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

PRESENT: GOODMAN Justice PART 17

EDELMAN, PETER F.

INDEX NO. 116230/07

MOTION DATE

-v-

CLAUDIA POSTER

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No ; and CPLR motion is decided per attached

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

Dated: 3/4/09

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17
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PETER F. EDELMAN,

Plaintiff,

Index No. 116230/07

-against-

CLAUDIA POSTER,

Defendant.

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Emily Jane Goodman, J.S.C.:

In this action by an attorney to recover fees allegedly owing from his client, defendant Claudia Poster, plaintiff Peter F. Edelman, appearing pro se, moves for summary judgment, pursuant to CPLR 3212, granting him damages in excess of $155,000, plus interest. Plaintiff also seeks attorney's fees for the present litigation. Defendant cross-moves for an order dismissing the complaint.

Plaintiff represented defendant in a matrimonial dispute, commencing with a retainer agreement dated February 28, 1997 (Retainer Agreement). Notice of Motion, Ex. B. Two more retainer agreements followed, dated August 17, 1999 (*id.*, Ex. D), and July 3, 2001 (*id.*, Ex. E). Each retainer agreement covered a different aspect of the defendant's ongoing matrimonial

litigation. In a letter dated June 12, 2002, plaintiff informed defendant that, pursuant to the retainer agreements, plaintiff had no further obligation to render services on defendant's behalf, and that the outstanding balance owed to plaintiff was $155,934.05, plus substantial interest. *Id.*, Ex. F.

Plaintiff brings three causes of action: (1) for breach of the Retainer Agreement; (2) account stated; and (3) counsel fees for the prosecution of the present action.

Defendant's cross motion, and her opposition to plaintiff's motion, is based on the alleged breach of an arbitration provision contained in the Retainer Agreement, which plaintiff maintains is governed by 22 NYCRR 136 *et seq*. The arbitration provision states that, should a fee dispute arise, defendant has:

> the right, at your election, to seek arbitration, the results of which are binding on both parties. I shall advise you in writing by certified mail to elect to resolve the dispute by arbitration, and I shall enclose a copy of the arbitration rules and a form for requesting arbitration. If no action is pending and if you do not timely enforce your rights to enter fee arbitration, I may commence legal proceedings against you to recover any unpaid fee.

Retainer Agreement, at 4.

It is undisputed that plaintiff never sent defendant a notice of her right to arbitrate. On this basis, defendant cross moves to have the complaint dismissed.

Plaintiff maintains that he was not required to send defendant a notice of her right to arbitrate under the agreement, because no such notice is necessary under 22 NYCRR 136 *et seq*, upon which the Retainer Agreement's arbitration provision is allegedly based.

Former section 136[1] concerns fee arbitration rules in domestic relations matters. Section 136.2 provides that "[i]n the event of a fee dispute between attorney and client ... the client may seek to resolve the dispute by arbitration, which shall be binding upon both attorney and client." Section 136.5 (a) provides that, where a fee dispute arises, the attorney must notify the client by certified mail or personal service that the client has 30 days from receipt of the notice to elect to arbitrate. If the client does not seek arbitration, the attorney may proceed to litigate the matter in court. 22 NYCRR 136.5 (b).

Section 136.4 (a), regarding the arbitrator's jurisdiction, states that an arbitration program may not hear any fee dispute in which the amount in dispute is in excess of $100,000, including disbursements. Based on this language, plaintiff

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[1]Former section 136 was replaced by section 137 in 2002. Former section 136 can be found in McKinney's NY Rules of Court, State, 2001 ed.

argues that he had no obligation to send defendant a notice of her right to arbitrate at all, because, under 22 NYCRR 136.4 (a), the amount in dispute exceeded the arbitrator's jurisdiction.

Defendant argues, among other things, that the Retainer Agreement made no reference to any court rule regarding arbitration of fee disputes, and no reference to a monetary limit on arbitration. Consequently, defendant maintains, among other arguments, that defendant was bound to offer her arbitration without regard to 22 NYCRR 136.4 (a), and that the complaint should be dismissed as a result of plaintiff's failure to do so.

The issue is one of pure contract interpretation. It is beyond cavil that "'when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms.'" *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Company*, 1 NY3d 470, 475 (2004), quoting *W.W.W. Associates v Giancontieri*, 77 NY2d 157, 162 (1990). The interpretation of unambiguous contracts is the province of the court. *Greenfield v Philles Records, Inc.*, 98 NY2d 562 (2002); *W.W.W. Associates v Giancontieri*, 77 NY2d 157, *supra*.

It is further settled that "[a] contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the

[agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Greenfield v Philles Records, Inc.*, 98 NY2d at 569, quoting *Breed v Insurance Company of North America*, 46 NY2d 351, 355 (1978). Finally, if the agreement 'is reasonable susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity. *Greenfield v Philles Records, Inc.*, 98 NY2d at 570.

The Retainer Agreement is not ambiguous, and therefore must be interpreted by this court. The writing contains no reference at all to 22 NYCRR 136, *et seq*, no reference to a 30 day period to respond to a notice of a fee dispute, and no mention of a jurisdictional limit to disputes that defendant may arbitrate. Therefore, defendant was entitled to a notice of her right to arbitrate regardless of the existence of 22 NYCRR 136, *et seq*, and regardless of plaintiff's unexpressed intention that the arbitration be governed by that section. Because plaintiff's intention is not reflected in the writing itself, it is irrelevant. In fact, even if the arbitration clause was found to be ambiguous, the court should "construe it most strongly against [plaintiff] and favorably to [defendant] because [plaintiff] drafted the agreement[]." *See Matter of Cowen & Company v*

Anderson, 76 NY2d 318, 323 (1990); *see also Jacobson v Sassower*, 66 NY2d 991, 993 (1985)("[i]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language").

As a result of the foregoing, plaintiff's only recourse is to give defendant notice of her right to arbitrate, to allow her the choice of whether or not to do so. The court notes that in addition to failing to comply with the arbitration provision which he, as attorney, drafted, plaintiff inexplicably chose to wait over five and one half years before commencing this action. Thus, to the extent plaintiff might face a statute of limitations problem, this problem must be laid at his door, despite his diligent work and any "personal notions of fairness and equity" this court may entertain. *See Greenfield v Philles Records, Inc.*, 98 NY2d at 570.

Accordingly, it is

ORDERED that the motion brought by plaintiff Peter F. Edelman for summary judgment on the complaint, and for attorneys' fees is denied; and it is further

ORDERED that the cross motion brought by defendant Claudia Poster to dismiss the complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint, with costs and disbursement to defendant as taxed by the Clerk of the Court upon a submission of an appropriate bill of costs.

This Constitutes the Decision and Order of the Court.

Dated: March 4, 2009

ENTER:

J.S.C.

EMILY JANE GOODMAN