

**Quinn Emanuel Urquhart Oliver & Hedges, L.L.P. v
Tufenkian**

2005 NY Slip Op 30123(U)

January 10, 2005

Supreme Court, New York County

Docket Number: 0602196/2005

Judge: Marilyn Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 36

Justice

Index Number : 602196/2005
QUINN EMANUEL URQUHART OLIVER
vs
TUFENKIAN, JAMES
Sequence Number : 001
DISMISS ACTION

INDEX NO. 602196/05
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *be denied*
pursuant to attached Reason

FILED
NOV 22 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/10/05

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP,

Plaintiff,

Index No. 602196/05

-against-

JAMES TUFENKIAN and TUFENKIAN
IMPORT/EXPORT VENTURES, INC. d/b/a
TUFENKIAN CARPETS,

Defendants.

-----X

Marilyn Shafer, J.:

Defendants James Tufenkian (Tufenkian) and Tufenkian Import/Export Ventures, Inc., d/b/a Tufenkian Carpets (Tufenkian Carpets) (together, defendants) move for dismissal of the complaint in this action for attorney's fees. Defendants alleged that plaintiff Quinn Emanuel Urquart Oliver & Hedges, LLP, a law firm, is not entitled to attorney's fees because of the firm's alleged failure to comply with 22 NYCRR 1215.1, which requires, in certain circumstances, that an attorney who undertakes to represent a client must first provide the client with an adequate written letter of engagement.

Tufenkian is the Chief Executive Officer of Tufenkian Carpets. According to plaintiff, Tufenkian, both in his individual capacity, and on behalf of Tufenkian Carpets approached plaintiff in September 2004 to represent defendants in

an action in the United States District Court for the Southern District of New York entitled *Nicholls v Tufenkian Import/Export Ventures Inc. d/b/a Tufenkian Carpets and James Tufenkian*, No. 04 Civ 2110, (the action). At that time, and according to plaintiff, the parties entered into an engagement letter (the engagement letter) regarding the services that plaintiff was to perform for defendants. Plaintiff maintains that the engagement letter was meant to include both Tufenkian individually, and Tufenkian Carpets, and is signed by Tufenkian to reflect that fact.

Plaintiff alleges that it provided defendants with valuable legal services which allowed defendants to prevail in the action. However, although defendants paid an initial retainer of \$50,000, they were slow to pay subsequent bills, and eventually refused to pay the full balance of plaintiff's invoices. Plaintiff claims to be owed \$168,775.91.

Defendants maintain that they do not have to pay the balance of plaintiff's fees, based on plaintiff's alleged failure to provide a sufficient engagement letter to them under 22 NYCRR 1215.1. This section, as applicable, reads as follows:

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

(1) if otherwise impracticable; or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

The basis for defendants' refusal to pay the remainder of plaintiff's invoices are (1) that the letter does not include Tufenkian in his individual capacity, so that he is not bound thereby; and (2) that the letter does not include the provision regarding Tufenkian Carpets' right to arbitration, and so, is a nullity as to both defendants.

Although there apparently has not yet been appellate review of section 1215.1, several lower courts have spoken of the absolute need for an attorney to provide a client with an engagement letter before a fee can be collected. See *Nadelman v Goldman*, 7 Misc 3d 1011(A) (Civ Ct, New York County 2005); *Klein Calderoni & Santucci, LLP v Bazerjian*, 6 Misc 3d 1032(A) (Sup Ct, Bronx County 2005); *Feder, Goldstein, Tanenbaum & D'Errico v Ronan*, 195 Misc 2d 704 (District Ct, Nassau County 2003). However, some courts have suggested that, in the absence of an engagement letter, an award in quantum meruit, allowing the

attorney to retain the amounts already paid to it by the client, would not be inappropriate. See *Grossman v West 26th Corp.*, 9 Misc 3d 414 (Civ Ct, Kings County 2005); *Lewin v Law Offices of Godfrey G. Brown*, 8 Misc 3d 622 (Civ Ct, Kings County).¹

In the present case, the engagement letter on its face does not include the name of Tufenkian as the party to be represented; only Tufenkian Carpets is named². Although Tufenkian executed the letter, there is no indication that he did so in any capacity other than as Tufenkian Carpet's representative. Therefore, there was never an engagement letter between plaintiff and Tufenkian.

Plaintiff argues that it did indeed represent Tufenkian individually, in that he personally approached plaintiff to represent both himself and Tufenkian in the action; that they dealt with Tufenkian personally throughout the trial, and performed legal services to Tufenkian in his personal capacity; and that plaintiffs always held itself out as representing both

¹One court, in *Matter of Estate of Feroletto* (6 Misc 3d 680 [Sur Ct, Bronx County 2004), while acknowledging that a failure to comply with 22 NYCRR 1215.1 required that fees be denied to the law firm, nevertheless allowed an award in quantum meruit for all the legal work which had been performed on behalf of the client.

²Defendants make a significant fuss over the fact that the first page of the engagement letter was missing from the copy presented on this motion, as evidence of plaintiff's deliberate attempt to obfuscate the fact that Tufenkian was not named in the engagement letter. The court find the omission both inadvertent, and unimportant.

parties at trial.

None of these excuses suffices to alter the fact that no engagement letter naming Tufenkian individually exists. It is natural that Tufenkian acted as agent for his company, sitting besides plaintiff's attorney during the action, and seeking plaintiff's advice. None of these actions binds Tufenkian to the engagement letter. And, to the extent that plaintiff did legal work for Tufenkian, it did so without an engagement letter. In consequence, Tufenkian cannot be held liable for plaintiff's outstanding invoices.

Plaintiff's failure to inform Tufenkian Carpet in the engagement letter that it had a right to arbitrate does not, however, afford this defendant the windfall it would receive if this omission were to serve to invalidate the engagement letter.

22 NYCRR 1215.1 (b) (3) states that the engagement letter "where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title." Part 137.0 provides that fee disputes shall be arbitrated. Section 137.1 (b) lists when the Part shall not apply, and includes "amounts in dispute involving a sum of less than \$1,000 or more than \$50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented." Section 137.1 (b) (2).

The amount in dispute in the instant action exceeds \$50,000,

which indicates that defendant would not have the right to arbitrate the matter under Part 137. Therefore, 22 NYCRR 1215.1 (b) (3) would not come into play, and plaintiff's failure to include the advice would not vitiate the engagement letter.

At least one court has determined that the failure to include an arbitration clause in an engagement letter creates a meritless argument where the client has not asked for arbitration, and "has merely argued that he should be absolved from paying the attorney anything, even for expenses." *Miller v Phillips Bryant Park, LLC*, 2005 WL 1430474, *2 (SD NY 2005). The *Miller* court decried such a tactic as seeking a windfall, since under Part 137, the client in *Miller* was also not entitled to arbitrate the matter. The *Miller* court held that an attorney could not be deprived of a fee for services rendered "merely because the retainer agreement, otherwise entirely adequate, does not contain a *pro forma* reference to the possibility that some forms of fee dispute - but not the type actually in issue here - may be subject to arbitration at the client's request"

This court agrees with this reasoning, especially, as in *Miller*, Tufenkian Carpets has no right to arbitrate the fee dispute at hand in any event. Consequently, the failure of plaintiff to refer Tufenkian Carpets to the possibility of arbitration does not allow Tufenkian Carpets the windfall which would result should it be allowed to avoid any fees which

plaintiff might prove to be owing.

As a result of the foregoing, dismissal as to Tufenkian is appropriate, while dismissal of Tufenkian Carpets is not.

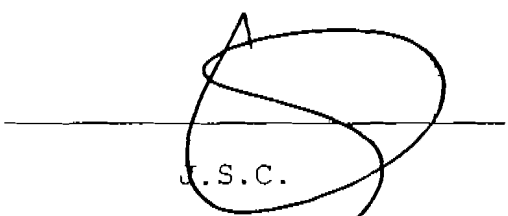
Accordingly, it is

ORDERED that the motion brought by defendants James Tufenkian and Tufenkian Import/Export Ventures, Inc., d/b/a Tufenkian Carpets is granted as to James Tufenkian, and denied as to Tufenkian Import/Export Ventures, Inc.; and it is further

ORDERED that Tufenkian Import/Export Ventures, Inc. is directed to serve an answer to the complaint within 10 days of receipt of this order with notice of entry.

Dated: 11/10/05

ENTER:



J.S.C.

HON. MARILYN SHAFER, JSC

FILED
NOV 22 2005
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