

<b>Pryor Cashman, LLP v Saryan</b>
2009 NY Slip Op 32863(U)
December 4, 2009
Supreme Court, New York County
Docket Number: 107543-2009
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Index Number: 407543/2009

PRYOR CASHMAN LLP

vs  
SARYAN, JACK

Sequence Number : 002

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

Upon the foregoing papers, it is ordered that this motion

**FILED**

DEC 08 2009

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: December 4, 2009

J. Gischa  
HON. JUDITH J. GISCH: 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 10**

-----x  
Pryor Cashman, LLP,

Plaintiff (s),

-against-

Jack Saryan and Petro Energy, Corp.,

Defendant (s).  
-----x

**DECISION/ORDER**

Index No.: 107543-2009  
Seq. No.: 002

**PRESENT:**

Hon. Judith J. Gische  
J.S.C.

**FILED**  
DEC 08 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m (CPLR 3215) w/WLC affirm, non-mll affirm, exhs, proof of service	..... 1

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by a law firm against defendants to recover legal fees that plaintiff contends were incurred by the defendants in the amount of \$118,117.93 and which defendants have refused to pay. In connection with a prior motion by plaintiff for entry of a default judgment against both defendants, the court found that defendant Jack Saryan had been properly served, but it was unclear whether service had been properly effectuated on Petro Energy Corp. ("Petro" or "corporate defendant"), a foreign corporation with its principal headquarters in California. The court denied plaintiff's motion without prejudice to renew (Order, Gische J., 10/14/09) ("prior order").

Plaintiff now moves to renew the court's decision only insofar as it seeks a money judgment against Saryan. It also moves for additional time to re-serve the

complaint on the corporate defendants, apparently because it cannot prove it was properly served. Alternatively, plaintiff asks that it be allowed to discontinue this action against the corporate defendant so it can commence a new action against Petro.

Since the court has already found that Saryan was properly served with the complaint, and therefore, subject to the court's personal jurisdiction, as a defaulting party he is deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). Thus, as to Saryan, the court has to decide whether plaintiff is entitled to a money judgment against him, or as previously observed in the court's prior order, the parties' dispute has to be arbitrated. The issue of whether plaintiff should have more time to properly serve the corporate defendant will also be decided.

The court's decision is as follows:

### **Discussion**

Arbitration and other alternative procedures for resolving disputes are creatures of contract and therefore, if the parties have an agreement to arbitrate their differences, that agreement should be enforced (FCI Group, Inc. v. City of New York, 54 AD3d 171, 862 NYS2d 352 [1<sup>st</sup> Dept 2008] *lv den* 11 NY3d 716, 874 NYS2d 5 [2009]).

The right to compel arbitration can, however, be waived where a defendant fails to raise any right to arbitration as a defense in its answer (Ryan v. Kellogg Partners Institutional Services, 58 AD3d 481 [1<sup>st</sup> Dept. 2009]). Once waived, the right to arbitration cannot be regained.

Here, plaintiff has agreed to waive its right to arbitrate the legal fees dispute with its former client. Although plaintiff intended to pursue arbitration, and it served Saryan

with a demand for arbitration, Saryan has thus far refused to participate in arbitration. He has not responded to the demand plaintiff served or to correspondence sent by the American Arbitration Association. Thus, not only has Saryan waived his right to arbitration by failing to raise this as an affirmative defense in his answer, he has, through his (in)action refused to participate in the arbitration process despite repeated notices and demands that he do so. Furthermore, despite having been duly served with this motion, he does not now step forward to demand arbitration, or oppose this motion by plaintiff for a default judgment in connection with this plenary action. Since both sides have waived arbitration, the issue of legal fees can be decided by the court.

Plaintiff has asserted four (4) causes of action. They are for breach of contract (1<sup>st</sup> Cause of Action), quantum meruit (2<sup>nd</sup> Cause of Action), account stated (3<sup>rd</sup> Cause of Action) and unjust enrichment (4<sup>th</sup> Cause of Action).

Plaintiff has established the material elements of its claims for breach of contract and quantum meruit causes of action based upon the following:

The parties had a retainer agreement signed by Saryan, agreeing to pay the legal fees incurred by him in connection with East Trust matters. Plaintiff sent Saryan bills for legal fees that he retained, did not object to, but did not pay either. Those fees total \$90,002.04. Therefore, plaintiff has proved that it is entitled to a money judgment against defendant Jack Saryan in the amount of \$90,002.04 because it provided Saryan with legal representation in connection with the East Trust matter for the period commencing October 13, 2008 through October 29, 2009 (1<sup>st</sup> Cause of Action).

Plaintiff also provided Saryan with legal services in connection with a financing agreement (GMAC). Although the retainer agreement does not encompass these legal

services, plaintiff has proved Saryan requested those legal services and therefore, the parties had an implied contract pursuant to which the law firm did legal work for Saryan for which it has not been paid, though the firm billed the defendant (Precision Foundations v. Ives, 4 A.D.3d 589 [3<sup>rd</sup> Dept. 2004]). Therefore, plaintiff's motion seeking a money judgment against Saryan for the \$1,452.63 in legal fees he incurred in connection with the GMAC matter (2<sup>nd</sup> Cause of Action) is granted as well.

As provided in paragraph 4 ("Billing Practices") of the retainer agreement, plaintiff is also entitled to interest on unpaid legal fees under the retainer agreement at the prime rate at J.P. Morgan Chase plus 2% which is 5.25%. Applying that formula, plaintiff calculates the interest owed as \$3,213.38 for the period October 13, 2008 through October 29, 2009. Although plaintiffs are entitled to interest, the way they have calculated it is incorrect because it appears to be compounded and, in any event, the default occurred in October 13, 2008. Thus, plaintiff is entitled to interest at the rate of 5.25% from April 22, 2009 through the date of entry, that being a reasonable intermediate date (CPLR 5001 [b]).

However, as to the unpaid legal fees for the GMAC matter, there is no contract setting the rate of interest. Therefore, plaintiff is entitled to interest at the statutory rate from November 20, 2008, the date Saryan was billed for those services.

Although plaintiff also seeks its legal fees, there is no provision in their retainer agreement that would allow plaintiff to shift that expense to Saryan. Therefore, the *claim for legal fees* is denied.

The court has also considered plaintiff's motion seeking an extension of time for it to properly serve Petro with the complaint. There is no reason to keep this case open

while plaintiff accomplishes that and the court has also considered that this complaint does not set forth facts that appear to support the cause of action asserted against Petro. Therefore, the claims against Petro are severed and dismissed without prejudice to plaintiff commencing a new action against that defendant.

### **Conclusion**

It is hereby

**ORDERED** that plaintiff's motion for entry of a default judgment against defendant Jack Saryan is hereby granted on plaintiff's 1<sup>st</sup> and 2<sup>nd</sup> Causes of Action; and it is further

**ORDERED** that plaintiff is entitled to, and the Clerk shall enter, a money judgment on the 1<sup>st</sup> Cause of Action (breach of contract) against defendant Jack Saryan in the amount of Ninety Thousand and Two 04/100 Dollars (\$90,002.04), with interest at the rate of 5.25% from April 22, 2009, that being a reasonable intermediate date (CPLR 5001 [b]); and it is further

**ORDERED** that plaintiff is entitled to, and the Clerk shall enter, a money judgment on the 2<sup>nd</sup> Cause of Action (quantum meruit) against defendant Jack Saryan in the amount of One Thousand Four Hundred Fifty Two and 63/100 Dollars (\$1,452.63), with interest at the statutory rate from November 20, 2008 at the statutory rate; and it is further

**ORDERED** that plaintiff's motion to recover its legal fees in connection with this enforcement action is denied for the reasons stated; and it is further

**ORDERED** that plaintiff's motion for more time to serve Petro Energy, Corp. with the complaint is denied, without prejudice to plaintiff commencing a new action against

that defendant; and it is further

ORDERED that the remaining causes of action (3<sup>rd</sup> and 4<sup>th</sup>) are hereby severed and dismissed with prejudice as to Saryan only, but without prejudice as to Petro Energy, Corp.; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York  
December 4, 2009

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
DEC 08 2009  
NEW YORK  
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