Short Form Order Index No. 46072/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

JOHN HILDRETH, Individually, and on behalf of HILDRETH AUTO GLASS, LTD.,

Plaintiffs,

-against-

CHRISTOPHER PIRATO and GLASSLAND, INC.,

Defendants.

Mot. Seq. No.	004 - Mot.-D
Orig. Return Date:	11/13/2018
Mot. Submit Date:	11/13/2018
Mot. Seq. No.	005 - MD
Orig. Return Date:	11/13/2018
Mot. Submit Date:	11/13/2018

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Upon the notice of motion, dated October 22, 2018 and supporting papers, the notice of cross-motion, dated November 6, 2018 and supporting papers, the affirmation in reply to motion and in opposition to cross-motion dated November 8, 2018 and supporting papers, and the reply affirmation in opposition to plaintiff's motion to confirm and in support of cross-motion, dated November 12, 2018, it is hereby

ORDERED plaintiff's motion (Mot. Seq. 004) is granted to the extent set forth herein; and it is further

ORDERED that plaintiff submit an additional affirmation as to attorney's fees from Eric D. Cherches, and a revised proposal for the date from which pre-judgment interest should run, in accordance with this decision, such submissions to be made within thirty days of the date of this decision and order; and it is further

ORDERED that defendants' cross-motion (Mot. Seq. 005) is denied.

Following a jury trial in which a verdict was rendered awarding the plaintiff damages in the sum of $21,426.08, plaintiff moved (Mot. Seq. 004) for an order confirming the verdict,

awarding pre-judgment interest, and awarding reasonable attorneys' fees and expenses. In response, defendants filed a cross-motion (Mot. Seq. 005) seeking also to confirm the verdict, opposing plaintiff's motion and requesting an award of attorney's fees to the defendants.

There can be no doubt that the plaintiff is entitled to pre-judgment interest. The statute mandates that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract . . ." CPLR §5001 (a) (emphasis supplied). The date from which such pre-judgment interest is to be computed must be specified, under the present circumstances, by the court. CPLR §5001 (c). Such date shall be "the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." CPLR §5001 (b).

Plaintiff proposes that the appropriate date is that of the agreement entered into by plaintiff and defendant, Christopher Pirato, provisions of which the jury found were breached. Defendants argue that interest should be computed from the docketing of the judgment, essentially positing that there should be no pre-judgment interest. The latter position is clearly contrary to the plain language of the statute and so must be rejected. However, plaintiff's proposal itself does not properly comport with the statute. The statute specifies that the date shall be when the "cause of action existed." Surely a cause of action for breach of contract cannot exist on the very date the contract was signed. The specific breaches found by the jury were refusals on the part of defendant, Christopher Pirato, to pay half of three specified invoices. Such refusals did not occur on the same date the agreement was signed.

The theory of awarding pre-judgment interest is "that there has been a deprivation of use of money or its equivalent and that the sole function of interest is to make whole the party aggrieved. It is not to provide a windfall for either party. *(citation omitted).*" ***Wolf v American Technical Ceramics Corp.***, 84 AD3d 1224, 1226, 924 NYS2d 143, 145 (2d Dept. 2011). Thus, plaintiff would be entitled to interest from the date or dates that he paid defendant's portion of the invoices. The plaintiff may make an additional submission in which he calls to the court's attention such dates as established at trial.

With regard to plaintiff's request for costs, he is entitled to statutory costs in this action. CPLR §8101. Those costs are to be taxed by the clerk as set forth in article 84 of the CPLR, based upon a bill of costs. Plaintiff is entitled to the typical costs set forth in article 82 of the CPLR, as well as disbursements as set forth in CPLR §8301. Those costs do not include that of the index number or note of issue. The court declines to award statutory costs on this motion.

The most contentious issue before the court is that of the award of attorneys' fees. Defendants' application on its cross-motion will be addressed first because it is easily disposed of. It is beyond dispute that attorneys fees will only be awarded to a prevailing party where such

award is authorized by "statute, agreement or court rule (*citation omitted*)." ***RMP Capital Court. v Victory Jet, LLC***, 139 AD3d 836, 839, 32 NYS3d 231, 235 (2d Dept. 2016). Defendant Glassland, Inc. was not a party to the settlement agreement that provides the basis for a request for attorney's fees in this case, and thus has no right to seek such relief, whether it may be considered a prevailing party or not. Defendant Pirato's request must be rejected because he was not a prevailing party, the definition of which will be more fully analyzed below with regard to plaintiff's application.

The provision of the agreement between the parties pertaining to attorneys' fees states as follows:

> **If any party bring any action to enforce any provisions of this agreement, whether at law, in equity or otherwise, the party who substantially prevails in such action shall be entitled, in addition to any other rights or remedies available to him or it, to collect from the other party or parties the reasonable costs and expenses incurred in the investigation preceding such action and the prosecution of such action, including but not limited to reasonable attorneys' fees.**

Plaintiff argues that he substantially prevailed because the jury returned a verdict in his favor in the amount of $21,426.08. Defendants argue that plaintiff cannot be said to have substantially prevailed because he had sought a much higher level of damages and the jury found he had not proven his causes of action for breach of the non-competition clause nor for breach of the implied covenant of good faith.

The Court of Appeals discussed the prevailing party issue in some detail in ***McGrath v toys "R" Us, Inc.***, 3 NY3d 421, 788 NYS2d 281 (2004) (*superseded by statute on other grds.*). The high court stated: "Because a damages judgment, whatever the amount, forces defendant to pay a sum to plaintiff that defendant would not otherwise be required to pay, it modifies defendant's behavior in a manner beneficial to plaintiff, making plaintiff a prevailing party." *Id.* at 431, 788 NYS2d at 285. The fact that a plaintiff obtains only nominal damages goes to the second part of an attorney's fee inquiry, namely, the reasonableness of the amount awarded, not to whether plaintiff prevailed or not. *Id.*

In line with such reasoning, the Appellate Division found error when the lower court denied fees to a plaintiff who won nominal damages of $1 on a breach of contract cause of action. ***Ross v Sherman***, 95 AD3d 1100, 944 NYS2d 620 (2d Dept. 2012). Although plaintiff in that case did not demonstrate actual damages, he did prevail on the issue of liability, and thus was entitled to fees, as provided by the contract, and the matter was remitted for determination of a reasonable award.

The prevailing party "must be successful with respect to the central relief sought (*citation

omitted)" ***DKR Mortg. Asset Trust 1, v Rivera***, 130 AD3d 774, 14 NYS3d 414 (2d Dept. 2015). In that case, the underlying matter was voluntarily discontinued, such that there was no substantial determination on the merits. Thus, there was no prevailing party. Similarly, there was no prevailing party where the proceeding was rendered academic because the property at issue was sold. ***Village of Hempstead v Taliercio***, 8 AD3d 476, 778 NYS2d 519 (2d Dept. 2004).

In the present matter, plaintiff prevailed in establishing a breach of the agreement between the parties, and was awarded damages. While the amount awarded was considerably less than what plaintiff had sought, it was certainly more than nominal. Thus, plaintiff did substantially prevail and is entitled to fees.

Having determined that plaintiff prevailed, the court must now turn to the second branch of the inquiry - the reasonableness of the award requested. The determination of a reasonable award is a matter for the trial court's sound discretion. ***RMP Capital Corp. v Victory Jet, LLC,*** 139 AD3d at 839-840, 32 NYS3d at 236. In exercising such discretion, the court need not hold a hearing, but must have before it sufficiently detailed information. ***Citicorp Trust Bank FSB v Vidaurre***, 155 AD3d 934, 65 NYS3d 237 (2d Dept. 2017). If the submission is not sufficiently detailed, the appropriate remedy is to require an additional submission providing the appropriate detail. *Id.*; ***RMP Capital Corp. v Victory Jet, LLC, supra.***

The affirmation of legal services submitted by Eric D. Cherches, while sufficient in its detail of his experience, and ability, as well as of the customary fee charged for similar services, is too vague and general with regard to the actual services performed. While stating that he maintains contemporaneous billing records, none is attached. Mr. Cherches devotes a single sentence of his affirmation to addressing the time and labor required of him, without any sort of breakdown of the mere list of tasks he undertook on behalf of his client. Other factors the court is to consider, such as the difficulty of the questions involved, are not addressed at all. Thus, the court will remit this aspect of the current application for further submission. *See, e.g.,* ***SO/Bluestar, LLC v Canarsie Hotel Corp.***, 33 AD3d 986, 825 NYS2d 80 (2d Dept. 2006).

By contrast, trial counsel, Jeffrey H. Miller provided the court with much greater detail. He presented his retainer agreement with the plaintiff, which reflects a fixed fee, plus expenses through trial. He noted his customary hourly rate of $375 and gave some detail regarding the breakdown of the hours he spent preparing for and conducting the jury trial in this matter. Based upon these factors, the amount sought, which is the $20, 794.70 paid by the plaintiff, is reasonable.

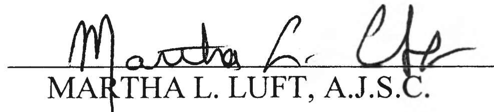
However, another factor that the court is to consider is what results were obtained. The extent of the prevailing party's success may enter into the court's consideration of the reasonableness of the award. ***McGrath v Toys "R" Us, Inc.***, 3 NY3d at 431, 788 NYS2d at 285-286. In the present matter, there can be no doubt that the alleged breach of the non-compete provisions of the parties' agreement was a very important component of plaintiff's case, as was

the allegation of a breach of the implied covenant of good faith. These also were significantly more complex claims, as compared with the claims that plaintiff did prevail on. The latter merely required establishing the amount of the outstanding invoices and the defendant's failure to pay his one-half portion thereof. Thus, the court determines that reducing the requested amount by one-third to $13,863.13 is a reasonable award.

Once plaintiff has submitted a more detailed affirmation from Mr. Cherches with regard to his fee request and a proposal as to the date from which the pre-judgment interest should run, in regard to the latter of which issues the defendant is invited to make a further submission as well, the court will direct that judgment be entered on the jury's verdict, with the specific fee award included and direction as to from what date the clerk should calculate the pre-judgment interest.

ENTER

Date: February 8, 2019
Riverhead, New York



MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

X NON-FINAL DISPOSITION