

**Nelson Bros. W. Seneca, LLC v Kaplan**

2023 NY Slip Op 32849(U)

August 16, 2023

Supreme Court, New York County

Docket Number: Index No. 656304/2022

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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NELSON BROTHERS WEST SENECA, LLC, NELSON BROTHERS WEST SENECA INVESTOR UNITS, LLC, NB-WEST SENECA TIC 1, LLC, NB-WEST SENECA TIC 2, LLC, NB-WEST SENECA TIC 3, LLC, NB-WEST SENECA TIC 4, LLC, NB-WEST SENECA TIC 5, LLC, NB-WEST SENECA TIC 6, LLC, NB-WEST SENECA TIC 7, LLC, NB-WEST SENECA TIC 8, LLC, NB-WEST SENECA TIC 9, LLC, NB-WEST SENECA TIC 10, LLC, NB-WEST SENECA TIC 11, LLC, NB-WEST SENECA TIC 12, LLC, NB-WEST SENECA TIC 13, LLC, NB-WEST SENECA TIC 14, LLC, NB-WEST SENECA TIC 15, LLC, NB-WEST SENECA TIC 16, LLC, NB-WEST SENECA TIC 17, LLC, NB-WEST SENECA TIC 18, LLC, NB-WEST SENECA TIC 19, LLC, NB-WEST SENECA TIC 20, LLC, NB-WEST SENECA TIC 21, LLC, NB-WEST SENECA TIC 22, LLC, NB-WEST SENECA TIC 23, LLC, NB-WEST SENECA TIC 24, LLC, NB-WEST SENECA TIC 25, LLC, NB-WEST SENECA TIC 26, LLC, NB-WEST SENECA TIC 27, LLC, NB-WEST SENECA TIC 28, LLC

INDEX NO. 656304/2022

MOTION DATE 05/03/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
 MOTION**

Plaintiffs,

- v -

WAYNE KAPLAN, ROBERT BORSODY,

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 88, 89, 90, 91, 92, 93

were read on this motion for ATTORNEY'S FEES.

Plaintiffs' motion for costs and fees, including reasonable attorney's fees, is **granted in part**.

## BACKGROUND

Plaintiffs assert a single claim for breach of a personal guaranty (“Guaranty” [NYSCEF 5]). The Guaranty provides that Defendants are obliged, “[t]o the fullest extent permitted by law,” to make “full and faithful and punctual payment” to Landlord “of any costs or expenses, including reasonable attorneys’ fees, incurred by Landlord in enforcing this Guaranty.”

Defendants filed an Answer including Counterclaims for breach of the Premier Closing Note (“Note” [NYSCEF 16]) and for attorney’s fees. The Court granted Plaintiffs’ motion to dismiss the Counterclaims on December 9, 2022 (*Nelson Bros. W. Seneca, LLC v Kaplan*, 2022 N.Y. Slip Op. 34240[U], 1 [N.Y. Sup Ct, New York County 2022]).

On February 10, 2023, Plaintiffs moved for summary judgment on their Guaranty claim (NYSCEF 33). On April 24, 2023, the Court granted Plaintiffs’ motion for summary judgment and directed that Plaintiffs apply for costs, fees and disbursements on or by May 1, 2023 and that opposition be filed on or by May 8, 2023 (NYSCEF 72 [April 25 Order], NYSCEF 74 [April 24 Transcript])). On May 1, 2023, Plaintiffs moved for an award of \$327,817.64, consisting of \$274,850.65 in costs and disbursements incurred by Plaintiffs’ litigation counsel, Ingram Yuzek Gainen Carroll & Bertolotti, LLP’s (“Ingram”) and \$48,285 incurred by Plaintiff’s outside general counsel, Mosley, LLP (“Mosley”) (NYSCEF 75-80).

On May 8, 2023, Defendants opposed (NYSCEF 82-83). Defendants argue that Plaintiffs are not entitled to any fees billed by Mosley, which has not appeared in this action. Defendants submit that the only Mosley invoice (NYSCEF 80) is annexed to the affirmation of Caitlin L. Bronner, Esq., a partner with Ingram Defendants also argue that the Mosely invoice is dated after the Court’s summary judgment order and concerns work beyond the scope of this litigation. Thus, Defendants argue the Mosley invoice should not be considered.

Next, Defendants argue that Ingram's bills are excessive and unreasonable. Among other things, Defendants argue that Ingram spent 125 hours on a motion for summary judgment in lieu of a complaint that was never filed. Defendants further complain that Ingram spent (a) 25.65 hours converting the motion to the Complaint; (b) nearly 120 hours drafting their motion to dismiss counterclaims and related reply; (c) 110 hours drafting a motion for summary judgment consisting of a 5 page affidavit and 15 page memorandum; and (d) 28 hours preparing for oral argument. In sum, Defendants argue that it is not reasonable for Ingram to have incurred approximately \$280,000 in fees in a single year, in a single-issue case, in which no discovery was completed, and the Court's decisions were rendered based primarily on the limited documents annexed to the Complaint.

## DISCUSSION

### Legal Standard

“The determination of what constitutes a reasonable attorney's fee is a matter within the sound discretion of the Supreme Court” (*Lancer Indem. Co. v JKH Realty Group, LLC*, 127 AD3d 1035, 1035-36 [2d Dept 2015]). “The attorney bears the burden of establishing the reasonable value of the services rendered, based upon a showing of the hours reasonably expended and the prevailing hourly rate for similar legal work in the community” (*id.* at 1036). Appropriate factors include “the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel” (*JK Two LLC v Garber*, 171 AD3d 496, 496 [1st Dept 2019], citing *In re Estate of Freeman*, 34 NY2d 1, 9 [1974]). When reviewing the overall reasonableness of a fee application, the “court is not required to ‘set forth item-by item findings concerning what may be countless objections to individual billing items[.]’” (*Reveyoso v Town Sports Int'l. LLC*, 2018 NY Slip Op 32939[U], \*7 [Sup Ct, NY County 2018]).

### **A. Mosley's Fees are Disallowed**

The Mosley fees are disallowed. Plaintiffs' moving papers lack an evidentiary foundation for Mosley's billing records, and Plaintiffs' moving papers are insufficient for the Court to conduct a meaningful review of the claimed fees (*Cf. Sachs v Adeli*, 121 AD3d 490, 490 [1st Dept 2014]). This prejudiced Defendants' ability to respond (*Wal-Mart Stores, Inc. v U.S. Fid. and Guar. Co.*, 11 AD3d 300, 301 [1st Dept 2004] [generally, evidence submitted for the first time on reply should not be considered]). The Mosley invoices concern work beyond the scope of this litigation (e.g. a bankruptcy) and neither the moving nor reply papers sufficiently demonstrate that all of the fees invoiced by Mosley relate to this litigation. Similarly, Plaintiff has not demonstrated why Mosley, Plaintiff's outside general counsel, needed to incur nearly \$50,000 in fees in a case litigated exclusively by Ingram.

### **B. Ingram's Fees are reduced to \$225,000**

The Court has reviewed Ingram's invoices seeking \$274,850.65 (NYSCEF 79). The invoices include charges that appear to be attributable to other matters including an Erie County action and a bankruptcy. That said, Ingram prevailed on two dispositive motions and secured a victory for Plaintiffs, without the need to engage in discovery, in this action.

Defendants' opposition argues that the fees sought are excessive given Plaintiff's characterization of this case as "a straightforward breach of Guaranty" (NYSCEF 69 at 1) and asks that they be "substantially reduced." For instance, the invoices show that Ingram spent more than fifty hours preparing an unfiled motion for summary judgment in lieu of a complaint. The Court does not find that a further hearing is necessary. Based on the parties' submission and consideration of the requisite factors, the Court determines that an award of \$225,000 in legal fees for Ingram's work is reasonable.

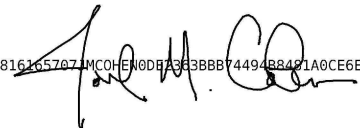
\* \* \* \*

Accordingly, it is

**ORDERED** that Plaintiffs' motion for costs and fees is **GRANTED IN PART** in the amount of \$225,000; it is further

**ORDERED** that Plaintiff submit a proposed judgment within seven (7) days on NYSCEF with a courtesy copy to [SFC-Part3@nycourts.gov](mailto:SFC-Part3@nycourts.gov) and that Defendants submit any proposed-counter judgment within three (3) days thereafter.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

8/16/2023  
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DATE

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE