

Shapiro v National Arbitration & Mediation, Inc.

2011 NY Slip Op 33956(U)

December 19, 2011

Supreme Court, Bronx County

Docket Number: 251286/11

Judge: Jr., Kenneth L. Thompson

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This opinion is uncorrected and not selected for official publication.

DEC 23 2011
CASEDISP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
LAUREN SHAPIRO,

Index No. 251286/11

Plaintiff,

-against-

DECISION/ORDER

NATIONAL ARBITRATION & MEDIATION, INC., a/k/a
NAM ADR,

Present:
HON. KENNETH L. THOMPSON, Jr.

Defendants.

The following papers numbered 1 to 3a read on this motion, __

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1, 1a</u>
	Answering Affidavit and Exhibits-----	<u>2, 2a</u>
	Replying Affidavit and Exhibits-----	<u>3, 3a</u>
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants' motion for an Order pursuant to CPLR ¶¶ 3211(a)(1) and (a)(7) dismissing Plaintiff's Complaint is **GRANTED**.

The Agreement

Plaintiff entered into an Agreement with Defendant to resolve a child support dispute by arbitration. Under the Agreement, Plaintiff agreed "TO THE SUBMISSION OF [HER] DISPUTE TO NAM IN ACCORDANCE WITH NAM'S RULE." (Agr. at ¶ 1.) (caps in Agreement). The Agreement informed Plaintiff that Defendants "may not provide legal services to the parties in arbitration," thus, it was "recommended that each party consult with separate independent legal counsel." (Id. at ¶ 2.) Plaintiff agreed to pay an initial "administrative fee of \$400." (Id. at ¶ 5.) And an hourly fee of \$500 per hour, which was to be "split equally between" her and—presumably—the father of the child for whom support was sought. (Id.) This fee included "hearing time and any time

spent by the Arbitrator reviewing documents prior to or after the arbitration, and preparation for the arbitration decision." (*Id.*) Plaintiff commenced this action to recover \$3,625 in fees paid to Defendants, \$4,900 in fees paid to her attorney and punitive damages based on allegations of fraud, malpractice, breach of contract and violation of public policy. (S&C at 12-13.)

The Complaint

In Plaintiff's matter, Defendants billed: \$1250 for 2.5 hours, emanating from a "preliminary phone conference" (S&C at ¶ 6); \$1000 for 2.0 hours, regarding a "scheduling order" (*id.* at ¶ 8); \$875 for 1.75 hours, in reference to a "decision" (*id.* at ¶ 11); and \$500 for 1 hour, to conduct a telephone conference. Although the Complaint mentions that Defendant's Arbitrator billed for 4.5 hours to write the decision, there is no indication of whether the Arbitrator expected or received payment for this time. (*Id.* at ¶ 14.) Defendants billed \$3625 for 11.5 hours of work on the arbitration, half of which Plaintiff was liable for under the Agreement. Thus, she was required to pay Defendant \$1812.50 for 11.5 hours of work, totaling \$157.60 an hour, before she could obtain the decision which would presumably entitle her to the support she sought. (*Id.* at ¶ 19.) Despite this tally, Plaintiff is alleging that Defendants committed fraud by "routinely padd[ing] its bills." (*Id.* at pg. 12, ¶ 2.)

Plaintiff acknowledges that Defendants' "Arbitrator(s) [would] attempt to render final Award within thirty (30) days from the date the Arbitration is declared closed" (*id.* at ¶ 16) and that the Award did increase her child's support (*id.* at ¶ 20.) Yet, she is alleging that Defendants: committed fraud "by not producing the decision within 30 days of the trial" (*id.* at pg.12, ¶ 3); breached the Agreement based on "the absence of a

decision which was rendered 60 days later than promised, and then withheld" (*id.* at pg.12, ¶ 5.); and violated public policy by "withholding child support, and withholding order that directs child support" (*id.* at pg. 13). Plaintiff also alleges that Defendants committed malpractice because the Arbitrator "fail[ed] to issue all decision in writing, by violating its own rules, and failing to train or supervise its employees." (*id.* at pg.13, ¶3.)

Dismissal Standard

"On a motion to dismiss pursuant to CPLR § 3211 the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324 (citations omitted).

In deciding a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must give the pleading a liberal construction, accept all of the facts alleged in the pleading to be true, and accord the plaintiff the benefit of every possible favorable inference in determining whether the allegations fit under any cognizable legal theory

Smith v. Meridian Techs., Inc., 52 A.D.3d 685, 689 (citations omitted).

Fraud

"A cause of action sounding in actual fraud must state that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and that the other party justifiably relied upon such misrepresentation or concealment to his or her own detriment." Levin v Kitsis, 82 A.D.3d 1051, 1054.

Breach of Contract

The "essential elements" of a breach of contract claim are "the existence of a contract, the plaintiff's performance pursuant to that contract, the defendants' breach of their obligations pursuant to the contract, and damages resulting from that breach."

Elisa Dreier Reporting Corp. v Global Naps Networks, Inc., 84 A.D.3d 122, 127.

The Fees

Plaintiff claims that, "NAM's fees greatly exceeded those of the private arbitrators." (Pl. Aff. Opp. at unnumbered pg. 2.) And proffers data from "the CUNY Dispute Resolution Center," that showed that the "[a]verage fees in New York City are \$200 per hour for family mediations." (Id. at 2-3.) She fails, however, to state whether the 11.5 hours billed was beyond the norm for her matter. Consequently, the Court finds that the \$157.60 per hour in fees Plaintiff actually paid was below the average she cited to.

Regardless of this finding, there is no evidence that Defendants misrepresented their fees—as stated in the Agreement—or the amount of time it would take to arbitrate the matter. Furthermore, the language of NAM's Rule 7, stating that any fee waivers are granted in Defendants' "sole discretion" (S&C at ¶ 18), belies Plaintiff's allegations that she is entitled to that waiver. Moreover, Plaintiff fails to state any allegations in support of her claim of entitlement to the payment of her attorney's \$4,900 fee. Thus, Plaintiff has failed to sufficiently state a cause of action for fraud based on her claim of excessive fees.

The Decision

There is no indication in the Complaint, the Agreement or the Rules that Defendants promised or represented to Plaintiff that she would get an arbitration

decision within 30 days after the Hearing. Rather, Plaintiff concedes that Defendants' rules stated that she was not entitled to a copy of the decision until "all outstanding fees [were] paid." (S&C at ¶ 19.) Plaintiff admitted that the Award actually increased her child's support. And despite her claim that she "was deprived the use of the money while NAM withheld the decision," she does not allege that she actually lost any money as a result of this purported withholding. Ergo, she has not stated a cause of action for fraud or breach of contract based on these allegations.

Public Policy

The Complaint alleges that, "the decision did award [Plaintiff] an increase in child support" (S&C at ¶ 20). This leads to the inference that some type of support obligation was in place at the time of the decision. And while the decision may have been delayed, there is no indication that this delay eliminated, diminished, abrogated—or otherwise interfered with—this preexisting obligation. See Matter of Thomas B. v Lydia D., 69 A.D.3d 24, 27. Consequently, Plaintiff has failed to sufficiently state this "novel" cause of action based on her own theory of liability.

Malpractice

Professional malpractice requires a showing of "negligence ... , that the negligence was the proximate cause of the loss sustained, and proof of actual damages." See Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 6 (applying it in reference to a lawyer) (citation omitted). Although Plaintiff makes myriad allegations of Defendants' negligence, she does not claim that she is dissatisfied with the Arbitrator's final award. Plaintiff has also failed to allege that she has sustained a loss proximately caused by any alleged negligence. Or that she

suffered any damages due to any alleged negligence. Thus, she has failed to state a cause of action for malpractice.

The foregoing shall constitute the decision and order of this Court.

Dated: DEC 19 2011



J.S.C.
KENNETH L. THOMPSON, JR.