

Sieratzki v Sei Global, Inc.

2009 NY Slip Op 32656(U)

November 10, 2009

Supreme Court, New York County

Docket Number: 600183/09

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER

PART 8

Index Number : 600183/2009
SIERATZKI, STEVEN
 vs.
SEI GLOBAL, INC.
 SEQUENCE NUMBER : 001
 CONFIRM OR STAY ARBITRATION

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 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

*decided pursuant to attached
Mem*

FILED
 NOV 13 2009
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 11/10/09

MARILYN SHAFER
 J.S.C. 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 8

-----X
STEVEN S. SIERATZKI, ESQ.,

Plaintiff,

Index No.:
600183/09

- against -

SEI GLOBAL, INC.,

Defendant.

-----X
Marilyn Shafer, J.:

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

In this action for attorney's fees, defendant, Sei Global, Inc. moves, pursuant to CPLR 7503, to compel arbitration and stay this action pending arbitration, pursuant to 22 NYCRR Part 137.

Plaintiff, Steven S. Sieratzki, cross-moves, pursuant to CPLR 3211, to dismiss the nine affirmative defenses and counterclaim, and, pursuant to CPLR 3212, for an order granting plaintiff summary judgment for a money judgment in the sum of \$52,617.90, together with interest thereon from September 3, 2008, plus costs, expenses and disbursements against defendant.

For the following reasons, the motion to compel is denied and the cross motion is granted.

Background

Plaintiff, an attorney admitted to practice in the State of New York, represented defendant and its president, non-party Seung On Sohn, a/k/a June Yamagata, for a number of years concerning various legal matters.

In January 2008, defendant retained plaintiff to represent

it in an arbitration before the American Arbitration Association (AAA), entitled *HL Group Partners, LLC v Sei Global, Inc.*, AAA No.: 13 145 E 0265S 07 (the Arbitration). Plaintiff was substituted in as counsel for defendant and represented defendant at the Arbitration.

On May 13, 2008 and June 3, 2008, plaintiff sent invoices to defendant in connection with the arbitration. On July 3, 2008, payment was made in the amount of \$10,000.00. Subsequent invoices were sent in August and in September with respect to the matter; however, despite repeated requests, no further payments were made.

In addition, plaintiff represented defendant in three other matters, including a holdover proceeding. Defendant was separately billed for each matter in August and September 2008. However, no payments were made.

On September 7, 2008, plaintiff sent defendant a letter concerning the outstanding legal fees. Plaintiff advised defendant that, if plaintiff did not receive payment by September 10, 2008, he would be compelled to withdraw as counsel in the Arbitration, as well as in another matter (see September 7, 2008 letter from plaintiff to defendant, Cross Motion, Ex. C). By e-mail dated September 8, 2008, defendant requested that all of the bills be sent for review so that it could "take care of this as soon as possible" (Cross Motion, Ex. G). Plaintiff resent the

invoices and defendant acknowledged receipt (*id.*). However, no payment was sent. On September 11, 2008, plaintiff wrote a letter to the arbitrator requesting that he be removed as counsel for defendant in the Arbitration (see September 11, 2008 letter to Arbitrator Michael Berger from plaintiff, Cross Motion, Ex. D). Thereafter, by e-mail dated September 12, 2008, plaintiff was advised that Sohn, defendant's president, would be serving as the representative for defendant (Cross Motion, Ex. E).

In November 2008, defendant notified plaintiff that it believed that plaintiff had overcharged defendant. The total sum of all outstanding invoices is \$52,617.90, plus interest.

Discussion

Motion to Compel Arbitration

It is well-settled that whether a controversy is properly subject to arbitration is initially one for the courts to determine (see *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]). It is the burden of the proponent of arbitration to show that the parties agreed to arbitrate the dispute at issue (*id.*).

The relevant provision of the retainer agreement, dated June 26, 2008, provides that "[i]n the event that a dispute arises between you and the firm relating to our fees, you may have the right to arbitration of the dispute pursuant to Part 137 of the Rules of the Chief Administrator of the New York State Courts, a

copy of which shall be provided to you upon request" (see Complaint, Ex. C). Part 137 of the Rules of the Chief Administrator of the Courts, which establishes the New York State Fee Dispute Resolution Program, specifically provides, however, that it does not "apply where the amount in controversy is 'more than \$50,000,' unless the parties consent to arbitration" (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v. Torino Jewelers, Ltd.*, 44 AD3d at 583, quoting 22 NYCRR 137.1 [b] [2]). Here, there was no such consent.

While defendant argues that the legal fees should be viewed as separate claims, in all four claims, plaintiff alleges that he was retained by defendant to represent it as its corporate and securities counsel, and was either not paid or not fully paid for his legal work. The claims have matters of fact in common. The court views the sum of the amount in controversy concurrently, and holds that said sum exceeds \$50,000; therefore, the rules are inapplicable herein.

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. Specifically, 22 NYCRR 137.6 (b) requires that "[a]n attorney who institutes an action to recover a fee must allege in the complaint: (1) that the client received notice under this Part of the client's right to pursue arbitration and did not file a

timely request for arbitration; or (2) that the dispute is not otherwise covered by this Part." Plaintiff has done so (see Complaint, ¶ 4).

Based on the foregoing, the motion to compel arbitration is denied.

