SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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30 CARMINE LLC a/k/a DEAN ROSS, 174 HESTER ST. LLC a/k/a DEAN ROSS, 171 MULBERRY LLC a/k/a DEAN ROSS and 109 ELDRIDGE LLC a/k/a DEAN ROSS,

Plaintiffs,

-against-

JAY ARTHUR GOLDBERG, P.C. a/k/a JAY ARTHUR GOLDBERG, P.C., ESQ. a/k/a LAW OFFICES OF JAY ARTHUR GOLDBERG, P.C.,

Defendant.

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DECISION AND ORDER

Index No. 116990/2009

O. PETER SHERWOOD, J.:

This is an action for declaratory relief and to recover damages for alleged overpayments for legal services rendered by defendant for tax certiorari work. Before the court is plaintiffs' motion for an order: (1) pursuant to CPLR § 3211 (a) (1) and (7) dismissing all counterclaims asserted against Dean Ross individually; (2) pursuant to CPLR § 3024 (b) striking defendant's answer for improperly referring to an arbitration which is subject to *de novo* review; (3) alternatively, striking from the answer all references to the prior arbitration; and (4) pursuant to 22 NYCRR 130-1.1 awarding plaintiffs sanctions against defendant for frivolous conduct. Defendant opposes the motion and cross moves to compel plaintiffs to reply to its counterclaims within seven (7) days of the order and setting the matter down for an immediate trial.

Background

The controversy between the parties emanates from a dispute as to legal fees claimed by defendant Jay Arthur Goldberg, P.C. a/k/a Jay Arthur Goldberg, P.C., Esq. a/k/a Law Offices of Jay Arthur Goldberg, P.C. ("Goldberg" or "defendant") to be owing from plaintiffs 30 Carmine LLC a/k/a Dean Ross, 174 Hester St., LLC a/k/a Dean Ross, 171 Mulberry LLC a/k/a Dean Ross and 109 Eldridge LLC a/k/a Dean Ross (collectively "plaintiffs"). The facts underlying the dispute are derived from the verified complaint. In March and April 2007, Goldberg was retained by the plaintiffs, each of which is a limited liability company ("LLC"), pursuant to written retainer agreements (the "Retainer Agreement"), which were signed in each instance by Dean Ross ("Ross"),

an attorney, as member of such LLCs (Affidavit of Dean Ross in Support of Motion [Ross Aff.], Ex. "J", Ver. Compl. ¶¶ 6-9). Goldberg was retained for the purpose of performing tax certiorari work in an effort to reduce the valuation of the respective plaintiffs' property for certain specified tax years. Each of the Retainer Agreements provided that fee disputes under $50,000.00 would be submitted to binding arbitration pursuant to Part 137 of the New York Rules of the Chief Administrator (22 NYCRR). After Goldberg performed services pursuant to the Retainer Agreements, a dispute arose as to the amount of legal fees owed to Goldberg. Pursuant to the provision in the Retainer Agreements, the parties submitted the fee dispute to arbitration. A three-member arbitration panel made awards in favor of Goldberg against each of the plaintiffs and Ross, individually, in the aggregate sum of $35,694.25. The arbitration awards were mailed to plaintiffs, Ross and defendant on or about November 4, 2009.

Plaintiffs then timely commenced this plenary action by filing a summons with notice on December 3, 2009, seeking *de novo* review of the fee dispute as permitted by section 137.8 of the Rules of the Chief Administrator. The Notice stated that the action was for a declaration "as to what, if anything, Plaintiffs owe Defendant in connection with tax certiorari work allegedly performed by Defendant to reduce real estate taxes for the 2008/2009 tax year" and also for a declaration and monetary relief "for overpayment of legal fees in connection with tax certiorari work allegedly performed by Defendant for plaintiff 30 Carmine LLC to reduce real estate taxes for the 2007/2008 tax year". Pursuant to defendant's demand, on or about April 26, 2010, plaintiffs served a verified complaint seeking essentially the same relief as was indicated in the Notice.

Issue was joined by service of Goldberg's verified answer in which it admits that it provided tax certiorari legal services to plaintiffs pursuant to written retainer agreements it drafted with information provided by Ross, it achieved significant reductions in the assessed values of plaintiffs' properties for the 2008/2009 tax year and for the 2007/2008 tax year, and it states that it was owed the aggregate sum of $36,902.25 (Ross Aff. Ex. "K", Ver. Ans., ¶ 8). Goldberg otherwise denies many of the material allegations of the verified complaint, interposes as affirmative defenses that the action is barred by the doctrines of res judicata, collateral estoppel and laches and counterclaims against plaintiffs and Ross, individually, to recover as against the plaintiffs and Ross the aggregate

sum of $36,902.25 for legal services rendered, with interest from May 6, 2008, upon theories of breach of contract, quantum meruit, and account stated (*id.*).

Soon after this plenary action was commenced, by petition filed December 17, 2009, defendant commenced a proceeding to confirm the arbitration award (*Jay Arthur Goldberg, P.C. v 30 Carmine LLC, 174 Hester St. LLC, 171 Mulberry LLC, 109 Eldridge LLC and Dean Ross,* Index No. 117674/2009) (the "Confirmation Action"). The Confirmation Action was dismissed by decision and judgment entered March 24, 2010 (Stallman, Michael D., J.), on the ground that the subject retainer agreements did not explicitly provide that the clients were waiving their right to *de novo* review of the arbitration award (*Jay Arthur Goldberg, P.C. v 30 Carmine LLC,* 27 Misc3d 680 [Sup Ct, N.Y. Co. 2010]). Justice Stallman denied Goldberg's request to consolidate the Confirmation Action with this plenary action stating that "[b]ecause respondents are entitled to de novo review, the arbitral awards have no binding effect on the plenary action" (*id.* at 683). Defendant's appeal from the decision and judgment in the Confirmation Action is now pending before the Appellate Division, First Department (*see* Affidavit of Dean Ross in Support of Motion [Ross Aff.], Ex. "K", Verified Answer, ¶ 29).

Plaintiffs now move, *inter alia,* pursuant to CPLR § 3211 (a) (1) and (7) to dismiss the counterclaims as against Ross in his individual capacity. In support of the motion, Ross, who is a member of each of the plaintiff LLCs and appearing as plaintiffs' counsel, submits his personal affidavit in which he avers on the basis of documentary evidence, namely the Retainer Agreements, that he did not retain Goldberg in his individual capacity to perform legal services on behalf of plaintiffs nor was any of the legal work provided for him in his individual capacity, but rather such work was performed solely for the plaintiff LLCs.

In opposition, defendant submits his attorney's affirmation which claims that the counterclaims are properly stated against Ross individually as Ross "has blurred the lines between himself as an individual and his real estate entities."

Accepting as true the facts pleaded by defendant and according defendant the benefit of every favorable inference to be drawn from those facts (*see EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]; *Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]), defendant has failed to state a cause of action as against Ross individually. Here, there is no dispute that each of the named plaintiffs is a limited liability company. It is well settled that pursuant to section 609 (a) of the

Limited Liability Company Law, members and managers of a limited liability company are statutorily exempt from individual liability for the obligations or liabilities of such company, unless the "veil" of the limited liability company is pierced (*see Retropolis, Inc. v 14th St. Development LLC*, 17 AD3d 209, 210 [1st Dept 2005]; *Collins v E-Magine*, 291 AD2d 350, 351, *lv denied* 98 NY2d 605 [2002]). A party seeking to pierce a corporate (or limited liability) veil "bear[s] a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences . . . Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance . . . " (*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998]; *see Matter of Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 35 [1993]; *Collins*, 291 AD2d at 351).

In the case at bar, defendant has alleged no facts in support of his counterclaims that may serve as a predicate for Ross' individual liability. Goldberg does not claim that it was retained by Ross individually, that Ross signed the retainer agreements in his individual capacity, or that Goldberg believed that it was being retained by Ross individually. Nor does the record show that Ross dominated the plaintiff LLCs and used such domination to commit a fraud or other tortious act. Ross simply cannot be held liable for the plaintiffs' obligations by mere virtue of his status as a member of the respective plaintiffs LLCs. Accordingly, the counterclaims must be dismissed to the extent that they are asserted against Ross in his individual capacity.

Plaintiffs also move pursuant to CPLR § 3024 (b) to strike defendant's verified answer for improperly referring to the arbitration which is subject to *de novo* review in this proceeding or, alternatively, striking all references to the arbitration contained in the verified answer. Plaintiffs contend that defendant's references to the prior arbitration and award are irrelevant to this action, are highly prejudicial and have "irretrievably tainted" this action (Ross Aff. ¶¶ 12, 18-22). Moreover, they contend that because such references are incorporated into the majority of the answer making the excising of prejudicial matter extremely difficult, the entire answer should be stricken.

Defendant contends that he raised the issue of the arbitration and award in his answer in order to preserve his rights with respect to his pending appeal in the Confirmation Action. On this basis,

defendant maintains that such references are appropriate and neither its answer nor such references in its answer should be stricken.

CPLR § 3024 (b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted into a pleading." "In reviewing a motion pursuant to CPLR 3024 (b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (*Soumayah v Minnelli,* 41 AD3d 390, 392 [1st Dept 2007], *appeal withdrawn* 9 NY3d 989 [2007]). Where allegations are relevant to a cause of action, they will not be stricken (*see New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan,* 22 AD3d 391 [1st Dept 2005]).

Of significance to this inquiry are the Part 137 rules and procedures governing fee resolution disputes. Absent an agreement to the contrary, a party aggrieved by the award in a Part 137 fee dispute arbitration may seek a *de novo* review of the dispute by commencing an action on the merits of the fee dispute within 30 days after the arbitration award has been mailed (22 NYCRR § 137.8). Thus, arbitration awards under Part 137 are not necessarily or automatically binding upon the parties (*see Eisman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.,* 44 AD3d 581, 584 [1st Dept 2007 [dissenting opinion McGuire, J.]). Such *de novo* review is of the fee dispute itself rather than a review of the arbitration or of the arbitration award and, as such, it proceeds as if the arbitration never occurred. In this respect, it differs from a CPLR Article 75 proceeding to confirm, vacate or modify an arbitrator's award and such procedures as are relevant to such proceedings are inapplicable to the Part 137 fee dispute procedure or arbitration awards entered in such disputes (*see generally Sachs v Zito,* 28 Misc3d 567, 571 [Sup Ct, Orange Co., 2010]). Moreover, section 137.8 (c) specifically provides that "[a]rbitrators shall not be called as witnesses [in a de novo review action] nor shall the arbitration award be admitted in evidence at the trial de novo".

The key to determining the relevance of matter inserted into a pleading is generally whether such matter would be admissible in evidence at trial (*see generally* Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR C:3024:4, at 52-53). The case of *Landa v Dratch* (45 AD3d 646 [2d Dept 2007]), relied upon by plaintiffs, appears to be on all fours with the instant action. In *Landa,* the plaintiff sought *de novo* review of the merits of a legal fee dispute. The Appellate Division, Second Department held that since the arbitration award was inadmissible as evidence at the trial *de novo*, it could not be attached as an exhibit to the defendant's answer or

otherwise referred to in the defendant's pleading. The branch of plaintiff's motion as sought to strike such material from defendant's answer as prejudicial and unnecessary was, therefore, granted.

Goldberg attempts to distinguish *Landa* from the facts of the instant matter by claiming that in *Landa* the defendant did not oppose plaintiff's application for *de novo* review, did not seek confirmation of the arbitration award and no appeal was pending in a parallel action. In addition, Goldberg asserts that the defendant therein improperly asserted that the court was bound by the arbitration award. In contrast, Goldberg contends that the arbitration is raised here simply to preclude plaintiffs from arguing that the appeal in the Confirmation Action is moot due to the pendency of this action. Defendant's arguments are unpersuasive particularly as they do not address the issue of the admissibility of the challenged material at trial or demonstrate how reference to the arbitration is relevant in this action. Accordingly, all references to the arbitration in defendant's answer must be stricken.

Plaintiffs' remaining issue concerns the imposition of sanctions against defendant for allegedly engaging in frivolous litigation as defined in 22 NYCRR 130-1.1. Such sanctions are only appropriate when a party or attorney has abused the judicial process by engaging in wholly frivolous litigation (*see Drummond v Drummond,* 305 AD2d 450, 451 [2d Dept 2003], *lv denied* 1 NY3d 504 [2003]; *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). Plaintiffs have not shown that defendant abused the judicial process or that the arguments raised are completely without merit in law. Accordingly, the court denies plaintiffs' request for sanctions.

Defendant's application in its cross motion that this matter be set down for an immediate trial is granted to the extent that the matter will be set down for a pre-trial conference at which the nature and extent of appropriate discovery will be considered. The primary purpose of the Part 137 fee dispute resolution procedures, as noted by the former Chief Judge of the New York Court of Appeals Judith Kaye at the time the program was established, is to provide a "fair and speedy alternative to litigation" of attorney-client fee disputes (*Borgus v Marianetti,* 7 Misc3d 1003 [A] [City Ct., City of Rochester 2005], quoting "The State of Judiciary 2002,", January 14, 2002). In recognition of this purpose, the provision for a trial de novo of the dispute should be interpreted in the same manner as in other circumstances where a trial de novo is available, namely, that the demand for a trial de novo is the equivalent of a note of issue and, once filed, places all claims on the trial calendar (*see*

Brooklyn Caledonian Hosp. v Cintron, 147 Misc2d 498, 499 [Civ. Ct., Kings Co. 1990]; *Alllison v State Painting & Decorating Co., Inc.,* 141 Misc2d 797, 798 [Civ. Ct., N.Y. Co. 1988]). The fact that the trial de novo under Part 137 is obtained by commencing an action rather than by serving a demand does not then permit the parties to engage in extensive discovery in advance of the actual trial. To hold otherwise would frustrate the objectives and intent of the Fee Dispute Resolution Program to promote the expeditious resolution of fee disputes with attorneys.

Based upon the foregoing discussion, it is

ORDERED that the branch of plaintiffs' motion to dismiss the counterclaims as against the individual plaintiff is granted and the counterclaims are hereby dismissed as against Dean Ross, individually; and it is further

ORDERED that the branch of plaintiffs' motion pursuant to CPLR § 3024 (b) to strike defendant's answer or, alternatively, to strike all references to the prior arbitration is granted, the answer is stricken, and defendant is granted leave to serve a new answer within fifteen (15) days of entry of this order, which answer shall contain no references to the prior arbitration; and it is further

ORDERED that plaintiffs shall reply to the counterclaims, if any, in the new answer within seven (7) days of service of the new answer; and it is further

ORDERED that the branch of plaintiffs' motion as seeks an imposition of sanctions against defendant is denied; and it is further

ORDERED that defendant's cross motion to set this matter down for an immediate trial *de novo* is granted to the extent that counsel for the parties are directed to appear for a pre-trial conference in Part 61, at 60 Centre Street, Room 341, on January 19, 2011, at 2:30 p.m.

The foregoing constitutes the decision and order of the court.

DATED: 12/2/10

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.