

**Russo, Scamardella & D'Amato, P.C. v Hanley
Conroy Bierstein Sheridan Fisher & Hayes, LLP**

2007 NY Slip Op 32555(U)

August 16, 2007

Supreme Court, Richmond County

Docket Number: 0100803/2007

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

Index No.: 100803/07
Calendar Nos: 762 - 001
892 - 002
893 - 003

RUSSO, SCAMARDELLA & D'AMATO, P.C.,

Plaintiff

against

**HANLEY CONROY BIERSTEIN SHERIDAN FISHER
& HAYES, LLP, HANLEY & CONROY, LLP,
THE SIMMONS FIRM, LLC AND SIMMONS COOPER,
LLC.,**

Defendants

**DECISION
HON. JOSEPH J. MALTESE**

The following papers were considered in the review of this Order to Show Cause and motions:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause and Affidavits Annexed	1
Notice of Cross Motion and Affidavits Annexed	2
Notice of Cross Motion and Affidavits Annexed	3
Answering Affidavits	4
Replying Papers	5,6
Exhibits	Attached to Papers
Memorandum of Law	Attached to Papers

Upon the foregoing cited papers, petitioner's application for a preliminary injunction and for an order compelling discovery, is granted in its entirety. The cross motion of defendant THE SIMMONS FIRM, LLC to dismiss is granted only to the extent that plaintiff's first and third causes of action are dismissed as against it; the balance of the motion seeking to compel arbitration in Illinois, and the cross motion of defendant HANLEY CONROY BIERSTEIN SHERIDAN FISHER & HAYES, LLP, for like relief, are denied.

Petitioner/plaintiff RUSSO, SCAMARDELLA & D'AMATO commenced an action to recover legal fees allegedly due based on its participation in the settlement of claims related to the OxyContin litigation with pharmaceutical company Purdue-Pharma. It has been alleged that RUSSO, SCAMARDELLA & D'AMATO (hereinafter RSD) entered into an agreement with defendant/respondent HANLEY & CONROY, LLP (hereinafter HANLEY CONROY), dated July 16, 2003, to market and prosecute civil claims against Purdue-Pharma for the manufacture and distribution of the drug OxyContin.

Pursuant to the terms of the agreement, RSD was responsible for marketing the OxyContin litigation and for the intake of potential clients as a result of such marketing, including, *inter alia*, developing an information package for potential clients, obtaining information from potential clients, conducting initial screening of clients, obtaining client retainers, and performing all aspects of pre-trial, trial and post-trial work to its conclusion. The cost, however, of such marketing would be equally shared by RSD and HANLEY CONROY. As is relevant here, the agreement further provided that all fees from the litigation shall be equally shared, including fees generated from settlements, judgments or otherwise, as well as the shares of fees generated from OxyContin cases that were referred to other lawyers (in other states). The agreement further provided that "all cases generated through our cooperative marketing activities shall be subject to this fee agreement, whether filed in New York or another jurisdiction" (*see* RSD's Exhibit A).

It has been further alleged that another agreement, referred to by the parties as the "OxyContin Global Fee Agreement", was executed on January 9, 2004, by RSD, HANLEY CONROY, codefendant THE SIMMONS FIRM, LLM (hereinafter SIMMONS), and two other law firms, that are not parties to this current litigation. This agreement provided for, *inter alia*, litigation responsibility and fee sharing among the signatories of the agreement. HANLEY CONROY contends that this agreement supercedes its prior agreement with RSD, RSD contends that it does not. Following the settlement agreement with Purdue-Pharma, the aggregate legal fees were alleged to be approximately \$28 million and are being held in escrow by codefendant SIMMONS.

In the current application, RSD seeks a preliminary injunction prohibiting defendants from distributing, paying, utilizing or accepting any legal fees arising out of the settlement of claims and actions relating to the OxyContin litigation pursuant to a settlement agreement with Purdue-Pharma, including the 1,121 individual actions filed in this Court, pending the final determination by this Court, and a declaration by this Court regarding the equitable and legal rights of the plaintiff and defendants to such legal fees; and in the event that defendants have already utilized any part of the fees, that such fees be returned and deposited into an interest-bearing escrow account pending final determination.