Cross Motion for Dismissal of Affirmative Defenses and Counterclaim

Plaintiff cross-moves to dismiss the nine affirmative defenses raised by defendant. The affirmative defenses are as follows: (1) failure to state a cause of action (first affirmative defense); (2) lack of subject matter jurisdiction (second affirmative defense); (3) timely objection to invoices (third affirmative defense); (4) failure to offer arbitration pursuant to Part 134 (fourth affirmative defense); (5) unclean hands (fifth affirmative defense); (6) lack of written retainer agreement (sixth affirmative defense); (7) improper service (seventh affirmative defense); (8) violation of the code of professional responsibility (eighth affirmative defense); and (9) plaintiff committed malpractice (ninth affirmative defense).

Defendant's answer merely sets forth affirmative defenses, which are entirely conclusory and unsupported by even a single factual allegation. Defendant has not properly stated any affirmative defenses and they must be dismissed as insufficient (see CPLR 3013; *Commissioners of State Ins. Fund v Ramos*, 63 AD3d 453 [1st Dept 2009] (bare legal conclusions are not sufficient to

raise affirmative defenses).

The court next turns to the cross motion to dismiss the counterclaim for legal malpractice. It is well-settled that an action for legal malpractice requires proof that the attorney was negligent, that such negligence was a proximate cause of plaintiff's losses and that the plaintiff sustained actual damages (*Brooks v Lewin*, 21 AD3d 731 [1st Dept 2005]). In order to establish proximate cause, a plaintiff must demonstrate that "but for" the attorney's negligence, the plaintiff would have prevailed in the matter in question (see *McClellan v Jacoby & Meyers, L.L.P.*, 30 AD3d 223 [1st Dept 2006]; *Brooks*, 21 AD3d 731). The failure to establish proximate cause requires the dismissal of a legal malpractice action, irrespective of whether negligence is established (see *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63 [1st Dept 2002]). In order to be successful in a legal malpractice action, a plaintiff must rely on more than mere conjecture (*id.*).

The basis for defendant's legal malpractice claim is that plaintiff withdrew himself as counsel for defendant while in the middle of an arbitration proceeding, refusing to continue representation through the hearing. Defendant claims it was "forced" to continue the hearing without an attorney, and as a result, a judgment was entered against it in the amount of \$25,000, and it lost on a counterclaim in the amount of \$75,000.

Based on these alleged facts, defendant assumes that he would have been successful if plaintiff had not withdrawn as counsel. Such conjecture does not suffice in a malpractice action (*Arkin Kaplan LLP v Jones*, 42 AD3d 362, 366 [1st Dept 2007]; *Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002]). That notwithstanding, plaintiff submitted a written request to the arbitrator seeking to withdraw as counsel for defendant based on plaintiff's: (1) claimed inability to effectively represent its client's interests, due to defendant's repeated demands to comply with its directions as to how the case should be dealt with; and (2) unsuccessful attempts to collect his legal fees. The next day, plaintiff received an e-mail from the AAA indicating that On Sohn, defendant's president, would be representing defendant in the matter. According to plaintiff, the arbitrator adjourned the hearing providing defendant with time to retain new counsel. Defendant chose to proceed pro se.

Pursuant to CPLR 321 (b) (2), an attorney of record may withdraw from a case by an order of the court in which the action was brought. In this case, permission was sought and obtained from the arbitrator. Judicial scrutiny of an arbitrator's determination is quite limited (see CPLR 7511). No such basis exists here. Rather, counsel may be permitted to withdraw as counsel where the client refuses to pay attorney's fees or expenses (see *Weiss v Spitzer*, 46 AD3d 675 [2d Dept 2007]).

Based on the foregoing, defendant's counterclaim is dismissed.

Cross Motion for Summary Judgment

Plaintiff moves, pursuant to CPLR 3212, for an order granting summary judgment in his favor. In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman*, 49 NY2d at 560). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp., Inc.*, 298 AD2d 224, 226 [1st Dept 2002]).

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993] [internal quotation marks and citation omitted]). The agreement may be

implied as well as express. An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time, because the party receiving the account is bound to examine the statement or to procure someone to examine it for him, and to object if he disputes its correctness (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165 [1st Dept 1991]). The First Department has held that four months constitutes a reasonable time (see *R.A. Assocs. v Lerner*, 245 AD2d 437 [1st Dept 1997]). The rule is that either the receipt and retention of an account, without objection within a reasonable period of time, or partial payment gives rise to an account stated (*Morrison Cohen Singer & Weinstein LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]).

Here, defendant relies on plaintiff's admission that, in November 2008, defendant notified plaintiff that it objected to the invoices (see Reply at p. 4). However, this was five months after defendant initially received the first invoice dated May 2008, which has yet to be paid in full. Moreover, although defendant also claims that it objected to the amount of invoices back in June of 2008, a subsequent payment in the amount of \$10,000 was made on July 3, 2008.

Based on the foregoing, summary judgment is granted in favor of plaintiff, and a money judgment in the amount of \$52,617.90 together with interest, plus costs, expenses and disbursements is

herein awarded.

In light of the above, the court need not reach the remainder of plaintiff's arguments.

Conclusion

Accordingly, it is

ORDERED that the motion by defendant Sei Global, Inc. to compel arbitration is denied; and it is further

ORDERED that the part of the cross motion by plaintiff Steven S. Sieratzki, Esq. which seeks to dismiss the affirmative defenses and counterclaim is granted; and it is further

ORDERED that the plaintiff's motion for summary judgment is granted on default, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$52,617.90, with interest as prayed for allowable by law [at the rate of ____% per annum from the date of 6/22/09,] until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk.

Dated: 11/10/09

Enter: MARILYN SHAFER
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