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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 110893/2006

KAYE SCHOLER LLP

VS

FAILSAFE AIR SAFETY SYSTEMS

Sequence Number : 001

PARTIAL SUMMARY JUDGEMENT

INDEX NO. 110893/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-F	1
Answering Affidavits — Exhibits Cross-motion and 1-16	2, 3
Replying Affidavits + Exhibits A-B	4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED
JAN 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

DEC 21 2007

Dated: _____

MARTIN SHULMAN 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: PART 1

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KAYE SCHOLER LLP,

Index No. 110893/06

Plaintiff,

- against -

FAILSAFE AIR SAFETY SYSTEMS CORP.,

Defendant.

----------X

MARTIN SHULMAN, J.:

Plaintiff Kaye Scholer LLP ("plaintiff") commenced this action to recover legal fees, disbursements, and costs that defendant Failsafe Air Safety Systems Corp. ("defendant") allegedly owes to it. Plaintiff now moves for partial summary judgment on its claims of account stated and breach of contract in the amount of $522,777.56. Defendant cross-moves to dismiss the complaint.

Plaintiff alleges that, in November 2002, defendant retained it to handle matters pertaining to intellectual property rights, as well as general corporate matters. Between November 2002 and October 31, 2003, plaintiff performed legal services on defendant's behalf, including preparing patent applications and related documents in the United States and other countries, advising defendant about licensing matters, and researching various legal issues. On February 10, 2003, the parties executed a written retainer agreement (the "Retainer Agreement"), memorializing their prior oral agreement, and setting forth the scope of the work to be performed. Thereafter, the parties acknowledged the validity of the alleged outstanding fees through October 31, 2003 in the amount of $375,004.43 by entering into a written agreement dated as of

November 21, 2003 (the "November 2003 Agreement") which *inter alia* sets forth a payment plan.

Plaintiff alleges further that, as of the date of the complaint, defendant owes it $522,777.56 for legal services that it rendered on defendant's behalf, and that plaintiff has repeatedly demanded payment, to no avail. This action ensued.

The complaint contains six causes of action for: (1) breach of contract (the November 2003 Agreement); (2) breach of contract (the Retainer Agreement); (3) account stated; (4) quantum meruit; (5) unjust enrichment; and (6) declaratory judgment. Of these theories of liability, plaintiff presently seeks recovery based on account stated and breach of contract.

In support of its cross motion to dismiss the complaint, defendant argues that plaintiff has not complied with Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR 137, *et seq.*), because the complaint in this action for attorneys' fees fails to allege either that plaintiff sent defendant notice under Section 137.6 of the client's right to arbitrate, or that Part 137 does not cover this dispute.

Plaintiff argues that Part 137 does not apply to attorneys' fee disputes involving amounts less than $1,000 or more than $50,000, and that plaintiff satisfied any pleading requirement under this rule by alleging facts establishing the inapplicability of Part 137. Plaintiff's assertion is unpersuasive, and for the reasons that follow, the cross motion is granted, and the complaint is dismissed without prejudice.

New York's "Fee Dispute Resolution Program," codified at Rules of the Chief Administrator of the Courts (22 NYCRR 137, *et seq.*), "provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration

and mediation" (22 NYCRR 137.0). Where an attorney and client cannot agree as to the amount of the attorney's fee, the attorney is required to provide the client with 30 days' written notice of the client's right to elect to resolve the dispute by arbitration (22 NYCRR 137.6 [a]).

These rules specifically provide, however, that they do not apply where the amount in controversy is more than $50,000, which is the case here, unless the parties consent to arbitration (22 NYCRR 137.1 [b] [2]; *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v. Torino Jewelers, Ltd.*, 44 A.D.3d 581, 844 N.Y.S.2d 242 [1st Dept., 2007]). Although the amount at issue places this matter outside the scope of the fee dispute resolution program, the complaint must, nevertheless, expressly acknowledge such circumstance. In this regard, Section 137.6 (b) provides, in relevant part, that an attorney who institutes an action to recover a fee must allege in the complaint:

> (i) that the client received notice under this Part of the client's right to pursue arbitration; or
>
> (ii) that the dispute is not otherwise covered by this Part.

