

Feinberg v Charles

2016 NY Slip Op 32661(U)

February 3, 2016

Supreme Court, New York County

Docket Number: 655767/16

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 2

-----X
ERIC FEINBERG,

Plaintiff,

-against-

LINDA CHARLES,

Defendant.

-----X
HON. KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOT. AND AFF. IN SUPPORT	1-2 (Exs. A-D)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action by plaintiff Eric Feinberg seeking “declaratory and/or injunctive relief”,¹ defendant *pro se* Linda Charles moves, pursuant to CPLR 3012(b), to dismiss the action due to plaintiff’s failure to serve a complaint. Defendant also moves to confirm an arbitration award dated October 20, 2016 issued following an arbitration between the parties. The motion is unopposed. After a review of the parties’ papers and the relevant statutes and case law, the motion is **granted in part**.

¹Unless otherwise noted, all references are to the exhibits annexed to the affidavit of defendant Linda Charles submitted in support of this motion.

FACTUAL AND PROCEDURAL BACKGROUND:

On June 18, 2016, defendant Linda Charles retained plaintiff Eric Feinberg, an attorney, to represent her in connection with an appeal. Def. Aff., at par. 4. Upon her retention of plaintiff, defendant paid him a \$5,000 retainer fee. Id. Almost immediately thereafter, defendant discharged plaintiff as her attorney and demanded the return of the retainer fee. Id., at par. 5. Plaintiff advised defendant that he would not return the fee unless ordered to do so by a court. Id. Defendant then filed a complaint with the Joint Committee on Fee Disputes and Conciliation (“the Committee”), in which she requested arbitration of the issue of whether the retainer fee should be refunded to her. Id., at par. 6.

By correspondence dated July 12, 2016, the Committee advised plaintiff that it had been referred the dispute and requested that plaintiff provide it with his position statement and supporting documents. Ex. A. On September 15, 2016, the Committee notified defendant that an arbitration was to be conducted on October 19, 2016. Ex. B. On October 20, 2016, the day after the arbitration, the arbitrator mailed an award in favor of defendant in the amount of \$5,000.² Def. Aff., at par. 8. In a notice of arbitration award dated October 20, 2016, the Committee advised the parties that 1) “[e]ither party may reject the decision of the [arbitrator] and “commence [a trial *de novo*] on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed”; or 2) “[e]ither party may seek to vacate the award within 90 days after delivery [of the arbitration award] to the party.” Ex. C.

Plaintiff then commenced the captioned action by filing a summons with notice with this

²The Court notes that the actual award is neither an exhibit to the motion nor filed with this Court.

Court on November 1, 2016. Ex. D. In the summons, plaintiff represented that the action was for “declaratory and/or injunctive relief.” Id.

On November 18, 2016, defendant served and filed a notice of appearance and demand for a complaint. NYSCEF Doc. No. 2.

Defendant now moves, pursuant to CPLR 3012(b), to dismiss the action due to plaintiff’s failure to serve a complaint, as well as to confirm the arbitration award.

POSITION OF THE DEFENDANT:

Defendant asserts that the action must be dismissed pursuant to CPLR 3012(b) because plaintiff failed to served a complaint in response to her notice of appearance and demand for a complaint. She further requests that this Court issue an order confirming the arbitration award on the ground that, since plaintiff did not seek a trial *de novo*, the said award is binding on him.

LEGAL CONCLUSIONS:

Failure To Serve Complaint

Pursuant to CPLR 3012(b), a plaintiff who commences an action by service of a summons with notice and who has been served with a demand for the service of a complaint has 20 days in which to comply with that demand. *See Wess v Olympia and New York Realty Corp.*, 201 AD2d 365 (1st Dept 1994). A plaintiff seeking to serve a complaint after the expiration of the 20-day period must demonstrate the merits of the cause of action and a reasonable excuse for the delay. *See Barasch v Micucci*, 49 NY2d 594, 599 (1980).

Here, defendant’s notice of appearance and demand for a complaint was served and filed on

November 18, 2016. NYSCEF Doc. No. 2. However, despite proof that plaintiff was served with the notice of appearance and demand for complaint (Id.), as well as with this motion (NYSCEF Doc. No. 7), he has neither served a complaint nor even opposed this motion with any proffered reason why no complaint was served. Thus, the action is dismissed in the discretion of this Court pursuant to CPLR 3012(b). *See Alvarado v New York City Hous. Auth.*, 192 AD2d 461 (1st Dept 1993).

Motion to Confirm the Arbitration Award

Given the dismissal of the captioned proceeding, defendant's motion to confirm the award is academic in this matter. Should defendant be inclined to seek confirmation of the arbitration award, she must do so by means of a special proceeding. CPLR 7502(a).

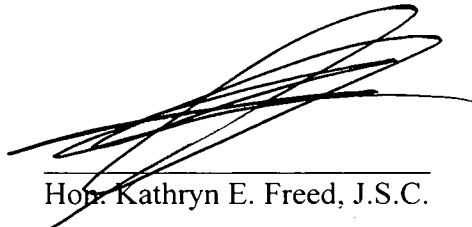
Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant Linda Charles is granted to the extent of dismissing the action pursuant to CPLR 3012(b); and it is further,

ORDERED that this constitutes the order and decision of the court.

DATED: February 3, 2016

ENTER:



Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**