

Drone USA, Inc. v Antonelos

2023 NY Slip Op 30427(U)

February 9, 2023

Supreme Court, New York County

Docket Number: Index No. 650863/2019

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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DRONE USA, INC., MICHAEL BANNON

Plaintiff,

- v -

DENNIS ANTONELOS,

Defendant.

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INDEX NO. 650863/2019

MOTION DATE 12/16/2022

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for

JUDGMENT - MONEY

Background

Plaintiffs commenced this case against defendant Dennis Antonelos, the former Chief Financial Officer (“CFO”) of plaintiff Drone USA, Inc. (“Drone”), in February 2019. Plaintiffs filed an amended complaint on April 10, 2019. In their amended complaint, plaintiffs alleged that defendant breached a guarantee of Drone’s obligations under an employment agreement between Drone and nonparty Paulo Ferro (“Ferro”), Drone’s former Chief Strategy Officer (“CSO”) (*see* Doc 18 [first amended complaint], Doc 19 [Ferro employment agreement]). Specifically, plaintiffs alleged that Drone incurred a \$600K liability by settling a lawsuit that plaintiffs and a nonparty hedge fund commenced against Ferro in California, and that Defendant breached his obligation to pay 50% of that settlement amount under the “Corporate Guarantee” provision in Ferro’s employment agreement.

Defendant answered the amended complaint and asserted two counterclaims, seeking: 1) indemnification of his attorneys’ fees in this action under Drone’s bylaws; and 2) breach of his

own employment agreement against Drone for unpaid salary (Doc 42 [answer with counterclaims]).

On March 22, 2021, Defendant moved for summary judgment seeking to dismiss the amended complaint, and for judgment as to plaintiff's liability for his two counterclaims. On October 18, 2021, the court granted the motion to the extent that it sought to dismiss the amended complaint and denied defendant's motion for summary judgment on the counterclaims. Defendant appealed that decision, and plaintiffs cross-appealed, however plaintiffs later withdrew their appeal.

On September 6, 2022, the First Department reversed this court's denial of defendant's motion for summary judgment on liability on his two counterclaims (Doc 139 [AD1 decision and order]). The First Department entered judgment in defendant's favor as to plaintiff's liability for both counterclaims, and "remanded for a determination of attorneys' fees [relating to defendant's indemnification counterclaim] consistent with the decision herein." (*Drone USA, Inc. v Antonelos*, 208 AD3d 1062 [1st Dept 2022]).

Defendant now moves in Motion Sequence No. 05 to: 1) enter judgment in his favor on breach of contract counterclaim for \$86,687.61, with pre-judgment interest from July 10, 2017; 2) enter judgment in his favor on the indemnification counterclaim for fees totaling \$93,979.79; and 3) to amend this case's caption to reflect Drone's new business name, Bantec, Inc.

Discussion

1. \$86,687.00 plus interest

There has been no opposition to that part of the motion seeking to enter judgment against plaintiff in the amount of \$86,687.00 plus prejudgment interest from July 10, 2017. Nor should there be as the Appellate Division, First Department already ordered it (see 208 AD3d 1062 [1st

Dep't 2022]). Accordingly, the court orders that judgment be entered against plaintiff in the amount of \$86,687.61, together with pre-judgment interest at the statutory rate of 9% per annum from the date of July 10, 2017.

2. Indemnification

Drone is a Delaware corporation. Section 9.1 of Drone's bylaws required Drone to indemnify former officers and employees 'to the fullest extent' allowable pursuant to the DGCL (Doc 136 [Drone USA, Inc. Bylaws], pg. 18).

8 Del. Code § 145, the applicable Delaware statute, states the following:

(b) A corporation shall have power to indemnify any person who was or is a party . . . to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, . . . against expenses (including attorneys' fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit

(c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

(*id.* § 145 [b]-[c]).

The First Department determined that defendant is entitled to indemnification for his defense of this suit and remanded the case to this court to determine the amount of attorneys' fees that he is entitled to recover. Defendant now moves to recover his attorneys' fees for the entire suit, including those incurred prosecuting his counterclaim for breach of contract.

In opposition, plaintiffs correctly argue that defendant is not entitled to indemnification for attorneys' fees incurred in relation to the counterclaim for his unpaid salary because Delaware law does not permit indemnification for an officer's unrelated counterclaims. Plaintiffs incorrectly

contend, however, that defendant cannot recover attorneys' fees that were incurred after the court dismissed plaintiffs' affirmative claims on September 23, 2021.

A corporation that provided individuals with mandatory indemnification to the fullest extent of the law bears the burden of proving that the individual is not entitled to indemnification. (*See, e.g., O'Brien v. IAC/Interactive Corp.*, 2010 WL 3385798, at *5 (Del. Ch. Aug. 27, 2010), *aff'd*, 26 A.3d 174 (Del. 2011).) "An individual is not entitled to indemnification for "litigating a specific and personal contractual obligation that does not involve the exercise of judgment, discretion, or decision-making authority on behalf of the corporation" (*Paolino v Mace Sec. Int'l, Inc.*, 985 A.2d 392, 403 [Del. Ch. 2009]). However, "if a corporation brings indemnifiable claims against an individual, then the individual also will be indemnified for any counterclaims that are "necessarily part of the same dispute and were advanced to defeat, or offset" the corporation's claims. "This rule encompasses personal counterclaims that otherwise would not qualify for indemnification as long as an aspect of the counterclaim would negate an element of the corporation's suit" (*Dore v Sweports, Ltd.*, 2017 WL 415469, at *21 [Del Ch Jan. 31, 2017], *judgment entered*, [Del Ch 2017]).

