

Spiegel v Outside Ventures, LLC

2015 NY Slip Op 31638(U)

August 28, 2015

Supreme Court, New York County

Docket Number: 107713/2009

Judge: Jeffrey K. Oing

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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: IAS PART 48

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NATHAN SPIEGEL,

Plaintiff,

-against-

OUTSIDE VENTURES, LLC, TRIBUL MERCHANT
SERVICES, LLC, 2ND SOURCE FUNDING, LLC,
AND TRIBUL CASH, LLC,

Defendants.

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DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Plaintiff moves, pursuant to CPLR 4403, for an order confirming the report and recommendation, dated May 14, 2014, of the Honorable Ira Gammerman, JHO (the "report") (Stern Affirm. [NYSCEF Doc. No. 73], Ex A).

Defendants cross-move for an order vacating the report.

Factual Background

I presided over the jury trial of this action in which the jury rendered a verdict in favor of plaintiff (NYSCEF Doc. No. 61). With respect to defendants' counterclaims against plaintiff for breach of the employment agreement and breach of the implied covenant of good faith and fair dealing, the jury found in favor of defendants on both counterclaims, but awarded no damages (Id.). I granted plaintiff's and defendants' application for an award of attorney's fees to the extent of referring the issue to

a Special Referee/JHO to hear and report on the amount of such² fees (Stern Reply Affirm. [NYSCEF Doc. No. 84], Ex. A, at p. 16).

Discussion

A review of the report and the record demonstrates that JHO Gammerman's recommendation that plaintiff's attorney's fees award should be \$240,788 was proper.

With respect to the amount of attorney's fees incurred by defendants, JHO Gammerman's recommendation was that defendants were not entitled to such an award:

I just want to point out that the transcript of March 25, which is the transcript reflecting the jury verdict, indicates very clearly that question two answered by the jury was, "Did defendants breach the employment agreement?" Once the jury says "yes" to that question, the questions relating to the plaintiff's alleged breach should not have been answered by the jury.

(Stern Affirm. [NYSCEF Doc. No. 76], Ex. A, at p. 28).

Defendants argue that JHO Gammerman's recommendation was not proper because I "clearly determined after trial and the jury's determination that Plaintiff had breached the Agreement, that Defendants were entitled to contractual attorneys' fees under the Agreement" (Defendants' Memorandum of Law [NYSCEF Doc. No. 79], at p. 14). This argument is unavailing.

Although I referred the issue of the amount of attorney's fees to a Special Referee/JHO to hear and report, contrary to defendants' argument I did not determine that defendants were

entitled to such an award -- "I will determine ... whether or not to make an award of the attorneys fees" (Stern Affirm. [NYSCEF Doc. No. 84], Ex. A, at p. 16). The question that remains is whether defendants are entitled to an award of contractual attorney's fees.

Defendants base their entitlement to an award of attorney's fees on section 10(f) of the parties' agreement, which provides:

Attorneys Fees and Costs: Employee is liable for all costs, expenses and expenditures, including without limitation, the reasonable attorneys fees incurred by Company in enforcing this Agreement as a result of any default of this Agreement by Employee.

(Nemon Affirm. [NYSCEF Doc. No. 78], Ex. C). For the reasons that follow, I concur with JHO Gammerman's recommendation that defendants are not entitled to an award of attorney's fees, but respectfully differ on the legal basis for denying such an award.

The elements of a breach of contract claim are a formation of a contract between the parties, performance by one party, the nonperformance by the other party, and resulting damages (Flomenbaum v New York Univ., 71 AD3d 80, 91 [1st Dept 2009]). Critically, although the jury found that plaintiff breached the agreement, the jury did not award defendants damages. Thus, defendants failed to prove the final element of its breach of contract counterclaims -- namely, damages, and, as such, failed to establish all the elements of their contractual counterclaims.

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Under these circumstances, defendants have failed to prove plaintiff's default under the parties' agreement.

Accordingly, it is


ORDERED that plaintiff's motion to confirm the report is granted, and it is hereby confirmed in all respects; and it is further

ORDERED that defendants' cross motion to vacate the report is denied; and it is further

ORDERED that plaintiff's and defendants' counsel shall submit on notice to Part 48 a proposed judgment and counter-judgment, respectively on or before September 30, 2015.

Dated:

8/28/15


HON. JEFFREY K. OING, J.S.C.