

Newman & Newman, P.C. v Mali
2021 NY Slip Op 31618(U)
May 14, 2021
Supreme Court, New York County
Docket Number: 157363/2015
Judge: Deborah A. Kaplan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PRESENT: HON. DEBORAH A. KAPLAN
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NEWMAN & NEWMAN, P.C.,

Plaintiff,

Trial Decision and Order

-against-

Index No. 157363/2015

LUCRETIA MALI and
HENRY W.T. MALI & COMPANY, INC.,

Defendants.
-----X

Background

Plaintiff Newman & Newman, P.C. (plaintiff) is a New York law firm located in Manhattan. Nonparty Jay Newman (Mr. Newman) is a New York licensed attorney and a member of the firm. Nonparty Stephanie Graff Newman is one of plaintiff’s founders and principals.

Defendant Henry W.T. Mali & Company, Inc. (the company) was a New York corporation. Defendant Lucretia Mali (Ms. Mali) resides in New York. The company and Ms. Mali are collectively referred to as defendants. Ms. Mali was married to nonparty Frederick Mali (Mr. Mali) who, until his death in February 2007, was the president and chief executive officer of the company.

In the verified complaint dated July 20, 2015, plaintiff alleges that in or about November 2009, it entered into an agreement with the company, pursuant to which plaintiff “agreed to perform legal services at the specific request and instance of [the company],” and the company “agreed to pay the Plaintiff at a specific hourly rate, plus disbursements” (complaint, ¶ 5 [plaintiff’s exhibit A] [NYSCEF doc no 27]). At around the same time, Ms. Mali also allegedly

entered into an agreement with plaintiff for the provision of legal services by plaintiff (*see id.*, ¶ 7).

In or about August 2011, Ms. Mali allegedly “agreed to pay for the legal services and disbursements” that the company owed to plaintiff (*id.*, ¶ 9). Plaintiff alleges that “[t]he agreed value of the legal services rendered by [p]laintiff on behalf of [d]efendants, for the period from November 2009 through April 25, 2013, inclusive of disbursements, is \$48,144.13, of which \$2,261.63 has been paid[,] leaving an amount due and owing of \$45,882.50” (*id.*, ¶ 10).

Plaintiff states the following causes of action: (i) for breach of contract, seeking \$45,882.50 in damages, plus interest from November 1, 2009; (ii) for reasonable value of legal services and disbursements provided, seeking the same amount of damages; (iii) for unjust enrichment, seeking the same amount of damages; and (iv) for account stated, seeking the same amount of damages. Plaintiff subsequently withdrew the second cause of action (*see* 12/07/20 Cohn affirmation at 1 n 1 [NYSCEF doc no 23]).

In a verified answer dated September 28, 2016, Ms. Mali, among other things, alleges that: (i) “[f]or some time prior to November 1, 2009 and continuing thereafter the [p]laintiff had had an established and continuous attorney-client relationship with [Ms. Mali and Mr. Mali] pursuant to which the [p]laintiff rendered advice and legal services to [them], including, *inter alia*, the drafting of wills, health care proxies, powers of attorneys, advice regarding real property insurance claim, and other matters” (*id.* at 4 [plaintiff’s exhibit B] [NYSCEF doc no 28]); (ii) following Mr. Mali’s death, plaintiff “served as counsel for [his] estate” (*id.*); (iii) Ms. Mali, “with no experience in the running of a commercial enterprise, became the *de facto* President and Chief Operating Officer of the” company (*id.*); (iv) plaintiff continued providing legal advice to Ms. Mali “in a personal capacity, and also provided legal advice [to the company], via [Ms.]

Mali, with regard to various matters including . . . corporate resolutions, capital financing for the continued operation of the company, and the potential sale of [the company] to interested purchasers” (*id.* at 4-5); (v) “[a]t no time did the [p]laintiff ever propose to [Ms.] Mali that she enter into a written retainer agreement to memorialize the terms and conditions of the legal representation and services to be provided by the [p]laintiff to [Ms.] Mali” (*id.* at 5); (vi) “[a]s a result of the [p]laintiff’s dual representation of [Ms.] Mali and [the c]ompany, the [p]laintiff had a conflict of interest with respect to such representation that violated the relevant New York rules of legal ethics then in effect” (*id.*); (vii) “[d]uring the time [that] the [p]laintiff had dual representation of [Ms.] Mali and [the c]ompany, [p]laintiff did not obtain any written [or informed] consent from [Ms.] Mali with respect to any conflict of interest (*see id.*); (viii) the written instrument, allegedly issued by Ms. Mali to plaintiff, “in which she guarantees payment of alleged sums due and owing by [the company] to the [p]laintiff,” is unenforceable because: (a) “it was obtained under false pretenses”; (b) “it violated the [p]laintiff’s duty of loyalty”; (c) “it was not obtained with . . . informed written consent”; (d) “it was not obtained following the [p]laintiff’s full disclosure of its interests therein”; (e) “it was not fair and reasonable to [Ms.] Mali”; (f) “it adversely affected the [p]laintiff’s representation of [Ms.] Mali”; (g) “[p]laintiff failed to instruct [Ms.] Mali to seek the opinion and guidance of an independent legal counsel regarding whether she should issue the alleged written instrument”; and (h) “it otherwise violated the . . . New York Rules and New York Lawyer’s Code of Professional Responsibility” (*see id.* at 5-7 [listing Disciplinary Rule 5-101[A], Rules 1.7(b) and 1.8 of the New York Rules]).

