SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CITRIN COOPERMAN & COMPANY, LLP,

Plaintiff,

Index No.
158875/2013

Decision and
Order

- against -

Mot. Seq. 01

DAVID KASSEL,

Defendant.

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

Plaintiff, Citrin Cooperman & Company, LLP ("Plaintiff"), brings this action seeking attorney's fees allegedly incurred for various legal proceedings relating to the arbitration of a fee dispute between Plaintiff and Defendant, David Kassel ("Defendant").

As alleged in the Complaint, Plaintiff entered into a written contract (the "Contract") with Defendant, whereby Plaintiff was hired to perform economic consulting services for Defendant, and alleges that Contract contained a mandatory arbitration provision governing any potential fee disputes between the parties, as well as a provision awarding Plaintiff attorneys fees and costs "for any action brought to enforce, interpret or collect damages" for breach of the Contract. Plaintiff alleges that such a dispute arose, that Plaintiff initiated arbitration proceedings to resolve said dispute, and that Defendant filed an order to show cause seeking to stay the arbitration which Plaintiff opposed. On or about January 11, 2013, Justice Huff rendered a decision denying Defendant's Petition to Stay Arbitration. On January 22, 2013, Defendant filed a Notice of Appeal.

The Arbitration proceeded in February 2013 which resulted in an Arbitration Award dated March 13, 2013 in favor of Plaintiff. The Award awarded $4,000 in attorneys' fees for Plaintiff. Plaintiff commenced a proceeding

to confirm the Arbitration Award, and prior to the conclusion of the proceeding, Defendant paid Plaintiff the sum of $37, 317.71, which included the $4,000 awarded for attorneys' fees.

In this action, Plaintiff now seeks attorneys fees and disbursements it has incurred unrelated to the Arbitration in the amount of $40,000.

Defendant moves for an Order dismissing Plaintiff's complaint, pursuant to CPLR §§ 3211(a)(1), (2), (5), and 3018(b), as barred by a mandatory arbitration clause, and on the grounds of documentary evidence, *res judicata*, collateral estoppel, and the "law of the case doctrine." Defendant also moves for costs and attorney's fees, pursuant to CPLR § 8303-a and 22 N.Y.C.R.R. 130-1.1. Plaintiff opposes.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (1) a defense is founded upon documentary evidence;
> >
> > (2) the court has not jurisdiction of the subject matter of the cause of action;
> >
> > (5) the cause of action may not be maintained because of . . . collateral estoppel, [or] . . . res judicata

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Collateral estoppel, or issue preclusion, "precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . , whether or not the tribunals or causes of action are the same." (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500[1984]).

Defendant submits the retainer agreement (the "Agreement") entered between Plaintiff and Defendant on September 24, 2010. Defendant argues that the Agreement contains a mandatory arbitration clause that warrants the dismissal of Plaintiff's complaint.

Specifically, the retainer agreement entered between the parties on September 24, 2010, provides:

> We understand that David Kassel is responsible for the payment of our fees, costs and out-of-pocket expenses and that Crystal and Donohue is in no way liable for the fees, costs and out-of-pocket expenses incurred in this matter.
>
> If this Agreement, or any moneys due and under the terms hereof, is placed in the hands of an attorney for collection of the account, David Kassel promises and agrees to pay of our reasonable attorney fees and collection costs, plus interest at the then legal rate, whether or not any legal action is filed. If any suit or action is brought by us to enforce, interpret, or collect damages for the breach of this agreement by your client, your client agrees to pay our reasonable attorney fees and costs of such suit or action, including any appeals is fixed by the applicable Court or Courts.
>
> All parties agree that any dispute over fees charged by Citrin Cooperman will be submitted for resolution by arbitration in accordance with the Rules for Professional Accounting and Related Services Disputes of the American Arbitration Association. Such arbitration shall be binding and final. In agreeing to arbitration, all parties are giving up the right to have the dispute decided in a court of law before a judge or jury and instead we are accepting the use of arbitration for resolution. The costs of any arbitration or mediation proceeding shall be shared equally by all parties participating in such dispute.

Defendant also submits documents relating to a previous arbitration

between the parties. That previous arbitration involved a fee dispute between the parties, which resulted in an arbitral award for Plaintiff. Defendant argues that the instant action seeks attorneys fees that were sought and denied in the arbitration proceeding. Defendant also argues that Plaintiff's request for attorneys fees relating to Defendant's commencement of a proceeding to stay the arbitration was previously litigated and decided against Plaintiff. As a result, Defendant contends, Plaintiff is precluded from re-litigating these fees.

Here, Plaintiff's claim for attorney's fees incurred in connection with the proceeding to stay the arbitration is precluded by the doctrines of *res judicata* and collateral estoppel. This issue was clearly raised in that proceeding, and decided against Plaintiff. (*Matter of Kassel v Citrin Cooperman & Co. LLC*, 107 A.D.3d 615 [1st Dep't 2013]) ("We have considered respondent's request for attorneys' fees in connection with this appeal and find it unavailing. This is not an action to collect unpaid fees as contemplated by the engagement letter. This proceeding was commenced solely for the purpose of staying the arbitration pending a determination of the arbitral issues."). Accordingly, Plaintiff is estopped from re-litigating this claim in the case at bar.

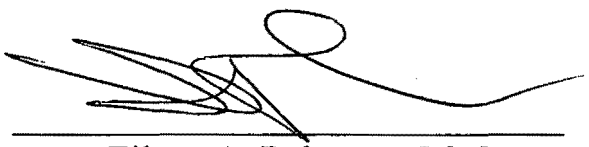
The Complaint fails to show an entitlement to new fees which are unrelated to the Arbitration and which would not have been before the Arbitrator. While Plaintiff contends that it is seeking fees it has incurred unrelated to the Arbitration, all fees alleged are connected to the arbitration.

Wherefore it is hereby,

ORDERED that defendant David Kassel's motion to dismiss the Complaint is granted and the Complaint is dismissed in its entirety as against defendant David Kassel, and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: MARCH 7, 2014



Eileen A. Rakower, J.S.C.