"Under the test articulated in *Roven*, and refined by subsequent case law, a counterclaim will be considered to be "defending" and thus advanceable, if it is: (1) "necessarily part of the same dispute," in the sense that it qualifies as a compulsory counterclaim under the prevailing Delaware and federal procedural standard, and (2) "advanced to defeat, or offset" the affirmative claims. Under Federal Rule of Civil Procedure 13 and its Delaware analog, a counterclaim is compulsory if it, among other requirements, "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" "

(*Pontone v Milso Indus. Corp.*, 100 A3d 1023, 1054-1055 [Del Ch 2014] [footnotes omitted]).

Here, defendant's counterclaim for breach of the employment agreement does not qualify for indemnification. That counterclaim was related to defendant's salary and has no connection to plaintiff's affirmative claim for breach of an unrelated guarantee. However, defendant is entitled

to attorneys' fees incurred prosecuting his indemnification counterclaim, as that counterclaim is plainly within the scope of the indemnification provision in the bylaws. While defendant is not entitled to attorneys' fees for incurred prosecuting his counterclaim for unpaid salary, he is entitled to attorneys' fees for his indemnification claim, including fees he incurred pursuing the indemnification counterclaim after the court dismissed plaintiffs' claims on September 23, 2021.

Plaintiff's argument that the fee award should exclude fees incurred after the complaint's dismissal fails. After the dismissal, this case proceeded on the issue of defendant's indemnification counterclaim. Plaintiffs disputed that issue at summary judgment, on appeal, and now again in opposition to this motion. Section 145(a) authorizes indemnification for expenses incurred in successfully prosecuting an indemnification suit. As such, defendant can recover fees he incurred, including attorneys' fees incurred for bringing the indemnification counterclaim itself. Plaintiffs even concede that Delaware law requires, at a minimum, indemnification of "fees incurred in bringing the indemnification suit itself" (Doc 142, pg. 10).

Under applicable Delaware law, defendant is also entitled to "fees on fees" that he incurred in defense of plaintiffs' affirmative claims and in prosecuting his indemnification counterclaim (*Stifel Fin. Corp. v Cochran*, 809 A2d 555, 557 [Del 2002]). The only fees defendant is not entitled to recover under the indemnification provision of the Drone bylaws are the fees incurred prosecuting defendant's unrelated counterclaim for breach of the employment agreement.

Nevertheless, the movant "has the burden of establishing how much of his total fees qualify for indemnification" (*O'Brien v IAC/Interactive Corp.*, 2010 WL 3385798, at *14 [Del Ch Aug. 27, 2010], *affd sub nom. IAC/InterActiveCorp v O'Brien*, 26 A3d 174 [Del 2011]). Defendant has not met his burden. Here, the updated billing report (Doc 148 [updated billing report]) submitted by defendant's counsel does not provide an issue-by-issue (or claim by claim) break down of how

much time was allocated to each claim and counterclaim, or otherwise segregate the attorneys' fees incurred for the defense or prosecution of each claim and counterclaim. Thus, defendant has not met his burden of demonstrating the amount of his fees that are entitled to indemnification and, as a result, the court cannot determine on this record whether the requested attorneys' fees are reasonable. Accordingly, the portion of defendant's motion that seeks entry of judgment for defendant's attorneys' fees is denied without prejudice to a new motion to be made within 20 days of the date of this decision and order.

3. Amendment/Drone's Name Change

The court granted defendant's application to change the caption to reflect Drone's corporate name change on the record at oral argument based on plaintiff's own SEC filings. Plaintiff's assertion that Bantec is distinct entity from Drone contradicts its own representations that it previously made to the SEC, that Bantec was a name change and that it was f/k/a Bantek Inc. and Drone USA, Inc." (Doc 135).

The court has considered the parties remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Motion Sequence 5 is granted in part; and it is further

ORDERED that the caption be amended to reflect the amendment, and that all future papers filed with the Court shall bear the amended caption; it is further

ORDERED that the action shall bear the following caption:

And it is further

ORDERED that within 5 days of the court’s entry of this order, counsel for defendant shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the General Clerk’s Office (Room 119), who are directed to mark the Court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-filing” page on the court’s website – www.nycourts.gov/supctmanh); and it is further

ORDERED that the portion of defendant's motion that seeks attorneys’ fees in connection

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BANTEK, INC. F/K/A BANTEK, INC. F/K/A
DRONE USA, INC., MICHAEL BANNON

Plaintiffs,

- v -

DENNIS ANTONELLOS,

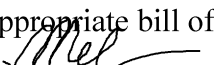
Defendant.

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with his indemnification counterclaim is denied without prejudice to a new motion to be made within 20 days of the date of this decision and order; and it is further

ORDERED that defendant’s motion is granted to the extent that it seeks entry of a final judgment for the breach of contract counterclaim; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant DENNIS ANTONELOS, and as against plaintiff BANTEC, INC. F/K/A BANTEK, INC. F/K/A DRONE USA, INC., in the amount of \$86,687.61, together with pre-judgment interest at the statutory rate of 9% per annum from July 10, 2017, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.


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<u>2/9/2023</u> DATE		<u>MELISSA A. CRANE, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE