

**Peters v Collazo, Carling & Mish**

2012 NY Slip Op 33300(U)

January 12, 2012

Sup Ct, NY County

Docket Number: 150078/2011E

Judge: Paul G. Feinman

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

Index Number : 150078/2011 E

PETERS, KRISTAN

vs.

COLLAZO FLORENTINO & KEIL LLP

SEQUENCE NUMBER : 001

DISMISS ACTION

PART 12

INDEX NO. 150078/11E

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

MOTION SEQ. NO. 601

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.**

Dated: JAN. 12, 2012

SMA

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

KRISTEN PETERS,  
Plaintiff,

Index No. 150078/2011E  
Mot. Seq. Nos. 001,002

- against -

**DECISION and ORDER**

COLLAZO, CARLING & MISH, d/b/a  
COLLAZO FLORENTINO & KEIL LLP,  
Defendant.

-----X

**Appearances:**

**For Plaintiff**  
Kristan Peters, Esq. (*pro se*)  
21 Compo Parkway  
Westport, CT 06880

**For Defendant**  
Francis Carling, Esq.  
174 East 74<sup>th</sup> St, ste. 12BC  
New York, NY 10021-3533

**Papers considered in review of these motions:**

**E-Filing Document Number**

Motion sequence number 001:

Notice of motion, Carling affirm. and annexed exhibits 1 - 2	3 - 6
Peters affirmation/memorandum of law in opposition and annexed exhibits A - D	8 - 9-4
Carling reply affirm. in further support and annexed exhibits 3 - 9	10 - 10-7
Peters sur-reply affirm. and annexed exhibits A - B	11 - 11-2

Motion sequence number 002:

Notice of motion, Peters affirm.	12 - 13
Carling affirm. in opposition	14
Plaintiff's reply memorandum of law in further support and annexed exhibits B - D	15 - 18
Peters reply affirm. in further support and annexed exhibits A - B, E	21 - 24

Transcript of oral argument held September 14, 2011, received in chambers October 12, 2011 Not uploaded<sup>1</sup>

**PAUL G. FEINMAN, J.:**

Defendant, Collazo, Carling & Mish, d/b/a Collazo Florentino & Keil ("Collazo"), moves for the following relief in the motion filed under sequence number 001: (1) pursuant to CPLR 7510, to confirm an arbitration award issued on March 2, 2011, in an arbitration proceeding between Collazo and plaintiff, Kristan Peters; (2) pursuant to CPLR 7514 (a), to enter judgment

<sup>1</sup>The movant in motion seq. 001 (defendant) is directed to upload a copy of the oral argument transcript into the NYSCEFS within 10 (ten) days of entry of this order.

against plaintiff and in favor of defendant in the amount of \$33,801, plus prejudgment interest as provided in the arbitration award, together with the costs of this action; and (3) pursuant to CPLR 3211 (a) (5) and (7), to dismiss this action in its entirety on the grounds that the plaintiff's claim cannot be maintained because of the arbitration award and res judicata, and because the complaint fails to state a cause of action under 22 NYCRR Part 137. Plaintiff opposes.

In the motion filed under sequence number 002, plaintiff moves for the following relief: (1) for an order pursuant to Section 10 (a) (4) of the Federal Arbitration Act; (2) pursuant to federal case law, to vacate the arbitrator's decision as having being rendered in manifest disregard of the law; (3) pursuant to CPLR 7511 (b) (1), to vacate the order of arbitrator Amy Rothstein issued on March 2, 2011, awarding attorney's fees; and (4) pursuant to CPLR 7514 (a), to enter judgment against defendant, together with the costs of this action (Doc. 12, Notice of motion). Defendant opposes.

The motions filed under sequence numbers 001 and 002 are joined for purposes of this decision and order. For the reasons provided below, defendant's motion, filed under sequence number 001, is granted, and plaintiff's motion, filed under sequence number 002, is denied.

### ***Background***

Plaintiff Kristan Peters is an attorney admitted to the New York state bar, a Connecticut resident, and appears pro se in this action.<sup>2</sup> Peters retained defendant to represent her in an appeal to the United States Court of Appeals, Second Circuit of a decision the United States District Court, Southern District of New York, in which the District Court imposed non-

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<sup>2</sup>The correct spelling of plaintiff's first name is Kristan, not Kristen. Both sides agreed that the caption should be amended to reflect the correct spelling of plaintiff's first name. They did not agree to amend the caption to reflect a different defendant. (Oral Argument Tr. 2 - 6).

monetary sanctions upon Peters for her conduct in connection with a litigation pending before that court (*see Wolters Kluwer Financial Serv. Inc. v Scivantage*, 525 F. Supp. 2d 448 [SDNY 2007]). In a lengthy decision containing detailed findings, the District Court, among other things, found that Peters had acted in bad faith and had engaged in conduct that was entirely without color of law and clearly taken for the improper purpose of circumventing the court's orders (*id.*). The retainer agreement entered into between defendant and Peters, dated July 29, 2008, provided that "[a]ny disputes concerning [defendant's] bills, fees and disbursements shall be resolved by expedited arbitration under the Association of the Bar of the City of New York's Rules for Arbitration of Lawyer-Client Fees Disputes" (Doc. 10-6, ex. A, Retainer). During the course of this representation, disputes arose between plaintiff and Carling, who was then of counsel to Collazo Carling & Mish LLP, and now represents defendant law firm. According to defendant, personal claims were made by Carling against Peters and by Peters against Carling, which now are the subject of action presently pending in the United States District Court for the Southern District of New York (*Carling v Peters*, 10 Civ. 4573 [VM] [HBP]).

On November 10, 2009, defendant and Carling, as joint-claimants, commenced an arbitration proceeding against Peters before the Association of the Bar of the City of New York ("the City Bar"). The arbitration demand sought payments of various bills issued by the joint-claimants, as well as findings by an arbitrator that Peters had engaged in fraud in inducing Carling and defendant to represent her, that she had engaged in unethical conduct in her relationship with the claimants, and that Peters had defamed Carling to the managing partner of the defendant law firm (Doc. 4, Carling affirm. at ¶ 5). According to Carling, the demand for arbitration contained a notice pursuant to CPLR 7503 (c) requiring Peters to move in court to

stay the arbitration within 20 days if she did not wish to be precluded from objecting that a valid agreement to arbitrate did not exist, but Peters made no such application, nor did she ever contest the jurisdiction of the City Bar to resolve the dispute by arbitration (*id.* at ¶ 6).

Apparently, at the time the arbitration proceeding was commenced, the City Bar no longer conducted arbitrations of attorney-client fee disputes as such arbitrations had been taken over by the New York County Lawyers' Association pursuant to 22 NYCRR Part 137 (*id.* at ¶ 7). However, on November 24, 2009, the General Counsel of the City Bar wrote to Peters informing her that the City Bar was prepared to appoint an arbitrator to hear the dispute between the parties under its Rules for the Arbitration of Disputes *Among Lawyers*. Both defendant and Peters then consented to the arbitration and on January 7, 2010 the City Bar issued a ruling by letter appointing an arbitrator to hear the parties' dispute under the Rules for Arbitration of Disputes *Among Lawyers*. This letter also noted that objections to the scope of the arbitration had been considered, and the parties were free to raise them again before the arbitrator. It further provided that the parties agreed that the arbitration would be final and binding. As the proceedings progressed, several interim rulings by two separate arbitrators became necessary, and two decisions were issued by different judges of the United States District Court of the Southern District of New York. An appeal brought by Peters to the Second Circuit is still pending. As a result of motion practice, Carling is no longer an individual party to the arbitration and was permitted to pursue his claims against Peters in federal court, where they are now currently pending (*id.* at ¶ 10).

On November 18, 2010, Peters filed an answer and counterclaims in the arbitration proceeding against defendant, containing 21 affirmative defendants and three counterclaims: (1)

breach of contract; (2) breach of duty of good faith and fair dealing; and (3) breach of fiduciary duty. In connection with these counterclaims, Peters sought damages of not less than \$100,000.00 (*id.* at ¶ 11). After considering extensive testimony, numerous exhibits, and post-hearing testimony briefs submitted by the parties, the arbitrator issued an award resolving all issues on March 2, 2011, in defendant's favor, awarding \$33,801 with interest to defendant, and dismissing all of Peters's counterclaims (Doc. 6, ex. 2, Arbitrator's award).

On April 1, 2011, Peters commenced this action by electronically filing a complaint and petition for a trial *de novo* (Doc. 1, Compl.). The complaint states that, pursuant to 22 NYCRR 137.8 (a), Peters was commencing a plenary action for declaratory relief pursuant to CPLR 3001 and for monetary relief, and demanded a trial *de novo* on the merits of a fee dispute within 30 days after an arbitration award had been mailed (*id.*). The complaint asserts causes of action sounding in: (1) breach of contract; (2) fraudulent inducement; (3) misrepresentation; (4) negligent inducement; (5) fraudulent misrepresentation; (6) negligence per se; (7) breach of duty of good faith and fair dealing; and (8) attempted extortion. Peters seeks compensatory and punitive damages in an amount not to exceed \$75,000.00, plus attorney's fees and costs associated with this action and with the arbitration proceeding, damages for the loss of past and future income, and unspecified liquidated damages (*id.* at ¶ 72). Other than the portion of the introductory paragraph that indicates that Peters was commencing a plenary action pursuant to section 137.8 (a) within 30 days after an arbitration award had been mailed, the complaint contains little discussion of the arbitration itself. It does allege that defendant and Carling failed to tell Peters that she did not have to agree to arbitration, to provide her with the required notice that she did not have to agree to final and binding arbitration, and to tell her that under 22

NYCRR 137.8, she had the right to *de novo* review of any arbitration award. The eight causes of action do not relate to defendant's conduct in connection with the arbitration, but concern the events that were later in dispute and resolved in the arbitration.

### *Analysis*

#### **1. Motion to confirm arbitration award**

CPLR 7510 provides that “[t]he court shall confirm an award upon application of a party made within one year after its delivery ... unless the award is vacated or modified upon a ground specified in section 7511.” Under CPLR 7511 (a), an application to vacate or modify an arbitration award may be made by a party within 90 days after its delivery. A court may vacate an award if the court finds that the rights of a party that participated in the arbitration were prejudiced by: (1) corruption, fraud or misconduct in procuring the award; (2) partiality of an arbitrator appointed as a neutral; (3) the arbitrator making the award exceeded its power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (4) failure to follow the procedure of Article 75, unless the party applying to vacate on this ground continued the arbitration with notice of the defect and without objection (CPLR 7511 [b] [1] [i] - [iv]). For purposes of Article 75, impartiality may take two forms, actual bias, which must be proven by clear and convincing evidence, and the appearance of bias from which a conflict of interest may be inferred (*see New York Restaurants Exchange, Inc. v Chase Manhattan Bank, N.A.*, 226 AD2d 312, 315 [1<sup>st</sup> Dept 1996]).

Here, Peters opposes the branch of defendant's motion seeking to confirm the arbitration award for three reasons: (1) plaintiff is entitled to 90 days to move to vacate making the motion premature; (2) CPLR 75 is inapplicable to arbitrations under the fee dispute resolution procedure

of 22 NYCRR 137; and (3) because defendant failed in its retainer to mention Part 137, the retainer agreement is in violation of public policy, the arbitration and the award are therefore void and defendant cannot maintain a suit for fees (Doc. 9, Peters opp. at 6).

As for the first argument, the fact that CPLR 7511 allows a party 90 days to move to vacate or modify an arbitration award does not preclude the other party from moving to confirm the award before those 90 days have expired. Rather than present any arguments that she may have had in opposition to defendant's motion, Peters instead waited until May 31, 2011, to raise them when she filed her motion under sequence number 002. For purposes of judicial economy and in effort to prevent further delay in the resolution of this dispute, the court will consider the arguments presented by Peters in connection with her motion to vacate in determining defendant's motion to confirm the arbitration award.

Contrary to Peters' contention, 22 NYCRR 137 does not govern the parties' arbitration before the City Bar. While 22 NYCRR 137 may apply to certain arbitrations involving fee disputes between an attorney and client, 22 NYCRR 137.1 (b) expressly excludes those that involve amounts in dispute that are below \$1,000.00 or in excess of \$50,000.00, unless the parties have consented, the claims involve "substantial legal questions, including professional malpractice or misconduct" or "claims against an attorney for damages or affirmative relief other than adjustment of the fee" (22 NYCRR 137.1 [b] [2], [3], [4]). Here, in addition to seeking to recover unpaid expenses incurred and billed to Peters, defendant's demand for arbitration accuses Peters of engaging in fraud in inducing Carling to undertake representing her and thereby violated Disciplinary Rule 1-102 (A) (5) of the Lawyer's Code of Professional Responsibility of New York State, then in effect. The demand also claimed that Peters violated Disciplinary Rule

1-102 (A) (4), and that Carling was entitled to nominal damages for allegedly false and defamatory statements made by Peters to Collazo. Peters asserted counterclaims sounding in breach of contract, breach of fiduciary duty, and breach of duty of good faith and fair dealing. In support of these counterclaims, and reiterated in the complaint in support of the causes of action asserted therein, Peters alleged that defendant and Carling breached their duty to Peters by failing to prepare adequately for oral argument, and as a result, although the others that appealed their sanctions to the Second Circuit prevailed, Peters's sanctions were affirmed. Peters also alleged that defendant performed their work incompetently, made misrepresentations to Peters, engaged in unethical conduct, and made false statement. Clearly, the arbitration involved issues that are excluded from the scope of 22 NYCRR 137.

Furthermore, and perhaps most importantly, the parties voluntarily consented to the City Bar arbitration knowing that it would not be governed by 22 NYCRR 137. The letter sent by the City Bar on November 24, 2009 to Peters informed her that the procedure that would be followed in the arbitration was found in the City Bar's Rules for the Mediation and Arbitration of Disputes Among Lawyers, and a copy of the rules was enclosed with the letter (Doc. 10-3). The City Bar's January 7, 2010 letter to Carling and Peters notes that the parties have agreed to submit to arbitration by the City Bar pursuant to the arbitration clause contained in the parties' July 29, 2008 letter agreement, again referring to the City Bar's Rules for Disputes Among Lawyers (Doc. 10-4). No where in any of these letters is any mention made of 22 NYCRR 137. Based on the above, because the parties consented to arbitrate their claims outside of the procedure provided by 22 NYCRR 137, and then proceeded to fully participate in the arbitration thereafter, Peters cannot now claim the protections of 22 NYCRR 137 to avoid an unfavorable outcome. In any

event, 22 NYCRR 137 could not have governed the arbitration, because as outlined above, it clearly involved “substantial legal questions, including professional malpractice or misconduct” or “claims against an attorney for damages or affirmative relief other than adjustment of the fee” (22 NYCRR 137.1 [b] [3], [4]). Therefore, the provisions of CPLR article 75 govern defendant’s motion to confirm and Peters’s motion to vacate.

Peters argues that the arbitration award should be vacated because, in her view, the arbitrator, Rothstein, was biased. She contends that “[a]fter one arbitrator withdrew because of bias, Carling sought repeatedly to introduce the same issue of bias before Arbitrator Rothstein. As a result, Arbitrator Rothstein was ... biased” (Doc. 13, Peters affirm. at ¶ 33). The only proof she offers in support is her contention that the arbitrator “did not permit [her] to have as much time as defendant, and did not permit [her] to put on evidence that [she] sought to present” (*id.*). These statements, found only in an unsworn affirmation and lacking in the slightest bit of factual support, are insufficient to sustain Peters’ heavy burden of showing bias (*see New York Restaurants Exchange, Inc.*, 226 AD2d at 315); *Scollar v Cece*, 28 AD3d 317, 317 [1<sup>st</sup> Dept 2006]).

Having failed to offer any proof of her conclusory bias allegations, Peters does not demonstrate that she was not given a full and fair opportunity to litigate the issues before the arbitrator (*see Kern v Excelsior 57<sup>th</sup> Corp.*, 77 AD3d 500 [1<sup>st</sup> Dept 2010]). Even if Peters had provided competent proof of her allegations that she did not receive as much time as defendant and was not permitted to submit all of the evidence that she had sought to have considered, she gives no basis for concluding that these determinations were not within the sound discretion of the arbitrator (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin*, 1 AD3d 39, 43 [1<sup>st</sup>

Dept 2003] [stating that “[u]nless the arbitration agreement provides otherwise, the arbitrator is not bound by principles of substantive law or rules of evidence .... Even where the arbitrator makes errors of law or fact, the court may not undertake to conform the award to its sense of justice”]). Finally, because the award is not totally irrational and does not exceed a specifically enumerated limitation of the arbitrator’s power, the court is bound by the arbitrator’s factual findings, interpretation of the parties’ arbitration agreement and judgment concerning remedies (*id.* at 43).

Thus, Peters has failed to establish a basis for vacating or modifying the arbitration award. Accordingly, defendant’s motion to confirm the arbitration award is granted.

## **2. Motion to confirm**

Having confirmed the arbitration award, the court now turns to defendant’s motion to dismiss this action on res judicata grounds. It is well settled that prior arbitration awards may be given preclusive effect in a subsequent judicial action (CPLR 3211 [a] [5]; *Bernard v Proskauer Rose, LLP*, 2011 NY Slip Op 06184 [1<sup>st</sup> Dept 2011]; citing *Matter of Metro-North Commuter R.R. Co. v New York State Exec. Dept. Div. of Human Rights*, 271 AD2d 256, 257 [1<sup>st</sup> Dept 2000]). Each of the eight causes of action asserted in Peters’ complaint rely upon the same facts and occurrences that were the basis of Peters’ three counterclaims in the arbitration. The issues arising out of those facts were litigated before the arbitrator and necessarily decided in the arbitration award denying all three of Peters’ counterclaims.

Accordingly, defendant’s motion to dismiss under CPLR 3211 (a) (5) is granted. Defendant’s motion to dismiss under CPLR 3211 (a) (7) is denied as having been rendered academic. Peters’s motion to vacate the arbitration award is denied in its entirety for the same

reasons discussed above in connection with defendant's motion to confirm the arbitrator's award.

Accordingly, it is

ORDERED that the branch of defendant's motion, filed under sequence number 001, which seeks to confirm the award rendered in favor of defendant and against plaintiff is granted and the award is confirmed; and it is further

ORDERED that the branch of defendant's motion, filed under sequence number 001, which seeks to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the spelling of plaintiff's first name in the caption herein from "Kristen" to "Kristan:" and it is further

ORDERED that plaintiff's motion, filed under sequence number 002, to vacate the arbitration award is denied in its entirety.

This constitutes the decision and order of the court. Settle judgment dismissing the plaintiff's complaint in its entirety and confirming the March 2, 2011 arbitration award.

Dated: January 12, 2012  
New York, New York

  
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J.S.C.

(150078\_2011\_001\_002\_daz(Mot2ConfirmArb\_M2D))