The complaint here does not recite either of these statements, and it contains no reference to the fee dispute resolution program. The failure to comply with this statutory requirement mandates dismissal of the complaint. *Kerner and Kerner v. Dunham*, ____ N.Y.S.2d ____, 2007 WL 4394903 (1st Dept.)(complaint was properly dismissed for failure to allege that the dispute was not covered by the Fee Dispute Resolution Program, without prejudice to commencement of new action). Compliance is a mandatory pleading requirement, including compliance with subsection two, quoted above (i.e., where the pleader asserts that the dispute is not covered by Part 137)

(*Wexler & Burkhart, LLP v. Grant*, 12 Misc.3d 1162 [A], 819 N.Y.S.2d 214 [Sup Ct, Nassau County 2006]).[1] See also, *Hobson-Williams v. Jackson*, 10 Misc.3d 58, 809 N.Y.S.2d 771 [App. Term, 2nd Dept., 2005]; *Lorin v. 501 Second St. LLC*, 2 Misc.3d 646, 769 N.Y.S.2d 361 [Civ. Ct., Kings County 2003]; *see also, Herrick v. Lyon*, 7 A.D.3d 571, 777 N.Y.S.2d 141 [2nd Dept., 2004] and *Paikin v. Tsirelman*, 266 A.D.2d 136, 699 N.Y.S.2d 32 [1st Dept., 1999] [construing the since repealed Part 136]).

Plaintiff does not argue that satisfying the pleading requirement is not a condition precedent to bringing the fee dispute action. Rather, plaintiff argues that it satisfied any pleading requirement under this rule by alleging facts establishing that Part 137 does not pertain to this dispute. Specifically, according to plaintiff, the complaint does this by alleging that "Failsafe had accumulated an outstanding balance to Kaye Scholer for legal services in the amount of $365,004.43" by November 30, 2003, and that, as of the date of the complaint, "Failsafe has failed to pay the $522,777.56 currently owed and outstanding" (Complaint, ¶¶ 12, 25). Contrary to plaintiff's assertion, these statements do not comply with the statutorily-mandated pleading requirements.

The statute expressly required the complaint to allege that "the dispute is not otherwise covered by this Part." In so doing, the attorney/plaintiff would alert the client/defendant of the existence of the fee dispute resolution program, and the attorney's stated belief that the dispute at hand falls outside the scope of the program.

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[1] Plaintiff notes in a footnote that defendant's answer does not allege non-compliance with Part 137 as a defense and as such, the defense is waived. However, the parties have not briefed this issue and at least one court has held that the failure to state compliance with Part 137 is an issue of subject matter jurisdiction, which may be raised at any time. See *Lorin v. 501 Second St. LLC*, 2 Misc.3d 646, 769 N.Y.S.2d 361 (Civ. Ct., Kings County 2003).

Even if the client were not to disagree with the assertion that the mandatory aspects of the program are inapplicable, the parties may consent to have an arbitral body hear the dispute (22 NYCRR 137.1 [b] [2]). The complaint does not contain any information whatsoever to apprise defendant of the existence of the fee dispute resolution program. To be sure, the complaint is to be construed liberally in favor of the pleader, but this principle should not be applied in a manner that eviscerates the statutory requirement. As stated in *Wexler & Burkhart, LLP v. Grant*:

> [A]dopting the movant's position would mean that a client, unschooled in the law and unaware of the fee dispute resolution program established in the Uniform Rules, would lose any chance of arbitrating or mediating bills he or she felt were excessive by simply remaining silent when the bills arrived. It is difficult to imagine how such a result comports with the overall plan evidenced by Part 137.

(12 Misc.3d 1162 [A], 819 N.Y.S.2d 214, at *1).

Plaintiff's reliance upon *Rosen v. Watermill Dev. Corp.* (1 A.D.3d 424, 768 N.Y.S.2d 474 [2nd Dept., 2003]) is misplaced. There, the plaintiff failed to comply with General Business Law § 777-a (4), which requires the complaint to allege that, prior to the commencement of the action, and within 30 days of the expiration period of the warranty, the plaintiff provided the defendant with written notice of the warranty claims. The court in *Rosen v. Watermill Dev. Corp.* found that the complaint satisfied the General Business Law, because it alleged that plaintiff provided defendant with written notice of the claims, and the fact that plaintiff sent the written notice within 30 days of the expiration period of the warranty was apparent from the complaint's other allegations. Here, as discussed above, the complaint is devoid of any reference to the fee dispute resolution program.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the cross motion is granted and the complaint is dismissed without prejudice.

This constitutes the decision and order of this court. A copy of this decision and order has been mailed to counsel for the plaintiff and defendants.

Dated: New York, New York
December 21, 2007

Hon. Martin Shulman, J.S.C.