

Sills Cummis & Gross P.C. v Dusange-Hayer

2019 NY Slip Op 31390(U)

May 14, 2019

Supreme Court, New York County

Docket Number: 158238/2017

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 158238/2017

SILLS CUMMIS & GROSS P.C.,
Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 003; 004; 005

BETTY DUSANGE-HAYER, ISHAN HOLDINGS AND
DEVELOPMENT CORPORATION, EMMET PIERCE, ERWIN
SINGH BRAICH, SATINDER DHILLON

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70 were read on this motion to/for JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 77, 78, 79 were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 005) 80, 81, 82, 83, 84 were read on this motion to/for DISMISSAL

In this action to recover unpaid attorneys' fees, plaintiff law firm Sils Cummis & Gross P.C. (Sills Cummis), moves in motion sequence 003 (MS3) for default judgment against defendants Betty Dusange-Hayer, Ishan Holdings and Development Corporation (Ishan), Emmet Pierce, Erwin Singh Braich, and Satinder Dhillon in the sum of \$370,355.87 plus interest (NYSCEF #39 – Pl's Notice of Motion MS3). The individual defendants are all self-represented; Ishan, the corporate defendant, has not retained counsel. MS3 is plaintiff's third motion to obtain a default judgment; this court denied plaintiff's prior two motions for failure to comply with CPLR 3215(f) (NYSCEF #37 – July 9, 2018 Decision and Order).

For their part, defendant Emmet Pierce moves in motion sequence 004 (MS4) to be removed from the pleadings as the retainer agreement is between Ishan and Sils Cummis, and for dismissal of this matter as the retainer requires arbitration for fee disputes (NYSCEF #74 – Pierce Notice of Motion MS4). Defendant Santinder Dhillon moves in motion sequence 005 (MS5) for the same relief as Pierce (NSYCEF #80 – Dhillon Notice of Motion MS5). The Decision and Order is as follows:

ALLEGATIONS AND PROCEDURAL FACTS

This action originates in January 2017, when Sills Cummis partner Paul M. Kaplan, Esq. joined the firm from Locke Lord LLP (NYSCEF #40 – Paul Kaplan Aff at ¶8). Kaplan avers that while he was at Locke Lord he represented defendant Erwin Braich in connection with potential litigations against an entity known as Karnalyte Resource Inc. (*id.*). Defendant Ishan, Braich’s financial advisor, had negotiated an acquisition of Karnalyte on Braich’s behalf but Karnalyte breached the parties’ Acquisition Agreement, and Braich and Ishan were exploring their legal options (*id.*). Apparently, defendant Dusange-Hayer and Ishan had previously commenced an action in the United States District Court of South Carolina, and Braich requested Kaplan review and advise them in that matter (*id.*)

When Kaplan joined Sills Cummis, Braich directed Locke Lord to transfer his files to Sills Cummis (*id.* at ¶9). Kaplan avers that Braich told Kaplan to continue to represent him (*id.*). When Kaplan informed Braich that a new Engagement Agreement was needed, Braich responded that while he would continue to pay the invoices, the Agreement itself was to be entered into with defendants Ishan, Dusange-Hayer, and Pierce (*id.*).

As such, on February 1, 2017, Dusange-Hayer and Pierce signed the Engagement Agreement with Sills Cummis (NYSCEF #42 – Engagement Agreement). A review of the Engagement Agreement reveals that Dusange-Hayer signed on her own behalf, and Emmet Pierce signed on behalf of Ishan (*id.* at 6). The Engagement Agreement specifically states that “[u]nless expressly agreed in writing, [Sills Cummis] will not be representing any related, affiliated or associated person or entity, including... any parent, subsidiary or affiliated corporation... or any of the Company’s or their officers, directors, investors, agents, partners, employees, agents or representatives... in connection with this or any other matter” (*id.* at 3).

The Engagement Agreement also included a mandatory arbitration clause which states: “in the event that [Sills Cummis] and [client] are unable to come to an amicable resolution with respect to any dispute (including, without limitation, any dispute with respect to the firm’s legal services and/or payment by you of amounts due to the firm), we and you agree that such dispute will be submitted to and finally determined by arbitration in accordance with the provisions set forth in attachment 1 to this retainer letter” (NYSCEF #42 at 5).

Kaplan states that he personally met with Dusange-Hayer, Pierce, Braich, and Dhillon in Vancouver, British Columbia, Canada to discuss the legal strategies against Karnalyte and that they all approve on how to proceed (NYSCEF #40 at ¶18). Kaplan avers that he rendered legal services to the defendants between

January 2017 and August 2017, with a total unpaid invoice of \$370,355.87 (*id.* at ¶28).

Kaplan further claims that Braich personally guaranteed the payment of the legal invoices (*id.* at ¶29). Plaintiff offers screen captures of text messages between Braich and Kaplan (NYSCEF #8 – Text Messages between Braich and Kaplan). A read-through of the alleged “guarantee texts” reveals a thread of Braich constantly promising that wire transfers were initiated and Kaplan saying that Sills Cummis had not received payment.

Due to the repeated failures of defendants to pay the outstanding invoices, the last one being issued on August 8, 2017, Sills Cummis commenced this action against defendants on September 14, 2017 (NYSCEF #44 – Invoices; NYSCEF #1-2 – Summons and Complaint). Plaintiff’s complaint alleges two causes of action: (1) defendants’ failure to pay \$370,355.87 in attorneys’ fees; and (2) account stated as defendants retained plaintiff’s billing statement without objection (NYSCEF #2 – Complaint at ¶¶7-18). There is no indication that plaintiff ever submitted this matter for arbitration or provided notice to defendants of its intent to arbitrate.

All defendants are Canadian citizens, and Ishan is a Canadian corporation. Plaintiff effectuated service on defendants Braich and Hayer on October 6, 2017, and on defendants Ishan, Pierce, and Dhillon on October 27, 2017, in accordance with CPLR 312-a and Article 10 of the Hague Service Convention (NYSCEF #48 and 50 – Affidavits of Service). Plaintiff served the defendants by both Federal Express delivery and by international registered mail and has attached delivery confirmations to its motion (NYSCEF #48-54).

Initially, defendants failed to respond, and plaintiff filed one motion for default judgment on November 29, 2017, and a second one on January 5, 2018 (NYSCEF #5 and #15). While the motions were pending, defendants each submitted Answers to the action (NYSCEF #25-27, 31-33). The court notes that defendant Ishan answered without counsel and relied on Emmet Pierce to sign its Answer (NYSCEF #26 – Ishan Answer). Plaintiff rejected defendants’ answers as untimely (NYSCEF #29-30, 34-36 – Notice of Rejection). This court denied plaintiff entry of default judgment on both motions by Order dated July 6, 2018, due to plaintiff’s failure to comply with the proof requirement of CPLR 3215(f) (NYSCEF #37 – July 6, 2018 Decision and Order).

Plaintiff now brings MS3 again attempting to obtain default judgment against all defendants. This time, plaintiff submitted an affidavit from Paul Kaplan as an affidavit of knowledge to address the infirmity of its prior motions. The individual defendants submitted affidavits in opposition to the instant motion (NYSCEF #70 – Affidavits from Dusange-Hayer, Pierce, Braich, and Dhillon).

Defendant Ishan did not oppose the default judgment motion. Defendants Pierce and Dhillon filed motions to dismiss in MS4 and MS5, respectively.

DEFAULT JUDGMENT MOTION

Plaintiff's motion for default judgment is denied and its complaint is dismissed for lack of subject matter jurisdiction. Plaintiff's failure to provide any evidence that it complied with 22 NYCRR 137.6(a)(1), governing the Attorney Fee Dispute Resolution Program, means that default judgment must be denied at this time pursuant to CPLR 3215(f) for failure to provide adequate proof of claim. Per 22 NYCRR 137.1(a), mandatory Attorney Fee Dispute Resolution applies to "all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter".

While 22 NYCRR 137.1(b)(2) states that the Fee Dispute Program does not apply to "amounts in dispute involving a sum of... more than \$50,000" it includes the exception that the program does apply "if the parties have consented" to disputes involving other amounts. The arbitration clause in the Engagement Agreement clearly states that "in the event that [Sills Cummis] and [client] are unable to come to an amicable resolution with respect to any dispute (including, without limitation, any dispute with respect to the firm's legal services and/or payment by you of amounts due to the firm), [Sills Cummis] and [client] agree that such dispute will be submitted to and finally determined by arbitration" (NYSCEF #42). As such, mandatory arbitration applies to "any dispute" between the parties regarding payment and regardless of the amount in dispute. Thus, even though plaintiff alleges fees well above the \$50,000 cap, it has contracted around the restriction per the Engagement Agreement. As such, plaintiff is required to comply with the Fee Dispute Program rules.

Plaintiff has not provided any evidence that it sent defendants a "Notice of Client's Right to Arbitrate" or that it proceeded to Arbitration in any manner, in violation of 22 NYCRR 137.6(b). Indeed, plaintiff has failed to even allege any compliance with 22 NYCRR 137.6.

Absent any indication of compliance with both its contractual obligation to pursue mandatory arbitration and the Attorney Fee Dispute Resolution Program rules, this court lacks subject matter jurisdiction in this matter (*see Peter Axelrod & Assoc., P.C. v Berk*, 19 Misc 3d 1134(A) [Civ Ct, New York County 2008, Mendez, J.] ["Failure to notify in accordance with the [Attorney Fee Dispute Program] divests this court of subject matter jurisdiction and leaves it with no other recourse but to dismiss this case"]; *see also Lorin v 501 Second St. LLC*, 2 Misc 3d 646, 648 [Civ Ct, Kings County 2003, Silber, J.] [attorney's failure to allege compliance with Attorney Fee Dispute Program rules is an issue of subject matter jurisdiction and requires dismissal). "[A] court's lack of subject matter jurisdiction is not waivable,

but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action” (*Fin. Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008] [citations omitted]).

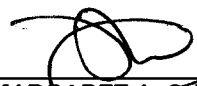
As this court is without subject matter jurisdiction, it is unnecessary to resolve defendants Pierce’s and Dhillon’s motions to dismiss, as those issue are rendered academic.

Accordingly, it is hereby ORDERED that plaintiff’s motion for default judgment is denied; it is further

ORDERED that this matter is dismissed for lack of subject matter jurisdiction; it is further

ORDERED that defendants Pierce’s and Dhillon’s respective motions to dismiss are denied as academic; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

<u>5/14/2019</u> DATE	 MARGARET A. CHAN, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE