

**American Guard Servs., Inc. v Griffin Sec. Servs.,
Inc.**

2015 NY Slip Op 31709(U)

September 4, 2015

Supreme Court, New York County

Docket Number: 651105/2013

Judge: Saliann Scarpulla

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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: PART 39

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AMERICAN GUARD SERVICES, INC. and WORLDWIDE
SOURCING GROUP, INC.,

Plaintiffs,

DECISION/ORDER

Index No. 651105/2013
Motion Seq. No. 003

-against-

GRIFFIN SECURTY SERVICES, INC. and MICHAEL
SMITH

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action arising from a breach of a stock purchase agreement, defendant Griffin Security Services, Inc. (“Griffin”) moves for a final judgment dismissing plaintiff American Guard Services, Inc.’s (“Plaintiff”) complaint and for attorney’s fees.

On May 20, 2013, Griffin cross-moved to dismiss Plaintiff’s complaint. By decision and order dated June 30, 2014, I granted Griffin’s motion to dismiss the first cause of action for breach of contract with respect to the \$250,000 loan, the third cause of action for breach of contract, the fourth cause of action for specific performance, and the sixth cause of action for a temporary receiver pursuant to CPLR § 3211(a)(7). As to the two remaining causes of action against Griffin for breach of contract and unjust enrichment, I ordered a traverse hearing to be conducted before a Special Referee to determine whether Plaintiff properly served the complaint on Griffin.

After conducting a traverse hearing, Special Referee Jeffrey Helewitz issued a report on December 10, 2014, in which he recommended that I grant Griffin’s motion to dismiss the action based on improper service under CPLR § 3211(a)(8). Special Referee Helewitz’s recommendation

to dismiss the complaint was based on Plaintiff's failure "to come forward with any evidence" that the complaint was properly served.

Griffin now moves for a final judgment dismissing Plaintiff's complaint and for attorney's fees. Griffin argues that it is entitled to attorney's fees and expenses in this action and a related 2012 action (Index No. 653499/2012), pursuant to Section 12.8(d) of the stock purchase agreement. Griffin's attorney Philip H. Kalban submits an affidavit stating that Griffin incurred \$45,677 in attorney's fees and \$305.44 in expenses in this action, and \$24,160.50 in attorney's fees and \$265.16 in expenses in the 2012 action.¹ American Guard opposes the motion for attorney's fees on the grounds that Griffin is not a prevailing party, and Griffin's attorney fees are unreasonable.

Discussion

1. Referee's Report

First, I find that the Special Referee's report and recommendation to dismiss the complaint against Griffin for improper service is substantially supported by the record. Plaintiff failed to submit any evidence to demonstrate that it properly served the complaint on Griffin. Accordingly, the Special Referee's report is confirmed, and I dismiss the complaint against Griffin for improper service pursuant to CPLR § 3211(a)(8).

2. Attorney's Fees

Griffin moves for attorney's fees and expenses incurred in this action and the 2012 action. In general, "a party must pay his or her own attorney's fees unless an award is authorized by an agreement between the parties, or by statute or court rule." *Degregorio v. Richmond Italian Pavillion, Inc.*, 90 A.D.3d 807, 808 (2d Dep't 2011); *City of New York v. Zuckerman*, 234 A.D.2d

¹ Kalban further states that Griffin will incur an estimated \$7,545 in attorney's fees and costs related to this motion.

160, 161 (1st Dep't 1996). An award of attorney's fees is within the sound discretion of the trial court. *Mastrandrea v. Mastrandrea*, 268 A.D.2d 293, 293 (1st Dep't 2000).

At the outset, I deny Griffin's motion for attorney's fees and expenses incurred in the related 2012 action. Any attorney's fees and expenses related to the 2012 action should have been sought in that particular action, prior to judgment.

In regards to attorney's fees and expenses in this action, Griffin argues that it entitled to such an award pursuant to Section 12.8(d) of the stock purchase agreement. Section 12.8(d) provides that "the prevailing party in any action brought with respect to or to enforce any right or remedy under this Agreement shall be entitled to recover from the other party . . . all reasonable costs and expenses . . . incurred by the prevailing party in connection with such action, including without limitation attorneys' fees and prejudgment interest."

To determine whether a party has prevailed, the "court must consider the true scope of the dispute litigated and what was achieved within that scope." *Sykes v. RFD Third Ave. I Associates, LLC*, 39 A.D.3d 279, 279 (1st Dep't 2007). A party is considered to be a prevailing party when it is successful "with respect to the central relief sought." *25 East 83 Corp. v. 83rd Street Associates*, 213 A.D.2d 269, 269 (1st Dep't 1995).

In my June 30, 2014 decision, I found that Plaintiff failed to state a claim against Griffin on its first cause of action with respect to the \$250,000 loan, as well as its third, fourth, and sixth causes of action. In dismissing these claims, I determined that: (1) neither the stock purchase agreement nor the letter of intent between the parties contained any loan agreement whereby Griffin agreed to repay a \$250,000 loan to American Guard; (2) Plaintiff could not seek damages or specific performance related to a 49% transfer of stock ownership because it failed to allege its own

performance prior to the closing; and (3) Plaintiff could not assert a claim for a temporary receiver as an ultimate form of relief in this action.

Griffin is a prevailing party with respect to the above causes of action because it successfully obtained dismissal of these claims, which claims may not be re-commenced by Plaintiff in the same form. *25 E. 83 Corp*, 213 A.D.2d at 269; *Jocar Realty Co. v. Galas*, 176 Misc.2d 534, 536 (Civ. Ct. New York County 1998). Griffin, however, is not a prevailing party with respect to the remaining portion of the first cause of action and the second cause of action because those claims were dismissed solely on the basis of improper service. Furthermore, the remaining portion of the first cause of action (which related to a \$50,000 loan provided for in the letter of intent) and the second cause of action for unjust enrichment do not fall within the scope of the attorney's fees provision because they are unrelated to the enforcement of any right or remedy under the stock purchase agreement.

Accordingly, Griffin is entitled to reasonable attorney's fees and expenses incurred with respect to the dismissal of the first, third, fourth, and sixth causes of action. *Weingarten v. Optima Communications Systems, Inc.*, 544 F.Supp.2d 193, 197-198 (S.D.N.Y. 2008). I therefore order a hearing before a Special Referee to determine the amount of attorney's fees and expenses that Griffin expended to defend those causes of action. In determining the award of attorney's fees, I will also assess whether those fees are reasonable and warranted for the services rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363, 365 (2d Dep't 1999); *Match v. Match*, 168 A.D.2d 226, 226 (1st Dep't 1990).

In accordance with the foregoing, it is

ORDERED that defendant Griffin Security Service, Inc.'s motion to dismiss the complaint pursuant to CPLR § 3211(a)(8) is granted; and it is further

ORDERED that defendant Griffin Security Service, Inc.'s motion for attorney's fees is granted on the issue of liability only to the extent set forth above, and otherwise denied; and it is further

ORDERED that a hearing on the amount of reasonable attorney's fees to be awarded defendant Griffin Security Service, Inc. shall be conducted before a Special Referee. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel for defendant Griffin Security Service, Inc. shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that defendant Michael E. Smith's motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) is granted; and it is further

ORDERED that a final judgment shall be entered after a hearing to determine the amount of reasonable attorney's fees to be awarded to Griffin Security Service, Inc.

This constitutes the decision and order of the Court.

DATE:

9/4/15


SCARPULLA, SALIANN, JSC