

**Kubera N. Am., Inc. v Inhibikase Therapeutics, Inc.**

2023 NY Slip Op 34026(U)

November 9, 2023

Supreme Court, New York County

Docket Number: Index No. 653781/2021

Judge: Melissa A. Crane

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

INDEX NO. 653781/2021

KUBERA NORTH AMERICA, INC., KUBERA N.A. LLC,

08/04/2023,

Plaintiff,

MOTION DATE 08/04/2023

- v -

MOTION SEQ. NO. 004 005

INHIBIKASE THERAPEUTICS, INC.,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 97, 102, 106

were read on this motion to/for ATTORNEY - FEES

The following e-filed documents, listed by NYSCEF document number (Motion 005) 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 107

were read on this motion to/for ATTORNEY - FEES

The court presumes familiarity with the facts underlying this 2021 case but provides the following factual background as relevant to these two motions for attorneys' fees.

On January 31, 2023, Defendant-Counterclaim Plaintiff Inhibikase Therapeutics, Inc. ("Inhibikase") moved for partial summary judgment seeking to dismiss Count II of the Amended Complaint. That same day, Plaintiffs Kubera North America, Inc. and Kubera N.A., LLC ("Kubera") filed their own motion for summary judgment as to both Counts I and II, as well as to dismiss defendant's counterclaims, which were for breach of contract and rescission (Doc 11 [Answer and Counterclaims]).

In Count I, plaintiff sought damages for breach of a Consulting Agreement. In Count II, plaintiff sought a declaratory judgment "that the Consulting Agreement was modified by the parties to provide for the cashless exercise right under the Warrant that was issued to KNA LLC," as well as interests, costs, and attorneys' fees (Doc 7 [Amended Complaint]).

On May 24, 2023, the court granted plaintiff's motion in part, awarded plaintiff summary judgment as to Count I, and dismissed defendant's counterclaims. The court also granted defendant's motion for partial summary judgment and dismissed Count II, as there was no agreement to modify the Warrant, and found that Inhibikase did not owe Kubera damages on Count II (Doc 77 [MS 02 Decision]).

Thus, the court declared that defendant "is not liable for damages [under Count II] because there was not an enforceable agreement to grant KNA LLC a cashless exercise right in its Warrant" (*id.*). Judgment was entered in favor of plaintiff and against defendant in the amount of \$251,326.77 (inclusive of pre-judgment interest, costs, and disbursements) for defendant's failure to pay consulting fees (Count I) (Doc 104 [Judgment]).

Now, in Mot. Seq. No. 04, defendant moves for an order awarding it attorneys' fees and costs, related to Count II in the Amended Complaint, in the amount of \$127,970.96 (Doc 82 [Notice of Motion]). In Mot. Seq. No. 05, plaintiff also moves for an order awarding them attorneys' fees and costs, in in the amount of \$271,717<sup>1</sup> (Doc 90 [Notice of Motion]). Both parties assert that they are the prevailing party in this case.

### Discussion

Section 14 of the relevant Consulting Agreement at issue in this case provides for the recovery of attorneys' fees and states the following:

14. Recovery of Attorney's Fees. In the event of any litigation arising from or relating to this Agreement, the prevailing party in such litigation proceedings shall be entitled to recover, from the non-prevailing party, the prevailing party's reasonable costs and attorneys' fees, in addition to all other legal and equitable remedies to which it may otherwise be entitled.

---

<sup>1</sup> As stated in its reply papers, plaintiff agrees that the amount claimed should be further reduced by \$18,185, identified by defendant as additional work performed regarding the cashless warrant which was not deducted by plaintiff. As such, plaintiff reduces its total claim for legal fees to \$253,532 (Doc 107 [Reply MOL] at 3).

(Doc 87 [Consulting Agreement], § 14).

In determining whether a party is a “prevailing party” for the purposes of awarding attorneys’ fees, the court must “[consider] the true scope of the dispute litigated and what was achieved within that scope” (*Free People of PA LLC v Delshah 60 Ninth, LLC*, 169 AD3d 622, 623 [1st Dept 2019], citing *Excelsior 57th Corp. v Winters*, 227 AD2d 146, 147 [1st Dept 1996] [determination of prevailing party “requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope”]). To be a prevailing party, one must prevail on the central claims advanced, and receive substantial relief in consequence thereof (*Bd. of Managers of 55 Walker St. Condominium v Walker St., LLC*, 6 AD3d 279, 280 [1st Dept 2004]).

Here, plaintiff prevailed on Count I of the Amended Complaint, but defendant prevailed in its defense against Count II. For Count I, the court awarded plaintiff summary judgment on its cause of action for breach of this Consulting Agreement, and plaintiff obtained a judgment for damages in the amount of \$210,002. In Count II, plaintiff sought declaratory relief and damages on the grounds that the underlying Warrant, which was incorporated into the Consulting Agreement (Doc 87 [Consulting Agreement]), was orally modified to make the warrant option cashless. The court dismissed Count II on the merits, holding that defendant is “not liable for damages to [Kubera] because there was not an enforceable agreement to grant [Kubera] a cashless exercise right in its Warrant” (Doc 76 [MS 01 Decision]). In a January 3, 2022 dated letter to the Clerk of the Court, plaintiff’s counsel asserted that Count II “is worth no less than \$1,921,429.25” (Doc 17 [Letter]).

The mixed outcome of this litigation was not substantially favorable to either party. Accordingly, the court finds that neither party is entitled to the status of a prevailing party for the purpose of recovering their attorneys’ fees (*see Blue Sage Capital, L.P. v Alfa Laval U.S. Holding*,

Inc., 168 AD3d 645, 646 [1st Dept 2019]; *Berman v Dominion Mgt. Co.*, 50 AD3d 605, 605 [1st Dept 2008]; *Pelli v Connors*, 7 AD3d 464 [1st Dept 2004]).

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

Accordingly, it is

ORDERED that Motion Sequence No. 04, Defendant-Counterclaim Plaintiff Inhibikase Therapeutics, Inc.'s motion for attorneys' fees, is denied; and it is further

ORDERED that Motion Sequence No. 05, plaintiffs Kubera North America, Inc. and Kubera N.A., LLC's motion for attorneys' fees, is denied;

ORDERED that the Clerk is directed to mark this case as disposed.

11/9/2023  
DATE

  
MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE