

First Mercury Ins. Co. v D'Amato & Lynch, LLP

2020 NY Slip Op 32725(U)

August 17, 2020

Supreme Court, New York County

Docket Number: 159185/2019

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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FIRST MERCURY INSURANCE COMPANY,
acting through its agent, RIVERSTONE
CLAIMS MANAGEMENT, LLC,

Index No. 159185/2019

Plaintiff

- against -

DECISION AND ORDER

D'AMATO & LYNCH, LLP, LUKE LYNCH JR.,
ESQ., ARTURO BOUNTIN, ESQ., MICHAEL
HAIG, DAVID BOYAR, ROBERT LANG, John
Does 1-20, and Jane Does 1-10,

Defendants

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LUCY BILLINGS, J.S.C.:

I. PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT AGAINST DEFENDANT
D'AMATO & LYNCH

Plaintiff moves for a default judgment on the liability of defendant D'Amato & Lynch, LLP, a law firm, which entered an Engagement Agreement with plaintiff's agent RiverStone Claims Management, LLC, to represent plaintiff's insurance policyholders in defending litigation against them. The Engagement Agreement appointed D'Amato & Lynch the national coordinating counsel (NCC) for RiverStone Claims Management and plaintiff.

Plaintiff establishes that in one action that D'Amato & Lynch handled, Cox v. Linco Restoration Corp., a D'Amato & Lynch attorney advised plaintiff that the action was settled for \$1,000,000 to be paid by plaintiff. Plaintiff issued a check for

that amount to "D'Amato & Lynch LLP Trust Account," Aff. of Andrew Lavcott Bluestone (Oct. 24, 2019) Ex. A (V. Compl.) ¶ 20, to be held pending disbursement to the settling plaintiff, but D'Amato & Lynch deposited the check in the firm's operating account, where the firm used the funds for purposes other than to pay the plaintiff in settlement of the Cox action. Plaintiff in this action claims the firm's professional negligence, breach of fiduciary duty, conversion, fraudulent conveyance, unjust enrichment, violation of New York Judiciary Law § 487, and violation of the Rules of Professional Conduct, which is not a claim this court may adjudicate. N.Y. Jud. Law § 90; Shapiro v. McNeil, 92 N.Y.2d 91, 97 (1998); Suttongate Holdings Ltd. v. Laconm Mgt. N.V., 173 A.D.3d 618, 619 (1st Dep't 2019); Cohen v. Kachroo, 115 A.D.3d 512, 513 (1st Dep't 2014); Art Capital Group, LLC v. Neuhaus, 70 A.D.3d 605, 607 (1st Dep't 2010).

Plaintiff admits that § VII(F) of the Engagement Agreement with D'Amato & Lynch provides for mediation and arbitration of disputes between the parties, but insists that the dispute over the \$1,000,000 payment is an "Extra-Contractual Obligation or Loss" defined in § V(G)(3) of the Engagement Agreement and not subject to alternative dispute resolution. Plaintiff fails to present the Engagement Agreement, however, so plaintiff's allegations regarding the agreement's contents and its exclusion of the dispute over the \$1,000,000 payment from mediation and

arbitration are hearsay. People v. Joseph, 86 N.Y.2d 565, 570 (1995); Shanmugam v. SCI Eng'g, P.C., 122 A.D.3d 437, 438 (1st Dep't 2014). See B.P. AC Corp. v. One Beacon Ins. Group, 8 N.Y.3d 708, 716 (2007); Williams v. Esor Realty Co., 117 A.D.3d 480, 480-81 (1st Dep't 2014).

