Matter of McKenzie v Nasser Ghorchian
2016 NY Slip Op 31293(U)
July 11, 2016
Supreme Court, New York County
Docket Number: 161670/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon PART 42
Justice

MATTER OF ROY A. McKENZIE

- v -

NASSER GHORCHIAN and NEW YORK COUNTY LAWYERS ASSOCIATION JOINT COMMITTEE ON FEE DISPUTES & RESOLUTION

INDEX NO. 161670/2015
MOTION DATE 2/3/2016
MOTION SEQ. NO. 001

The following papers were read on this proceeding, in effect, pursuant to CPLR article 75 to permanently stay arbitration:

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law	No(s). 1
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 2
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 3

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

The petitioner seeks to permanently stay arbitration of an attorneys' fee dispute initiated by Nasser Ghorchian before the New York County Lawyers Association Joint Committee on Fee Disputes & Resolution (NYCLA), contending that the dispute is neither the subject of an arbitration agreement nor subject to compulsory arbitration under the court-sanctioned Fee Dispute Resolution Program set forth in 22 NYCRR part 137. In the order to show cause initiating this proceeding, the court declined to temporarily restrain the arbitration proceedings pending the hearing of the petition. Ghorchian and NYCLA now oppose the petition. The petition is denied.

CPLR 7503 permits a party who has not yet participated in an arbitration, and has neither made nor been served with a petition in a judicial proceeding to compel arbitration, to seek a permanent stay of arbitration on the ground that a valid agreement to arbitrate was not made. The petitioner alleges that he entered into a retainer agreement with two of Ghorchian's business entities, 52 State Realty Corp. (52 State) and KCNG Realty Corp., to represent them in connection with real property transactions, but that Ghorchian never personally retained him as an attorney, and that he never represented Ghorchian. The petitioner asserts that Ghorchian only executed a personal guarantee of the corporations' obligations under the retainer agreement, and that only 52 State was invoiced for legal services, once in the sum of $51,951.50 and once in the sum of $4,095.68, for a total $56,047.18. The petitioner avers that, even if that amount is reduced by the sum of $5,000 that was concededly paid to him, a balance of $51,047.18 remains outstanding, and Ghorchian necessarily demanded arbitration before NYCLA of the entire amount that was billed. The petitioner thus seeks to permanently stay arbitration, arguing that no agreement to arbitrate a

fee dispute with Gorchian was made and, in any event, the amount in controversy exceeds the $50,000 limit for arbitrations governed by 22 NYCRR part 137.

In opposition, Ghorchian asserts that, contrary to the allegations in the petition, the relevant retainer agreement expressly identified him as the individual who retained the petitioner. Ghorchian submits a copy of the retainer agreement, which provides that "[t]he words 'you,' 'your,' and 'yours' in this letter shall refer to Nasser Ghorchian personally and to 52 SRC and KCNG," and that, "[b]y signing below, you agree to retain me to represent . . . entities owned by you." The retainer also contained a provision that, "upon request by you," meaning Ghorchian, the petitioner would arbitrate a fee dispute pursuant to 22 NYCRR part 137 that "arises between me," i.e., the petitioner, and "you," i.e., Ghorchian, where the fees are more than $1,000 and not in excess of $50,000. The retainer agreement also provided that the prevailing party to any "litigation or arbitration" initiated to resolve a fee dispute was entitled to recover costs. Ghorchian signed the retainer agreement both "personally" and on behalf of the two corporations.

Ghorchian further contends that the amount in controversy does not exceed the limit of NYCLA's jurisdiction, since he only seeks to arbitrate the validity of $40,000 of the $51,047.18 that remains outstanding, and NYCLA's rules provide that only the portion of the fee upon which the attorney and client disagree is to be considered in determining the arbitrability of the dispute. Finally, he asserts that questions as to the arbitrability of the dispute and the jurisdiction of NYCLA to serve as the arbitrator under 22 NYCRR part 137— whether the amount in controversy exceeds $50,000 and whether Ghorchian is or is not a party to the retainer— are for NYCLA, as arbitrator, to determine in the first instance. NYCLA opposes the petition as well, arguing that, as the designated arbitrator, it is not a proper party to the instant proceeding, which may only be litigated between the petitioner and Ghorchian. In any event, it agrees with Ghorchian that any questions as to its own jurisdiction over the fee dispute are for it to determine in the first instance.

22 NYCRR part 137 establishes a statewide regime for the arbitration of attorney fee disputes in certain civil actions, including where, as here, the amount in dispute is greater than $1,000 but does not exceed $50,000, and the fee is not otherwise governed by statute. See 22 NYCRR 137.1(b)(2). The Presiding Justice of the Appellate Division, First Department, approved a local program to resolve disputes in New York County, to be administered by a local bar association (see 22 NYCRR 137.4[a]), here, NYCLA. NYCLA is empowered to "establish written instructions and procedures for administering the program." 22 NYCRR 137.(4)(b)(1). Rule 1(c)(2) n 1 of NYCLA's Local Program Rules provides that "[t]he disputed sum is the portion of the fee upon which the attorney and client disagree, and not the total amount of the fees charged by the attorney." Rule 8(d)(1) provides that "[t]he Arbitrator is authorized to rule on his or her own jurisdiction under Part 137 and these Rules, including rulings as to an arbitration agreement's existence, scope or validity." Rule 8(d)(3) provides that any objection to the arbitrator's jurisdiction must be raised before or when filing the required response to a request for arbitration, and that the arbitrator may rule on any such objection at any time, including in the final award.

The law is settled that whether a controversy is properly subject to arbitration is initially one for the courts to determine. See Primex Intl. Corp. v Wal-Mart Stores, 89 NY2d 594, 598,(1997); Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd., 44 AD3d 581, 583 (1st Dept 2007). The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue. See Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd., supra, at 583. An arbitration clause, as a component of a contractual agreement, must be enforced according to its terms. See Greenfield v Philles Records, 98 NY2d 562, 569 (2002); W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 (1990). Ghorchian alleges that the sum in dispute here is $40,000, as that is the portion of the fee upon which he and the petitioner disagree, and was claimed in the demand to arbitrate. To the extent that the remaining $11,047.18 is not in dispute, it is admittedly owed by Ghorchian to the petitioner. As such, the amount in dispute is facially within NYCLA's jurisdiction, and the dispute is arbitrable. In any event, NYCLA has the authority to decline jurisdiction at any time, including in the final award, if it ultimately finds the amount in dispute to exceed $50,000. Therefore, there is no basis to permanently stay the arbitration on the ground that the amount in dispute exceeds NYCLA's jurisdiction under 22 NYCRR part 137.

This matter is distinguishable from Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd., supra, in which an attorney and its client disagreed as to whether the fee in dispute was greater or less than $50,000. In Eiseman, the client claimed that the amount in dispute was $49,424.80, which had been billed prior to the client's discharge of the attorney. However, the attorney continued to perform services for the client for one week after the client directed it to stop work, billing it an additional $10,979.80 for those services. Thus, there was no question that the $49,424.80 already in dispute was increased by an additional $10,979.80 in fees that was also clearly disputed, bringing the total to $60,404.60. The Court declined to compel arbitration, concluding that it was "not an uncontroverted fact" that the disputed amount was $49,424.80. Here, conversely, Ghorchian has conceded that he and his corporations owe the petitioner $11,047.18, and dispute only $40,000 of the fees that were invoiced. Moreover, there is no indication that the Eiseman Court applied NYCLA's definition of the "disputed sum" to that controversy. Even if it had, the parties clearly disagreed about the propriety of the entire $60,404.60 that was billed there.

In the absence of a claim of overreaching or overbearing, a retainer agreement executed by the parties is a contract that is subject to rules of contract construction, and should be enforced as written. See Eiseman, supra, at 583. The court concludes that Ghorchian and the petitioner were both parties to the retainer agreement, that Ghorchian was the petitioner's client within the meaning of 22 NYCRR part 137, and that he has the right to enforce the arbitration clause.

The petition must be denied insofar as asserted against NYCLA since, as the arbitrator itself, it is not a proper party to a proceeding to stay arbitration. See CPLR 7503(c).

Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed, and the petitioner and the respondent Nasser Ghorchian are directed to proceed to fee arbitration forthwith before the New York County Lawyers Association Joint Committee on Fee Disputes & Resolution.

This constitutes the Decision and Order of the court.

Dated: July 11, 2016

HON. NANCY M. BANNON, JSC

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER