

**Matin v Chowdhury**

2020 NY Slip Op 32491(U)

June 18, 2020

Supreme Court, Queens County

Docket Number: 701633/2019

Judge: Joseph Risi

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Short Form Order

**FILED**

NEW YORK SUPREME COURT - QUEENS COUNTY

**6/23/2020**

**12:48 PM**

Present: HONORABLE JOSEPH RISI  
A. J. S. C.

IA Part 3

**COUNTY CLERK  
QUEENS COUNTY**

-----X  
MOHAMMED MATIN and ALIF SAMI CORP.,

Index  
Number 701633/2019

Plaintiffs,

-against-

**DECISION/ORDER**

NAVILA CHOWDHURY,

Motion Seq. #2

Defendant.

-----X  
NAVILA CHOWDHURY,

Third-Party Plaintiff,

-against-

SUBWAY SANDWICH SHOPS, INC., THE BILLAH  
LAW FIRM, PLLC, and MOHAMMED BILLAH, ESQ.

Third-Party Defendants.  
-----X

The following numbered papers read on this motion by third-party defendants The Billah Law Firm, PLLC and Mohammed Billah, Esq. (“Billah defendants”) to dismiss the third-party complaint against them pursuant to CPLR §3211(a)(1) and (a)(7) and for sanctions against third-party plaintiff Navila Chowdhury (“Chowdhury”) pursuant to 22 NYCRR 130-1.1; and on this cross motion by Chowdhury for a default judgment against the Billah defendants pursuant to CPLR §3215 for failure to timely answer the third-party complaint.

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits .....	EF 30 - 33
Notice of Cross Motion - Affidavits - Exhibits .....	EF 37 - 43
Answering Affidavits - Exhibits .....	EF 45

Reply Affidavits ..... EF 44

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

Initially, the court will address Chowdhury’s cross motion for a default judgment against the Billah defendants pursuant to CPLR §3215. In response to the Billah defendants’ motion to dismiss, Chowdhury cross moved for a default judgment against the Billah defendants, arguing that the Billah defendants never interposed an answer to the third-party complaint and that their motion to dismiss is untimely. On a motion for leave to enter a default judgment pursuant to CPLR §3215, the plaintiff is required to file proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendant’s default in answering or appearing (CPLR §3215[f]; see Atlantic Cas. Ins. Co. v RJNJ Servs., Inc., 89 AD3d 649, 651 [2d Dept 2011]; Allstate Ins. Co. v Austin, 48 AD3d 720 [2d Dept 2008]). To avoid entry of a default judgment and to compel a plaintiff to accept an untimely answer, a “defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to . . . extend the time to answer” (Ennis v Lema, 305 AD2d 632, 633 [2d Dept 2003]; see Holubar v Holubar, 89 AD3d 802 [2d Dept 2011]; Wells Fargo Bank, N.A. v Cervini, 84 AD3d 789 [2d Dept 2011]; Equicredit Corp. of Am. v Campbell, 73 AD3d 1119, 1121 [2d Dept 2010]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the court (see Wells Fargo Bank, 84 AD3d at 789; Matter of Gambardella v Ortov Light., 278 AD2d 494, 495 [2d Dept 2000]).

In support of her cross motion, Chowdhury adequately demonstrated that the Billah defendants failed to answer or otherwise appear in the third-party action within the requisite timeframe, despite having been served with process (CPLR §3215[f]; see HSBC Bank USA, N.A. v Alexander, 124 AD3d 838 [2d Dept 2015]; U.S. Bank, N.A. v Razon, 115 AD3d 739, 740 [2d Dept 2014]). In opposition, however, the court finds that the Billah defendants set forth a reasonable excuse and made a sufficient showing of the existence of a potentially meritorious defense to the action by presenting evidence demonstrating that they did not provide legal representation to Chowdhury in the underlying sales transaction and the management agreement at issue. Based on the foregoing, Chowdhury’s cross motion for a default judgment against the Billah defendants is denied and, in turn, the court will address the merits of the Billah defendants’ motion to dismiss the third-party complaint against them.

On a motion to dismiss pursuant to CPLR §3211, the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (see Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001]). The role of the court is to “determine only whether the facts as alleged fit within any cognizable legal theory” (id.). Where, as here, evidence is submitted by the movant in support of a CPLR §3211(a)(7) motion, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (see Hartman v Morganstern, 28 AD3d 423 [2d Dept 2006]; Steiner v Lazzaro & Gregory, 271 AD2d 596 [2d Dept 2000]). Where documentary evidence definitively

contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR §3211(a)(1) is warranted (*see DiGiacomo v Levine*, 76 AD3d 946, 949 [2d Dept 2010]; *Berardino v Ochlan*, 2 AD3d 556, 557 [2d Dept 2003]).

Applying these principles to the case at bar, the court concludes that the allegations of the third-party complaint as well as certain documentary evidence submitted by the Billah defendants, including e-mails and the underlying management agreements between Chowdhury and the plaintiff in the main action, Mohammed Matin ("Matin"), do not conclusively establish as a matter of law that the Billah defendants are entitled to dismissal of the third-party claim for legal malpractice asserted against them. In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Von Duerring v Hession & Bekoff*, 71 AD3d 760 [2d Dept 2010]). To establish causation, a plaintiff must show that, but for the lawyer's negligence, he or she would have prevailed in the underlying action or would not have incurred any damages (*id.*).

Here, the third-party complaint sufficiently alleges a claim for legal malpractice by stating that, in 2018, Chowdhury believed that the Billah defendants were acting as her attorney with respect to the management agreement and the purchase agreement between Matin and Chowdhury, and that the Billah defendants were negligent in failing to advise and discuss with Chowdhury all the legal rights and remedies available to her, failing to know the applicable law, and failing to advise Chowdhury of a conflict of interest in representing both Matin and Chowdhury in connection with the management agreement. The third-party complaint further alleges that, as a result of this alleged negligence, Chowdhury signed the management agreement that she would have not otherwise signed and forewent legal action to recover the \$95,000.00 paid by Chowdhury in the purchase of the subject Subway restaurant. The Billah defendants primarily argue that they did not provide legal representation to Chowdhury in connection with the management agreement and subsequent asset purchase agreement between Chowdhury and Matin. In support of their motion, the Billah defendants submitted an email dated June 28, 2016, in which it was stated that the Billah defendants represented Matin in the preparation of the contract of sale between Matin and Chowdhury and that Chowdhury informed Matin that she would not be represented by an attorney in the transaction, as well as the signed asset purchase agreement between the parties dated April 13, 2018, the signed management agreement between the parties dated October 4, 2017, and the signed management agreement between the parties dated January 16, 2018. These documents, however, do not completely disprove Chowdhury's factual allegations of legal malpractice surrounding the events that occurred in connection with the management agreement and the asset purchase agreement between Matin and Chowdhury in 2018.

Likewise, that branch of the motion to dismiss the third-party cause of action alleging fraud against the Billah defendants is denied. To state a cause of action for fraud, a plaintiff must allege that a person knowingly misrepresented a material fact, upon which the plaintiff justifiably relied, resulting in damages (*see Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950 [2d Dept 2013]).

Here, the third-party cause of action for fraud alleges that Matin engaged in fraud in an effort to get Chowdhury to sign the management agreement and asset purchase agreement in 2018 and the Billah defendants assisted Matin by purporting to act as Chowdhury and Matin’s attorney in the preparation and signing of those agreements as well as failing to advise Chowdhury of the conflict of interest by representing both parties and failing to provide her with proper legal advice regarding the recovery of the \$95,000.00 she paid toward the purchase of the subject restaurant, which resulted in Chowdhury signing the management agreement and subsequent asset purchase agreement. The complaint further alleges that, during the consultation on January 16, 2018, the Billah defendants requested Chowdhury pay \$500.00 in cash as her share of the fee for their legal representation in connection with the transaction. Based on a careful review of the emails and signed contracts submitted by the Billah defendants in support of their motion, as described above, the court finds that such documentary evidence does not conclusively dispose of the allegations of fraud asserted against the Billah defendants.

That branch of the Billah defendants’ motion for sanctions and costs against Chowdhury for commencement of a frivolous lawsuit against them is denied. The court, in its discretion, may award reasonable costs or financial sanctions against an attorney or party resulting from frivolous conduct (22 NYCRR §130-1.1[a]). Frivolous conduct is defined as conduct that is (1) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, (2) undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another, or (3) asserts material factual statements that are false (22 NYCRR §130-1.1[c]). To determine whether conduct is frivolous, the court must consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party (*id.*).


In this case, the evidence does not demonstrate that the within action was commenced in bad faith or primarily to harass or maliciously injure the Billah defendants, that Chowdhury’s claims are completely without legal merit, or that Chowdhury’s conduct was frivolous within the meaning of 22 NYCRR §130-1.1(c) (*see e.g. Providence Wash. Ins. Co. v Munoz*, 85 AD3d 1142 [2d Dept 2011]; *Mimoun v Zicherman*, 293 AD2d 585 [2d Dept 2002]). Therefore, under these circumstances, the imposition of sanctions and costs for frivolous conduct pursuant to 22 NYCRR §130-1.1 is unwarranted.

Accordingly, the motion and cross motion are denied.

This is the decision and order of the Court.

Dated: June 18, 2020

FILED

  
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Hon. Joseph Risi, A.J.S.C.

6/23/2020

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