Ms. Mali asserts eight affirmative defenses that allegedly bar plaintiff in whole, or in part, from any recovery (*see id.* at 7-8). The affirmative defenses are: (i) failure to state a cause of action upon which relief can be granted; (ii) statute of limitations and laches; (iii) failure to

mitigate alleged damages; (iv) breach by plaintiff of its duty of loyalty to Ms. Mali; (v) New York State public policy; (vi) unclean hands; (vii) plaintiff's "own actions or omissions which caused or contributed to its claimed damages"; and (viii) unreasonableness of the plaintiff's "overall fee" and plaintiff's use of "an hourly rate not agreed upon by" Ms. Mali (*see id.*).

The company has not interposed an answer and has not appeared in this action.

Having concluded discovery, the parties stipulated in a number of so-ordered stipulations that with respect to the trial: (i) they "will . . . submit their respective evidence and memoranda of law to the Court in lieu of in person testimony"; (ii) they "expressly waive their respective right to provide live testimony and to present evidence in person to the Court"; (iii) "[p]laintiff will e-file affidavits from parties and or witnesses as to the plaintiff's factual contentions, deposition testimony, an attorney[']s affirmation and a memorandum of law"; (iv) Ms. Mali "will e-file her Opposition . . . including affidavits from parties and or witnesses as to her factual contentions, deposition testimony, an attorney[']s affirmation and a memorandum of law in opposition"; (v) "[p]laintiff will e-file its Reply, to the extent it deems necessary"; (vi) "the parties will confer and agree as to what documents may be entered into evidence without objection, mark them as Exhibits and e-file them with their respective submissions and as to those documents that they can not [*sic*] mutually agree to submit, they will identify them as such and submit them to the Court for its determination as to their admissibility"; and (vii) Ms. Mali "may seek and obtain [p]laintiff's consent and/or move to e-file a sur-reply, if deemed necessary" (*see e.g.* 10/29/20 stipulation [NYSCEF doc no 21]).

Exhibits

Plaintiff is seeking to introduce its exhibits into evidence that are marked A through J (*see* 12/07/20 Cohn affirmation at 2 [NYSCEF doc no 23]). The parties have agreed that plaintiff's exhibits A, B, C, D, and F are admissible (*see id.*). Ms. Mali's counsel is objecting to the

introduction of plaintiff's exhibits E, G, and H (*see id.* at 3). Ms. Mali's counsel allegedly has not consented, nor objected to, the introduction of plaintiff's exhibits I and J (*see id.* at 5).

Exhibit E is a retainer agreement that plaintiff allegedly sent to Ms. Mali in connection with the probate proceeding for the estate of Mr. Mali. Mr. Cohn argues that the retainer agreement is: (i) admissible, pursuant to CPLR 4518, as a business record that was created and maintained in the ordinary course of business (*see id.* at 3); and (ii) "an exception to the hearsay rule in that it is not being admitted for the truth of the document itself but to establish the fact that [Ms. Mali] received it" (*id.*). Nonparty Stephanie Graff Newman provides an affidavit, in which she writes that: (i) in February 2007, she prepared and sent to Ms. Mali the retainer agreement in connection with the estate of Mr. Mali; (ii) plaintiff did not request a retainer fee, only a payment of the Surrogate's Court filing fee of \$1,250, which Ms. Mali promptly paid and requested that plaintiff "provide all of the legal services that were necessary in connection with her husband's estate"; (iii) plaintiff performed such services and sent invoices to Ms. Mali, billed at the hourly rates stated in the retainer, and Ms. Mali allegedly paid all of the invoices in connection with plaintiff's work regarding the estate of Mr. Mali; and (iv) the retainer agreement is created and maintained in the regular course of plaintiff's business (*see* 12/06/20 Graff Newman aff [NYSCEF doc no 25]).

"To be admissible, evidence must be relevant and its probative value outweigh the risk of any undue prejudice" (*Mazella v Beals*, 27 NY3d 694, 709 [2016]). It is not clear to the court how this unsigned retainer agreement serves to prove, as Mr. Cohn argues, that Ms. Mali received it. Given that it is unsigned by either party, the court is concerned that it may cause undue prejudice to Ms. Mali. Accordingly, exhibit E is not admitted into evidence.

Exhibit G is a sales report that shows “the sixty-eight (68) invoices sent to the [d]efendants from . . . 2004 until October 2009. All of these invoices were paid and are submitted to establish the custom and practice of the relationship between the parties regarding invoicing and payment for the five year period involved” (12/07/20 Cohn affirmation, ¶ 14). Exhibit H is a deposit report, which “reflects the payments made by the [d]efendants to the [plaintiff] as a result of the invoices remitted to [them]. Exhibit H is a companion record to Exhibit G as it reflects that forty-five (45) payments were made to [p]laintiff in payment of the 68 invoices reflected in Exhibit G” (12/07/20 Cohn affirmation, ¶ 15). “Exhibits G and H establish that in the period between 2004 and October 2009, all of the [p]laintiff’s invoices were paid by [d]efendants in a timely manner” (12/07/20 Cohn affirmation, ¶ 16; *see also* 12/07/20 Newman aff, ¶¶ 13-16 [Mr. Newman stating, among other things, that both documents “were created and maintained in the regular course of business,” “contemporaneously with the issuance of each invoice and the recording of each of the payments/deposits received,” and “as the managing partner, it is [his] responsibility to make and to maintain” them] [NYSCEF doc no 24]).

The court finds that Exhibits G and H are business records, generated in the ordinary course of business, that are relevant to plaintiff’s claim and are, therefore, admissible.

