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SAMACA, LLC, ORDER ON DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND EXPENSES AND PLAINTIFF SAMACA, LLC'S CROSS MOTION TO COMPEL ARBITRATION OF DEFENDANT'S MOTION FOR LEGAL EXPENSES

Alice D. Bonner
Fulton County Superior Court, Judge

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

SAMACA, LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action File No. 2016CV276036
)	
CELLAIRIS FRANCHISE, INC.,)	
GLOBAL CELLULAR, INC., and CELL)	
PHONE MANIA, LLC,)	
)	
Defendants.)	

**ORDER ON DEFENDANTS’ MOTION FOR ATTORNEYS’ FEES AND EXPENSES
AND PLAINTIFF SAMACA, LLC’S CROSS MOTION TO COMPEL ARBITRATION
OF DEFENDANT’S MOTION FOR LEGAL EXPENSES**

The above styled action is before this Court on the Motion of Defendants Cellairis Franchise, Inc. (“Cellairis”) and Global Cellular, Inc. (“Global”) (collectively, “Defendants”) for an award of Attorneys’ Fees and Expenses (hereinafter “**Motion for Fees**”) filed on March 24, 2017 and Plaintiff Samaca LLC’s Cross Motion to Compel Arbitration of Defendants Motion for Legal Expenses (hereinafter “**Motion to Compel**”) filed on November 26, 2018. Having considered the record, the Court finds the following:

I. BACKGROUND

Plaintiff Samaca, LLC is a Florida limited liability company that had reached an agreement with Cell Phone Mania (“CPM”) to purchase CPM’s four franchises. CPM operated the four franchises at the Dolphin Mall in Miami, Florida under franchise agreements with Cellairis. Global, an affiliate of Cellairis, licensed the spaces from the operator of the Dolphin Mall and CPM sub-licensed the spaces to operate the franchises in Dolphin Mall from Global. On June 30, 2014, when Plaintiff and CPM had reached an agreement for Plaintiff to purchase

CPM's four franchises, Plaintiff entered into four new franchise agreements (the "Franchise Agreements") with Cellairis. Plaintiff also entered into four new sub-license agreements (the "Sub-License Agreements") with Global to acquire CPM's sub-licenses to operate the franchises in the mall. Both the Franchise Agreements and the Sub-License Agreements contained an agreement to arbitrate.

Within the same time period, Plaintiff, Cellairis and CPM executed an Assignment and Assumption Agreement (the "AA Agreement") effective September 1, 2014 which stated that Plaintiff was required to sign new franchise and sub-license agreements which were "attached to this Agreement" and "incorporated herein by this reference." The AA Agreement contained a choice of law provision where the parties agreed the sole and exclusive venue to adjudicate any controversy would be in this Court.

Plaintiff took possession of the four franchise units on October 1, 2014 and later in 2014 learned that Dolphin Mall would not renew the licenses for the franchise locations at Dolphin Mall. Plaintiff sued Cellairis in March 2015 in state court in Florida, asking to rescind the Franchise Agreements and Sub-License Agreements. Cellairis and Global moved to dismiss the action based on the arbitration clauses and because the complaint failed to state a claim. Before the Court ruled on that motion, Plaintiff voluntarily dismissed its suit.

When Plaintiff initiated the underlying complaint in the Superior Court of Fulton County, Defendants filed a Motion to Dismiss and Compel Arbitration based on the arbitration agreements in the Franchise Agreements and the Sub-License Agreements. Plaintiff then amended its complaint to allege that the AA Agreement and attendant choice of law provision superseded the Franchise Agreements and Sub-License Agreements and their attendant arbitration clauses.

II. PROCEDURAL HISTORY

On February 7, 2017, this Court issued an Order on Defendants' Motion to Dismiss Complaint and Compel Arbitration (hereinafter "**Order**") granting Defendants' Motion to Dismiss and to Compel Arbitration, holding that the "[t]he question of arbitrability of the claims raised against [Defendants] should be submitted to an arbitrator." Following the **Order**, Plaintiff filed an appeal. Prior to the case appearing before the Georgia Court of Appeals, Defendants filed their Motion for Fees on March 24, 2017.

On February 28, 2018 the Court of Appeals unanimously affirmed the trial court holding that "the arbitration agreements at issue in this case include a 'delegation provision' e.g., an agreement to arbitrate threshold issues concerning the arbitration agreement." Plaintiff's Motion for Reconsideration with the Court of Appeals was denied on March 20, 2018. Plaintiff's Petition for Certiorari with the Supreme Court of Georgia was denied on October 22, 2018 and its Petition for Reconsideration of the Denial of its Petition for Certiorari was denied on November 15, 2018.

III. ANALYSIS AND FINDINGS OF LAW

A. Defendants' Motion for Attorneys' Fees

In their Motion for Fees, Defendants assert that, as the "prevailing party" in the action, they are entitled to an award of attorneys' fees and expenses under Section 13(K) of the Franchise Agreements.¹ Defendants explain that because they indisputably sought to enforce

¹ Section 13(K) of the Franchise Agreements provides that "[i]n any arbitration or litigation to enforce the terms of this Agreement, all costs and all attorneys' fees (including those incurred on appeal) incurred as a result of the legal

their contractual right to arbitrate, they “unquestionably” prevailed in this action in enforcing that contractual right and are therefore entitled to recover their attorneys’ fees and litigation expenses. The Defendants assert that, alternatively, they are also entitled to attorneys’ fees and expenses under O.C.G.A. § 9-15-14 (a) and O.C.G.A. § 9-15-14 (b), claiming that Plaintiff could not have reasonably believed its claims would have succeeded in this forum and that Plaintiff’s conduct in this proceeding “unnecessarily expanded the proceeding.”

1. Prevailing party

Defendants argue that because they indisputably sought to enforce a contractual right in this action – their contractual right to arbitrate – and because they unquestionably prevailed in this action of enforcing their contractual right, they have prevailed in litigation to enforce a contractual right, thus enabling them to recover their attorneys’ fees and expenses under Section 13(K) of the Franchise Agreements at issue in this case. Defendants concede that a party ordinarily is not the prevailing party until the merits of a case have been decided, but argue that they moved for attorneys’ fees once Defendants “became the prevailing parties by dismissal of Samaca’s complaint.” Finally, Defendants contend the fact that this Court did not adjudicate the ultimate merits of Plaintiff’s claims is not material to Defendants’ fee claim.

Insofar as the parties’ agreements expressly state that “[a]ll controversies, claims, or disputes . . . arising out of or relating to . . . [the] agreement . . . [and/or] “[t]he scope and validity of th[e] Agreement” and “specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)” must be decided by an arbitrator. The Court therefore finds that Defendants’ request for fees under the “prevailing party” provision arises out of or is related to the agreement and thus must be decided by an arbitrator.

action shall be paid to the prevailing party by the other party.” See Franchise Agreements (Exhibits 18 – 21 of **Complaint**) § 13(K).

For the forgoing reasons, Defendants' motion for attorneys' fees pursuant to §13(K) of the parties' contract is DENIED.

2. *O.C.G.A. § 9-15-14*

Defendants contend that pursuant to O.C.G.A. § 9-15-14(a) and (b) this Court has jurisdiction to award attorneys' fees. Under O.C.G.A. § 9-15-14(a), a court is required to award reasonable and necessary attorneys' fees and expenses of litigation if it finds that a party "has asserted a claim, defense, or other position with respect to which there existed such complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim." O.C.G.A. § 9-1-14(a). A court may also award attorneys' fees and expenses if an attorney or party "brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment." O.C.G.A. § 9-15-14(b). The decision to grant an award of attorneys' fees and litigation expenses, and the amount of any such award, rests solely with the court without input from a jury. O.C.G.A. § 9-15-14(f).

The Georgia Court of Appeals has held that fees under O.C.G.A. § 9-15-14(b) are warranted where a party's tactics delay the disposition of the case and expand the proceedings. Harkleroad & Hermance, P.C. v. Stringer, 220 Ga. App. 906, 909, 472 S.E.2d 308, 312 (1996) (finding that defendants' tactics in the trial court were meant to delay the disposition of the case, to harass and to expand the proceedings, reasoning that defendants avoided a decision for almost three years on a routine action, where defendants presented no evidence to support a number of his counterclaims; filed a direct appeal without following the interlocutory appeals procedures; requested binding arbitration on the eve of trial, made no effort to prove his counterclaims in arbitration, and then disputed the award in trial court.).

Insofar as the present Motion asks this Court to award fees based on litigating Defendants' Motion to Compel Arbitration and Dismiss, the Court considers whether Plaintiff's claims "lacked substantial justification" or "were interposed for delay or harassment." In considering Defendants' Motion to Compel Arbitration and Dismiss, the narrow issue before this Court was whether the parties' claims should have been submitted to arbitration, and whether the arbitrability of certain claims should also be submitted to arbitration. Based on the clear and unambiguous language of the parties' agreements, specifically the delegation clause which noted that whether any specific claim is subject to arbitration is itself a subject to arbitration, and the express incorporation of the arbitration clauses into the Assignment & Assumption Agreement, the Court finds that Plaintiff's arguments to the contrary lack substantial justification, and that Plaintiff's conduct in the litigation of the claims before this Court was interposed for delay or harassment.

B. Plaintiff's Motion to Compel Arbitration

Plaintiff asserts that because Defendants' Motion for Fees involves a question of arbitrability arising out of the parties' agreements, it should be decided by an arbitrator. In response, Defendants assert that no arbitrability dispute exists and raise the arguments put forth in their Motion for Fees. The Court has addressed this question in section A of this Order, and has found that the question of arbitrability under the parties' contract is for an arbitrator. However, the Court has also found that Plaintiff's tactics during the pendency of this case were meant to delay the disposition of the case and to harass and expand these proceedings for almost three years, thus justifying an award of attorneys' fees under O.C.G.A. § 9-15-14.

For the foregoing reasons, Defendants' motion for attorneys' fees under O.C.G.A. § 9-15-14(b) is hereby **GRANTED**. The Court will defer a ruling as to the amount of fees until after

the merits of the case have been decided in arbitration. After such a ruling by an arbitrator, Defendants are invited to renew their motion before this Court.

SO ORDERED this 27TH day of February, 2019.

Alice D. Bonner
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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