RSD also seeks the production of discovery with regard to documents relating to the computation, determination and allocation of the parties' respective rights and shares to the subject legal fees.

Defendant SIMMONS opposes the application and cross-moves to dismiss plaintiffs first and third cause of action. According to SIMMONS, the only connection between itself and plaintiff is the January 9, 2004 Global Fee Agreement, and that plaintiff's first cause of action relates only to the agreement between RSD and HANLEY CONROY.

With regard to the third cause of action, SIMMONS contends that RSD cannot recover under breach of contract, and under a theory of quantum meruit. As such, SIMMONS contends that RSD's third cause of action against it should be dismissed.

SIMMONS also cross-moves for an order compelling arbitration under the terms of the OxyContin Global Fee Agreement in Madison County, Illinois. According to SIMMONS, the clear language of the arbitration clause contained in this agreement expressly provides that any disputes under the agreement shall be resolved by arbitration in Illinois.

HANLEY CONROY also cross-moves to compel arbitration in Illinois pursuant to the January 9, 2004 “OxyContin Global Fee Agreement”, and for a stay of proceedings pending such arbitration.

The motion is decided as follows:

Plaintiff’s order to show cause for a preliminary injunction is granted. It is well settled that the granting of a preliminary injunction lies within the discretion of the court (see CPLR Article 63). Here, it is the opinion of this Court that plaintiff has established, for the purpose of this application, its entitlement to equitable protection given the substantial settlement award obtained by the parties in the underlying mass tort action. Moreover, given the fact that the purpose in granting injunctive relief is to maintain the status quo (*see Chrysler Corp. v. Fedders Corp.*, 63 AD2d 567, 569), it is the opinion of this Court that a preliminary injunction, preventing the distribution of fees pending the outcome of the underlying litigation is the most appropriate remedy on these facts in the current situation.

With regard to RSD’s application insofar as it seeks discovery, it is well settled that CPLR 3101(d) entitles parties to full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. What is “material and necessary” has been left to the sound discretion of the court and may include “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*see Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406). Here, it is the opinion of this Court that regardless of whether the claims are resolved here, or proceed to arbitration in Illinois, plaintiffs are entitled to the documents requested, since they are both relevant and material and necessary to the prosecution of such claims. As such, defendants shall respond to such demand within the time period hereinafter provided.

With regard to SIMMONS' cross motion to dismiss plaintiff's first and third causes of action, it is the opinion of this Court that plaintiff's first cause of action as against SIMMONS must be dismissed as it fails to allege any wrongdoing on SIMMONS' part with regard to the agreement between RSD and HANLEY CONROY. Moreover, SIMMONS was not a party to that agreement, and therefore, cannot be said to have committed any breach thereof.

Similarly, plaintiff's third cause of action as against SIMMONS must be dismissed in view of the existence of a valid and enforceable written contract between the parties, which precludes plaintiff from recovering under a the theory of quantum meruit (*see Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 NY2d 382). Here, plaintiff does not dispute the existence of two valid contracts, and argues, in fact, that the second contract (Oxy Contin Global Fee Agreement) does not supercede its agreement with HANLEY CONROY. Accordingly, it cannot be said that there is no written agreement between the parties which would require the Court's finding of a quasi-contract in order to permit plaintiff a recovery, over and above that already provided for in the two agreements.

With regard to the cross motion which seeks an order compelling arbitration, both HANLEY CONROY and SIMMONS contend that the OxyContin Global Fee Agreement contains an arbitration clause specifically stating that "any dispute hereunder shall be resolve by arbitration brought in Madison County, Illinois". HANLEY CONROY also contends that the July 16, 2003 agreement with RSD was superceded by the subsequent agreement, and therefore, the parties are required to arbitrate any fee disputes in Madison County, Illinois. This court disagrees with HANLEY CONROY'S contention.

There is no indication that RSD and HANLEY CONROY specifically contemplated that the OxyContin Global Fee Agreement was intended to supercede or substitute the prior agreement executed by RSD and HANLEY CONROY, nor is there any specific language in the OxyContin Global Fee Agreement, such as a general merger clause, indicating a merger of the two agreements. Therefore, it is the opinion of this Court that two separate agreements exist between RSD and HANLEY CONROY.

Under the first agreement, RSD commenced and completed the work contemplated by that agreement and filed 1,117 separate actions *in this Court*, all of which resulted in a settlement agreement. According to that agreement, RSD is entitled, *inter alia*, to a certain percentage of legal fees, which is disputed by HANLEY CONROY. Absent, however, is a clause providing for the arbitration of any disputes arising from that agreement.

The OxyContin Global Fee Agreement, however, specifically provides for the arbitration of any disputes arising under the agreement to be held in Illinois. This Court does not dispute the validity of the arbitration clause in that agreement, nor is the Court disputing the applicability of the Federal Arbitration Act, where, as here, the parties provided for arbitration in Illinois, (*see Fletcher v. Kidder, Peabody & Co.*, 81 NY2d 623, 630-631). However, this Court nevertheless disagrees with its applicability to the earlier agreement between RSD and HANLEY CONROY, which does not provide for arbitration., nor which was incorporated by reference in the OxyContin Global Fee Agreement.

It is well settled that the question of arbitrability , in the first instance must be determined by the Court (*see Matter of Smith Barney Shearson, Inc. v. Sacharow*, 91 NY2d 39). Here, the Court is faced with two agreements, one containing an arbitration clause, and one that does not. Ordinarily, when faced with such agreements, many courts have resolved the issue in favor of the agreed-upon arbitration clause (*see Matter of Primex Int'l Corp. v. Walmart Stores, Inc.*, 89 NY2d 594). What is critical here, however, is the fact that many of the cases were commenced in New York and brought to settlement here in New York.

Forwarding the issue of fee disputes to an out-of-state arbitrator who is alien to the issues involved in the mass tort litigation in New York, would not effectuate the judicial control contemplated by the New York Judiciary Law is overseeing New York attorneys and those permitted to practice in New York. Accordingly, it is the opinion of this Court that the appropriate remedy would be to resolve those New York fee dispute issues in this court or to compel arbitration here in

New York with regard to the actions that were brought in this forum. Fee disputes over the remaining cases brought outside of New York may be determined in another forum if governed by the OxyContin Global Fee Agreement. Although the Court is mindful of the freedom of the parties to negotiate the terms of its own agreements, the Court, nevertheless must play the role of gatekeeper so as to supervise the charging of fees for legal services under the court's inherent authority to regulate the practice of law in this state (*see Stortecky v. Mazzone*, 85 NY2d 518, 525).

Accordingly, it is hereby:

ORDERED, that plaintiff's order to show cause is granted and a preliminary injunction is issued; and it is further

ORDERED, that defendant HANLEY CONROY respond to plaintiff's demand for expedited discovery within 20 days of service of this Order with Notice of Entry upon it; and it is further

ORDERED, that the cross motion of defendant THE SIMMONS FIRM, LLC is granted to the extent that plaintiff's first and third cause of action against it is hereby severed and dismissed, and the balance of the motion for an order compelling arbitration in Illinois in accordance with the OxyContin Global Fee Agreement, is denied to the extent that all disputes arising from cases commenced in this jurisdiction shall be subject to adjudication here in New York; and it is further

ORDERED, that the cross motion of defendant HANLEY CONROY BIERSTEIN SHERIDAN FISHER & HAYES, LLP to stay the proceedings and compel arbitration in Illinois in accordance with the OxyContin Global Fee Agreement, is denied to the extent that all disputes arising from cases commenced in this jurisdiction shall be subject to adjudication here in New York.

E N T E R,

DATED: August 16, 2007

Joseph J. Maltese
Justice of the Supreme Court