

<b>FM Cost Containment, LLC v 42 W 35th Prop. LLC</b>
2021 NY Slip Op 31742(U)
May 17, 2021
Supreme Court, New York County
Docket Number: 653515/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART IAS MOTION 42EFM

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FM COST CONTAINMENT, LLC,	<b>INDEX NO.</b>	<u>653515/2020</u>
Plaintiff,	<b>MOTION DATE</b>	<u>04/22/2021</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>004</u>
42 W 35TH PROPERTY LLC, MEADOW CAPITAL MANAGEMENT LP, HOTEL ASSET VALUE ENHANCEMENT, INC.	<b>DECISION + ORDER ON MOTION</b>	
Defendant.		

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HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this breach of contract action, the plaintiff moves pursuant to CPLR 3211 to dismiss the counterclaims asserted by defendant +42 W 35th Property, LLC (the “defendant”) seeking attorney’s fees and costs. The defendant opposes the motion. The motion is granted in part and denied in part to the extent discussed herein.

II. BACKGROUND

By a prior order, the court granted a pre-answer motion to dismiss brought by the defendant, Meadow Capital Management, LP, and Hotel Asset Value Enhancement, Inc., to the extent that it dismissed all but the first cause of action in the complaint, sounding in breach of contract as against the defendant. The court further directed the defendant to file an answer to that claim. The defendant filed its answer, in which it also asserted two counterclaims. The first

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counterclaim seeks to recover attorneys' fees for an action brought in Pennsylvania, seeking the same relief, that was dismissed for lack of personal jurisdiction. The second counterclaim seeks to recover attorneys' fees for the action currently before the court.

### III. LEGAL STANDARD

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151–52 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it and accept the facts alleged in it as true. Id. at 152; see Romanello v Intesa Sanpaolo, S.P.A., 22 NY3d 881 (2013). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" 511 W. 232nd Owners Corp., 98 NY2d at 152 (quoting Polonetsky v Better Homes Depot, Inc., 97 NY2d 46, 54 [2001] and citing Guggenheimer v Ginzburg, 42 NY2d 268, 275 [1977]).

### IV. DISCUSSION

The parties' agreement provides that "[i]n the event of litigation brought to enforce the provisions of th[e] Agreement, all costs of the prevailing party, including reasonable attorney's fees will be borne by the non-prevailing party."

The plaintiff argues that the first counterclaim must be dismissed because the defendant cannot recover attorneys' fees incurred in the Pennsylvania action as the defendant was not a "prevailing party" in that action. Specifically, the plaintiff contends that the defendant cannot claim prevailing party status since the action was decided not on the merits, but rather on

jurisdictional grounds. The defendant counters that it was the prevailing party in the prior action because, *inter alia*, dismissal of the action on jurisdictional grounds foreclosed relief in the Pennsylvania courts. With respect to the second counterclaim, the plaintiff avers that the defendant cannot assert a counterclaim for attorneys' fees at this stage in the instant action and that a cause of action for attorneys' fees cannot stand alone as an independent cause of action. In opposition, the defendant asserts that a claim or counterclaim for attorney' fees can in fact be a separate cause of action. The court will address each counterclaim in turn.

1. The First Counterclaim

“Under the general rule in New York, attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties.” Flemming v Barnwell Nursing Home & Health Facilities, Inc., 15 NY3d 375, 379, (2010) (citing Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]). “New York has traditionally followed the common-law rule disfavoring any award of attorney's fees to the prevailing party in a litigation. . . . Therefore, the appropriate canon of statutory construction to be applied . . . favors a narrow interpretation.” Gottlieb v Kenneth D. Laub & Co., 82 NY2d 457, 464 (1993); Murphy v Vivian Realty Co., 199 AD2d 192, 194 (1st Dept. 1993).

In accordance with these principles, relevant to whether a party is the “prevailing party” such that it is entitled to attorneys' fees is whether the party has “prevailed with respect to the central relief sought,” (Nestor v McDowell, 81 N.Y.2d 410, 416 [1993]), as well as whether the party prevailed on the “central claims advanced, and received substantial relief in consequence thereof.” Board of Mgrs. of 55 Walker Condo. v Walker St., 6 AD3d 279, 280 (2004) (citation omitted); New York Univ. v Cliff Tower, LLC, 107 AD3d 649, 650 (1st Dept. 2013) (“As

neither party is the prevailing party with regard to its ‘central claim,’ neither is entitled to attorneys' fees in connection with its motion.”). Also relevant is whether “the ‘ultimate outcome’ of the controversy has [] been reached.” Horatio Arms, Inc. v Celbert, 41 Misc 3d 11, 13 (App. Term 2013) (quoting Elkins v Cinera Realty, Inc., 61 AD2d 828, 828 [2nd Dept. 1978]). See also Quik Park W. LLC v Bridgewater Operating Corp., 189 AD3d 488, 489 (1st Dept. 2020) (upholding court’s award of attorneys’ fees where court determined that defendant breached the agreement as it “solidified plaintiffs’ status as the prevailing party” and confirmed that plaintiffs “successfully defended against the affirmative defenses”). Further, a determination as to whether a party “should be accorded the status of ‘prevailing party’” requires “consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope.” Excelsior 57th Corp. v Winters, 227 AD2d 146, 147 (1st Dept. 1996).

In the Pennsylvania action, neither party prevailed with respect to the central relief sought and neither party received substantial relief in consequence thereof. While the Pennsylvania action came to an end for lack of jurisdiction, the underlying dispute between the parties remains ongoing — indeed, if the parties’ dispute had been resolved such that the defendant had prevailed, there would be no action currently before the court. See Elkins, 51 AD2d at 828 (“it would be unjust to allow [a party] to recover [its] reasonable attorney's fees based on each separate stage of what is clearly one controversy”). In view of the scope of the dispute being litigated, it is clear the ultimate outcome of the controversy has not yet been reached. See, e.g., New York University, 107 AD3d 649 (no prevailing party where the plaintiff was granted partial summary judgment dismissing one of ten counterclaims and the defendant denied relief).

Therefore, the court cannot conclude that the defendant was the prevailing party in the Pennsylvania action.

The two nonbinding trial court decisions cited by the defendant do not counsel otherwise. See DBCA, LLC v Cohen, 62 Misc 3d 493 (Dist. Ct. Nassau Cty. 2018); Parkview Apartments, Corp. v Guy, 15 Misc 3d 1106(A) (Table), 2007 WL 841002 (Justice Ct., Westchester Cty. March 19, 2007). In neither of the cases cited was the defendant pursuing fees for its defense against a prior action while a new action, asserting the same claims and commenced in a separate court, remained pending. As the court has stated, the existence of the instant action, which is essentially the same action that was before the Pennsylvania court, merely in a different forum, makes plain that the ultimate outcome of the controversy has not been reached.

By the same token, the court finds the federal case law cited by the plaintiff persuasive. Though the federal courts were interpreting the meaning of “prevailing party” under federal law, their rationale for determining when a party is “prevailing” is instructive. See, e.g., Zanotti v Invention Submission Corp., No. 18-CV-5893 (NSR), 2020 WL 2857304, at \*17 (S.D.N.Y. June 2, 2020) (dismissal without prejudice for lack of personal jurisdiction did not render the defendants the prevailing parties). See also Dattner v Conagra Foods, Inc., 458 F.3d 98, 102 (2d Cir. 2006) (citations omitted) (“a *forum non conveniens* dismissal is a non-merits based decision akin to dismissal for lack of personal jurisdiction . . . [and] [a] dismissal on the ground of *forum non conveniens* does not, after all, immunize a defendant from the risk of further litigation on the merits of a plaintiff’s claims; it merely provides that another forum ‘would be the most convenient and best serve the ends of justice.’ Thus, because [the plaintiff] is free to pursue his claims against the defendants in [another forum], and because it remains to be seen which party

will, in fact, prevail on the merits, defendants have not yet achieved a judicially sanctioned change in the legal relationship of the parties so as to be considered ‘prevailing’ . . .”).

Accordingly, the first counterclaim is dismissed.

## 2. The Second Counterclaim

A separate cause of action for attorneys’ fees may be maintained where attorneys’ fees are available pursuant to an express provision of an agreement. See Kibbutz Givat Brenner v Alroy, 171 AD2d 589, 590 (1st Dept. 1991); Cree v Cree, 124 AD2d 538 (2<sup>nd</sup> Dept. 1986); Levine v Infidelity, Inc., 2 AD3d 691 (2<sup>nd</sup> Dept. 2003) (separate action for attorney’s fees).

It is undisputed that the parties’ agreement entitles the prevailing party to attorneys’ fees with respect to litigation brought to enforce the agreement. While it is true that any award of attorneys’ fees at this juncture would be premature, the counterclaim sufficiently states a cause of action under the standards for dismissal.

The court has considered the plaintiff’s arguments on this front and has found them unavailing. In fact, the three cases to which the plaintiff cites in the penultimate paragraph of its Reply Memorandum of Law are all inapposite as they involve attorneys’ fees permitted by rules and statutes not at issue here, where there is an express contractual attorneys’ fees provision.

Accordingly, the second counterclaim survives.

## V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff’s motion to dismiss the counterclaims asserted by the defendant +42 W 35th Property, LLC, is granted to the extent that the first counterclaim seeking

to recover attorney's fees arising from a related action in Pennsylvania is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff shall file its reply to the surviving counterclaim within 20 days of the date of this order.

This constitutes the Decision and Order of the court.

DATED: May 17, 2021

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**