Plaintiff served the summons and complaint on D'Amato & Lynch by delivery to the State Secretary of State September 23, 2019, giving D'Amato & Lynch until October 23, 2019, to answer. C.P.L.R. § 3012(c). In opposition to plaintiff's motion, D'Amato & Lynch explains that it advised its insurer when the firm was served and expected the insurer to defend the action. When the insurer denied a defense several weeks later, the D'Amato & Lynch retained defendant Lynch's attorney, who on October 28, 2019, five days late, filed a Notice of Appearance for the firm and requested from plaintiff an extension of time to respond to the complaint. Plaintiff refused unless D'Amato & Lynch answered rather than responded to the complaint with a motion. Since D'Amato & Lynch intended to move to compel alternative dispute resolution under the Engagement Agreement, D'Amato & Lynch proceeded with that motion. On November 1, 2019, plaintiff and both defendants D'Amato & Lynch and Lynch stipulated to extend these defendants' time to oppose plaintiff's motion for a default judgment against D'Amato & Lynch and to move to compel alternative dispute resolution until November 12, 2019.

In opposition to plaintiff's motion, D'Amato & Lynch also presents the parties' Engagement Agreement, which Lynch authenticates. Section VII(F) provides that:

If any dispute arises between RiverStone and NCC with respect to this Engagement Agreement which the parties are unable to resolve by negotiation within fifteen (15) days of written notice by any party to the others, the parties agree that the dispute will be submitted to mediation in California before a professional mediator. If the dispute is not resolved within thirty (30) days after submission to mediation, any party may submit the matter for final binding resolution by arbitration.

Aff. of Luke D. Lynch, Jr. (Nov. 12, 2019), Ex. B (emphases added). The parties' dispute over the \$1,000,000 payment arises from and relates to D'Amato & Lynch's performance of its services under the Engagement Agreement. Shapiro v. Sankarsingh, 178 A.D.3d 484, 485 (1st Dep't 2019); Minoque v. Malhan, 178 A.D.3d 447, 448 (1st Dep't 2019); DS-Concept Trade Inv. LLC v. Wear First Sportswear, Inc., 128 A.D.3d 585, 585 (1st Dep't 2015); BRG Sports, LLC v. Zimmerman, 127 A.D.3d 499, 499 (1st Dep't 2015). In fact, even if, as plaintiff maintains, this dispute is over which party's actions are responsible for "Extra Contractual Obligations . . . or Loss in Excess of Policy Obligations," § V(G)(3) provides that such a dispute "shall be resolved pursuant to Section VII.F." Id. Since plaintiff fails to establish that its claim for the \$1,000,000 in settlement funds is not subject to mandatory mediation and arbitration under the parties' Engagement Agreement, the court denies plaintiff's motion for a

default judgment against D'Amato & Lynch. C.P.L.R. § 3215(f); Manhattan Telecom Corp. v. H & A Locksmith, Inc., 21 N.Y.3d 200, 203 (2013); Martinez v. Reiner, 104 A.D.3d 477, 478 (1st Dep't 2013); Giordano v. Brenhouse, 45 A.D.3d 416, 417 (1st Dep't 2007).

II. PLAINTIFF'S MOTION FOR A CONSTRUCTIVE TRUST ON THE PROPERTY OF DEFENDANTS D'AMATO & LYNCH AND LYNCH

Plaintiff also moves for a constructive trust on the real and personal property of D'Amato & Lynch and of Lynch as the firm's sole general partner and the sole signatory on the firm's escrow accounts. To be entitled to an equitable interest in defendants' real or personal property, plaintiff must show that D'Amato & Lynch or Lynch has misappropriated the \$1,000,000 payment to acquire real or personal property for the firm's or Lynch's own benefit, and that property is at risk of being removed from New York, lost, or destroyed. Homapour v. Harounian, 182 A.D.3d 426, 427-28 (1st Dep't 2020); Estate of Calderwood v. ACE Group Lntl. LLC, 157 A.D.3d 190, 199 (1st Dep't 2017).

