

Grossberg v Van Bakergem

2016 NY Slip Op 31718(U)

September 8, 2016

Supreme Court, New York County

Docket Number: 651376/15

Judge: Charles E. Ramos

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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

-----x
ERIK WELLER GROSSBERG,

Plaintiff,

Index No. 651376/15

- against -

DEREK VAN BAKERGEM,

Defendant,

-----x
DEREK VAN BAKERGEM,

Counterclaim-Plaintiff,

- against -

ERIK WELLER GROSSBERG and WYATT
CARDER,

Counterclaim-Defendants.

-----x
Hon. C. E. Ramos, J.S.C.:

Plaintiff/Counterclaim Defendant Erik Weller Grossberg moves for an order, pursuant to section 11.11 of the parties' operating agreement, awarding him, as the prevailing party in this action, his attorneys' fees and costs, totaling \$73,480.97.

Background

This action arises from a dispute among the members of Pampelonne LLC (Pampelonne), concerning membership purchase rights under Pampelonne's Operating Agreement. Pampelonne's equal, one-third owners were Grossberg, defendant-counterclaim plaintiff Bakergem, and counterclaim-defendant Wyatt Carder.

Grossberg originally commenced this action seeking (1) a declaration that Bakergem's "Purchase Election is a nullity,"

that Bakergem failed to timely respond to Grossberg's "Buy-Sell Offer," that Grossberg is entitled to purchase Bakergem's membership interest in Pampelonne for \$10,000, and (2) specific performance of the Operating Agreement, requiring Bakergem to sell his membership interest to Grossberg.

Previously, this Court heard oral argument on Grossberg's motion for summary judgment on the complaint and for dismissal of Bakergem's counterclaims. On the record, this Court granted Grossberg's motion and entered judgment in his favor (award of summary judgment). Thereafter, the Court entered an order and interlocutory judgment in Grossberg's favor (October 2015 order/judgment).

Bakergem moved to reargue and renew the October 2015 order/judgment. In its January 2016 decision (January 2016 decision), this Court granted reargument to the extent of clarifying that Grossberg is entitled to summary judgment based on the plain language of the Operating Agreement; upon reargument, the Court adhered to its prior determination, and denied renewal. In the January 2016 decision, the Court held that "Bakergem's failure to purchase Grossberg's membership interest triggered Grossberg's right to purchase Bakergem's interest 'for a price equal to the purchase price provided in the Buy-Sell Offer,' or \$10,000" (January 2016 decision, 11).

On February 1, 2016, Bakergem assigned his membership

interest in Pampelonne to Grossberg pursuant to the October 2015 judgment/order and the January 2016 order.

Discussion

According to Grossberg, section 11.1 of the Operating Agreement entitles him to an award of attorneys' fees and costs incurred in this dispute because he is the prevailing party under the Court's rulings. Section 11.1 of the Operating Agreement provides,

"[I]n any dispute among the Members concerning the Company or this Agreement, the prevailing Member shall be entitled to recover its reasonable attorneys' fees and costs (including litigation and collection costs) from the non-prevailing Member."

In support of the requested award of attorneys' fees and costs, and to demonstrate the reasonableness thereof, Grossberg submits copies of his attorneys' invoices which purportedly reflect the compilation of the contemporaneous time entries made by the individual attorneys and paralegals who worked on this matter on Grossberg's behalf.

In opposition, Bakergem represents that Grossberg initiated the buy-sell mechanism in bad faith, and only actually prevailed on a single discrete issue. Bakergem additionally argues that he is prejudiced insofar as he was not afforded adequate notice of the demand for attorneys' fees because Grossberg did not include a claim to this effect in his complaint. Furthermore, Bakergem challenges the reasonableness of the invoices, and argues that

they show a number of items that do not directly relate to this lawsuit nor do they provide sufficient detail to determine the exact number of hours and fees incurred in the underlying litigation and seeks a reduction of forty percent. Finally, Bakergem asserts that Grossberg is not entitled to an award of "fees on fees" of making this motion.

Under section 11.1 of the Operating Agreement, which contains broad language that "in any dispute among the Members concerning the Company or this Agreement," Grossberg is entitled to an award of attorneys' fees and costs as a prevailing party in this litigation. The Court plainly granted the relief sought by Grossberg in the complaint, namely a declaration that Bakergem's purchase election is a nullity, that Bakergem is deemed to have not timely responded to the buy-sell offer, and that Grossberg is therefore entitled to purchase Bakergem's membership interest in Pampelonne for \$10,000. The Court granted the relief sought in the complaint without reservation, in the October 2015 order/judgment.

The Court rejects the contention that Bakergem was not afforded adequate notice of the claim for attorneys' fees and costs, when it is plainly listed as a prayer for relief in the wherefore section of the complaint.

Nonetheless, the recovery of "fees on fees" should not be permitted. Under New York law, an award of fees on fees must be

based on explicit statutory authority or contract (546-552 W. 146th Street, 99 AD3d 117 [1st Dept 2012]). The relevant provision, section 11.11, does not contain clear language expressly providing for an award of fees on fees (see *IG Second Generation Partners, L.P. v Kaygreen Realty Co.*, 114 AD3d 641, 643 [2d Dept 2014]). Given the absence of unmistakably clear intent regarding the recovery of fees on fees, a right to recover those fees should not be implied.

For these reasons, the motion is granted in part, to the extent of awarding Grossberg reasonable attorneys' fees and costs arising solely from the prosecution of this action, without the inclusion of legal fees incurred in prosecuting the claim for legal fees.

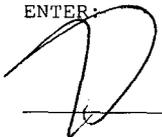
Accordingly, it is

ORDERED that the motion by Plaintiff/Counterclaim Defendant Erik Weller Grossberg for reasonable attorneys' fees and costs incurred in prosecution this action is granted, and the issue of calculating the reasonable attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, the Special Referee shall determined the aforesaid issue; and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with

notice of entry, upon the Special Referee Clerk in Room 119, who is directed to place this matter on the calendar of the Special Referee's Part.

Dated: September 8, 2016

ENTER: 

J.S.C.

CHARLES E. RAMOS