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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL E. HUFF PART 32

Justice

Nelson

-v-

New York

INDEX NO. 113411/97

MOTION DATE 6/7/02 (84)

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED AUG 06 2002

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, ~~it is ordered that this motion~~

motion is decided in accordance with accompanying memorandum decision

SCANNED AUG 05 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: JUL 28 2002

CAROL E. HUFF J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application of : Index No. 113411/97
MARIANNE NESTOR and PEGGY NESTOR,

Petitioner, :

For a Judgment Pursuant to Article 78 of the Civil Practice :
Law and Rules,

- against -

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent, :

- and -

THOMAS BRITT,

Respondent-Intervenor, :
----------x

CAROL E. HUFF, J.:

Petitioners move, pursuant to CPLR 2221(e), for leave to renew their motion that resulted in this Court's decision dated April 9, 2002, in which respondent-intervenor Thomas Britt was awarded $123,529.70 in legal fees and expenses. The basis for this motion is asserted to be "a change in the law that would change the prior determination. . . ." CPLR 2221(e)(2). Because the Appellate Term decision in Henriques v Boitano, NYLJ April 2, 2002, at 18, col 1, affects an issue central to petitioners' prior motion – whether a court may award "fees on fees" in connection with sanctions ordered pursuant to 22 NYCRR § 130-1.1 – the motion for renewal is granted.

The extensive background of this case is recited in earlier decisions and need not be repeated here. In brief, Britt was forced to intervene in this proceeding to protect his interests against misrepresentations made by petitioners. In her March 6, 1998 decision, Justice McMahon awarded Britt "all costs . . . incurred in bringing this petition [to intervene]," and directed Britt's attorneys to submit evidence of the expenses "incurred in connection with this proceeding." See 22 NYCRR § 130-1.1 (courts may award reimbursement "for actual expenses . . . resulting from frivolous conduct"). She further assessed $6,000 in sanctions against petitioners' counsel for their misrepresentations, also pursuant to Rule 130. Britt's attorneys' fees and costs amounted to $14,060.75 through February 1998.

Petitioners appealed the March 6, 1998, decision and the First Department affirmed the award of Britt's expenses but reduced the attorney sanctions to a total of $1,250. Petitioners moved to reargue the First Department decision, and that motion was denied. They then appealed the rulings to the Court of Appeals, which dismissed the appeal in part and otherwise denied it. Britt then moved for and was granted a hearing to determine and award the additional attorneys' fees and costs resulting from these appeals and attendant motion practice. The Special Referee awarded Britt the entire amount he sought, $132,743.40, and this Court, in its April 9, 2002, decision, reduced the award to $112,743.40, which, with interest added, resulted in a judgment for $123,529.70.

Thus Britt's "fees on fees" in this matter – the cost of appeals and motion practice subsequent to and resulting from the Rule 130 award – amount to more than $100,000. At the time of the reference to the Special Referee, there was no case law directly on point as to whether such an award is within the scope of Rule 130. However, after the original motion was decided,

the Appellate Term addressed the issue in Henriques. In relevant part, the decision provides:

> On a prior appeal, this Court sustained the suppression of documents improperly subpoenaed by petitioner's counsel and the imposition of Rule 130 sanctions against counsel to cover the reasonable costs and attorneys' fees incurred by respondents as a result of the discovery abuse. Although the prior appeal was unsuccessful, the arguments raised therein by petitioner's counsel were not frivolous within the meaning of Rule 130 and did not give rise to a further sanction award (see Mancini v Mancini, 269 AD2d 366 [2d Dept 20001). Nor can respondents properly recover any further sanction in connection with the prior appeal under the guise of a so-called "fee on a fee" (cf. Kumble v Windsor Plaza Co., 181 AD2d 259 [1st Dept 19901, lv denied 76 NY2d 709), since the initial sanction award was sought and obtained by respondents solely on the basis of Rule 130, and the reciprocal provisions of Real Property Law § 234 were not shown to be implicated.

While the Appellate Term decision is not binding on this Court, its reasoning is nevertheless persuasive. In Mancini, the Second Department distinguished between frivolous appellate practice, where the plaintiff moved on improper grounds for vacatur of certain judgments, and a non-frivolous appeal of another ruling, which was denied. In Kumble, the First Department allowed as a "fee on a fee" costs of an appeal of an award of fees, but the attorneys' fees in that case were awarded pursuant to a statute (Real Property Law § 234) that provided that the prevailing party is entitled to all its expenses. Rule 130 contains no such provision. When the First Department awarded Rule 130 sanctions based upon an appeal in another case, Levy v Carol Mgt. Corp., 260 AD2d 27, **34** (1st Dept 1999), it stated:

> Whether we exercise our discretion depends on whether the proceeding results from "frivolous conduct." For these purposes, frivolous conduct can be defined in any of three manners: the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false (22 NYCRR 130-1.1[c]).

There has been no finding in this case that petitioners' appeals of Justice McMahon's

Rule 130 sanctions were frivolous in themselves. Indeed, the initial appeal resulted in the First Department's lowering of the attorneys' sanction. Consequently, Britt is not entitled to attorneys' fees on defending the appeals of the Rule 130 sanction award, and he is entitled only to his expenses in bringing the motion to intervene, $14,060.75, with interest to be calculated from the date of filing of Justice McMahon's decision, March 20, 1998.

Accordingly, it is

ORDERED that the motion for renewal is granted, and it is further

ORDERED that, upon renewal, petitioners' motion to reject the report of the Special Referee is granted; and it is further

ORDERED that the judgment of this Court dated April 9, 2002, in the amount of $123,529.70 is hereby vacated; and it is further

ORDERED and ADJUDGED that respondent-intervenor Thomas Britt have judgment and recover against petitioners Marianne Nestor and Peggy Nestor in the amount of $14,060.75, plus interest at the rate of 9% per annum from the date of March 20, 1998, as computed by the Clerk in the amount of $_____, and that respondent-intervenor have execution therefor.

Dated: JUL 2 8 2002

CAROL E. HUFF
J.S.C.

_____
Clerk

Thomas Britt

15 East 63rd Street, Apt. 2B

New York, NY

Marianne Nestor & Peggy Nestor

15 East 63rd Street

New York, NY