Plaintiff nowhere alleges that D'Amato & Lynch or Lynch used the \$1,000,000 deposited in the firm's operating account to acquire identifiable real or personal or real property. Moreover, the only evidence plaintiff presents to show that any of defendants' property will be removed from New York, lost, destroyed, or otherwise rendered inaccessible or worthless is an

uncertified, unverified complaint against D'Amato & Lynch by its landlord for rent; an inadmissible news article about that lawsuit, People v. Samandarov, 13 N.Y.3d 433, 437 (2009); Rodriguez v. City of New York, 105 A.D.3d 623, 624 (1st Dep't 2013); and unsworn correspondence by RiverStone Claims Management. The correspondence recites D'Amato & Lynch's notification to RiverStone Claims Management "that the firm was withdrawing from working on litigated claims" and "would be unable to perform any substantive work on any files after June 14, 2019." Aff. of Andrew Lavoott Bluestone (Nov. 11, 2019) Ex. C, at 1. While this notification may raise an inference that the firm was winding down its business and thus qualify as an admission that is an exception to the rule against hearsay, no foundation is laid for the admissibility of the first layer of hearsay; the correspondence itself, as a business record or other exception to the rule against hearsay. E.g., C.P.L.R. § 4518(a); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012).

Nor does the complaint allege the factual basis for a constructive trust or even seek such relief, which would ensue at the conclusion of the action, where plaintiff is without the legal remedy of damages that plaintiff claims here. Simonds v.

Simonds, 45 N.Y.2d 233, 242-43 (1978); AO Asset Mgt. LLC v. Levine, 154 A.D.3d 430, 431 (1st Dep't 2017). Plaintiff's motion is in effect a motion for summary judgment on an unpleaded claim, Quik Park W. 57 LLC v. Bridgewater Operating Corp., 148 A.D.3d 444, 445 (1st Dep't 2017); Burgos-Lugo v. City of New York, 146 A.D.3d 660, 662 n.3 (1st Dep't 2017); Pludeman v. Northern Leasing Sys., Inc., 106 A.D.3d 612, 616 (1st Dep't 2013), which is also premature before defendants have answered. C.P.L.R. § 3212(a); City of Rochester v. Chiarella, 65 N.Y.2d 92, 101 (1985); Stone Column Trading House Ltd. v. Beogradska Banka A.D., 139 A.D.3d 577, 578 (1st Dep't 2016); Ruotolo v. Mussman & Northey, 105 A.D.3d 591, 593 (1st Dep't 2013); Drezin v. New Yankee Stadium Community Benefits Fund, Inc., 94 A.D.3d 542, 543 (1st Dep't 2012).

Moreover, defendants have shown that the Engagement Agreement requires that the claims in this action be resolved through mediation or arbitration, depriving this court of the authority to grant relief based on those claims, even if the grounds for a constructive trust were pleaded and a constructive trust sought in the complaint. Defendants' dispute over the \$1,000,000 payment stems from their claim against plaintiff for its prior repudiation of its outstanding payments due to D'Amato & Lynch for the firm's services upon termination of the Engagement Agreement, which offset plaintiff's claim for the

\$1,000,000. Defendants show that on December 2, 2019, D'Amato & Lynch demanded alternative dispute resolution under the Engagement Agreement to address both plaintiff's claim for the \$1,000,000 payment and D'Amato & Lynch's claim for more than \$1,200,000 in damages owed by plaintiff to the firm. Since plaintiff fails to plead the grounds for a constructive trust or support it with admissible evidence, and such relief, even if pleaded and supported, is premature and under the Engagement Agreement is subject to mandatory mediation and arbitration, the court denies plaintiff's motion for a constructive trust on the property of D'Amato & Lynch and Lynch.

III. PLAINTIFF'S MOTION FOR APPOINTMENT OF A TEMPORARY RECEIVER OF DEFENDANT D'AMATO & LYNCH'S BUSINESS AND PERSONAL PROPERTY

Next, plaintiff moves for appointment of a temporary receiver of D'Amato & Lynch's business and personal property. C.P.L.R. § 6401(a). To support this relief, plaintiff must show not only that the receiver is necessary to preserve specific property, but also that plaintiff maintains an interest in the property. Moran v. Moran, 77 A.D.3d 443, 445 (1st Dep't 2010); Quick v. Quick, 69 A.D.3d 828, 829 (2d Dep't 2010). Plaintiff's claim of entitlement to the monetary amount of \$1,000,000 from D'Amato & Lynch's assets is not the identifiable personal property that C.P.L.R. § 6401(a) envisions.

Moreover, while the appointment of a temporary receiver,

unlike the constructive trust, need not be supported by the complaint and is not necessarily premature, plaintiff presents no additional evidence to show that D'Amato & Lynch's business or property will be removed from New York, lost, destroyed, or otherwise rendered inaccessible or worthless. Ficus Invs., Inc. v. Private Capital Mgt., 61 A.D.3d 1, 12 (1st Dep't 2009); Matter of Armienti & Brooks, 309 A.D.2d 659, 661 (1st Dep't 2003); Board of Mgrs. of Nob Hill Condominium Section II v. Board of Mgrs. of Nob Hill Condominium Section I, 100 A.D.3d 673, 673 (2d Dep't 2012); Breslin Realty Dev. Corp. v. Shaw, 91 A.D.3d 804, 805 (2d Dep't 2012). Nor does plaintiff show that it may not seek this relief through arbitration.

Finally, plaintiff fails to show that it maintains any partnership or other interest in D'Amato & Lynch. The Engagement Agreement expressly provides that it is "not intended to form a partnership for the practice of law, any other type of partnership, or the sharing of legal fees." Aff. of Elizabeth A. O'Connor Ex. A (Dec. 5, 2019) § VII(I). The Engagement Agreement does not even confer an attorney-client relationship between plaintiff and D'Amato & Lynch, but instead expressly provides that: "The only attorney-client relationship intended to be created is between NCC and Insureds whom NCC will defend pursuant to this Engagement Agreement." Id.

In sum, plaintiff fails to support its entitlement to or

need for a temporary receiver with admissible evidence. Such relief, even if supported, is also subject to mandatory mediation and arbitration under the Engagement Agreement. Because plaintiff has not made the "clear evidentiary showing warranting the drastic remedy of appointment of a receiver," 1195 Birchall Ave. LLC v. Boodhoo, 128 A.D.3d 504, 504 (1st Dep't 2015), the court denies plaintiff's motion for appointment of a temporary receiver of D'Amato & Lynch's business or personal property. C.P.L.R. § 6401(a); Moran v. Moran, 77 A.D.3d at 445; Ficus Invs., Inc. v. Prvate Capital Mgt., 61 A.D.3d at 12; Sanley Co. v. Louis, 197 A.D.2d 412, 413 (1st Dep't 1993).

IV. THE MOTION BY DEFENDANTS D'AMATO & LYNCH AND LYNCH TO STAY THIS ACTION AND COMPEL ALTERNATIVE DISPUTE RESOLUTION AND PLAINTIFF'S CROSS-MOTION TO STAY ALTERNATIVE DISPUTE RESOLUTION

On November 12, 2019, D'Amato & Lynch and Lynch moved to stay this action and to compel arbitration of plaintiff's claims in this action under the Engagement Agreement's alternative dispute resolution provision if, pursuant to that provision, the claims are not resolved through mediation. C.P.L.R. § 7503(a) and (c). Plaintiff then cross-moved to stay any alternative dispute resolution of plaintiff's claims in this action. C.P.L.R. § 7503(b) and (c). As set forth above, plaintiff's claim for its \$1,000,000 settlement payment arises from and relates to D'Amato & Lynch's performance of its services under the Engagement Agreement and thus is subject to its alternative

dispute resolution provision. Shapiro v. Sankarsingh, 178 A.D.3d at 485; Minogue v. Malhan, 178 A.D.3d at 448; DS-Concept Trade Inv. LLC v. Wear First Sportswear, Inc., 128 A.D.3d at 585; BRG Sports, LLC v. Zimmerman, 127 A.D.3d at 499. Contrary to plaintiff's suggestion, the alternative dispute resolution provision is not limited to issues regarding how the Engagement Agreement is to be interpreted or applied. See Gerling Global Reins. Corp. v. Home Ins. Co., 302 A.D.2d 118, 124 (1st Dep't 2002). Even if, as plaintiff maintains, the dispute is over responsibility for "Extra Contractual Obligations . . . or Loss in Excess of Policy Obligations," the Engagement Agreement provides that such a dispute is also subject to alternative dispute resolution. Lynch Aff. Ex. B § V(G)(3).