Exhibit I is a letter dated July 24, 2008 from Jay Newman to Marc Simonis regarding the possibility of a purchase of the shares or assets of the company (NYSCEF doc no 35). Exhibit J is a letter of intent dated April 2, 2009 from Iwan Simonis, Inc. to Ms. Mali to purchase the assets of the company, along with a cover letter dated April 3, 2009 from Iwan Simonis, Inc.’s counsel (NYSCEF doc no 36). Mr. Newman states in his affidavit that he prepared the letter

marked as Exhibit I and received the letter marked as Exhibit J (*see* 12/07/20 Newman aff, ¶¶ 26-27).

The court finds that Exhibit I is admissible, whereas Exhibit J is not (*see Std. Textile Co. v Natl. Equip. Rental, Ltd.*, 80 AD2d 911, 911 [2d Dept 1981] [“the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records”]).

Ms. Mali does not seek to introduce any exhibits.

In reply, plaintiff is seeking to introduce exhibits K and L (NYSCEF doc nos 47, 48). Exhibit K is the same retainer agreement dated February 15, 2007 that plaintiff sought to introduce as exhibit E, except that it is signed by Ms. Graff Newman on behalf of plaintiff and by Ms. Mali. Plaintiff contends that it is seeking the introduction of this document in order to refute: (i) Ms. Mali’s assertion that she does not recall having been provided with it; and (ii) her counsel’s assertion “regarding the lack of a written retainer agreement” between plaintiff and Ms. Mali (*see* 03/19/21 Cohn affirmation, ¶¶ 3-8 [NYSCEF doc no 44]; *see also* 03/18/21 Graff Newman aff [NYSCEF doc no 45] [stating that she retrieved plaintiff’s files and found the signed retainer]). The court finds that the signed retainer agreement is relevant since it pertains to the issue of the existence of a retainer agreement between plaintiff and Ms. Mali. Hence, exhibit K is admissible.

Exhibit L is a certified verdict sheet and judgment in an action entitled *Lucretia Mali v Federal Insurance Company*, United States District Court, District of Connecticut, 3:06-cv-01475. According to Mr. Cohn, Ms. Mali’s attorney does not oppose to plaintiff’s use of exhibit L in reply (*see* 03/19/21 Cohn affirmation, ¶ 19). Exhibit L pertains to a legal action that Ms. Mali commenced against an insurance company for breach of contract in connection with

damage cause by fire to her house in Connecticut (CT house damage). It appears that some of plaintiff's services, for which Ms. Mali refuses to pay, pertain to CT house damage claims. Exhibit L satisfies the requirements of CPLR 4540 (b) and is relevant to both plaintiff's claims and Ms. Mali's defenses. Hence, exhibit L is admitted into evidence.

Summary of Submissions

Plaintiff

Jay Newman's Affidavit

In an affidavit dated December 7, 2020, Mr. Newman, in relevant parts, claims that: (1) he is one of plaintiff's principals (*see id.*, ¶ 3 [NYSCEF doc no 24]); (2) between 2009 and 2014, he "supervised all of the work performed by [plaintiff's associates, nonparties] Louis Wollin, Maria Karelas, Tara Shamroth and Britt Kissin [collectively, the associates], in connection with [the company] . . . and [Ms.] Mali" (*see id.*, ¶ 7); (3) plaintiff handled both Mr. and Ms. Mali's personal matters, such as trusts and estates work in 2004 and 2007, as well as the company's legal matters starting in July 2005 (*see id.*, ¶¶ 8-12); (4) in February 2007, plaintiff provided Ms. Mali a retainer agreement, along with a statement of client's rights and responsibilities, in connection with probate of Mr. Mali's will and administration of his estate, and Ms. Mali paid invoices that plaintiff sent to her in connection with this work (*see id.*, ¶¶ 11-12); (5) between October 8, 2004 and September 15, 2009, plaintiff sent 68 invoices for legal work for the corporation and the Malis, which they did not dispute, and paid in full (*see id.*, ¶¶ 13-15; *see also* plaintiff's exhibits G and H); (6) Mr. Mali ran the corporation, and, upon his death, Ms. Mali "became the President and CEO of" the company and "utilized [plaintiff's] services . . . in connection with the operation of the . . . [company], in addition to continuing to utilize [its] services for a number of personal matters" (*see id.*, ¶ 17); (7) the 29 invoices that are subject of

this action are dated from November 18, 2009 to February 18, 2014 [the invoices] (*see id.*, ¶ 18; *see also* plaintiff's exhibit D); (8) prior to the commencement of this action, Ms. Mali never disputed the invoices (*see id.*, ¶ 19; *see also* exhibit C [Ms. Mali's dep tr at 69-98; 101]); (9) plaintiff "performed all of the work that is detailed in the . . . [i]nvoices[,] and [Mr. Newman] personally performed the vast majority of that work[and] . . . supervised the work performed by [the] associates . . . that is reflected in the . . . [i]nvoices" (*see id.*, ¶¶ 20-21); (10) all, except for three invoices, are "for less than \$3,000.00," and "for the same general kind of work" that plaintiff provided to the corporation and the Malis over the years (*see id.*, ¶ 22); (11) Mr. Newman discussed with Ms. Mali "her outstanding account on a number of occasions and she repeatedly asked [him] to be patient," and "told [him] a number of times that she would pay the outstanding invoices in full (*see id.*, ¶ 25); (12) "[i]n 2008, Ms. Mali told [Mr. Newman that] she wanted to sell the [company] and she promised [that] she would pay the outstanding balance upon [its] sale"; Mr. Newman "prepared a confidentiality agreement for a potential purchaser . . . Peltzer et Fils, a Belgium company," and "Ms. Mali authorized [Mr. Newman] to offer to sell [to this entity] the shares of the . . . [company] or its assets for \$4.8 million" (*see id.*, ¶¶ 25-26; *see also* plaintiff's exhibit I); (13) in April 2019, Iwan Simonis Inc. offered \$736,000 to purchase the assets of the company, which Ms. Mali rejected (*see id.*, ¶ 27); (14) in August 2011, Mr. Newman had a meeting with Ms. Mali and her accountant, nonparty Ted Goetz, and explained to them that: (i) Ms. Mali's "relatively small payments were not keeping up with the invoices that the work was generating and [that] the debt was continuing to grow"; (ii) since plaintiff was owed in excess of \$30,000, it "would not be able to continue to provide legal services any longer"; (iii) the company "could not afford to pay its legal bills," as Mr. Newman was working on "obtaining various personal loans to continue to fund" the company and Ms. Mali was

reluctant to agree to a sale of the corporation; and (iv) Ms. Mali and the company should find new counsel (*see id.*, ¶¶ 28, 29); (15) Ms. “Mali told [Mr. Newman] that she wanted [plaintiff] to continue to represent her” and “offered to pay the invoices of the . . . [company] personally in order to induce [Mr. Newman] to continue with the work [that he] was doing for the . . . [company]” (*see id.*, ¶ 29); (16) Ms. Mali “offered to pay the invoices of the . . . [company] personally,” but “claimed she did not then have available liquidity” to do so (*see id.*); (17) Mr. Newman “suggested that [Ms. Mali] could guarantee the outstanding invoices of the . . . [company] and future work that [he] would be doing for it”; Ms. Mali “approved of the idea and asked [Mr. Newman] to draft a short guarantee for her to send to” him; Mr. Newman “prepared the guarantee and forwarded it to her,” which she signed and returned to plaintiff’s office (*see id.*, ¶ 29; exhibit F [personal guarantee]); (18) Ms. Mali told Mr. Newman that she was advised by her accountant to file an amended tax return “in connection with a casualty loss she suffered when her country home in Connecticut burnt down” and that she expected to “receive a significant tax refund and that she would pay all of the outstanding legal bills with the proceeds of the tax refund”; the accountant, Ted Goetz, confirmed that the amended tax returns were filed and that Ms. Mali “would be receiving a refund that would be more than sufficient to pay her outstanding account”; “[o]n October 7, 2013, [Mr. Newman] learned from Ted Goetz that [Ms.] Mali had received a tax refund . . . in excess of \$75,000,” but Ms. Mali “never paid [plaintiff’s] “outstanding account” (*see id.*, ¶¶ 30-32); (19) plaintiff’s billing rates were as follows: (i) in 2009 and 2010, Mr. Newman billed at a rate of \$425 per hour, and, between 2011 and 2013, his rate was \$450 per hour; (ii) associate Louis Wollin billed \$350 per hour in 2009 and \$375 in 2011; (iii) associate Maria Karelak billed \$295 per hour in 2011 and \$315 per hour in 2012; (iv) associate Tara Shamroth billed \$225 per hour in 2012; (v) associate Britt Kissin billed \$225 per

hour in 2012 (*see id.*, ¶¶ 33-37); and (20) “[i]n July 2015, when this action was commenced, the total amount of the . . . [i]nvoices was \$45,882.50,” and, pursuant to CPLR 5001, plaintiff is seeking to recover pre-judgment interest from November 2009, the earliest unpaid invoice, in the amount of \$45,423.67; the total of these two amounts is \$91,306.17, minus \$5,375.79 that Mr. Mali paid after the action was commenced, resulting in \$85,930.38, plus costs and disbursements (*see id.*, ¶¶ 39-44).

Defendant

Ms. Mali's Affidavit

In an affidavit dated February 5, 2021, Ms. Mali, in relevant parts, claims that: (1) she “was never presented with a[nd] never entered into a written retainer agreement with the [p]laintiff” (*id.*, ¶ 2 [NYSCEF doc no 40]); (2) she does “not recall ever having been provided with a proposed retainer agreement from the [p]laintiff in connection with [p]laintiff’s representation of my husband’s estate” (*id.*, ¶ 3); (3) “[p]laintiff never sought or obtained a written consent from me regarding its conflict of interest in representing me and [the company]” (*id.*, ¶ 4); (4) “[f]ollowing [Mr. Mali’s] death, [she] took over running [the company]” (*id.*, ¶ 5); (5) “[w]hile [p]laintiff was tasked with assisting [her] in the sale of [the company,] this did not transpire and the company eventually shut down” (*id.*, ¶ 9); (6) “[p]laintiff admits that it rendered assistance on ‘real property insurance claims’ which is a reference to the abysmal result obtained on [her] and [her] deceased husband’s claim for recovery on a fire casualty on [their] Connecticut property” (*id.*, ¶ 10); (7) “[p]laintiff was instrumental in guiding [the Malis] to a lawyer [who] mismanaged [their] case and resulted in no recovery notwithstanding hundreds of thousands of dollars of legal expenses” (*id.*, ¶ 11); (8) “[Mr. Newman] acknowledges that he both suggested to [her] and then wrote the alleged guarantee that [she] supposedly signed” (*id.*, ¶

12); (9) Ms. Mali “never requested to [Mr.] Newman that he draft a guarantee for [her] to sign” (*id.*, ¶ 13); (10) Mr. Newman “failed to include on the alleged guarantee [that] he drafted any reference to New York law governing such a guarantee or even to provide that that the guarantee had to be witnessed or notarized as some evidence of it being a genuine document” (*id.*, ¶ 14); (11) she “verily swear[s] to the Court that [she] never signed the alleged guarantee and that [she] would never have signed a guarantee for [the company’s] debts and obligations” (*id.*, ¶ 15 [emphasis in the original]); (12) “[w]hen shown the alleged guarantee at [her] deposition[, she] testified ‘. . . it doesn’t look – it’s not my handwriting, but it looks like somebody copied my name’” (*id.*, ¶ 16; *see also* plaintiff’s exhibit C [NYSCEF doc no 26] [02/14/19 Ms. Mali’s dep tr at 56-57]); (13) she “never provided a personal guarantee of any of [the company’s] other debts nor ha[s she] ever personally guaranteed any debts for any other third parties” (*id.*, ¶ 18); (14) “[p]laintiff’s invoices do not show any charges for drafting of the alleged guarantee,” and “there is no documentation of how [Mr.] Newman claims to have forwarded [her] the alleged guarantee” (*id.*, ¶¶ 23, 26); (15) she “recall[s] complaining to [Mr.] Newman on many occasions over the phone about the high legal fees his firm was charging during the course of its representation of [her] and [the company] (*id.*, ¶ 19); (16) “[i]t is false to claim [she] was ‘silent’ as [she] had many conversations with [Mr.] Newman expressing concern about the invoices” (*id.*, ¶ 20); (17) she “den[ies] that any of the services provided to [her] and for which the [p]laintiff seeks to recover from [her] were of any value as has been claimed by the [p]laintiff” (*id.*, ¶ 27); (18) she “do[es] not recall ever authorizing [her] accountant . . . to tell [p]laintiff that [she] would use proceeds from an expected tax refund to pay [p]laintiff’s legal bills” (*id.*, ¶ 21); (19) she offered “to try and resolve this dispute with [p]laintiff via the attorney-client mediation program administered by the Court”; [p]laintiff . . . refused to so proceed, and this case has

languished on the Court's docket through no fault of [hers]"; "[t]his should weigh against the recovery of interest by the [p]laintiff if the Court believes the [p]laintiff is entitled to any recovery" (*id.*, ¶ 22); and (20) she is "83 years old" and "ha[s] suffered from a few very serious and life-threatening health conditions in recent years[,] including a prolonged hospitalization and subsequent recovery," and, as a result, "[her] hearing and eyesight have substantially diminished in recent years and [she] was comprised [*sic*] in [her] ability to hear clearly, or see clearly, the questions [she] was asked, and the documents [she] was shown, at [her] deposition conducted by [p]laintiff's counsel in this matter" (*id.*, ¶¶ 28-29).

Affidavit of Lisa Anadollis

In an affidavit dated February 4, 2021, nonparty Lisa Anadollis, the treasurer for the company, states that: (1) she worked for the company from 1988 until it closed its operations in February 2013; (2) until his death in February 2007, Mr. Mali ran the company, and, after his death, Ms. Mali "took over running the company" (*see id.*, ¶¶ 2-5 [NYSCEF doc no 41]); (3) as the treasurer, she "was intimately involved in assisting [Ms.] Mali in her efforts to continue to run the business and was privy to all business decisions" (*see id.*, ¶ 6); (4) she spoke to Ms. Mali "on a daily basis" and believes that had Ms. Mali "actually signed a guarantee that she would have mentioned this at some point in time" (*see id.*, ¶ 11); (5) she finds it "very difficult to believe that [Ms. Mali] would have signed a guarantee" (*see id.*, ¶ 13); (6) she "also find[s] it odd that there are no initials of the person who drafted the alleged letter . . . next to [Ms.] Mali's initials as appear in the bottom left hand corner of the alleged letter" (*see id.*, ¶ 16); (7) "there is no documentation of how [Mr.] Newman allegedly forwarded the letter to [Ms.] Mali" (*see id.*, ¶ 18); and (8) "it is very unlikely [that she] would not have seen it as [she] was assisting [Ms.] Mali at the time with both her business and personal affairs" (*see id.*, ¶ 19).

Counsel for Ms. Mali

Ms. Mali's attorney argues, among other things, that, pursuant to Part 137 of the Rules of the Chief Administrative Judge, plaintiff was obligated to inform Ms. Mali that plaintiff's claim for legal fees may be resolved by way of arbitration before the Joint Committee on Fee Disputes and Conciliation (*see* 22 NYCRR §§ 137.1, 137.2). It is only if a client fails to request arbitration, that counsel then may commence a legal action. Given that plaintiff failed to satisfy this condition precedent, he argues, the complaint should be dismissed.

Plaintiff's Reply

In a reply affidavit dated March 19, 2021, Mr. Newman, in relevant parts, claims that: (1) Ms. "Mali admitted under oath that prior to the commencement of this action in 2015, she never disputed ANY of the Unpaid Invoices" (*see id.*, ¶ 3 [citing to Ms. Mali's dep tr at 69-98, 101] [NYSCEF doc no 29] [emphasis in the original] [NYSCEF doc no 46]); (2) "Ms. Mali testified that she did not recall ever being dissatisfied with the quality of the legal work performed by" plaintiff (*see id.*, ¶ 5; *see also* Ms. Mali's dep tr at 131-132 [NYSCEF doc no 29]); (3) in her affidavit, Ms. Mali does not "point to a single billing entry that she claims is excessive" (*see id.*, ¶ 7); (4) "Ms. Mali never disputed a single invoice in writing, nor did she orally claim that a single time entry was excessive or unnecessary. The only issue Ms. Mali ever raised . . . was that she claimed to have insufficient funds to pay them" (*see id.*, ¶ 8); (5) "[he] was concerned about the statute of limitations running which would bar [him] from pursuing this claim," and [his] counsel commenced this action; (6) more than two years had passed after the last legal services were provided to Ms. Mali and thus the Codes and Regulations . . . requiring notice of an opportunity to arbitrate this claim do not apply" (*see id.*, ¶¶ 9, 10 citing New York Court Rules § 137 [b] [6]); (7) "Ms. Mali does not dispute that in 2008 she promised to pay her outstanding

