SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN Justice PART 63

Index Number : 150787/2012
LINDENBAUM, ESQ., HERBERT G.
vs.
PULVERS, PULVERS & THOMPSON,
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Petition
MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER AND JUDGMENT

This constitutes the Judgment of the Court

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

12 150787

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

Dated: 7/25/12

_____, J.S.C.
HON. ELLEN M. COIN

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 63

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HERBERT G. LINDENBAUM, ESQ.,

Petitioner

–against–

PULVERS, PULVERS & THOMPSON, LLP,

Respondent.

----------X

Index Number 150787/2012
Submission Date June13, 2012
Mot. Seq. No. 001

DECISION, ORDER and JUDGMENT

Petitioner Pro Se:
Herbert G. Lindenbaum, Esq.
90 Broad St. #1901
New York, New York 10004
646-747-0300

Respondent Pro Se:
Pulvers, Pulvers & Thompson LLP
110 East Fifty-Ninth Street
New York, New York 10022
212-355-8000

Papers submitted on this Petition to Stay Arbitration and for Declaratory Relief:

Papers	**Numbered**
Notice of Pet. and Affidavits Annexed	1
Affirm. in Opp	2
Affirm. in Reply	3

ELLEN M. COIN, J.:

Petitioner Herbert G. Lindenbaum, Esq. ("Lindenbaum") has filed this special proceeding pursuant to Article 75 of the CPLR for an order permanently staying the arbitration commenced by Respondent Pulvers, Pulvers & Thompson, LLP ("PPT") and for a declaratory judgment that (1) the underlying fee-sharing agreement is unenforceable because it was unilaterally rescinded; (2) that the agreement is void and unenforceable as contrary to Part 137 of the New York Rules of the Chief Judge; and (3) that pursuant to Judiciary Law § 475 and 22 § NYCRR 1215.1, no charging lien exists on Lindenbaum's clients' cases.

Lindenbaum also seeks to permanently enjoin PPT from asserting its claims on his clients' cases. In support of his petition, Lindenbaum attaches an unsworn letter addressed to PPT from

Richard M. Maltz, apparently an expert in legal ethics, in which Mr. Maltz opines that PPT does not have a charging lien in Lindenbaum's cases, because it was not an attorney of record, and thus should not contact third parties, including insurance carriers, to claim a lien in any potential settlement. (Pet. Ex. E).

At the heart of this action is the *of counsel* agreement that Lindenbaum and PPT entered into on January 28, 2010. The agreement provides for the exchange of services between Lindenbaum and PPT and sets a fee-sharing arrangement applicable to a specifically delineated list of clients. Paragraph 26 of the agreement expressly provides for mandatory arbitration:

> In the event there is any dispute between the parties stemming from their relationship created by this agreement or of any of the terms thereof, then each party agrees to binding arbitration and specifically not to resort to any legal (court) action. The arbitration shall be by The American Arbitration Association.

(Def. Ex. A, ¶ 26). After PPT served its demand to arbitrate dated December 16, 2010 and Neutral Arbitrator Stanley Chinitz was appointed, the parties adjourned the preliminary arbitration hearing held on March 1, 2011 upon Lindenbaum's advising the arbitrator of his imminent bankruptcy filing. (Def. Ex. E). After termination of the automatic stay, the arbitration was reinstated. A second preliminary hearing was held on February 28, 2012. Lindenbaum thereafter obtained counsel to represent him in arbitration, and the hearing was scheduled for April 27, 2012. (Def. Ex. D). In the interim, and prior to the scheduled date for arbitration, Lindenbaum commenced the instant proceeding.

PPT opposes the proposed stay of arbitration, arguing that any challenges to enforceability of the agreement to share legal fees must be determined in arbitration and that the sole issue that the Court may consider pursuant to CPLR 7503 is the threshold issue of whether there is a valid

agreement to arbitrate. (Thompson Affirm., pp. 5-6). Further, PPT argues that pursuant to CPLR 7503(b), Lindenbaum may no longer seek to stay arbitration as he has already participated in the arbitration proceedings. (Thompson Affirm., p. 5).

According to Lindenbaum, this proceeding implicates ethical obligations of attorneys to act in their clients' best interests and, as such, is not appropriate for arbitration. Both in his petition and in reply, Lindenbaum invokes Rule 1.5(g) of the Code of Professional Responsibility, which sets mandatory requirements for fee splitting between attorneys. Lindenbaum argues that the both parties failed to comply with Rule 1.5(g)(2), as they did not fully disclose to Lindenbaum's clients the details of their fee-splitting arrangement and did not obtain the clients' written consent. Lindenbaum also argues that PPT failed to comply with NYCRR § 1215.1, which requires written letters of engagement or retainer agreements under certain circumstances.

Discussion

New York law favors arbitration. Once the parties' mutual intention to submit to arbitration and forego access to judicial remedies is clear, the parties are required to proceed to arbitration. (*Lory Fabrics, Inc. v Dress Rehearsal, Inc.*, 78 AD2d 262, 267 [1st Dep't 1980]).

Under CPLR 7503, there are two threshold issues a court may entertain: whether the dispute at issue is arbitrable and whether the arbitration is timely and within the statute of limitations. (*See Zachariou v Manios*, 68 AD3d 539, 540 [1st Dep't 2009]). The merits of a controversy governed by an agreement subject to a binding arbitration provision are exclusively within the province of the arbitrators. (*See Olympia & York OLP Co. v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 214 AD2d 509, 512 [1st Dep't 1995]).

Because Lindenbaum is bound by the arbitration clause in an agreement reduced to writing, the determination of whether disaffirmance, attempted oral modification or non-performance of the agreement is warranted on any particular ground is reserved for the arbitrator, not the Court. (*See Buckeye Check Cashing, Inc. v Cardegna*, 546 U.S. 440, 444-46 [2006]). It is also for the arbitrator to determine the issue of non-enforceability on the ground of any perceived illegality. (*See Matter of Natl Equip. Rental Ltd. v American Pecco Corp.*, 28 N.Y.2d 639, 641 [1971]).

Lindenbaum's assertion that PPT's rescission of the agreement voids the arbitration clause is inaccurate. There does not appear to exist any prior judgment granting rescission of the agreement. What Lindenbaum calls rescission is, at most, an alleged breach of contract, which must be arbitrated. Even assuming the contrary would nonetheless lead to the same conclusion. The mandatory arbitration clause in Paragraph 26 of the agreement is all-encompassing, as it expressly applies to "...any dispute...", admitting within its ambit claims of rescission. (*See Ercoli v Empire Professional Soccer, LLC*, 39 AD3d 1148, 1148 [4th Dept 2007]; *see also Triangle Equities Inc. v Listokin*, 13 AD3d 269, 270 [1st Dept 2004]).

Furthermore, there is no legal authority for the proposition that fee-splitting disputes between attorneys are not amenable to arbitration due to ethical considerations. Lindenbaum's emphasis on Rule 1.5(g) as a bar to PPT's recovery is misplaced. Rule 1.5(g) requirements are applicable to unassociated attorneys, which was not the case here. Despite the fact that Lindenbaum was not employed at PPT, pursuant to Paragraph 2 of the agreement, he received office space and complete litigation support and legal services from the firm at no separate charge and in exchange for a specified portion of the legal fees recovered. Moreover, Paragraph 17 prohibited Lindenbaum from providing "legal services to any other attorney or law firm, other than the acceptance of referral

matters . . ." without PPT's written consent. The *of counsel* relationship created a "fixed link" between Lindenbaum and PPT so as to bring the relationship within the meaning of the word "associated" for the purposes of Rule 1.5(g). (*See Gold v Katz*, 193 AD2d 566, 566 [1st Dept 1993] (interpreting DR 2-107, 22 NYCRR 1200.12, a predecessor to Rule 1.5(g)).

Lack of a separate retainer agreement between PPT and Lindenbaum's clients is not germane to the resolution of this fee-splitting dispute. (*See Ruta & Soulios LLP v Litman & Litman, PC*, 9 Misc 3d 1123A [Sup Ct, New York County 2005] (distinguishing between a charging lien and a claim of recovery of rendered legal services). It may, however, be relevant to the issue of the availability of a charging lien. (*See e.g., Matter of Jaghab & Jaghab v Marshall*, 256 AD2d 342, 343 [2nd Dept 1998](applying a charging lien only to attorneys of record)).

However, determination of any claimed charging lien cannot be referred to arbitration. Because a charging lien under Judiciary Law § 475 implicates PPT's alleged equitable ownership interests in Lindenbaum's clients' causes of action (*LMWT Realty Corp. v Davis Agency, Inc.*, 85 NY2d 462, 467 [1995]), it is not subject to the arbitration clause, as the underlying clients, who are necessary parties to any Judiciary Law § 475 proceeding, are not signatories to the agreement and have not been made parties to this petition. (*Cf. Morgan v Onassis*, 5 NY2d 732, 734 [1958]) Further, any determination on the issue of a charging lien should be brought before the court handling each of the particular actions in which the lien is alleged to have arisen. (*See Carbonara v Brennan*, 300 AD2d 528, 529 [2nd Dept 2002]; *see also Natole v Natole*, 295 AD2d 706, 708 [3rd Dept 2002]).

Because the Court has determined that Lindenbaum must arbitrate PPT's claim for a portion of the recovered fees under the agreement, the Court need not address the timeliness of this petition under CPLR § 7503(b).

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the portion of the above-captioned petition pursuant to Article 75 to stay arbitration is denied and dismissed; and it is further

ORDERED and ADJUDGED that the portion of the above-captioned petition seeking a declaratory judgment pursuant to Judiciary Law § 475 to determine the status of a charging lien claimed by Respondent is denied and dismissed, with leave to re-file the petition under Judiciary Law § 475 in an appropriate forum.

This constitutes the decision, order and judgment of the Court.

Dated: 7/25/12

ENTER:

Ellen M. Coin, A.J.S.C.

12 150787

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.