If plaintiff insists that the immediate relief sought, a constructive trust or a temporary receiver, or the ultimate recovery for negligence, breach of fiduciary duty, conversion, a fraudulent conveyance, unjust enrichment, or violation of Judiciary Law § 487 is not subject to mediation and arbitration, the Engagement Agreement authorizes the arbitrator to determine that issue. The Engagement Agreement provides that: "The arbitration . . . shall be conducted in accordance with the then effective Commercial Rules of the American Arbitration Association." Lynch Aff. Ex. B § VII(F). Lynch also presents and authenticates the current Commercial Rules of the American

Arbitration Association. Id. Ex. C. Rule 7(a) provides that: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Id. § R-7(a).

Finally, although Lynch is not a party to the Engagement Agreement, plaintiff's claims against him are for acts carried out as a partner of D'Amato & Lynch and because of his status as a partner of the firm. Therefore the Engagement Agreement's alternative dispute resolution provision covers plaintiff's claims against him as well as the firm, so that he may enforce the provision as a third party beneficiary. Shapiro v. Sankarsingh, 178 A.D.3d at 485; Huntsman Intl. LLC v. Albemarle Corp., 163 A.D.3d 420, 421 (1st Dep't 2018); Hirschfeld Prods. v. Mirvish, 218 A.D.2d 567, 568-69 (1st Dep't 1995).

V. PLAINTIFF'S CROSS-MOTION FOR A DEFAULT JUDGMENT AGAINST DEFENDANT LYNCH

In opposition to the motion by D'Amato & Lynch and Lynch to stay this action and compel alternative dispute resolution, plaintiff also cross-moves for a default judgment on Lynch's liability. Plaintiff did not serve Lynch until September 30, 2019, by delivery to a person of suitable age and discretion at Lynch's place of business, C.P.L.R. § 308(2), and by conspicuous place service at his residence, C.P.L.R. § 308(4), accompanied by mailings. Plaintiff filed the affidavit of substitute service

October 3, 2019, rendering that service complete October 13, 2019, followed by the affidavit of conspicuous place service filed October 25, 2019, rendering that service complete November 4, 2019. C.P.L.R. 308(2) and (4). Therefore Lynch's time to answer expired November 12, 2019.

On November 12, 2019, Lynch moved to stay this action and to compel arbitration of plaintiff's claims in this action under the Engagement Agreement's alternative dispute resolution provision if, pursuant to that provision, the claims are not resolved through mediation. C.P.L.R. § 7503(a) and (c). This motion was consistent with the stipulation dated November 1, 2019, between plaintiff and both Lynch and D'Amato & Lynch to extend these defendants' time to move to compel alternative dispute resolution until November 12, 2019.

D'Amato & Lynch maintains that, while it was five days late in appearing in response to the complaint, based on this stipulation extending its time to move to compel alternative dispute resolution, it did not default. Lynch maintains that he was never late because he moved to compel alternative dispute resolution both before his time to respond to the complaint expired and in compliance with the stipulation. Plaintiff, without citing any authority, contends that their motion, unlike a motion to dismiss the complaint, was not a response to the complaint that tolled defendants' time to answer. C.P.L.R. §

3211(f).

