Miller v Sontag
2020 NY Slip Op 31422(U)
May 7, 2020
Supreme Court, New York County
Docket Number: 653637/2019
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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GRAUBARD MILLER,

Plaintiff,

- v -

ALBERT SONTAG, BELTO REALTY CORP.

Defendants.

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INDEX NO. 653637/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 20

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiff's motion for leave to amend the complaint is denied and defendants' cross-motion to dismiss is granted.

Background

This legal fee dispute arises out of legal representation provided by plaintiff to defendants in connection with proceedings before the DHCR. Plaintiff moves to amend to add two paragraphs that include allegations that plaintiff advised defendants of their right to arbitrate and that defendants failed to serve their request to arbitrate. Plaintiff contends that it is owed just under $30,000.

In opposition and in support of their cross-motion, defendants contend that this case must be dismissed because plaintiff failed to comply with 22 NYCRR 137.6(b) which requires that an attorney must give a client notice about the right to arbitrate and 30 days to respond *before* bringing a lawsuit.

In reply and in opposition to the cross-motion, plaintiff acknowledges that it did not send the proper notice prior to commencing the instant action but insists this is not fatal to this case. It

argues that defendants were told about their right to arbitrate at an early stage of this litigation, it has now cured any defect by moving for leave to amend to include allegations about the required notice and defendants have suffered no prejudice. Plaintiff maintains that a defect in pleadings is generally not grounds to dismiss a case.

Discussion

22 NYCRR 137.6(b) provides that "If the attorney forwards to the client by certified mail or personal service a notice of the client's right to arbitrate, and the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue. An attorney who institutes an action to recover a fee must allege in the complaint: (1) that the client received notice under this Part of the client's right to pursue arbitration and did not file a timely request for arbitration; or (2) that the dispute is not otherwise covered by this Part."

The question in this motion is whether an attorney can correct his failure to comply with the fee dispute program by giving his client the notice to arbitrate only after starting a lawsuit. There is no question that if the attorney complied but failed to include allegations in a complaint that the notice was sent to the client, the attorney may cure this defect by moving for leave to amend (*see Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty*, 71 AD3d 533, 533 895 NYS2d 824 (Mem) [1st Dept 2010] (holding that plaintiff's failure to plead that the dispute over legal fees was not covered by the Fee Dispute Resolution Program did not require dismissal nor prevent plaintiff from moving for leave to amend).

But the issue here, contrary to plaintiff's contentions, is whether plaintiff can retroactively comply with the rules of the Fee Dispute Resolution Program after commencing an action. The "New York State Fee Dispute Resolution Program [ ] provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged" (22 NYCRR 137.0).

The purpose of this program is clear—to mandate that parties attempt to resolve certain types of fee disputes (including the one at issue here) through arbitration or mediation **before** commencing a lawsuit. In fact, 22 NYCRR 137.6(b) clearly contemplates that an attorney may start an action concerning a legal fee dispute *only after* the 30 days for the client to request an arbitration has passed. To read this regulation, as plaintiff does, to allow an attorney to remedy the failure to give a client the chance to arbitrate during the pendency of a litigation would render 137.6(b) meaningless.

Plaintiff fails to cite any binding case law in his reply that would prevent this Court from dismissing this case. Instead, he points to the legal principle that pleadings are freely amended even when the allegation is a prerequisite to a cause of action. But as, stated above, the issue is not whether plaintiff can move for leave to amend (he clearly can). This problem is that he did not comply with the relevant regulation before starting this case, a requirement that is clearly contemplated by that regulation. For some reason, plaintiff sent a letter informing defendants about the right to arbitrate on August 29, 2019, nearly three months after he started this case

(NYSCEF Doc. No. 17). Under these circumstances, the appropriate remedy is to dismiss the case (*see Kerner and Kerner v Dunham*, 46 AD3d 372, 848 NYS2d 617 [1st Dept 2007]).

Summary

The purpose of the Fee Dispute Resolution Program is to direct that certain things happen before a plenary action is commenced. The parties must try to mediate or the client must be given the chance to arbitrate. The program is not a mere inconvenience; plenty of disputed fees are resolved there and costly litigation is avoided. It is a client's right and attorneys must honor the program requirements before running to court. Although plaintiff wants this Court to overlook its failure to and essentially find that it complied nunc pro tunc by serving the notice after starting this case, the Court will not ignore reality. This is not a case where plaintiff honored its obligations and the client's rights but forgot to allege it in the complaint. The reality is that plaintiff failed to do what he was required to do before commencing this action. Therefore, the action is dismissed without prejudice to bringing it again after complying with 22 NYCRR 137.6(b) .

Accordingly, it is hereby

ORDERED that the motion by plaintiff for leave to amend is denied; and it is further

ORDERED that the cross-motion by defendants to dismiss is granted without prejudice to plaintiff instituting a new action after complying with 22 NYCRR 137.6(b).

5/7/2020

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE