

Awards.com, LLC v Kinko's, Inc.

2014 NY Slip Op 31455(U)

May 28, 2014

Sup Ct, NY County

Docket Number: 603105/03

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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AWARDS.COM, LLC, and INSPIRE SOMEONE, LLC,

Plaintiffs,

Index No. 603105/03

-against-

KINKO'S, INC., FEDERAL EXPRESS CORP., and
GARY KUSIN,

Defendants.

-----X

Hon. Charles E. Ramos, J.S.C.:

Motion sequence 016 and 017 are herein consolidated for disposition.

In motion sequence 016, the plaintiff Awards.com, LLC and Inspire Someone, LLC, (collectively, Awards) move to disaffirm the special referee report of JHO Ira Gammmerman, dated December 17, 2012 (the Report).

In motion sequence 017, the defendant Kinko's, Inc. (Kinkos) moves to confirm the Report.

Background

These motions arise out of a dispute over the attorney's fees that Kinkos is entitled to recover under its licensing agreement with Awards (the Agreement). The Agreement provided that Awards would pay Kinkos fixed monthly rental payments and a percentage of annual revenue in exchange for leasing space to sell its corporate awards products.

For a full recitation of the facts see this Court's prior decisions, filed on January 26, 2006 and June 23, 2008.

Awards commenced this action alleging that Kinko's purported termination of the Agreement on the basis of Awards's failure to timely pay the rent due constituted a breach of the Agreement. Subsequently, Kinko's asserted a counterclaim for breach of contract seeking the unpaid rent due and indemnification, including attorney's fees pursuant to the terms of the Agreement.

On January 26, 2006, this Court denied Awards's motion for summary judgment and dismissed its causes of action for fraud and lost profits damages. Awards subsequently appealed.

On April 17, 2009, the First Department modified this Court's decision denying summary judgment but also dismissed the complaint in its entirety, leaving only Kinko's' counterclaim for breach of contract remaining in the action.

On June 23, 2008, this Court granted summary judgment on Kinko's counterclaim and limited Kinko's recovery of attorney's fees to the fees incurred in asserting its breach of contract counterclaim only.

The calculation of the attorney's fees was referred to a special referee, but the hearing was rendered moot because the parties stipulated to specific amounts of attorney's fees depending on this Court's interpretation of the indemnification provision in the Agreement.

On December 22, 2008, this Court accepted Awards's interpretation and awarded Kinko's \$73,939 in attorney's fees and

\$5,000 in costs. On February 10, 2009, judgment was entered against Awards in the amount of \$210,493, which included attorney's fees and costs.

Kinko's subsequently appealed this Court's determination with respect to the award of attorney's fees and costs.

On May 24, 2011, the First Department modified this Court's decision and expanded the award to include other attorney's fees that Kinko's incurred in litigating its counterclaim, such as "fees incurred in taking discovery and litigating appeals" and remanded the issue to this Court for a recalculation of the attorney's fees (*Awards.com, LLC v Kinko's, Inc.*, 84 AD3d 639, 640 [1st Dept 2011]). This Court referred the matter to JHO Gammerman for a recalculation of the attorney's fees as directed by the First Department.

On October 18, 2012, JHO Gammerman issued the Report, which recommended an award of attorney's fees in the amount of \$814,000 to Kinko's.¹

Discussion

Awards now seeks to reject the Report arguing that the recommendations go beyond the scope of the First Department's decision by awarding attorney's fees that are exclusively related

¹ Kinko's asserted that it incurred attorney's fees in the amount of \$893,882 in prosecuting its counterclaim. Awards has previously paid Kinko's the amount of \$78,939 towards attorney's fees (\$893,882 minus \$78,939 equals \$814,943).

to Kinko's defense against Awards's cause of action for breach of contract, but unrelated to Kinko's assertion of its counterclaim for breach of contract.

Essentially, Awards argues that Kinko's defense of Awards's cause of action for breach of contract involved issues that were mutually exclusive to its cause of action and that are unrelated and unnecessary to Kinko's prosecution of its own counterclaim for breach of contract, such as issues of waiver, contract modification, and course of dealing.

This Court disagrees. A review of the briefs submitted in connection with Kinko's initial motions for summary judgment clearly demonstrate that Awards raised those issues as defenses to Kinko's breach of contract counterclaim.

Awards argued in Motion Sequence 011, that "Kinko's is required to establish all the elements of its breach of contract claim as a matter of law, including negating affirmative defenses raised by [Awards]" in order to obtain summary judgment (Pl. Opp., NYSCEF Doc. No. 7, p. 8)

Furthermore, Awards asserted "that genuine issues of material fact exists regarding whether (a) Kinko's repeated acceptance of late rental payments cause it to waive the Agreement's anti waiver provision; and (b) the parties' course of dealing . . . modified the payment provision of the Agreement" (*id.*).

Moreover, Awards argued that it was "currently able to assert these affirmative defenses because these issues were not addressed and resolved on the merits by the Appellate Division" (*id.*).

Awards cannot now take the position that it "did not argue that the issues of waiver, contract modification, and course of dealing constituted an affirmative defense to Kinko's right to pay rent instead, these issue pertained to the requirement of timely rent and whether failure to timely pay rent constituted a material breach" (*id.*).

Despite its contentions, Awards clearly raised the issues of waiver, contract modification, and course of dealing as defenses to Kinko's counterclaim for breach of contract. As a result, Kinko's was required to litigate those issues, along with the requisite discovery and appeals arising from those issues, in order to prosecute its counterclaim for breach of contract.

During the hearing before JHO Gammerman, Awards failed to raise objections to any specific invoices or billing entries submitted by Kinko's, relying instead on the legal arguments addressed in this decision (Gadoury Aff., Ex. 7, 11:5-6). Furthermore, Awards previously stipulated to an award of \$814,000 in attorney's fees in the event that Kinko's interpretation prevailed, which it has here (NYSCEF Doc. No. 42, p. 2).

Therefore, this Court finds that the award of \$814,000 in

attorney's fees proper and the recommendations in the Report should be confirmed.

Accordingly, it is

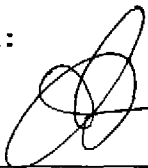
ORDERED that the plaintiffs motion to disaffirm the Report is denied in its entirety, and it is further

ORDERED that the defendant's motion to confirm the Report is granted in its entirety.

Settle judgment on notice.

Dated: May 28, 2014

ENTER:



J.S.C.

CHARLES E. RAMOS