| **Boon v Bo Shi** |
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| 2023 NY Slip Op 30158(U) |
| January 17, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 161422/2021 |
| Judge: David B. Cohen |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. DAVID B. COHEN** **PART 58**

***Justice***

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JIMMY KAM CHAW BOON,

Plaintiff,

- v -

BO SHI, SHI & ASSOCIATES,

Defendant.

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**INDEX NO.** 161422/2021

**MOTION DATE** 02/04/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion to/for DISMISS.

In motion sequence number 001, defendants move, pursuant to CPLR 3211(a)(1) and 3211(a)(7), for an order dismissing plaintiff's verified complaint. Plaintiff opposes.

FACTUAL ALLEGATIONS

Plaintiff's Complaint (NYSCEF 1)

On December 21, 2021, plaintiff, who is appearing *pro se*, filed a verified complaint and demand for a trial *de novo* against defendants. Plaintiff alleges that on October 23, 2017, he retained the legal services of defendants in the context of a landlord-tenant dispute, and that he paid them $67,350.00 for services rendered. He terminated defendants' representation on April 4, 2018, but prior thereto, he requested an itemized invoice for all work performed by them. Plaintiff further alleges that the amount billed by defendants was excessive and that they did not perform the work indicated in their invoices.

Plaintiff alleges that on June 20, 2018, he submitted defendants' billing records to an independent firm, Sterling Analytics, "to audit the billings for compliance with accepted billing practices in accordance with court precedent and the American Bar Association." (*id.* at ¶ 25).

According to plaintiff, Sterling Analytics issued a report stating that $69,922.00 of the $73,449.00 amount billed by defendants was "non-compliant with established case law." (*id.* at ¶ 26). Plaintiff alleges that he submitted the report to defendants, who refused to honor the findings and did not refund him any money. (*id.* at ¶ 27).

Plaintiff maintains that on March 22, 2019, he filed a request with the New York County Lawyer's Association Joint Committee on Fee Disputes and Conciliations for Fee Arbitration ("arbitration committee") against defendants, to dispute $50,000 in fees.[1] (*id.* at ¶ 29).

On January 29, 2020, the arbitration committee issued an arbitration award in plaintiff's favor in the amount of $41,850.00. (*id.* at ¶ 30). Despite the award, plaintiff alleges that, to date, defendant has failed to refund him any money. (*id.* at ¶ 31).

Plaintiff alleges a cause of action against defendant for a declaratory judgment in the amount of $56,725.00 plus statutory interest, as well as a claim for fraud and punitive damages, as to which he alleges that defendants made fraudulent representations to the arbitration committee by submitting false billing statements which were allegedly not previously provided to him.

<u>Defendants' Factual Allegations</u>

Defendants allege that in October of 2017, plaintiff retained their services in an ejection action, and that pursuant to a retainer agreement, they charged plaintiff $74,639.50, consisting of $74,290.00 for legal services and $349.50 in disbursements. (*id.* at ¶ 9). Defendants contend that, to date, plaintiff paid $67,350.00 and still owes defendants $7,289.50. (*id.* at ¶ 10).

Following the issuance of the arbitration award in plaintiff's favor, defendants allege that they timely filed a *de novo* review of the award in this court, under index number 100329/2020.

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[1] Plaintiff alleges that he "was only able to request $50,000.00 because this amount is the cap on the authority of the fee arbitration committee." (*See* NYSCEF DOC. NO. 1 at ¶ 29).

(*id.* at ¶ 11). A review of the Supreme Court Records On-Line Library reveals that defendants filed a summons and complaint against plaintiff on February 28, 2020, and that an affidavit of personal service on plaintiff was filed on August 5, 2020. The Court record does not reflect any additional filings, and a request for judicial intervention has not been filed by defendants.

DISCUSSION

A motion to dismiss based upon a defense founded upon documentary evidence pursuant to 3211(a)(1) may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law." (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intl.*, 80 AD3d 448, 450 [1st Dept 2011], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

In considering a motion to dismiss for failing to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1995]; *see also African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]).

Furthermore, "'a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law'" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 125 [2d Dept 2009], *affd* 16 NY3d 775 [2011], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

When evidentiary material is considered, the complaint should not be dismissed unless the defendant has established that a material fact alleged by the plaintiff "is not a fact at all and . . . no significant dispute exists regarding it." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A. Documentary evidence

Defendants rely on the arbitration award itself to establish that plaintiff's claims related to the award are time-barred. An application to confirm an arbitration award must be filed within one year of the award, unless the award has been modified within that period. (*Bevona v Command Sec. Servs*, 284 AD2d 125, 126 [1st Dept 2001]; *see also* CPLR 7510). An application for such modification must be made within 90 days of the award. (CPLR 7511). Moreover, the award provides that its confirmation is governed by CPLR 7510, and that an individual has "one year after the date of delivery of the award to confirm [it] by commencing a proceeding in the appropriate court." (NYSCEF 8).

In addition, to the extent that plaintiff is seeking a *de novo* trial, the award provides that "either party may reject the decision of the arbitrator(s) and commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed." (*id.*). Moreover, "if no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding." (22 NYCRR 137.8). This 30-day time period is absolute and not subject to judicial discretion. (*Matter of Gold, Stewart, Kravitz, Benes, LLP v Crippen*, 109 AD3d 919, 920 [2d Dept 2013]).

The award is dated January 30, 2020, and the notice of arbitration award is dated January 31, 2020, and it is undisputed that a copy of it was sent to plaintiff on January 31, 2020. Therefore, plaintiff's deadline to move to confirm the award would have been January 31, 2021.

However, several Executive Orders, issued during the COVID-19 pandemic, tolled plaintiff's time to commence an action to confirm the award, with the last Order expiring on November 3, 2020. Given the toll, plaintiff's last day to commence an action to confirm the award was September 13, 2021. As plaintiff did not commence this action until December 21, 2021, more than three months after the one-year deadline, his application to confirm the arbitration award is time-barred.

To the extent that plaintiff seeks a *de novo* trial, he was required to do so by March 1, 2020, and his application is thus time-barred.

In any event, as defendants timely filed an action for a *de novo* trial, it is not final and binding on them, and thus plaintiff is not entitled to judgment on the award (*See Lawyers Co-op. Pub. v Scott,* 255 AD2d 952 [4th Dept 1998] [as plaintiff failed timely demand for trial de novo, court properly denied defendants' motion for entry of final judgment on arbitration award]).

Defendants therefore demonstrate that plaintiff's claims for a declaratory judgment and monetary relief arising from the arbitration award must be dismissed.

B. Plaintiff's fraud and punitive damages claims

The elements of a common-law fraud claim are "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Ambac Assur. Corp. v Countrywide Home Loans, Inc*. 31 NY3d 569, 578-579 [2018], quoting *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]).

Plaintiff's fraud claim is predicated on his allegations that defendants made false misrepresentations to the arbitration committee about the work they performed on his behalf and

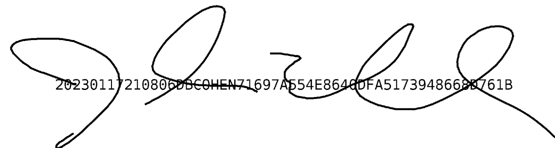
submitted false invoices. Since these misrepresentations were made to the committee and not to plaintiff, as plaintiff did not rely on them in any manner, and as he suffered no injury related thereto as he received an award from the committee, he fails to state a claim for fraud against defendants.

Moreover, punitive damages are only permitted when the defendant's wrongdoing is not simply intentional but "evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007], quoting *Walker v Sheldon*, 10 NY2d 401, 405 [1961]). The allegations set forth by plaintiff are insufficient to meet this standard. Accordingly, plaintiff's claims for fraud and punitive damages are dismissed.

CONCLUSION

Accordingly, it is

ORDERED, that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.




1/17/2023
DATE

DAVID B. COHEN, J.S.C.

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