, 114, 116, 121

were read on this motion to/for DISQUALIFY COUNSEL

The following e-filed documents, listed by NYSCEF document number (Motion 009) 117, 118, 119, 123

were read on this motion to/for STRIKE PLEADINGS

In this action seeking, inter alia, damages for breach of contract and housing discrimination, plaintiff Catherine Gibson, an attorney appearing pro se, moves: 1) pursuant to CPLR 3215, for a default judgment against defendants Jose Castillo and Maria Castillo ("the Castillos") (mot. seq. 007); 2) pursuant to 22 NYCRR 1200.0, to disqualify Raysa Castillo, Esq. of Castillo & Associates, P.C. as counsel for the Castillos; and 3) in effect, pursuant to CPLR 3012(a), seeking to dismiss the answer filed by the Castillos. The Castillos oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this matter are set forth in the orders of this Court entered October 27, 2021 (Doc. 59) and February 22, 2022. Doc. 105. Additional relevant facts are set forth below.

On March 4, 2022, the Castillos filed a “Notice of Appearance and Amended Answer.” Doc. 108.¹ The document was filed by Raysa Castillo, Esq. of Castillo & Associates, P.C. Doc. 108.

On March 7, 2022, plaintiff filed three motions. Initially, plaintiff moved, for the second time, for a default judgment against the Castillos (mot. seq. 007). Docs. 109-111. Her motion for the same relief was previously denied with leave to renew upon proper papers given her failure to establish the Castillos’ defaults. Doc. 105. The Castillos oppose the renewed motion, asserting that plaintiff must accept the answer they filed on March 4, 2022. Doc. 123.

Plaintiff also moved to disqualify Raysa Castillo, Esq. as counsel for the Castillos (mot. seq. 008) on the ground that the latter was a necessary fact witness in this action. Docs. 112-114. In an affirmation in opposition, Raysa Castillo asserts, inter alia, that the plaintiff lacks the standing to disqualify her. Doc. 123.²

The third motion made by plaintiff (mot. seq. 009) sought to strike the Castillos’ untimely answer filed on March 4, 2022. Docs. 117-119. In opposing the motion, Raysa Castillo argues, inter alia, that this Court should accept the Castillos’ answer given that, due to a language barrier, the Castillos did not understand the significance of the complaint. Doc. 123 at par. 17. She further

¹ It is unclear why this document was referred to as an amended answer since NYSCEF does not reflect that the Castillos filed a prior answer.

² Although the Castillos submit affidavits purporting to oppose the motion for default and the motion to disqualify their attorney Raysa Castillo, the affidavits largely fail to address the issues raised by those motions, but rather set forth factual arguments seeking to undermine the claims in the complaint. Doc. 121.

asserts that her “office could not effectively help [the Castillos] if [her firm] didn’t know about the pending action.” Doc. 123 at par. 17.

LEGAL CONCLUSIONS

Plaintiff’s Renewed Motion For Default (Mot. Seq. 007)

As noted previously, plaintiff’s initial motion for default was denied on the ground that she failed to prove the Castillos’ defaults. Doc. 105. Here, the plaintiff once again fails to establish that the Castillos defaulted. One document she submits, purportedly an affidavit in support of the motion, is a redacted bank statement. Doc. 110. Although she also submits an actual affidavit in which she attests that the Castillos were served with process, she fails to state therein that the Castillos failed to answer or otherwise appear in this action. Doc. 115. Therefore, the plaintiff’s motion for a default judgment is once again denied with leave to renew upon proper papers.

Plaintiff’s Motion To Disqualify Counsel (Mot. Seq. 008)

Plaintiff’s motion to disqualify Raysa Castillo as counsel for the Castillos must be denied as well. The decision whether to grant a motion to disqualify counsel rests in the discretion of the motion court (*see Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 5-6 [1st Dept 2015] [citation omitted]).

“Disqualification . . . during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a party’s right to representation by the attorney of its choice” (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). The right to counsel is “a valued right and any restrictions must be carefully scrutinized” (*id.*). Furthermore, where the rules relating to professional conduct are invoked not at a disciplinary proceeding but “in the context of an ongoing lawsuit, disqualification . . . can [create a] strategic advantage of one party over another” (*id.*). Thus, the movant must meet a heavy burden of showing that disqualification is warranted (*see Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept

1997]). Disqualification is required only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests (*see id.*).

(*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-470 [1st Dept 2013]).

Initially, despite the fact that the motion seeks to disqualify counsel, plaintiff's notice of motion seeks relief pursuant to CPLR 3215, which is the statute pertaining to default judgments. Where, as here, a party's notice of motion fails to properly request the relief it seeks, the court has the discretion to deny the relief. (*See Arriaga v Laub Co.*, 233 AD2d 244, 245 [1st Dept 1996]). However, since the plaintiff requested the disqualification of Raysa Castillo in her wherefore clause, this Court may grant the relief sought (*id.*). Moreover, this Court may consider plaintiff's argument because both sides addressed this issue in their motion papers and, thus, the Castillos will not be prejudiced as a result (*See Frankel v Stavsky*, 40 AD3d 918, 918-919 [2d Dept 2007]).

With respect to the merits, the defendants have failed to meet the burden necessary to disqualify Raysa Castillo. Initially, a purported affidavit in support of the motion is the same redacted bank statement submitted in support of plaintiff's renewed default motion. Doc. 113. Although the plaintiff does submit a separate document which is an actual affidavit in support of the motion, it merely contains her conclusory representation that "Raysa Castillo is a necessary fact witness in this case." Doc. 116 at par. 8.

In a memorandum of law in support of the motion, the plaintiff argues that she will be prejudiced if Raysa Castillo is not disqualified because the latter has a conflict of interest. Doc. 114. Specifically, urges the plaintiff, since Raysa Castillo was hired by the Castillos to negotiate the contract they had with the plaintiff, she (Raysa Castillo) cannot argue that the contract is not binding. Aside from being unsupported by any legal authority, this argument is logically deficient

since there is a plethora of potential reasons why an attorney who drafted an agreement may subsequently assert that the agreement is unenforceable.

Additionally, the plaintiff has failed to demonstrate why Raysa Castillo's testimony would be necessary in this action. In *S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446 [1987]), the Court of Appeals, in addressing the issue of whether an attorney's testimony is necessary, stated that:

whether a witness "ought" to testify is not alone determined by the fact that he has relevant knowledge or was involved in the transaction at issue. Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary []. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence []."

Here, although the plaintiff undoubtedly asserts that Raysa Castillo's testimony would be significant herein, she does not address the weight of the potential testimony or the availability of other evidence. Since the plaintiff fails to establish that Raysa Castillo's testimony will be necessary in this action, or that her testimony would result in prejudice to the plaintiff, the motion must be denied (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 469-470 [1st Dept 2013]; cf. *Matter of Ehrlich v Wolf*, 127 AD3d 613, 614 [1st Dept 2015]).

Plaintiff's Motion To Strike The Castillos' Answer (Mot. Seq. 009)

Plaintiff's notice of motion to strike the Castillos' answer also seeks relief pursuant to CPLR 3215. Doc. 118. However, since the wherefore clause of the plaintiff's affidavit seeks to strike the Castillos' answer, and the parties addressed the striking of the answer in their papers, this Court will address this issue (*Frankel v Stavsky*, 40 AD3d 918, 918-919 [2d Dept 2007]).

The Castillos were personally served with process in this matter on May 21, 2021. Docs. 5 and 6. Thus, their answers were due within twenty days (*see* CPLR 3012[a]). However, since it was not until March 4, 2022 that Raysa Castillo filed a “Notice of Appearance and Amended Answer” on behalf of the Castillos, the answer was clearly untimely. Doc. 108. After the Castillos filed their untimely answer, the plaintiff moved almost immediately, on March 8, 2021, to strike the same. Doc. 117.

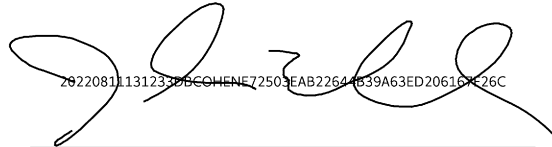
CPLR 3012(d) allows a defendant to move for an extension of time to file a late answer “upon a showing of reasonable excuse for delay or default.” Since the Castillos did not move for permission to file their untimely answer, that pleading is a nullity and, thus, the plaintiff’s motion to strike the same is granted (*see Zino v Joab Taxi, Inc.*, 20 AD3d 521 [2d Dept 2005] [IAS court precluded from deeming defendant’s answer timely served nunc pro tunc in the absence of a motion for such relief]). However, since public policy strongly favors the resolution of cases on the merits (*see Cuenca v Beach 65 LLC*, 192 AD3d 452 [1st Dept 2021]) the Castillos may seek leave to file their late answer pursuant to CPLR 3012(d), should they be so advised.

Accordingly, it is hereby:

ORDERED that the motion by plaintiff Catherine Gibson seeking a default judgment against defendants Jose Castillo and Maria Castillo pursuant to CPLR 3215 (mot. seq. 007) is denied with leave to renew upon proper papers, for the final time, within 30 days of entry of this order, and the plaintiff’s failure to refile the motion within such time frame shall result in the preclusion of the plaintiff from seeking this relief; and it is further

ORDERED that the motion by plaintiff Catherine Gibson seeking to disqualify Raysa Castillo as attorney for defendants Jose Castillo and Maria Castillo (mot. seq. 008) is denied; and it is further

ORDERED that the motion by plaintiff Catherine Gibson seeking to strike the purported answer filed by defendants Jose Castillo and Maria Castillo as NYSCEF Doc. No. 108 on March 4, 2022 (mot. seq. 009) is granted.



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8/11/2022

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE