

Feder Kaszovitz, LLP v Edrich
2013 NY Slip Op 32208(U)
September 13, 2013
Supreme Court, New York County
Docket Number: 105306/11
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

FEDER KASZOVITZ, LLP,
Plaintiff,

Index No.: 105306/11

Motion Date: 01/18/13

- v -

Motion Seq. No.: 01

GEORGE EDRICH,
Defendant.

The following papers, numbered 1 to 3 were read on this motion for summary judgment .

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s) .	1
Answering Affidavits - Exhibits	No(s) .	2
Replying Affidavits - Exhibits	No(s) .	3

FILED
SEP 19 2013

Cross-Motion: Yes No

NEW YORK

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE

In this attorney fees collection matter, plaintiff attorney seeks summary judgment in the sum of \$270,763.81, plus interest and costs, which is the alleged amount billed for professional services less credits in the approximate sum of \$265,000.00.

The professional relationship between the parties goes back to a retainer agreement executed by defendant on December 8, 2003. In that agreement, defendant retained plaintiff's firm in a matter captioned Festinger v. Edrich (Kings County, Index No. 18707/03), defending the client's title to a parcel of real estate located at 607 Avenue K, Brooklyn, New York.

Although this was the only retainer agreement executed between the parties, over a period of approximately six years plaintiff represented defendant in various other matters as

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

at 607 Avenue K, Brooklyn, New York.

Although this was the only retainer agreement executed between the parties, over a period of approximately six years plaintiff represented defendant in various other matters as evidenced by the display of captions in the exhibits attached to moving papers of both parties.

Among the exhibits annexed to plaintiff's moving papers is a stack of invoices, beginning on July 26, 2004, billing for time spent on the captioned Festinger v. Edrich. By June 15, 2005, the stack begins to identify the invoices as time spent on "All Matters." Succeeding monthly invoices continue to reflect "All Matters" until the final invoice dated September 9, 2009.

Plaintiff must address the mandatory arbitration provisions of Rule 137.2 of the Rules of the Chief Administrator of the Courts. Such rule provides that, where a client and an attorney cannot agree on a fee in a civil matter, the client has the right to resolve such dispute by arbitration. 22 NYCRR 137.6 [a] [1] states that the attorney must provide notice, by certified mail or personal delivery, of the client's right to elect to arbitrate the dispute within thirty days from the receipt of such arbitration notice, along with the necessary forms and instructions to enable the client to commence the arbitration proceeding. Such rules apply to all civil matters commenced on or after January 1, 2002 with the following exclusions: 1)

criminal matters; 2) amounts in dispute involving a sum of less than \$1,000.00 and sums of more than \$50,000.00; 3) claims involving malpractice or misconduct; 4) claims against an attorney for affirmative relief other than the fee adjustment; 5) disputes where the fee is set by statute, rule, or court order; and 6) where no services have been rendered for more than two years.

Plaintiff asserts that the exemption from the arbitration requirement of its claim is stated on the face of its complaint by its demand for a sum in excess of \$50,000.00.

Plaintiff's argument is unpersuasive and defendant is correct that authority compels the court to not simply deny plaintiff's motion for summary judgment but to dismiss the complaint outright. In Kerner & Kerner v Dunham, (46 AD3d 372 [1st Dept 2007]), the court, affirmed the Supreme Court's dismissal of the complaint below (James, J.) for the plaintiff's failure to allege that the provisions of 22 NYCRR 137.1 (b) (2) and 137.6 (b) (2) were inapplicable to the plaintiff's claim for a sum in excess of \$50,000.00. The appellate court reasoned that dismissal without prejudice was the appropriate remedy, as plaintiff's allegations of the disputed sum alleged in the moving papers would not ameliorate the insufficient pleadings in the complaint.

Similarly, in Mintz & Gold LLP v. Daibes, (2011 NY Slip Op

30985 [u] [Sup Ct, NY County 2011]), the court ruled that, even though the total sum claimed as a fee was stated in the complaint as \$81,049.65 plus interest, the failure to allege compliance with 22 NYCRR 137.6 (b), or that the claim is an exception thereto, requires the complaint to be dismissed. The allegation of either compliance with the regulation or exception to the regulation is a mandatory pleading requirement in default of which the complaint fails to state a meritorious claim. (Kaye Scholer LLP v. Fall Safe Air Safety Systems Corporation, 2007 NY Slip Op 34192 [u] [Sup Ct, NY County 2007]).

Were there not this pleading defect, there would still be a disputed issue of fact as to how the invoices, and the payments made over a six-year period reflect the allocation of time to one matter or another. Whether there are any individual matters that place in issue a sum of less than \$50,000.00 would be the query, and therefore there may be multiple disputes under the mandatory arbitration purview, as opposed to only one in excess thereof. Such disputed issues of fact would in and of themselves be sufficient to defeat plaintiff's motion for summary judgment as to the first and third causes of action, inasmuch as the claim for payment upon the retainer statement, or by *quantum meruit*, must await further discovery of billing records, payment records, and time sheets to determine if a sufficient claim may be pled pursuant 22 NYCRR 137.6 (a)(1). The sufficiency of plaintiff's

pleading will depend on the undisputed facts as to the allocation of time and payment to the several matters coming under plaintiff classification of "All Matters". As for the second cause of action on an account stated, a disputed issue is raised by the defendant's assertion, under oath, that he fired plaintiff for cause. Teichner v W & J Holsteins, 64 NY2d 977 (1985).

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED that, *sua sponte*, the complaint is dismissed without prejudice;

This is the decision and order of the court.

Dated: September 13, 2013

ENTER:


DEBRA A. JAMES J.S.C.

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SEP 19 2013
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