

**AKF Inc. v Avanti Health Link LLC**

2024 NY Slip Op 32899(U)

August 14, 2024

Supreme Court, New York County

Docket Number: Index No. 650087/2021

Judge: Emily Morales-Minerva

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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. EMILY MORALES-MINERVA PART 42M**

*Justice*

-----X

AKF INC. d/b/a FUNDKITE,

INDEX NO. 650087/2021

Plaintiff,

- v -

**DECISION/ORDER  
AFTER INQUEST**

AVANTI HEALTH LINK LLC, DIANE MARIE RAMIREZ

Defendants.

-----X

**APPEARANCES:**

Mestenchkin Law Group, P.C., New York, NY (Oleg A. Mestechkin, Esq., of counsel), for plaintiff.

EMILY MORALES-MINERVA, J.S.C.

In this action for breach of a revenue purchase agreement, the Court issued an amended order, dated April 24, 2024, granting plaintiff AFK INC. d/b/a FUNDKITE a default judgment against defendants AVANTI HEALTH LINK LLC and DIANE MARIE RAMIREZ, pursuant to the Uniform Rules for the New York State Trial Courts [22 NYCRR] § 202.27, and scheduling the matter for an inquest on damages (see NY St Cts Elec Filing [NYSCEF] Doc No. 35, amended order]). In accordance with the amended order, plaintiff filed with the Court proof of service of said order with notice of entry (NYSCEF Doc Nos. 37, notice of entry, 38, affidavit of service of the amended order, and 39 affidavit of service of notice of entry).

**OTHER ORDER – NON-MOTION**

The matter was returnable for the inquest on August 14, 2024, at 11:00 AM, in PART 42M, 111 Centre Street, NY, NY 10013, Room 574. At the call of the calendar, plaintiff appeared with counsel. Neither defendants nor their counsel of record appeared or contacted the Court with an excuse or request for an adjournment.

Plaintiff called as a witness Alex Shvarts, Chief Executive Officer of plaintiff AKF INC. d/b/b FUNDKITE, and the Court admitted into evidence plaintiff's exhibits 1 through 3, which include (1) a preliminary offer for business funding, and revenue purchase agreement, dated October 06, 2020, (2) bank statements of plaintiff AKF INC. d/b/b FUNDKITE, dated October 31, 2020, showing a wire transfer of funds from plaintiff to defendant AVANTI HEALTH LINK LLC in the amount of \$41,959.00, and (3) an undated payment ledger of plaintiff AKF INC. d/b/b FUNDKITE, showing "submitted payments" from an unidentified source, beginning October 08, 2020 through December 24, 2020, totaling \$23,182.54.

Upon review of the credible testimony, evidence admitted, and applicable law, the Court finds that plaintiff established damages in the amount of \$49,994.32, representing the purchase amount of \$62,338.00, less the payments in the sum of \$23,182.54, and a default fee of \$9,788.86.

The Court further finds that plaintiff has not established entitlement to attorneys' fees.

It is well settled that, "[u]nder the American Rule, a prevailing party in litigation generally may not recover attorney's fees from the losing party" (Sage Sys., Inc. v. Liss, 39 NY3d 27, 29 [2022], citing Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989])). Absent statute, agreement, or contract, containing "'unmistakably clear' language" permitting a successful party to recovery for attorneys' fees, no such recovery is permissible (Sage Sys, Inc., 39 NY3d at 31, citing Hooper, 74 NY2d at 492).

Here, no evidence exists of such an agreement between the parties. To the extent that plaintiff relies on language as to a "Default Fee" in the parties' revenue purchase agreement, such reliance is misplaced (see plaintiff's exhibit 1, at 24, ¶ D). The provision provides only the following: "In case of a default, a default fee in the amount of 25% of the total amount of Purchased Receipts outstanding [sic] The Default Fee is due when an Event of Default occurs." This language lacks express language or indicia of the parties' "unmistakably clear" intent to have defendants indemnify plaintiff for attorneys' fees in a contract action between them (see generally Sage Sys., Inc., 39 NY3d 27; see also Hooper Assoc. v AGS Computers, 74 NY2d 487, 491 [1989])).

The testimony of plaintiff's chief executive officer -- that plaintiff intended to use the default fee to cover attorneys' fees incurred -- does not change the plain language of the subject provision and does create an indemnification provision where none exists.

In any event, plaintiff failed to establish the reasonableness of the fees claimed. When a party is entitled to such fees due to contract, agreement or statute, the moving party must provide proof of reasonableness of the attorneys' fees (see Gray Mfg. Co. v. Pathe Indus., Inc., 33 AD2d 739 (1<sup>st</sup> Dept 1969)). When considering reasonableness of the attorneys' fees, "the court should consider factors such as time and labor, difficulty of the questions involved, the amount involved, counsel's experience, ability, and reputation, and the customary fee charged for such services" (Matter of Wellington Trusts. (JPMorgan Chase Bank, N.A. -Sarah P.), 165 AD3d 809, 815 [2d Dept 2018]). Plaintiff provided no such testimony or proof.

Accordingly, it is

ORDERED that the Clerk of the Court shall enter a judgment of damages in favor of plaintiff AFK INC. d/b/a FUNDKITE and against defendants AVANTI HEALTH LINK, LLC, d/b/a AVANTI HEALTH LINK and DIANE MARIE RAMIREZ, in the amount of \$49,944.32 plus interest from December 17, 2020 and costs; and it is further

ORDERED that plaintiff shall serve this order with notice of entry on defendant within 10 days of such entry, and file the same with the Court.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

*Emily Morales-Minerva*

EMILY MORALES-MINERVA, JSC

DATE: 8/14/2024

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify \_\_\_\_\_ )