

Park Union Condominium v 910 Union St., LLC

2019 NY Slip Op 31994(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 650291/2015

Judge: Saliann Scarpulla

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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. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

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INDEX NO. 650291/2015

THE PARK UNION CONDOMINIUM, THE BOARD OF
MANAGERS OF THE PARK UNION CONDOMINIUM,

MOTION DATE 04/03/2019

Plaintiff,

MOTION SEQ. NO. 011

- v -

910 UNION STREET, LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 401, 405, 406, 407, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Upon the foregoing documents, it is

The Park Union Condominium and the Board of Managers of The Park Union Condominium (“Plaintiffs”) request this Court to confirm the report of the special referee on the issues of attorneys’ fees/costs and breach date. In opposition to Plaintiffs’ motion, 910 Union Street, LLC (“Defendant”) cross-moves for an order rejecting the referee’s report, or in the alternative, reducing the award amount.

In an order dated November 22, 2017 (the “November 2017 Decision”), I referred an evidentiary hearing to a special referee to hear and report on the issue of (1) the amount of reasonable attorneys’ fees and costs to be awarded to Plaintiffs; and (2) the date of breach of the parties’ settlement agreement (the “Agreement”). The hearing was held on March 27, 2018, April 9, 2018, April 13, 2018 and May 29, 2018, in front of the Honorable Alice Schlesinger, Judicial Hearing Officer (“Referee Schlesinger”).

Referee Schlesinger issued a report on October 3, 2018 (the “Referee Report”) recommending that the date that Defendant breached the Agreement was December 25, 2014 for the Initial Payment and January 9, 2015 for the Second Payment. The Referee Report further recommended that Defendants compensate Plaintiffs for “[t]he amounts earned, requested and proved by Park Union[,] \$126,751.00 in attorneys’ fees, \$11,264.06 in costs and \$34,200.00 in preparation for the hearing and the four-day hearing itself.”

Plaintiffs contend that the Referee Report was correct and seek to confirm it in its entirety. Defendant, however, argues that the Referee Report should be rejected because Referee Schlesinger “awarded Plaintiff attorney’s fees for unsuccessful litigation, litigation and costs which were unrelated to the enforcement and prosecution of the Settlement Agreement and impermissible ‘fees on fees.’” Defendant alternatively argues that if this Court does not reject the Referee Report outright, it should significantly reduce the award.

Discussion

CPLR § 4403 states that upon the motion of any party, the judge “may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report.” Further, a “referee’s findings of fact and credibility will generally not be disturbed where substantially supported by the record.” *Flanagan & Cooke v. RC 27th Ave. Realty Corp.*, 305 A.D.2d 135, 135 (1st Dept. 2003).

1. Fees on Fees

Plaintiffs argue that the Referee Report's award of \$34,200 for Plaintiffs' hearing preparation and the four-day hearing itself was proper and does not constitute fees on fees. Defendant counters that the \$34,200 was an impermissible fees on fees award and should not be confirmed.

New York courts "have generally held that a party is not entitled to recover attorneys' fees that were incurred in prosecuting a claim to recover attorneys' fees, so-called 'fees on fees.'" *The Durst Bldgs. Corp. v. J P R 2, Inc.*, 2009 WL 2221468 (Sup. Ct. N.Y. Cty. July 17, 2009). There are two exceptions to this general rule, namely that fees on fees are allowed where such fees are explicitly provided for by either a statute or the parties' agreement. *See 546-552 West 146th Street LLC v. Arfa*, 99 A.D.3d 117, 120 (1st Dept. 2012) (stating that fees on fees awards "must be based on a statute or agreement").

First, the cases cited by Plaintiffs in support of its position are inapposite.¹ Second, as this Court previously stated in the November 2017 Decision, here the Agreement does not explicitly provide for an award of fees on fees and thus they are not recoverable. *See Jones v. Voskresenskaya*, 125 A.D.3d 532, 534 (1st Dept. 2015) (denial of fees on fees recovery appropriate because "the parties' agreement [did] not explicitly provide for such fees"); *Batsidis v. Wallack Management Co., Inc.*, 126 A.D.3d 551, 553

¹ The main case cited by Plaintiffs in support of their position – *Square Mile Structured Debt (One) LLC v. Swig*, No. 603825/08, 2013 WL 3989037, at *7 (Sup. Ct. N.Y. Cty. July 23, 2013) – is distinguishable because in that case the court found that the parties' agreement permitted fees on fees.

(1st Dept. 2015). I find that the \$34,200 award for the expenses that Plaintiffs incurred in connection with the referee proceeding was improper because it enables Plaintiffs, in contravention of caselaw and the law of the case, to recoup fees on fees.² Accordingly, Plaintiffs are only entitled to recover attorneys' fees and costs in the amount of \$138,015.06 and I confirm the Referee Report, as modified, in that amount.³

2. Other attorney fee award issues

Defendant makes various arguments that Referee Schlesinger also erred in awarding Plaintiffs their entire attorney fee award. A number of these arguments were previously rejected by Referee Schlesinger.⁴ I find that the recommendations in the Referee Report, which were issued after four days of hearings that included testimony and evidentiary submissions, are substantially supported by the record. *See Safka Holdings, LLC v. 220 West 57th Street Ltd. Partnership*, 142 A.D.3d 865, 866 (1st Dept. 2016) (lower court properly adopted special referee's report as to attorneys' fees and costs because the referee's "findings were supported by the record, and the [r]eferee clearly defined the issues and resolved matters of credibility."). Thus, I decline to reject

² Similarly, I reject Plaintiffs' request to add \$29,186.00, representing the time spent drafting and preparing the post referee hearing memoranda, to the total attorney fee award in the Referee Report.

³ Due to an addition error, the Referee Report stated that the total award amount was \$172,035.06 rather than \$172,215.06. The \$138,015.06 attorneys' fees and costs amount was arrived at by taking the latter corrected total award amount minus \$34,200.

⁴ For example, Defendant's primary argument is that Plaintiffs are entitled only to the fees incurred in connection with their successful appeal which, transcripts reveal, was raised and rejected at the referee hearing.

the Referee Report based on any of Defendant's arguments pertaining to the entirety of the fee award.

3. Date of Breach

Defendant contends that the Referee erred in determining the date of the breach of the Agreement.

“[W]here questions of fact are submitted to a referee, it is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility.” *Kardanis v. Velis*, 90 A.D.2d 727, 727 (1st Dept. 1982). Referee Schlesinger found, based on “undisputed evidence,” and after listening to witness testimony and assessing credibility, that the date of the breach with respect to the Initial Payment of \$500,00 was December 25, 2014 and the date of the breach with respect to the Second Payment of \$50,000 was January 9, 2015.

The Referee Report's recommendation as to the breach dates are “substantially supported” by the record. *Flanagan & Cooke*, 305 A.D.2d at 135. Accordingly, I confirm the Referee Report's findings concerning the dates of breach.

4. Plaintiffs' request for judgment

Plaintiffs also seek judgment on two other categories of recovery that this Court previously granted: “(i) statutory interest on the principal amount of the Agreement;” and “(ii) interest on Plaintiffs' fees award, ‘at the statutory rate of 9% from...June 30, 2016’ until the date Defendant makes payment thereof.” This branch of Plaintiffs' motion is unopposed.

(i) Statutory Interest on Principal Amount of Agreement

The November 2017 Decision granted “the Condominium’s and Board’s request for statutory interest, at the rate of ‘nine per centum per annum’ on the principal contract amount” but requested the referee to determine the date of breach. As Referee Schlesinger determined the breach dates for the principal amount of the Agreement to be December 25, 2014 and January 9, 2015, I will now enter judgment for interest at 9% per annum on the principal contract amount (i.e. the Initial Payment of \$500,000 and the Second Payment of \$50,000) from the respective breach dates to the date Defendant paid, July 6, 2016.

(ii) Interest on Plaintiffs’ fees award

The November 2017 Decision found that “the Condominium and Board may recover interest on their attorneys’ fees award at the statutory rate of 9% from the date they prevailed, June 30, 2016.”

Further, I ordered that

a final judgment shall be entered after a hearing to determine the amount of reasonable attorneys’ fees, costs and interest to be awarded to The Park Union Condominium and the Board of Managers of the Park Union Condominium.

Thus, I will now direct final judgment on the \$138,051.06 of attorneys’ fees and costs determined by the referee and discussed above together with interest.

In accordance with the foregoing it is

ORDERED that the motion to confirm the Referee Report by The Park Union Condominium and the Board of Managers of the Park Union Condominium is granted except as to the fees on fees award of \$34,200, which is denied; and it is further

ORDERED that 910 Union Street, LLC's cross-motion to reject the Referee Report is denied except as to the award of \$34,200; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of The Park Union Condominium and the Board of Managers of the Park Union Condominium, jointly and severally, and against 910 Union Street, LLC as follows:

- 1) in the sum of \$138,051.06 for attorneys' fees and costs, plus interest at the rate of 9% per annum, from the date of the award, June 30, 2016 to the date of this Decision and Order;
- 2) for statutory interest, at the rate of 9% per annum, on the principal contract amount of \$500,000, from December 25, 2014 to July 6, 2016; and
- 3) for statutory interest, at the rate of 9% per annum, on the principal contract amount of \$50,000, from January 9, 2015 to July 6, 2016.

This constitutes the decision and order of the Court.

7/8/2019
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED GRANTED IN PART SUBMIT ORDER

CHECK IF APPROPRIATE: SETTLE ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.