SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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SCANOMAT A/S,

Petitioner,

-against-

BOIES, SCHILLER & FLEXNER LLP,

Respondent.

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DECISION, ORDER AND JUDGMENT
Index No.: 655756/16
Mot. Seq. No.: 001

PRESENT:
Hon. Kathryn E. Freed

HON. KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
PETITION	1 (Exs. A-F)
PETITIONER'S ORDER TO SHOW CAUSE	2
MATALON AFF. IN SUPP.	3 (Ex. 1)
PETITIONER'S MEMO. OF LAW IN SUPP.	4
KUNSTLER AFF. IN OPP.	5 (Exs. A-B)
RESPONDENT'S MEMO. OF LAW IN OPP.	6 (Exs. A-B)
ANSWER WITH COUNTERCLAIMS	7 (Exs. A-B)
MATALON REPLY AFF.	8 (Ex. 2)
REPLY MEMO. OF LAW IN FURTHER SUPP.	9
REPLY TO COUNTERCLAIMS	10

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Petitioner Scanomat A/S commenced this special proceeding by order to show cause seeking an order, pursuant to CPLR 7503(b), permanently staying an arbitration demanded by respondent Boies, Schiller & Flexner LLP. Respondent opposes the application. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **granted.**

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from a legal fee dispute between petitioner Scanomat A/S, a Danish corporation, and respondent Boies, Schiller & Flexner LLP, a law firm with offices in New York State and Florida. Ex. A to Pet. On or about March 2, 2016, petitioner retained respondent as counsel in connection with a contract dispute in the matter of *Purcell-Murray Co., Inc. v Scanomat A/S*, which was pending in California Superior Court, San Mateo County. Ex. A to Pet. The "Engagement Letter" drafted by respondent and sent to petitioner on that date provided, inter alia, that:

> In the unlikely event that a dispute arises between the parties relating to *any matter other than our fees* in connection with the Engagement, the parties agree that such dispute shall be settled by binding, confidential arbitration under the JAMS Comprehensive Arbitration Rules and Procedures in force at the time such arbitration is commenced. In the event that a dispute arises between the parties relating to our fees, you *may* have the right to arbitration of that dispute pursuant to Part 137 of the Rules of the Chief Administrator of the Courts [hereinafter "Part 137"], a copy of which will be provided to you upon request.

Id. (*emphasis added*).

In or about May, 2016, petitioner made it clear that it did not intend to pay respondent for all legal services the latter performed (Kunstler Aff., at par. 12) and, in June, 2016, respondent moved to withdraw as counsel for petitioner. Id., at par. 18. Petitioner refused to consent to the withdrawal and, as a result, further legal fees were incurred since respondent had to proceed with the motion. Id. Respondent's motion to withdraw as counsel was granted on July 13, 2016. Id.

On or about July 20, 2016, respondent served petitioner with a Demand for Arbitration (hereinafter "DFA"). Ex. B to Pet. In the DFA, respondent claimed that respondent owed it

$427,481.29 in outstanding legal fees based on breach of contract and quantum meruit theories. Id. The DFA did not advise petitioner that it had 20 days in which to seek a stay of arbitration. Id.

By correspondence dated September 13, 2016, petitioner's attorney wrote to respondent's attorney to request that the DFA be withdrawn since the Engagement Letter specifically excluded attorneys' fees from claims which were to be arbitrated in the case of a dispute between the parties. Ex. C to Pet. The following day, respondent's attorney wrote to petitioner's attorney asserting that petitioner had "waived any objection [it] may have to proceeding in arbitration." Ex. D to Pet.

On November 1, 2016, petitioner filed an order to show cause commencing the captioned special proceeding seeking to stay arbitration, pursuant to CPLR 7503(b), on the ground that it is "not a party to an agreement to arbitrate fee disputes." NYSCEF Doc. No. 13. Respondent opposes the application. Respondent replied to the petition on or about November 23, 2016 by serving a "Verified Answer and Conditional Counterclaims". NYSCEF Doc. No. 14. The counterclaims sound in breach of contract and quantum meruit, and respondent asserts that it is owed $427,481.29 for legal fees rendered to petitioner. Id. On or about December 13, 2016, petitioner served a "Verified Reply to Conditional Counterclaims" denying all substantive allegations and seeking dismissal of said counterclaims. NYSCEF Doc. No. 24.

POSITIONS OF THE PARTIES:

Petitioner argues that it is entitled to a stay of arbitration of the fee dispute with respondent because the Engagement Letter did not expressly provide that the parties were required to arbitrate such a dispute. It further asserts that it was not required to move for a stay of the arbitration within 20 days after it was served with the DFA since no agreement to arbitrate fee disputes existed and

because the DFA did not contain a provision advising that petitioner had to seek such a stay within 20 days.

In opposition to the petition, respondent argues that petitioner's application must be denied since it has refused to pay for respondent's services, has refused to arbitrate, and has refused to consent to the jurisdiction of any United States court. Respondent further maintains that petitioner waived any right it had to object to the arbitration by failing to object to respondent's June 16, 2016 notification that it intended to arbitrate until September 12, 2016, at which time it stated, through subsequently retained counsel, that it would neither arbitrate the fee dispute (even after respondent had offered to pay petitioner's share of the arbitrator's fee) nor consent to jurisdiction in the courts of California or New York. Additionally, respondent asserts that, since the parties had an arbitration agreement, petitioner had only 20 days from service of the DFA to seek a stay of arbitration, and that it failed to seek a stay within that time. Respondent also asserts that petitioner is equitably estopped from seeking a stay given that it (respondent) detrimentally relied on petitioner's failure to object to arbitration by preparing a demand for arbitration with JAMS, paying JAMS its fee, and even paying petitioner's share of the fee. In the alternative, respondent asserts that arbitration should be conducted pursuant to Part 137. Respondent further asserts in the alternative that, by commencing the instant petition, petitioner has consented to the jurisdiction of New York State and thus its counterclaims against petitioner may be heard by this Court.

In reply, petitioner reiterates its contention that it is entitled to a stay of arbitration because the parties never agreed to arbitrate fee disputes. In support of this contention, petitioner emphasizes respondent's concession, at page 2 of its opposition papers, that petitioner only "agreed to arbitrate disputes, other than [those involving] fees, before JAMS." Petitioner further asserts that this matter

cannot be arbitrated pursuant to Part 137 because there was never a specific agreement to do so and because arbitrations conducted pursuant to that part only involve controversies of $50,000 or less.

LEGAL CONCLUSIONS:

CPLR 7503(b) provides, inter alia, that a party "may apply to stay arbitration on the ground that a valid agreement [to arbitrate] was not made."

> The law is well settled that no party is bound "to arbitrate unless [it] has clearly consented to do so." (*Matter of Chemoleum Corp. [Continental Grain Co.]*, 22 AD2d 865.) The intention to arbitrate "must be clear and direct" (*Matter of Marlene Inds. Corp. [Carnac Textiles]*, 45 NY2d 327, 334; *Matter of Riverdale Fabrics Corp. [Tillinghast-Styles Co.]*, 306 NY 288). An agreement to arbitrate must be express, direct and unequivocal as to the issues or disputes to be submitted to arbitration. This principle is particularly applicable in the instance of a limited arbitration clause (*Gangel v DeGroot*, 41 NY2d 840; *Shuffman v Rudd Plastics Fabrics Corp.*, 64 AD2d 699).

Robert Stigwood Organization, Ltd. v Atlantic Recording Corp., 83 AD2d 123, 126 (1st Dept 1981).

In *Stigwood*, the Appellate Division held that a stay of arbitration was properly granted where a limited arbitration clause in a contract governing royalties and distribution rates for phonograph records was equivocal and could be interpreted as applying only to disputes relating to "accounting procedures, methods of computation and payments" or as applicable to all disputes arising under a particular paragraph in the agreement, including the alleged breach of contract. Id., at 126.

Here, however, where the parties unequivocally agreed in the Engagement Letter that all disputes between them "relating to *any matter other than [respondent's] fees* * * * shall be settled by binding, confidential arbitration" (Ex. A to Pet.) (*emphasis added*), the facts even more strongly militate in favor of the granting of a stay of arbitration. Indeed, as petitioner correctly asserts, respondent concedes in its memorandum of law in opposition to the petition that petitioner only

"agreed to arbitrate disputes, other than [those involving] fees, before JAMS." Memo. Of Law in Opp., at p. 2.

Although respondent correctly points out that the Engagement Letter states that "[petitioner] may have the right to arbitration" pursuant to Part 137, such language did not constitute a binding agreement to arbitrate and, in any event, such arbitration could not have been conducted since the amount in controversy drastically exceeds the $50,000 limitation imposed on arbitrations pursuant to that section.

Respondent's argument that petitioner's application must be denied because the latter failed to move to stay arbitration within 20 days after it was served with the DFA is without merit. CPLR 7503(c) provides, inter alia, that a notice of intention to arbitrate or a demand for arbitration must state that "unless the party served applies to stay the arbitration within twenty days after such service [it] shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with . . ." and that "[a]n application to stay arbitration must be made by the party served within twenty [20] days after service upon [it] of the notice or demand [for arbitration], or [it] shall be so precluded."

Here, it is undisputed that petitioner did not move to stay arbitration within the 20-day period. However, the petition to stay arbitration was not time-barred because respondent failed to include in the DFA the requisite statutory language warning petitioner that it had 20 days in which to move for such a stay. *See Matter of State of N.Y.-Unif. Ct. Sys. v District Council 37*, 121 AD3d 497 (1st Dept 2014). Further, where, as here, "the application for a stay is made on the ground that no agreement to arbitrate exists, it may be entertained notwithstanding the fact that the stay was sought after the 20-day period." *Matarasso v Continental Cas. Co.*, 56 NY2d 264 (1982); *see also Matter*

of Allstate Ins. Co. v LeGrand (1st Dept 2012).

In light of the foregoing, this Court is constrained to grant petitioner a stay of arbitration. However, this Court recognizes that the granting of petitioner's application to stay arbitration will have the practical effect of impeding respondent from collecting what it claims are the legitimate fees it charged for its legal services on behalf of petitioner, a foreign corporation which has refused to consent to jurisdiction in California or New York. Thus, this Court agrees with respondent's contention that the counterclaims by respondent against petitioner should be considered.

> [A] court whose jurisdiction [an] out-of-state party has invoked can entertain counterclaims against that party (assuming the court has subject matter jurisdiction for the particular counterclaim). The state may fairly impose this condition as the price to be paid by the nondomiciliary for invoking the court's jurisdiction. *Adam v Saenger*, 1938, 303 U.S. 59, 58 S. Ct. 454, 82 L. Ed. 649.

Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 103.

Additionally,

> "[w]here, as here, the court has obtained jurisdiction over the parties, it shall not dismiss an action for lack of proper form but must 'make whatever order is required for its proper prosecution'" (*Matter of Sullivan v Lindenhurst Union Free School Dist. No. 4*, 178 AD2d 603, 604 [1991], quoting CPLR 103[c]; *see also Matter of Kovarsky v Housing & Dev. Admin. of City of N.Y.*, 31 NY2d 184 [1972]).

Yan Ping Xu v New York City Dept. of Health, 77 AD3d 40, 48 (1st Dept 2010).

Since this Court has personal jurisdiction over petitioner and respondent, it may convert the counterclaims in this special proceeding into a plenary action. *See generally Taskirian v Murphy*, 8 AD3d 360 (2d Dept 2004). Although respondent did not formally move to convert its counterclaims in the special proceeding into a plenary action (see CPLR 2214), this Court may

perform such conversion *sua sponte*, and hereby does so. CPLR 103(c); *see Bestafka v County of Suffolk*, 121 AD2d 670 (2d Dept 1986).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED and ADJUDGED that petitioner's application to stay arbitration is granted; and it is further,

ORDERED that respondent's counterclaims sounding in breach of contract and quantum meruit are hereby severed and converted from a special proceeding to a plenary action under the Index Number above; and it is further,

ORDERED that counsel for petitioner shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect the severance and conversion of this special proceeding to a plenary action by respondent against petitioner with two causes of action, one for breach of contract and one for quantum meruit; and it is further,

ORDERED that the parties are to appear for a preliminary conference in connection with the plenary action on May 2, 2017 at 2:30 p.m. at 80 Centre Street, Room 280, New York, New York; and it is further,

ORDERED that this constitutes the order and decision of the court.

DATED: February 9, 2016

ENTER:

Hon. Kathryn E. Freed, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT