

<b>Continental Indus. Group, Inc. v Ustuntas</b>
2022 NY Slip Op 31525(U)
May 7, 2022
Supreme Court, New York County
Docket Number: Index No. 653215/2012
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CONTINENTAL INDUSTRIES GROUP, INC.,	INDEX NO.	<u>653215/2012</u>
Plaintiff,	MOTION DATE	_____
- v -	MOTION SEQ. NO.	<u>007</u>
HAKAN USTUNTAS, PLASMAR PLASTIK VE KIMYA SAN. TIC. A.S., A/K/A PLASMAR PLASTIC, INC., and MARCHEM INTERNATIONAL TRADING LLP,	<b>DECISION + ORDER ON        MOTION</b>	
Defendants.		

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 319, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 335, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 350, 351, 352, 353, 354, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 387, 531, 533, 534, 535, 536, 537, 538, 539, 546, 547, 548, 564, 565, 567

were read on this motion to/for DISMISSAL.

In motion sequence number 007, defendants Hakan Ustuntas, Plasmar Plastik VE Kimya San. Tic. A.S. a/k/a. PLASMAR Plastic, Inc. and Marchem International Trading LLP moved, pursuant to CPLR 3103, 3126 and 3124, to strike the complaint and for attorneys' fees. Alternatively, they moved for discovery. The court reviewed each discovery request with the parties and resolved it on the record on March 12, 2018. On June 13, 2018, the court granted defendants' request for attorneys' fees and costs incurred as a result of plaintiff's actions regarding the allegedly dead server. (NYSCEF Doc. No. [NYSCEF] 357, Supplemental Decision and Order [motion seq. no. 007].)

Defendants' counsel submitted an affirmation explaining that her firm became counsel of record for defendants in January 2017 and does not have a traditional hourly fee arrangement with the defendants, requiring hourly or line-item invoices; rather, her firm's invoices, with certain exceptions, contain flat fees for monthly case administration and discovery charges. (NYSCEF 360, Gunay aff ¶¶ 14-15.) In her affirmation, defendants' counsel seeks \$79,518.30 in attorneys' fees, costs and expenses.<sup>1</sup> (*Id.* ¶ 24.) Counsel explains that her firm billed defendants \$177,487.89, \$29,168.29 of that amount was for expenses incurred such as postage, transportation, printing, research fees, transcript fees, etc.), leaving an amount of \$148,316.60 billed for legal fees. (*Id.* ¶¶ 14, 16.) Counsel goes on to state that "[o]nly \$5,000.00 of those charges ... does not pertain to work concerning discovery matters and/or disputes," leaving a total amount of legal fees of \$143,316.60. (*Id.* ¶ 17.) Counsel then requests that \$71,658.30 (half of \$143,316.60) be apportioned to plaintiff's refusal to produce the server. (*Id.* ¶ 18.) Counsel also seeks an additional \$5,860 for work performed after the issuance of the June 2018 Order and \$2,000 for additional work that was not included in the \$71,658.30. (*Id.* ¶ 19 and n 10.) Counsel states that at \$45,347.50 of the \$71,658.30 in attorneys' fees was incurred directly in connection with this motion (seq. no. 007). (*Id.* at n 10.) The court notes that defense counsel's hour rate at that time was \$350.00. (*Id.* at n 7.)

To determine the reasonableness of the requested fee, the court is guided by the following factors: (1) "the time and labor required, the difficulty of the questions involved,

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<sup>1</sup> Defense counsel also explains that defendants paid \$393,873.38 in fees to their previous counsel. (NYSCEF 360, Gunay aff ¶ 12.) The court's award of attorneys' fees was not for work by previous counsel, and defendants' current counsel certainly cannot affirm how much of these previous charges were related to discovery involving the dead server, if any. Thus, the court will consider these fees in this application.

and the skill required to handle the problems presented;" (2) "the lawyer's experience, ability, and reputation;" (3) "the amount involved and benefit resulting to the client from the services;" (4) "the customary fee charged by the Bar for similar services;" (5) "the contingency or certainty of compensation;" (6) "the results obtained;" and (7) "the responsibility involved." (*Matter of Freeman*, 34 NY2d 1, 9 [1974].) These factors apply in commercial cases. (Commercial Litigation in New York, 4th ed., 2015, § 53:7, Court-Awarded Attorneys' Fees.) The court also relies on its own knowledge of hourly rates charged by private firms who practice in the Commercial Division, New York County. (See *Miele v New York State Teamster Conference Pension & Retirement Fund*, 831 F2d 407, 409 [2d Cir 1987].)

Attorneys' fees were awarded in this matter because of plaintiff's egregious conduct whereby they denied possession and/or existence of a server from the start of litigation until 2017 when plaintiff submitted the affidavit of its IT Manager, and wife of plaintiff's sole owner, who affirmed that the server was in a closet. As the fee arrangement between the defendants and their counsel does not lend itself to a line-by-line review of invoices detailing hours spent on specific tasks, the court will apply its own knowledge of hours typically spent on the application for sanctions. Defendants' counsel's hourly rate of \$350 is very reasonable for her experience. The court finds that on an application such as this, an attorney typically spends 5 hours to research and draft motion papers, but here there was significant time invested discussing and searching for the server which was in plaintiff's closet all along for which the court adds another 20 hours. In addition, the court finds it reasonable to award defendants attorneys' fees in connection with obtaining the server after the June 2018 Order was issued. Defense counsel's services in doing so and invoices of \$5,860 and \$6,412.60

are reasonable. (See NYSCEF 336 and 382, Invoices.) Thus, defendants are entitled to a total award of attorneys' fees of \$21,022.60. Counsel's request for attorneys' fees in connection with the appeal of this motion is denied. (See NYSCEF 535, July 11, 2019 Letter.)

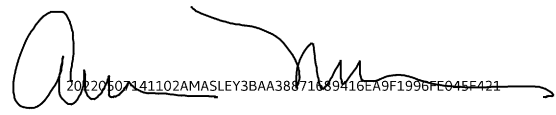
Further, in light of the issues in obtaining the server (see NYSCEF 379, BIA Letter), the court awards reimbursement of the expenses incurred as a result in the amount of \$4,872.50. (See NYSCEF 383, BIA Invoice.)

Finally, the court also sanctions plaintiff, not an attorney, in the amount of \$10,000 for its egregious conduct payable to the Lawyers' Fund for Client Protection which shall be deposited with the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance in accordance with 22 NYCRR 130-1.3.

Accordingly, it is

ORDERED that defendants are awarded attorneys' fees and expenses in the amount of \$25,895.10; and it is further

ORDERED that plaintiff is sanctioned \$10,000 for its conduct and directed to deposit that amount with the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance, in accordance with 22 NYCRR 130-1.3, for the Lawyers' Fund for Client Protection.

  
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5/7/2022  
DATE

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ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE