

Trell, Inc. v Fresh Aircraft Sales, LLC
2020 NY Slip Op 33645(U)
September 30, 2020
Supreme Court, Westchester County
Docket Number: 58580/2017
Judge: Sam D. Walker
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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: 8

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 pursuant to CPLR 2221 granting renewal and reargument of an application by counsel for the defendant, Fresh Aircraft Sales, LLC ("FAS"), for an award of attorney's fees and upon renewal and reargument, vacating the portions of the Court's prior Decisions dated January 31, 2020 and May 12, 2020, that denied attorney's fees and issuing a new order awarding reasonable attorney's fees to FAS, as well as an order pursuant to CPLR 5015 vacating and modifying the aforementioned court orders insofar as they imposed a requirement that the issue of attorney's fees be addressed in post-trial memoranda prior to a verdict being delivered adjudicating the plaintiff's claims against FAS, along with whatever additional relief this Court deems to be just and proper:

Notice of Motion - Affirmations in Support - Exhibits A-H - Affirmation of Service
Affirmation in Opposition-Exhibits 1-3
Affirmation in Reply

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

The 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 the plaintiff sought actual and punitive damages.

The 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.). The remaining issues were addressed by this Court in a non-jury trial commencing on October 16, 2019 and concluding on October 17, 2019. At completion of the trial, this Court instructed the attorneys to submit post-trial memoranda. Submissions from counsel for both sides were considered by the Court in arriving at the Decision and Order decided on January 31, 2020 and filed on February 5, 2020. That Decision stated that, although the Purchase Agreement provided that the unsuccessful party in a legal action shall pay to the successful party a reasonable sum for the successful party's attorney's fees, the defendant did not set forth an amount or how such amount should be granted and therefore, the Court was unable to ascertain what amount would be reasonable in light of the work performed.

FAS then filed a motion for attorney's fees on February 14, 2020, which motion was opposed by the plaintiff. This Court rendered a Decision and Order, dated May 11, 2020 and entered May 12, 2020, denying the motion and stating that:

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.

FAS now files the instant motion pursuant to CPLR 2221 for renewal and reargument of the prior motion by counsel for FAS, for an award of attorney's fees and upon renewal and reargument, vacating the portions of the Court's prior Decisions dated January 31, 2020 and May 12, 2020, that denied attorney's fees and issuing a new order awarding reasonable attorney's fees to FAS, as well as an order pursuant to CPLR 5015 vacating and modifying the aforementioned court orders insofar as they imposed a

requirement that the issue of attorney's fees be addressed in post-trial memoranda prior to a verdict being delivered adjudicating the plaintiff's claims against FAS.

The attorney argues in that part of the motion seeking reargument that the Court's prior Decision was the product of its misapprehension of facts and law, since the Court incorrectly determined that the issue of attorney's fees needed to be addressed within the post-trial memoranda and that the failure to do so is fatal. The attorney states that CPLR 8602(b) provides that a party seeking an award of attorney's fees is to submit its application within thirty days of final judgment. The attorney states that the statute is illustrative and his motion for an award of attorney's fees, made only nine days after the Court's verdict was filed to NYSCEF, was timely.

The attorney further argues in that part of the motion seeking renewal that the Court may exercise its discretion and grant renewal even where the party seeking renewal was aware of the facts and in making its determination, the Court should consider relevant factors such as the extent of the delay, prejudice or lack of prejudice to the opposing party, willfulness, and the strong public policy of resolving cases on the merits. The attorney asserts that all of these factors favor the Court granting the motion, since the delay was minimal, the failure to address attorney's fees was inadvertent and there is no prejudice to the plaintiff. The attorney states that it was Mr. Williams' erroneous impression that the issue of attorney's fees would be held in abeyance until the Court rendered a verdict and the Court initially indicated as such.

FAS also seeks relief pursuant to CPLR 5015(1), which authorizes the Court to relieve a party from the terms of a judgment or order, upon excusable default and to the extent the failure to address the issue of attorney's fees constitutes a default it was obviously unintentional and due exclusively to Mr. Williams not hearing the Court's statement that attorney's fees should be included within the post-trial memoranda. The attorney also asserts that the fees requested were reasonable and totals \$12,840.00, plus filing fees of \$180 for a total of \$13,020.00.

In opposition, the attorney for Trell, Inc. ("Trell"), Mr. Rosenblatt, argues that the Court made no award of counsel fees in the Decision and Order dated January 31, 2020, because defense counsel neglected to include its counsel fee request with the submitted

post-trial memorandum, which was in direct conflict with this Court's order set forth in the trial record.

The attorney argues that the part of the motion for reargument should be denied because Mr. Williams' claims that he did not hear the Judge's direction that counsel fee requests be included in the post-trial memoranda and that he did not hear the Judge's direction to submit the memoranda to him, do not form any basis for a motion to reargue and there is nothing that the Court misapprehended or overlooked, since it was this Court that made the ruling in the first instant. The attorney further argues that the part of the motion for renewal should be denied, because there are no new facts and therefore, no renewal should be granted.

The attorney next argues that the defense attorney did not make an adequate showing of good cause for relief from its failure to submit its papers on time and contends that the Court properly exercised its discretion in declining to award counsel fees and in declining to adjourn the date for submission of a counsel fee request.

In reply, FAS' attorney argues that he has now rectified the former procedural impediments by filing to renew or reargue the Court's prior Decision and seeking relief pursuant to CPLR 5015(a). The attorney argues that the motion is timely and contends that whenever possible, disputes should be decided on the merits. He further argues that Mr. Williams' not having heard the Court's directive, in no way equates to a lack of due diligence, which is the basis for denying applications for adjournments. He contends that the failure to address attorney's fees in the post-trial memorandum was inadvertent and there is no prejudice to the plaintiff if the Court adjudicates the application for attorney's fees at this time. The parties entered into a contract, by which both sides were aware that attorney's fees would be awarded to the successful party and the plaintiff chose not to accept the settlement offers made by the defendant before trial and knew that there was a risk of attorney's fees. The attorney argues that under these circumstances, it would be an abuse of discretion to decline to entertain the application for attorney's fees.

Discussion

A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion," (CPLR 2221[d][2]). Such

motions are addressed to the sound discretion of the Supreme Court, (see *Deutsche Bank Nat. Trust Co. v Ramirez*, 117 AD3d 674 [2d Dept 2014]).

“A motion for leave to renew must be based upon new or additional facts which, although in existence at the time of the original motion, were not made known to the party seeking renewal, and, therefore, were not known to the court” *Morrison v. Rosenberg*, 278 A.D.2d 392, 717 N.Y.S.2d 354 (2d Dept. 2000). The motion “must set forth a reasonable justification for the failure to present such facts on the prior motion” *Sobin v. Tylutki*, 59 A.D.3d 701, 873 N.Y.S.2d 743 (2d Dept. 2009). “[A] motion for leave to renew “is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” *Renna v. Gullo*, 19 A.D.3d 472, 797 N.Y.S.2d 115 (2d Dept. 2005).

However, “[t]he requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court’s discretion to grant renewal upon facts known to the moving party at the time of the original motion if the movant offers a reasonable excuse for the failure to present those facts on the prior motion” (see *Gonzalez v Vigo Const. Corp.*, 69 AD3d 565, citing *Matter of Surdo v Levittown Pub. School Dist.*, 41 AD3d 486 [2007]; see also *Heaven v McGowan*, 40 AD3d 583, 586 [2007]).

In this case, the Court did not overlook nor misapprehend the facts of the case and denied FAS’ application because he failed to submit the attorney’s fee request as directed by the Court. However, FAS also seeks renewal, which is within this Court’s discretion and Mr. Williams attested to not hearing the Court’s directive, which this Court credits based upon the record provided. Mr. Williams was initially engaging with the Court as to the date for post-trial memoranda, but did not participate in the part of the record, in which the Court directed that the attorney’s fees request be included with the post-trial memoranda. Further, earlier in the trial, the Court had indicated that the attorney’s fees request would be made subsequent to the Court’s determination of the matter. In addition, FAS’ motion for attorney’s fees was filed only a few days after this Court filed the Decision and Order.

The Court also grants FAS motion pursuant to CPLR 5015(a), seeking to vacate the default in filing for fees. A party seeking to vacate a default pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for [his or her] delay in appearing and

answering the complaint and a potentially meritorious defense to the action”, (*Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141). “The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court”, (*Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 904).

Here, FAS has provided a reasonable excuse for its default in seeking the attorney’s fees request and a potential meritorious defense, in that, the Court found in its favor, the Agreement provides for fees for the successful party and Arizona law, which is the controlling law under the Agreement, provides for the payment of fees to the prevailing party. Further, although, the Court did not grant attorney’s fees because of the defendant’s attorney’s failure to set forth the request in the post-trial memorandum, the Court also did not deny attorney’s fees, but simply stated that it is unable to ascertain the amount that would be reasonable based on the work performed.

However, having granted FAS’ relief, the Court finds the attorney’s request for \$129,177.61 in attorney’s fees and costs to be wholly unreasonable. Therefore, the Court will conference with the attorneys in an effort to settle on a reasonable amount. If a settlement cannot be reached, the Court will make a determination based upon the documents submitted in the motion.

Accordingly, based on the foregoing, it is

ORDERED that the part of the motion seeking an order pursuant to CPLR 2221 granting renewal of the application by counsel for the defendant, FAS, for an award of attorney’s fees and upon renewal, vacating the portions of the Court’s prior Decision and Order dated May 12, 2020, that denied attorney’s fees, is granted; and it is further

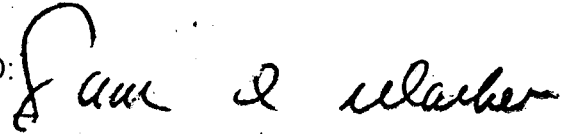
ORDERED that the part of the motion seeking an order pursuant to CPLR 5015 vacating the defendant’s attorney’s default in submitting the attorney’s fees request, is granted; and it is further

ORDERED that the parties are to appear before this Court in a virtual appearance on October 28, 2020 at 10:00 a.m. via the Microsoft Teams platform.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2020

SO ORDERED:



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

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