Even if plaintiff's position is supportable, D'Amato & Lynch's belief that its time to respond to the complaint was extended by the stipulation and both defendants' belief that their time to answer was tolled by their motion excuse any lateness by D'Amato & Lynch in responding to the complaint and any lateness by either defendant in answering. C.P.L.R. § 3012(d). D'Amato & Lynch's initial delay in responding to the complaint and both defendants' delay in answering before being confronted with plaintiff's unsupported position that their motion did not toll their time were brief and without any indication of a willful or dilatory default. Shmuklyer v. Feintuch Communications, Inc., 158 A.D.3d 469, 470 (1st Dep't 2018); Rivera v. New York City Dept. of Sanitation, 142 A.D.3d 463, 464 (1st Dep't 2016). Nor does plaintiff show any prejudice from the brief delay. Corcino v. 4303 Baychester, LLC, 147 A.D.3d 467, 467 (1st Dep't 2017); Melinda M. v. Anthony J.H., 143 A.D.3d 617, 619 (1st Dep't 2016); Rivera v. New York City Dept. of Sanitation, 142 A.D.3d at 464; Romero v. Alezeb Deli Grocery Inc., 115 A.D.3d 496, 496 (1st Dep't 2014).

While the parties' agreement to mediate and arbitrate disputes may not be a basis for dismissing this action, Allied Bldg. Inspectors Int. Union of Operating Engrs. v. Office of Labor Relations of City of N.Y., 45 N.Y.2d 735, 738 (1978); C & M

345 N. Main St., LLC v. Nikko Constr. Corp., 96 A.D.3d 794, 795 (2d Dep't 2012); Carbon Capital Mgt., LLC v. American Express Co., 88 A.D.3d 933, 940 (2d Dep't 2011), the agreement is certainly a basis to compel mediation and arbitration, C.P.L.R. § 7503(a), and to stay the action, which would stay defendants' time to answer in any event. Allied Bldg. Inspectors Int. Union of Operating Engrs. v. Office of Labor Relations of City of N.Y., 45 N.Y.2d at 738; Gabriel Capital, L.P. v. CAIB Investmentbank AG, 28 A.D.3d 376, 378 (1st Dep't 2006). See Daniels v. Commerzbank, 79 A.D.3d 506, 507 (1st Dep't 2010); Carbon Capital Mgt., LLC v. American Express Co., 88 A.D.3d at 940. Therefore the court excuses any lateness by D'Amato & Lynch and Lynch in responding to and answering the complaint, C.P.L.R. § 3012(d), and enforces the alternative dispute resolution provision in the Engagement Agreement. Fiveco, Inc. v. Haber, 11 N.Y.3d 140, 144 (2008); Shapiro v. Sankarsingh, 178 A.D.3d at 485; Minogue v. Malhan, 178 A.D.3d at 448; DS-Concept Trade Inv. LLC v. Wear First Sportswear, Inc., 128 A.D.3d at 585.

VI. DISPOSITION

For the reasons explained above, the court denies plaintiff's motions and cross-motions for a default judgment against defendants D'Amato & Lynch, LLP, and Lynch, for a constructive trust, for a temporary receiver, and to stay alternative dispute resolution. C.P.L.R. §§ 3212(a), 3215,

6401(a), 7503(b) and (c). The court grants the motion by defendants D'Amato & Lynch, LLP, and Lynch to stay this action against these two defendants, C.P.L.R. § 2201; Allied Bldg. Inspectors Int. Union of Operating Engrs. v. Office of Labor Relations of City of N.Y., 45 N.Y.2d at 738; Gabriel Capital, L.P. v. CAIB Investmentbank AG, 28 A.D.3d at 378, and to compel alternative dispute resolution under the parties' Engagement Agreement. C.P.L.R. § 7503(a); Fiveco, Inc. v. Haber, 11 N.Y.3d at 144; Shapiro v. Sankarsingh, 178 A.D.3d at 485; Minogue v. Malhan, 178 A.D.3d at 448; DS-Concept Trade Inv. LLC v. Wear First Sportswear, Inc., 128 A.D.3d at 585.

DATED: August 17, 2020

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.