

Stephanie R. Cooper, P.C. v Asch

2014 NY Slip Op 30009(U)

January 2, 2014

Supreme Court, New York County

Docket Number: 157433/2012

Judge: Saliann Scarpulla

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

PRESENT: SCARPULLA
Justice

PART 19

COOPER P.C., STEPHANIE R.

INDEX NO. 157433/12

- v -
SHARON ASCH

MOTION DATE _____

MOTION SEQ. NO. 02

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

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

Dated: 1/2/13


SALIANN SCARPULLA J.S.C.

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: CIVIL TERM: PART 19

-----X

STEPHANIE R. COOPER, P.C.,

Plaintiff,

Index No: 157433/2012
Submission Date: 10/23/13

-against-

DECISION AND ORDER

SHARON ASCH,

Defendant.

----- X

For Plaintiff:
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White Plains, NY 10601

For Defendant:
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New York, NY 10122

Papers considered in review of the motion to dismiss:

Notice of Motion	1
Affidavit in Opp	2
Reply	3

HON. SALIANN SCARPULLA, J.:

In this legal fee dispute, defendant Sharon Asch (“Asch”) moves to dismiss the complaint.

Plaintiff Stephanie R. Cooper, P.C. (“Cooper, P.C.”) filed its complaint in this action on October 22, 2012. According to the allegations of the complaint, on or about September 25, 2006, Asch retained Cooper, P.C. to perform certain legal services on her behalf. As of May 21, 2008, Asch owed Cooper, P.C. a balance of \$37,145.53 for services rendered.

Asch now moves to dismiss the complaint. She first asserts that Cooper, P.C.'s claims are barred by 22 NYCRR §137. She explains that according to the pleading requirement of §137.6, Cooper P.C. was required to have alleged in its complaint that Asch received notice of her right to arbitrate the dispute prior to the commencement of the action and did not file a timely request for arbitration. She argues that Cooper, P.C.'s complaint lacks that allegation.

She further maintains that because this case involves a domestic relations matter, the requirements of 22 NYCRR Part 1400 are also implicated, and they were violated. The parties' written retainer agreement provides that "in the event of any dispute as to the terms of this engagement, such dispute *shall* be submitted to binding arbitration in New York in accordance with the Fee Dispute Resolution Program set forth in 22 NYCRR §137.0 et seq." Asch argues that pursuant to 22 NYCRR Part 1400, the retainer agreement must not mandate that the client pursue arbitration as the only recourse in the event of a fee dispute, which the retainer agreement states in this case, rather, it should present arbitration as an option exclusive to the client.

Finally, Asch argues that the claims asserted in the complaint are meritless. She maintains that (1) the claimed damages, in the amount of \$37,145,53, are inconsistent with the claimed balance owed of \$27,845.63 in a letter dated May 21, 2012; (2) the claims for account stated and quantum meruit must be dismissed as duplicative of the

breach of contract claim; and (3) the statute of limitations has run because all of the invoices were billed, or should have been billed, prior to April 11, 2007.

In opposition, Cooper, P.C. first argues that the retainer agreement did not violate 22 NYCRR Part 1400, because at the time that she executed the retainer agreement, Asch also signed a Statement of Client's Rights and Responsibilities, which provided, in relevant part, "in the event of a fee dispute, you may have the right to seek arbitration. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request." That Statement was incorporated into the terms of the retainer agreement by reference.

In any event, Asch wanted to arbitrate this matter, and even filed an order to show cause to compel Cooper, P.C. to submit this matter to arbitration in December 2012. However, her application was rejected because no legal services had been provided by Cooper, P.C. to her within the last two years. The services in this matter were provided between September 25, 2006 and May 21, 2008. This action was commenced on October 22, 2012, more than four years after the last services were provided. Therefore, Cooper, P.C. was not required to comply with the notice provisions of 22 NYCRR 137 and did not have to allege in its complaint notice was provided and ignored.

Further, Cooper, P.C. maintains that it has properly alleged a breach of contract claim in its complaint. The statute of limitations, which is six years, does not bar the

claim. The first invoice was issued to Asch on October 25, 2006 and the complaint in this action was filed on October 22, 2012.

Discussion

New York State Fee Dispute Resolution Program, 22 NYCRR §137, was established in order to provide for "the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation." When an attorney and client have a fee dispute, the attorney is required to forward to the client a written "Notice of Client's Right to Arbitrate." 22 NYCRR §137.6(b) requires that an attorney who brings an action to recover a fee must allege in his or her complaint that the client received notice of his or her right to pursue arbitration and mediation and did not file a timely request for either, or that the dispute is not otherwise covered by the regulation.

A dispute is not covered by the regulation where, *inter alia*, "no attorney's services have been rendered for more than two years." (22 NYCRR §137.1[b][6]). Therefore, an attorney must notify his or her client of the rights conferred by the part unless more than two years have elapsed following the cessation of services. *Borah, Goldstein, Altschuler, Schwartz, & Nahins, PC v. Lubnitzki*, 13 Misc. 3d 823, 824 (Civ. Ct. N.Y. Co., 2006). As such, according to the regulation, even if the dispute is not covered by §137, there is still a pleading requirement, which if not completed, warrants dismissal.

Here, the fee dispute involves services rendered over two years prior to the dispute, and therefore the dispute is not covered by §137, and the notice requirement does

not apply. However, 22 NYCRR §137.6(b) clearly provides that if the dispute is not covered by the regulation, the pleading must contain a clause indicating such. Here, the complaint does not contain a clause indicating that the dispute is not governed by 22 NYCRR §137 and therefore, the complaint must be dismissed, without prejudice. *See Kerner & Kerner v. Dunham*, 46 A.D.3d 372 (1st Dept. 2007).

The court notes that Asch's argument that the complaint must be dismissed with prejudice pursuant to 22 NYCRR §1400 is without merit. While the retainer agreement did provide that "in the event of any dispute as to the terms of this engagement, such dispute *shall* be submitted to binding arbitration in New York in accordance with the Fee Dispute Resolution Program set forth in 22 NYCRR §137.0 et seq.," the retainer agreement also provided, "the written 'Statement of Client's Rights and Responsibilities,' which we are providing to you with this Agreement for your review and execution prior to your execution of this Agreement sets forth more fully your rights and responsibilities. That Statement is incorporated into this Agreement by reference." That Statement clearly indicated that "in the event of a fee dispute, you *may* have the right to seek arbitration. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request."

Accordingly, based on the pleading deficiencies, the complaint is dismissed without prejudice. For the purposes of judicial efficiency, the court will address the

substantive arguments raised in support of and in opposition to dismissal of the complaint.

Asch's contention that the breach of contract claim is barred by the six year statute of limitations is without merit. The evidence presented thus far establishes that the services in this matter were provided between September 25, 2006 and May 21, 2008, the first invoice was tendered to Asch on October 25, 2006, and this action was commenced on October 22, 2012. Any issue as to the amount actually billed and owed can be determined by the trier of fact.

However, Asch properly argues that the quantum meruit and account stated causes of action should be dismissed as duplicative, and Cooper, P.C. submits no opposition to this argument. See *Martin H. Bauman Assoc., Inc. v. H & M Int'l Transport, Inc.*, 171 A.D.2d 479 (1st Dept. 1991). As such, those causes of action are dismissed with prejudice.

Cooper, P.C. shall be permitted to recommence its action alleging breach of contract, pursuant to CPLR §205(a). See e.g. *Southern Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 104 A.D.3d 613 (1st Dept. 2013).

In accordance with the foregoing, it is hereby

ORDERED that defendant Sharon Asch's motion to dismiss the complaint is granted to the extent that the first cause of action is dismissed without prejudice, and the

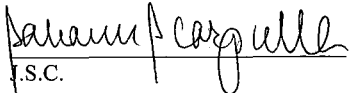
second and third causes of action asserted in the complaint are dismissed with prejudice;
and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
 January 8, 2014

ENTER:


J.S.C.

SALIANN SCARPULLA