account from the proceeds of the sale of the . . . [c]ompany” (*see id.*, ¶ 11); (7) “Ms. Mali does not dispute that in 2009 . . . [he] obtained an offer to purchase the assets of the . . . [c]ompany for \$736,000, nor does she dispute that she rejected that offer” (*see id.*, ¶ 12); (8) “Ms. Mali does not deny that she . . . promised to pay all outstanding invoices from the proceeds of her tax refund in 2011”; nor is she denying receiving the refund in excess of \$75,000 (*see id.*, ¶¶ 14, 15); (9) “[a]fter the death of Ms. Mali’s husband on February 1, 2007, and the date this action was commenced, [plaintiff] received 44 separate payments from Ms. Mali against the invoices that [were] issued” (*see id.*, ¶ 18); (10) “her pattern of requesting services, receiving invoices and paying those invoices, is a stark example of the fact that there was a relationship between [plaintiff] and Ms. Mali that entitled [plaintiff] to rely on her practice of paying her invoices which is why [plaintiff] continued to provide legal services to her even after she fell behind on her account” (*see id.*, ¶ 19); (11) as to the fire casualty claim: (i) Ms. Mali’s insurer denied her claim; (ii) Ms. Mali brought a federal lawsuit to recover her alleged damages and “turned down a settlement offer of \$500,000”; (iii) in 2016, “the matter went to trial,” and the jury “returned a special verdict” finding “that [since] the Plaintiffs[, Ms. Mali and Lucretia Mali as the Executor of the Estate of Frederick Mali,] violated the fraud and misrepresentation clause of the [insurance] policy,” “[t]he contract is void and the [p]laintiffs cannot recover for any of their claims” (*see id.*, ¶¶ 22-26; *see also* plaintiff’s exhibit L [verdict form in *Mali v Federal Insurance Company* at 1]); (iv) the jury verdict “refutes any claim that anyone, other than [Ms.] Mali, was responsible for the abysmal result” (*see id.*, ¶ 28); (12) Ms. Mali “proposed the idea of her personally paying the corporate debt in order to induce [Mr. Newman] to continue representing her and [the] company”; Mr. Newman “consented to continue [the] representation based on her agreement to pay all fees owed by the . . . [c]ompany”; “based on her requests[,] . . .

[Mr. Newman] prepared the guarantee and continued to perform legal services for both Ms. Mali and [the] company” (*see id.*, ¶ 33); (13) “Ms. Mali knew when she requested that [Mr. Newman] draft the personal guarantee that she was under no obligation to sign it” and that “she was free to hire another attorney, which she chose not to do” (*see id.*, ¶ 34); (14) at all relevant times, “Ms. Mali was the sole shareholder of [the company],” and “there is nothing inherently unethical about” “representing a small privately held business and its sole principal” (*see id.*, ¶¶ 35, 36); and (15) all delays in this action were caused by Ms. Mali and her counsel: (i) Ms. Mali requested a number of extensions to appear and to interpose an answer (the complaint was filed on August 27, 2015, and the answer was interposed on September 28, 2016), and then to sit for a deposition, which took place on February 14, 2019; (ii) it took a number of compliance conferences, total of nine conferences over the 25-month period following the preliminary conference, before Ms. Mali decided to waive Mr. Newman’s deposition (*see id.*, ¶¶ 37-40).

Summary of Ms. Mali’s Deposition

At a deposition taken on February 14, 2019, Ms. Mali testified¹ in relevant parts that:

(1) in an action against an insurance company, which she sued for failure to pay for fire-related damages to her house in Winchester, Connecticut, and where she was represented first by Michael D. O’Connell, Esq. of O’Connell, Flaherty and Attmore, LLC (O’Connell LLC) and then by Jamie Brickell, Esq. of Pryor, Cashman, LLP, a judgment was rendered in favor of the insurer (*see id.* at 9-12, 18, 21, 23 [plaintiff’s exhibit C] [NYSCEF doc no 29]); (2) she paid for O’Connell LLC’s services but did not know how much (*see id.* at 22-26); (3) she paid Pryor

¹ Ms. Mali stated a number of times that she was not able to see well, if it all, the documents that were shown to her at the deposition as a result of a medical condition that began in December 2017 (*see* plaintiff’s exhibit C [NYSCEF doc no 29] [02/14/19 plaintiff dep tr at 67-69, 75]). It also appears that Ms. Mali had difficulty hearing the questions that were asked of her (*see e.g. id.* at 74, 77, 79, 90, 108).

Cashman at least \$280,000 for their services (*see id.* at 38); (4) after her husband's death in February 2007, she took over running the company, which employed eight or nine employees and stayed in business until approximately 2010, with Lisa Anadollis serving as the company's treasurer (*see id.* at 46-47, 72, 79); (5) plaintiff performed legal work for Mr. Mali and for the company and served as Ms. Mali's counsel (*see id.* at 50-51, 91); (6) Mr. Mali never complained about plaintiff's bills, nor about Mr. Newman or anyone else at the firm (*see id.* at 51); (7) plaintiff utilized the services of plaintiff, including its work on Mr. Mali's estate (*see id.* at 52); (8) following Mr. Mali's death, plaintiff performed work for the company until it went out of business (*see id.* at 52, 91); (9) plaintiff did work in connection with Pryor Cashman's claims for legal fees (*see id.* at 52); (10) since Mr. Mali's death, Ms. Mali paid over \$500,000 to plaintiff (*see id.* at 53-54); (11) she stopped paying plaintiff when it "was no longer her attorney" (*see id.* at 55); (12) she did not remember if there are outstanding invoices to her, and nobody at the plaintiff's office told her "that she was in arrears in terms of their bills" (*see id.* at 56); (13) when asked if it is her signature on the letter of the guarantee, she stated: "[i]t's strange, but it doesn't look – it's not my handwriting, but it looks like somebody copied my name," and testified that she saw the letter for the first time when this action was commenced (*see id.* at 57-58); (14) she authorized plaintiff to discuss the sale of the company or the sale of its assets (*see id.* at 58); (15) she had no knowledge of authorizing Mr. Newman to make an offer of \$4.8 million to Iwan Simonis. Inc. (Simonis) to sell the company but testified that Simonis made an offer of approximately \$725,000 (*see id.* at 59-64); (16) Mr. Newman did work for Ms. Mali with respect to "the discussions with Simonis" (*see id.* at 64); (17) as to plaintiff's invoices that are in dispute, plaintiff was shown an invoice for "Estate Administration" for work performed from August 2, 2011 to August 29, 2011, in the amount of \$3,757 and testified that she has no recollection of

receiving this invoice, nor disputing it, nor paying any portion of it (*see id.* at 69-71);

(18) following Mr. Mali's death, defendant had nothing to do with reviewing or authorizing invoices that were addressed to the company, as they were handled by Lisa Anadollis, who also dealt with legal invoices (*see id.* at 78, 81, 85); (19) Ms. Mali was not involved "in the payment of [plaintiff's] invoices" other than possibly signing checks (*see id.* at 81-82, 87); (21) Ms. Mali stated repeatedly that she never saw and never disputed the unpaid invoices that were addressed to the company (*see e.g. id.* at 89-90, 91); (20) when the company closed, its records were shredded (*see id.* at 82-83); (21) she did receive plaintiff's bills addressed to her residential address but never disputed them (*see e.g. id.* at 93-100; *see also e.g.* plaintiff's exhibit D [NYSCEF doc no 30] [bills marked at Ms. Mali's deposition as plaintiff's exhibits 16-19, 20-29]); (22) other than her current counsel, nobody ever disputed plaintiff's bills on her behalf (*see id.* at 97-98); (23) when asked about the reasons for not paying plaintiff's invoices, Ms. Mali stated that: (i) "I believe we've paid a great many invoices to "plaintiff (*see id.* at 101); and (ii) "[t]he loss of the cases:" namely, "the sale of the company and the insurance claim" "against Chubb" (*see id.* at 104-105); (24) in the insurance claim case, Mr. Newman decided to replace Mr. O'Connell with Mr. Brickell Pryor Cashman because he felt that the latter "would be a better attorney" (*see id.* at 105-107, 108); (25) Ms. Mali was dissatisfied with Mr. Brickell's work, including the fact that he was unprepared and lost the case against Chubb (*see id.* at 109, 110, 112, 114); (26) as to the sale of the company, Ms. Mali testified that following a meeting involving Ms. Mali, Mr. Newman and Mark Simonis, Mr. Newman "[d]idn't follow through" regarding negotiations (*see id.* at 119-120); (27) when shown a letter that Mr. Newman wrote to Mr. Simonis offering to sell the company for \$4 million, Ms. Mali stated that this amount was improper, or excessive, as it did not "accurately reflect" the value of the company (*see id.* at 123-

124); (28) she never told Mr. Newman that she would pay his bills after she “received a tax refund on account of a casualty loss” (*see id.* at 130-131); and (29) she had no knowledge of ever telling Mr. Newman, or sending him an email, while he represented her, that she was “dissatisfied with his work as a lawyer” (*see id.* at 131).

Threshold Issues

The threshold issues, which must be addressed here, are: whether, pursuant to 22 NYCRR § 137, plaintiff gave notice to defendants of their right to demand arbitration of the legal fee dispute between them and plaintiff; and whether, if notice was not provided, such failure requires dismissal of the complaint.

Findings of Facts

Pursuant to CPLR 4213 (b), “[t]he decision of the court . . . shall state the facts it deems essential.” “While the court need not set forth evidentiary facts, it must state ultimate facts: that is, those facts upon which the rights and liabilities of the parties depend” (*Matter of Jose L. I.*, 46 NY2d 1024, 1025-1026 [1979]). “This statutory requirement mandates that the court set forth those ultimate or essential facts on which it relies to reach its decision” (*Weckstein v Breitbart*, 111 AD2d 6, 7 [1st Dept 1985]).

As is relevant to the threshold issues, the court makes the following findings of fact:

After Mr. Mali’s death, Ms. Mali took over the running of the company, and plaintiff provided legal services to the company and to Ms. Mali. As to the former, some of plaintiff’s services included negotiating with potential buyers for the sale of the company or its assets. As to the latter, some of plaintiff’s services involved handling the estate of Mr. Mali; assisting Ms. Mali with litigation against an insurance company in connection with fire damage to the Malis’ house in Connecticut (the insurance company litigation); and assisting Ms. Mali with legal fee

disputes that she had with different attorneys who represented her in the insurance company litigation.

Plaintiff provided a retainer agreement to Ms. Mali in connection with its work on Mr. Mali's estate. Plaintiff did not provide any other retainer agreements to Ms. Mali.

Plaintiff sent some invoices to the company's address and some to Ms. Mali's residence. Until October 2009, all of plaintiff's 68 invoices were paid in full. Between October 2004 and October 2009, plaintiff received payments on its invoices that total \$123,580.96. Neither the company nor Ms. Mali have paid plaintiff's invoices for work performed subsequent to November 2009, with the exception of one payment in the amount of \$2,261.63.

Ms. Mali stopped paying plaintiff's fees because she was dissatisfied with plaintiff's services with respect to the insurance company litigation and its handling of the negotiations to sell the company. However, she did not object to the unpaid invoices. The company went out of business in February 2013.

This action was commenced with the filing of the summons and complaint on July 21, 2015. Plaintiff sought payment of legal fees for services rendered for the period from November 2009 through April 25, 2013. In support of its claim, plaintiff provides 29 invoices for services rendered after November 1, 2009 (*see* plaintiff's exhibit D [NYSCEF doc no 30]). A review of these invoices reveals charges for services rendered after April 25, 2013, specifically, on December 3, 2013, December 26, 2013, and December 30, 2013 (*see id.* [bill dated February 18, 2014 marked at Ms. Mali's deposition as plaintiff's exhibit 29]).

Plaintiff never served Ms. Mali, in her personal capacity or in her capacity as the former officer of the company, with notice of the right to arbitrate the legal fee dispute. Indeed, in the verified complaint, plaintiff avers, in relevant part, that "22 NYCRR 137 is inapplicable to this

matter as no attorney's services have been rendered for the sums sought herein, for more than two years before the commencement of this action" (plaintiff's exhibit A [complaint, ¶ 14] [NYSCEF doc no 27]). In addition, in his affidavit in reply, Mr. Newman states that: "[his] counsel commenced this action more than two years after the last legal services were provided to Ms. Mali and thus the Codes and Regulations . . . requiring notice of an opportunity to arbitrate this claim do not apply" (*see* 03/19/21 Newman reply aff, ¶¶ 9, 10 [NYSCEF doc no 46]). Ms. Mali offered to try and resolve the fee dispute via "the attorney-client mediation program administered by the Court" (*see* Ms. Mali aff, ¶ 22 [NYSCEF doc no 40]).

Conclusions of Law

Fee Arbitration

22 NYCRR § 137 (Part 137 – Fee Dispute Resolution Program) gives clients the right to demand arbitration of any legal fees dispute in an amount between \$1,000 and \$50,000 (*see* 22 NYCRR §§ 137.1 [b] [2], 137.2 [a]). Section 137.1 (b) (6) provides that the obligation to arbitrate does not apply to "disputes where no attorney's services have been rendered for more than two years" (*see* 22 NYCRR § 137.1 [b] [6]).

As recited above, plaintiff claims that it was not obligated to serve defendants with notice of the right to arbitrate the fee dispute since more than two years had elapsed since it had provided legal services to them, and therefore, the Fee Dispute Resolution Program was not applicable. However, the unpaid invoices reflect charges for legal services rendered in December 2013, which is within two years of plaintiff's filing this action (*see* plaintiff's exhibit D [NYSCEF doc no 30]). Accordingly, plaintiff may not rely on the 22 NYCRR § 137.1 (b) (6) two-year exception, and plaintiff's failure to provide the defendants with written notice of the right to arbitrate the fee dispute requires dismissal of the complaint (*see e.g. Paikin v Tsirelman,*

266 AD2d 136, 136-137 [1st Dept 1999] [“plaintiff’s failure to provide his client with 30 days’ written notice of his right to arbitrate any fee dispute . . . and his failure to allege in his complaint that the client received such notice and did not file a timely request for arbitration . . . require dismissal of the complaint”]; *see also Herrick v Lyon*, 7 AD3d 571, 572 [2d Dept 2004] [stating same]).

Even if it could be argued that more than two years had passed since the last time that plaintiff had provided legal services to Ms. Mali or the company, the complaint would nonetheless have to be dismissed.

The Appellate Division, First Department has held that even in the circumstances when an attorney has not rendered any services for two years, if the attorney’s fees are in dispute, notice of the right to arbitrate must still be provided (*see Filemyr v Hall*, 186 AD3d 117, 119-122 [1st Dept 2020]). Specifically, the *Filemyr* court stated:

“Fee arbitration is mandatory if requested by a client or a former client. It is a right of the client. Where, as in this case, an attorney, through their own delay deprives the client of that right, the attorney cannot in good faith claim compliance with the procedures of part 137. Not only would this effectively give counsel the option of whether to arbitrate, because counsel could control whether the dispute began in two years or less, it would also be directly contrary to the rules, which provide that it is the client’s choice.”

(*id.* at 121). Therefore, plaintiff was obligated to provide Ms. Mali and the company with notice to arbitrate the fee dispute, which it failed to do. That Ms. Mali would have exercised her right to demand arbitration of the dispute seems likely as there is evidence that she suggested to plaintiff that they try to reach an agreement using the court-sponsored mediation program (*see Ms. Mali aff*, ¶ 22 [NYSCEF doc no 40]).

Accordingly, the dismissal of the complaint without prejudice against both defendants is warranted (*see Paikin v Tsirelman*, 266 AD2d at 136-137; *see also Herrick v Lyon*, 7 AD3d at 572).

The court does not, at this time, opine on the reasonableness of plaintiff's fees, whether Ms. Mali may be held personally liable for the debt of the company as a guarantor, or any other issues raised by plaintiff.

Conclusion


For the foregoing reasons, it is hereby

ORDERED that the complaint is dismissed in its entirety against defendant Lucretia Mali and defendant Henry W.T. Mali & Company, Inc. without prejudice to a new action, with costs and disbursements to defendant Lucretia Mali as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of defendant Lucretia Mali and defendant Henry W.T. Mali & Company, Inc.

Dated: May 14, 2021

ENTER:


HON. DEBORAH A. KAPLAN
Hon. Deborah A. Kaplan
J.S.C.