

defendant under the terms of the parties' agreement.² It also addresses the only issue raised in additional defendant's late-filed Statement, *i.e.*, whether the additional defendant can be said to have "prevailed" when the claims against him were voluntarily discontinued by the opposing party. Based upon Superior Court precedent, additional defendant did not "prevail," so he is not entitled to attorneys' fees under the parties' agreement.³

For all the foregoing reasons, the court respectfully requests that either the appeal be dismissed or the court's October 12th Order be affirmed on appeal.

Dated: February 25, 2013



PATRICIA A. McINERNEY, J.

² See Opinion filed August 18, 2010 in Gumbo Bros., LLC v. Queens Walk, L.P., No. 534 EDA 2009.

³ See Profit Wise Mktg. v. Wiest, 812 A.2d 1270, 1275-1276 (Pa. Super. 2002).

**IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL**

GUMBO BROTHERS, LLC,	:	JUNE TERM, 2006
	:	
Plaintiff,	:	NO. 01645
	:	
v.	:	COMMERCE PROGRAM
	:	
QUEENS WALK, LP, et al.,	:	Control No. 12080147
	:	
Defendants,	:	
	:	
v.	:	
	:	
MICHAEL COLAIZZO,	:	
	:	
Additional Defendant.	:	

OPINION

This case and a prior related case have a very convoluted procedural history, not all of which needs to be recounted for purposes of deciding defendants' Motion for Summary Judgment. In this action, plaintiff filed claims against defendants, who filed a joinder complaint against additional defendant. Additional defendant filed counterclaims against defendants, including a claim for his attorneys' fees incurred in this action. Judge Sheppard dismissed additional defendant's counterclaims based on a prior pending action between defendants and additional defendant.

Plaintiff and defendants settled their claims against one another, and defendants discontinued their claims against additional defendant in this action.¹ Additional defendant appealed from Judge Sheppard's dismissal of his claim for attorneys' fees, and the Superior

¹ A Praecipe to Settle, Discontinue and End was filed jointly by plaintiff and defendants on January 7, 2009.



Court reversed and remanded, directing this court to rule on the attorneys' fees claim.²

Defendants subsequently moved for summary judgment on that claim.

Additional defendant's claim is based on the contract between the parties, which provides that the "prevailing party in any action or proceeding between the parties" may recover its attorneys' fees from the other party.³

[T]he noun, "prevailing party" is commonly defined as "a party in whose favor a judgment is rendered, regardless of the amount of damages awarded." While this definition encompasses those situations where a party receives less relief than was sought or even nominal relief, its application is still limited to those circumstances where the fact finder declares a winner and the court enters judgment in that party's favor.⁴

Defendants' claims against additional defendant were discontinued rather than decided by a finder of fact. Additional defendant's counterclaims, aside from his claim for attorneys' fees, were dismissed by the court. Therefore, additional defendant was not a prevailing party, and he is not entitled to recover his attorneys' fees from defendants. Defendants' Motion for Summary Judgment on additional defendant's claim for attorneys' fees incurred in this action is granted.

BY THE COURT:



PATRICIA A. McINERNEY, J.

²The Superior Court held that additional defendant's attorneys' fees claim in this action was distinct from his attorneys' fees claim in the related action and, therefore, the prior pending action doctrine did not bar the claim. *See* Superior Court Opinion dated August 18, 2010.

³ Motion for Summary Judgment, Ex. B, p. 14.

⁴ Profit Wise Mktg. v. Wiest, 812 A.2d 1270, 1275-1276 (Pa. Super. 2002).