

**LMM Capital Partners, LLC v Mill Point Capital,  
LLC**

2024 NY Slip Op 31014(U)

March 26, 2024

Supreme Court, New York County

Docket Number: Index No. 653606/2022

Judge: Nancy M. Bannon

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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. NANCY M. BANNON **PART** **61M**

*Justice*

-----X

LMM CAPITAL PARTNERS, LLC,

Plaintiff,

- v -

MILL POINT CAPITAL, LLC, E&M LOGISTICS, INC.  
and MARTIN KELLY

Defendants.

-----X

**INDEX NO.** 653606/2022

**MOTION DATE** N/A

**MOTION SEQ. NO.** 006

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 113, 117, 118

were read on this motion to/for ATTORNEY - FEES.

In this breach of contract action, the court (Ostrager, J. [Ret.]), by an order dated May 10, 2023, dismissed the complaint in its entirety, finding that all claims were barred by the “clear and unambiguous release language” of the parties’ Mutual Termination Agreement and Release (MOT SEQ 003, 005). By an order dated February 15, 2024, the Appellate Division, First Department, affirmed. In the meantime, on August 30, 2023, the defendants moved for contractual attorney’s fees in the sum of \$416,722.73 (MOT SEQ 006). The plaintiff opposes the motion. The motion is granted on the issue of liability and referred to a Special Referee or Judicial Hearing Officer to determine the proper amount of fees to be awarded.

Generally, attorney’s fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1<sup>st</sup> Dept 1976). The defendants claim entitlement to contractual attorney’s fees based on Section 2 of the Mutual Termination Agreement and Release, which provides that “[t]he successful party in any action to enforce this agreement will be entitled to be awarded all costs, including reasonable attorney’s fees, paid, or incurred by such prevailing party in such action.”

“To determine whether a party has ‘prevailed’ for the purpose of awarding attorneys’ fees, the court must consider the ‘true scope’ of the dispute litigated and what was achieved within that scope (see Excelsior 57<sup>th</sup> Corp. v Winters, 227 AD2d 146 [1996]). To be considered a ‘prevailing party’, one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof (see Board of Mgrs. of 55 Walker Condo. v Walker St., 6 AD3d 279 [2004]).” Sykes v RFD Third Ave. I Assocs., LLC, 39 AD3d at 279 (1<sup>st</sup> Dept. 2007). The defendants have clearly prevailed here. The plaintiff’s arguments that the court lacks jurisdiction and that the motion is premature are unavailing. Specifically, the plaintiff cites no persuasive authority for its proposition that the defendant was required to include in their motion to dismiss the complaint an express request that the court retain jurisdiction to award attorney’s fees, and the argument that the motion is premature due to a pending appeal, now fails. The plaintiff’s assertions that the amount of fees demanded is excessive (by about 60%) due to the relatively limited issues and motion practice and because of block billing are not supported by their motion papers. In that regard, however, the court notes that the invoices submitted by the defendants are heavily redacted and otherwise provide minimal details of the legal work performed and other costs incurred in this action.

To prevail before the Referee, the defendants must submit proper and adequate proof to meet their burden of establishing a reasonable amount of fees and costs. The factors used to determine the reasonableness of legal fees “include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney’s experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (citations omitted).” Matter of Barich, 91 AD3d 769 (2<sup>nd</sup> Dept. 2012); see Matter of Freeman, 34 NY2d 1 (1974). An award of reasonable attorney’s fees is within the sound discretion of the court. See Diakrousis v Maganga, 61 AD3d 469 (1<sup>st</sup> Dept. 2009). The parties are encouraged to meet and confer and to stipulate to any amount less than amount requested on this motion. If any such agreement is reached, the parties shall promptly notify the court and the Referee Clerk.

Accordingly, it is

ORDERED that the defendants’ motion for contractual attorney’s fees is granted on the issue of liability, and the issue of damages is referred to a Judicial Hearing Officer or Special Referee to hear and report, and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) The amount of contractual attorney's fees and costs incurred by the defendants in this action;

and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for the defendants shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the defendants shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of the plaintiffs' papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees

Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the defendants shall serve a copy of this Decision and Order upon the plaintiff within 10 days.

This constitutes the Decision and Order of the court.

*Nancy M. Bannan*  
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3/26/2024  
DATE

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