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7-A-10

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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 100610/2010

150 SPRING STREET, LLC

VS.

COUGHLIN DUFFY LLP

SEQUENCE NUMBER : 001

COMPEL 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 ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JUL 07 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/30/10

HON. EILEEN A. RAKOWER J.S.C.

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

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 15

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150 SPRING STREET, LLC,

Plaintiff,

- against -

COUGHLIN DUFFY LLP,

Defendant.

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Index No. 100610/10

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Plaintiff 150 Spring Street, LLC ("150 Spring") brings this action against Defendant Coughlin Duffy LLP ("CD") for alleged legal malpractice committed by CD in the course of its representation of 150 Spring, landlord of property located in Manhattan, against Korres Spring Street, LLC, a commercial tenant.

Presently before the court is a motion by CD pursuant to CPLR §7503(a) to stay the instant action and compel 150 Spring to proceed with arbitration of its claims. CD submits an affidavit from Daniel F. Markham, member of CD, and an attorney's affirmation. CD also submits copies of the following as exhibits to their motion: 150 Spring's complaint; CD's December 8, 2006 engagement letter ("engagement letter") to 150 Spring setting forth the terms of CD's representation of 150 Spring; and a February 16, 2010 letter from counsel for CD to 150 Spring. The engagement letter provides as follows:

> It is agreed that any controversy or claim arising out of the representation, including any dispute regarding fees or possible lawyer malpractice (the "Claim"), will be first submitted to non-binding mediation before the Joint Committee on Fee Disputes and Conciliation of the Association of the Bar of the City of New York, The New York County Lawyer's Association and the Bronx County Bar Association (the "Joint Committee"). If mediation is

> unsuccessful, the Claim will be submitted to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association then in effect, unless we mutually agree otherwise, before an arbitrator in New York City selected under such Rules who shall be a lawyer who has been engaged in the private practice of law in New York for at least ten years. **By signing this agreement, we and 150 Spring agree to waive all rights to litigate any Claim in the courts.** Judgment upon the award of the arbitrator may be entered in any court having jurisdiction thereof and 150 Spring further agrees to pay reasonable attorneys' fees and expenses incurred by us in the collection of any judgment. New York law will apply to any such dispute.

The engagement letter is signed by Leonard Flamm, as member of 150 Spring.[1]

150 Spring submits an affidavit of Arlene Wiczyk, member of 150 Spring, and a memorandum of law in opposition to CD's motion. 150 Spring argues that it should not be compelled to arbitrate because the costs of arbitration are too prohibitive for 150 Spring to pay. Wiczyk states that 150 Spring was forced to sell the building in the fall of 2007, and that as a result of the forced sale, it "currently owns no property in its name, conducts no business, has no assets (other than its claim against CD) and generates no income or revenue." Wiczyk further states that following the sale, "150 Spring has maintained only a small bank account balance in order to pay anticipated annual franchise taxes to the City and State of New York and to cover the anticipated retention of a legal malpractice expert for this case." 150 Spring also argues that the retainer agreement does not clearly mandate arbitration of legal malpractice claims.

CD submits a reply affirmation, wherein it challenges 150 Spring's asserted claim to being an "impoverished litigant." Annexed to the reply as an exhibit is an ACRIS printout for the subject building, indicating that, at the time 150 Spring purchased the building in 1998, it secured a mortgage in the amount of $1,200,000, and that no additional mortgages were secured against the building prior to the sale

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[1]It bears mention that Mr. Flamm is acting as counsel for 150 Spring in opposing the instant motion, as a member of the Law Offices of Leonard N. Flamm.

of the building for $8,450,000.

It is well settled that New York courts have "a long and strong public policy favoring arbitration," and that "this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties. Therefore, New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*Stark v. Molod Spitz DeSantis & Stark, P.C.*, 2007 NY Slip Op 7740, *6-7 [2007]).

150 Spring relies upon the Court of Appeals' recent decision in *Brady v. Williams Capital Group, L.P.*, 2010 NY Slip Op 2434 [2010]) in support of the proposition that the costs of arbitration will be prohibitively high for 150 Spring, and thus it should not be compelled to arbitrate its legal malpractice claim. *Brady* involved an Article 78 petition by the petitioner, a former employee of the respondent, seeking an order compelling the respondent employer to pay the arbitrator's fee or to compel the American Arbitration Association ("AAA") to enter a default judgment against the employer. Brady sought to arbitrate a claim of unlawful termination on the basis of her race and/or sex against her employer. At the time she commenced employment with the respondent, Brady, as a registered salesperson of fixed income securities, was subject to NASD rules. NASD rules provided that employment discrimination claims were not subject to mandatory arbitration. However, in 2000, respondent employer issued an employee manual, which all employees were required to sign. The manual provided that employees agree to arbitrate all disputes with their employer, and that the arbitrator's fees and costs would be shared equally among the parties.

At the time Petitioner filed her arbitration demand, AAA rules provided that arbitration fees and expenses in employment disputes were to be borne by the employer. When AAA sent respondent an invoice/statement for the entire advance payment for the arbitrator's compensation, respondent refused to pay, demanding that Brady pay her share pursuant to their agreement. AAA advised that Brady's position was correct, and cancelled the arbitration after respondent's refusal to pay the full fee. The trial court dismissed Brady's petition, holding that the employment agreement, rather than AAA rules, governed. The Appellate Division reversed, directing respondent to pay the entire fee subject to later reallocation of costs by the arbitrator.

The Court of Appeals modified the order of the Appellate Division and

remitted the matter to Supreme Court for a hearing concerning Brady's financial ability to arbitrate. The Court reasoned that the "case-by-case, fact-specific approach employed by the federal courts" struck the proper balance between the competing public policies of favoring arbitration as an expeditious and economical method of dispute resolution on the one hand, and affording a litigant the ability to "vindicate[] his/her statutory rights" on the other (*id.* at *6) (citing cases). Accordingly, the Court of Appeals held that

> in this context, the issue of a litigant's financial ability is to be resolved on a case-by-case basis and that the inquiry should at minimum consider the following questions: (1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum (*id.*)

The Court of Appeals further stated that, although a full hearing is not necessarily required on the matter, "there should be a written record of the findings pertaining to a litigant's financial ability" (*id.*).

The court finds 150 Spring's arguments unavailing. Unlike the petitioner in *Brady*, and the plaintiffs in the cases referenced therein, 150 Spring is a limited liability company looking to assert a claim of attorney malpractice, rather than an individual litigant seeking to assert his or her statutory rights (*see Matarazzo v. L.R. Royal, Inc.*, 2010 NY Slip Op 20251 [Sup. Ct. Nassau Co. 2010]) (declining to apply *Brady* to a scenario where respondent employer asserted that arbitration costs were too costly). Moreover, as noted above, the engagement letter containing the subject arbitration clause was signed, and the conditions therein agreed to on behalf of 150 Spring, by Leonard Flamm, himself an attorney. While 150 Spring now asserts that litigation costs would be much smaller than arbitration costs due to Flamm's ability to represent 150 Spring at no expense, 150 Spring was free to attempt to negotiate the terms of the engagement letter, or seek other representation altogether.[2] Further still,

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[2]Nor is the contention that Flamm would be able to represent 150 Spring in litigation (at no expense) necessarily correct. CD notes that Disciplinary Rule 5-102(a) prohibits a lawyer from acting "as an advocate on issues of fact before any tribunal if the lawyer knows or it is

even if *Brady* were to apply to this matter, the court notes that the record is devoid of any documentation from 150 Spring whatsoever to substantiate its claim that it is so financially destitute as to be functionally precluded from arbitrating its malpractice claim.

Lastly, 150 Spring's contention that the retainer agreement did not clearly mandate arbitration over legal malpractice claims is flatly contradicted by the plain wording of the engagement letter, which, as noted above, provides that "**By signing this agreement, we** [CD] **and 150 Spring agree to waive all rights to litigate any Claim in the courts**" (emphasis in original).

Wherefore it is hereby

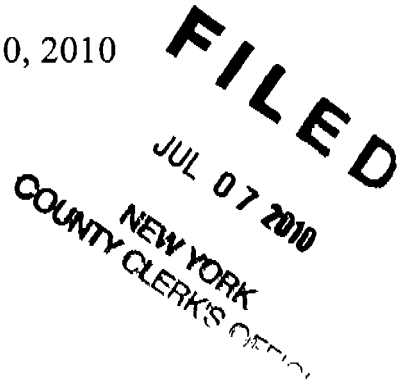
ORDERED that defendant CD's motion to compel arbitration and to stay this action is granted; and it is further

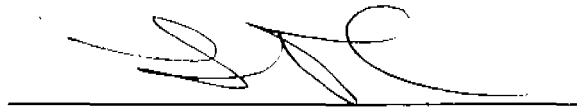
ORDERED that plaintiff 150 Spring shall arbitrate its claims against defendant CD in accordance with the terms of the engagement letter; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

Dated: June 30, 2010





EILEEN A. RAKOWER, J.S.C.

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obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client." Indeed, CD states that, in the event this matter were to proceed in court, it would make a motion to disqualify Flamm from representing 150 Spring.