

**Trell, Inc. v Fresh Aircraft Sales, LLC**

2020 NY Slip Op 33644(U)

May 11, 2020

Supreme Court, Westchester County

Docket Number: 58580/2017

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
TRELL, INC.,

Plaintiff,

-against-

DECISION AND ORDER  
Index No.: 58580/2017  
Sequence: 7

FRESH AIRCRAFT SALES, LLC; CENTERLINE  
AIRCRAFT, LLC; AND NORMAN HELDMAN d/b/a  
AIR AMERICA ATLANTIC,

Defendants.

-----X  
WALKER, J.

The following documents were read on this motion for an Order awarding defendant, Fresh Aircraft Sales, LLC, attorney's fees in the amount of \$124,295.15 and costs in the amount of \$4,882.46, along with whatever additional relief this Court deems to be just and proper:

- Notice of Motion - Affirmation in Support - Exhibits A-F - Affirmation of Service
- Affirmation in Opposition
- Affirmation in Reply - Affirmation of Service

Upon consideration of the foregoing, and for the following reasons, the motion is determined as follows:

Plaintiff, purchaser of a four seat light aircraft, commenced the instant action against the commercial seller by filing a summons and complaint, via New York State Courts Electronic Filing (hereafter "NYSCEF") on June 5, 2017. The complaint alleged eight causes of action and plaintiff sought actual and punitive damages.

Defendants were granted partial summary judgment pursuant to Decision and Order dated April 29, 2019, filed May 3, 2019 (Hon. Lawrence H. Ecker, J.S.C.) (motion sequence 5).

The remaining issues were addressed by this Court, which conducted a non-jury trial commencing on October 16, 2019 and concluding on October 17, 2019. At completion of the trial, this Court instructed to submit post-trial memoranda. Submissions from counsel for both sides were considered by the Court in arriving at Decision and Order decided on January 31, 2020 and filed on February 5, 2020 (motion sequence 6).

Defendant Fresh Aircraft Sales, LLC (hereafter "movant") filed this motion for attorney's fees on February 14, 2020.

Plaintiff filed opposition papers on February 27, 2020.

Defendant filed reply papers on March 5, 2020.

In the instant motion, defendant seeks attorney's fees pursuant to the laws of Arizona, which defendant claims are applicable as per the contract of sale between the parties. In relevant part, the Decision and Order of this Court filed February 5, 2020 holds "... even though the Aircraft Purchase Agreement provides that the unsuccessful party in a legal action shall pay to the successful party a reasonable sum for the successful party's attorney fees, Defendant has not set forth an amount or how such amount was arrived at by setting forth the time spent on various tasks, whether by counsel or paralegal and the hourly rate for each. That being the case, the Court is, unable to ascertain what amount would be reasonable in light of the work performed" (Hon. Sam D. Walker, J.S.C.).

In opposition, plaintiff does not dispute that it was the unsuccessful party in this action (see Affirmation in Opposition at ¶5), Rather, plaintiff argues that the motion is untimely (see Affirmation in Opposition at ¶6). Plaintiff states that during post trial colloquy, parties were directed that if counsel fees were sought, parties should include any such application, including time spent, in post-trial memoranda of law to be simultaneously submitted December 6, 2019. Plaintiff claims that as the defendant failed to do so, defendant has waived the right to seek counsel fees.

Movant's response to this issue in its reply papers is unavailing. Movant claims, "[a]n aside about the courts (*sic*) ruling is warranted. The Court order says no fees were awarded because the defendant had not adduced evidence....[t]he defendant, however, was stopped from adducing evidence and an exhibit dealing with the fees was not admitted during trial" Affirmation in Reply at ¶4-5. While that is correct, it does not address the relevant issue as to why movant failed to submit such evidence as directed in its post-trial memorandum of law and instead waited until after the Court had rendered a decision to file proper documentation with its motion.

Movant avers that pursuant to Arizona Law, it is entitled to reasonable legal fees as the prevailing party in the lawsuit and therefore the Court must award fees (see Affirmation in Reply at ¶12). Movant argues "...parties can fight if they insist, but the loser pays in Arizona. A court has no discretion under Arizona law so far as an agreed rate is concerned. And the reasonableness of the hours spent on a case is unrelated to the amount at issue" Affirmation in Reply at ¶23.

The Court does not disagree with movant's analysis of Arizona law as pertains to counsel fees. However, in the instant matter, the Court did not grant attorney's fees because movant failed to submit any evidence whatsoever as to the amount of fees sought, as directed to do in its post-trial brief. The Court was unable to grant fees as movant failed to provide any indication of what those fees may be, reasonable or not.

Furthermore, movant did not request an extension of time to submit evidence in support of its claim for legal fees, rather, in its brief submitted on January 3, 2020, movant stated, "Fresh Aircraft will submit a form of judgement and application for fees", despite not having been granted leave for an extension to do so. Having been directed to submit the application within the post-trial memorandum, movant fails to offer any explanation or excuse as to its failure to timely submit evidence in support of its application for legal fees.

In sum, the issue of counsel fees was decided by Decision and Order of this Court signed January 31, 2019 and entered February 5, 2020 pursuant to which

attorney's fees were not awarded based upon lack of documentary evidence to support such an award. The Order did not include a provision to renew. Movant does not seek to renew or reargue the prior Decision and Order pursuant to CPLR 2221 in the present motion, nor does movant seek relief from the Order pursuant to CPLR 5015(a).

Therefore, movant's application is denied as the issue has been previously adjudicated and movant offers no legal or factual basis upon which to disturb the prior Order.

Based on the foregoing it is:

ORDERED that defendant Fresh Aircraft Sales, LLC's motion for attorney's fees is denied; and it is further

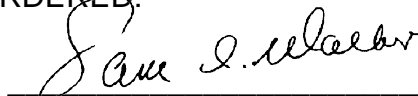
ORDERED that defendant Fresh Aircraft Sales, LLC shall serve a copy of this order with notice of entry on all parties within ten (10) days of entry; and it is further

ORDERED that all other relief requested herein and not decided is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
May 11, 2020

SO ORDERED:



HON. SAM D. WALKER, J.S.C.

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