[* 1]

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

PRESENT: EMILY JANE GOODMAN Justice

PART 1

010219911996

DAVID REALTY AND FUNDING
VS
SECOND AVENUE REALTY

INDEX NO. 102199-96

MOTION DATE

MOTION SEQ. NO. 018

SEQ 18

CONFIRM/REJECT REFEREE REPORT

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	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JUN - 3 2004
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/24/04

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

DAVID REALTY AND FUNDING LLC,

Plaintiff,

- against -

Index No.: 102199/1996

SECOND AVENUE REALTY CO, JOEL WIENER, ARTHUR WIENER, JONATHAN WIENER, THE BOARD OF MANAGERS OF THE 250 EAST 65TH STREET CONDOMINIUM, THE PEOPLE OF THE STATE OF NEW YORK, and THE CITY OF NEW YORK,

Defendants.

----------X

EMILY JANE GOODMAN, J.

This case originally began as a foreclosure action that has long since settled. The only remaining issues before this court concern payment of the commissions and expenses of a temporary receiver who had been appointed to manage units in a building located at 250 East 65th Street, New York, NY. The issues were referred to a Special Referee to hear and report, and the Special Referee issued his report on September 18, 2003.

Pursuant to CPLR 4.403, plaintiff and defendants' now move to reject the Special Referee's report (Motion Seq. No. 18). The temporary receiver, Jay G. Seiden, moves to confirm the report in part, and to reject it in part (Motion Seq. No. 19). This decision addresses both motions.

'The State and City of New York do not join in this motion. According to plaintiff and the other defendants, the State and City did not appear at the hearings before the Special Referee. Accordingly, "defendants" in this decisions refer to all defendants except the State and City of New York.

BACKGROUND

Defendant Second Avenue Realty Co. (Second Avenue) was the owner of a high-rise building located at 250 East 65th Street, New York, NY 10021, which later converted to condominium ownership (the Property), Second Avenue had partly financed the purchase of the Property with a loan from CrossLand Savings, FSB (Crossland), and the loan was secured by a mortgage on the Property dated March 11, 1985 (the Mortgage). Second Avenue was a New York partnership whose partners were defendants Joel Wiener, Arthur Wiener, and Jonathan Wiener,

In February 1996, Crossland's successor commenced this foreclosure action on the remaining 35 unsold residential units of the Property. By order dated March 4, 1996, the court (Saxe, J.) appointed Jay G. Seiden, Esq. as temporary receiver for the 35 units. Pursuant to court order dated April 29, 1996, Seiden engaged his own law firm, Seiden & Schein, P.C. (the Seiden firm), to serve as counsel to the receiver. Seiden also engaged AIB Management Company (AIB to act as a managing agent for the 35 units.

Later that year, Republic National Bank (Republic) acquired Crossland's successor, and Republic and Second Avenue reached a settlement agreement of this foreclosure action, following which a newly-formed affiliate of Second Ave would purchase Republic's interest in the Mortgage and Republic would assign its interest in this foreclosure action to the new affiliate. That newly-formed affiliate is David Realty and Funding, LLC (David Realty), which substituted Republic as plaintiff pursuant to a court order (Sklar, J.) dated September 21, 1997.

Meanwhile, the Seiden firm had filed a tax certiorari application for the 35 units for the tax year 1997-98, and, at Arthur Wiener's direction, another firm, Podell, Schwartz, Shecter &

Banfield (the Podell firm) filed a tax certiorari application for the same year for the entire building (including the 35 units). By order dated May 29, 1997, the court (Crane, J.) ordered the Podell firm "to withdraw its duplicate application for correction of assessment for the 35 units subject to the receivership * * *." Ultimately, the Tax Commission offered settlements to the Podell firm and the Seiden firm on the same terms: an 8.5 percent reduction in the total tax assessment. The Podell firm and the Seiden firm agreed to split the contingency fee that the Podell firm would receive from the settlement, if the Seiden firm discontinued its tax certiorari application as to the 35 units.

By order to show cause dated September 15, 1997, David Realty sought to remove Seiden as receiver. During proceedings held on the record on September 26, 1997, the court (Sklar, J.) granted David Realty's application and relieved Seiden of further "active managing duties." The court also directed Seiden, among other things, to file his final accounting. The court entered a written order to this effect on October 21, 1997.

Seiden filed his final accounting on November 21, 1997, to which plaintiff and defendants raised objections. Plaintiff and defendants accused Seiden of committing waste and misconduct, engaging in self-dealing, violating the order of appointment, and breaching his fiduciary duty, among other things. They also objected to the fact that Seiden had engaged an accounting firm, Friedman Alpren & Green LLP, to prepare the final accounting, and the law firm of Gaffin & Mayo, P.C. (the G&M firm) to represent him in connection with the final accounting.

By an order dated March 26, 1998, this court (Goodman, J.) referred the issues of the final accounting to the Honorable Howard G. Leventhal, Special Referee, to hear and report. The

hearings spanned twenty days in total, with approximately 100 documents received into evidence (Petitioner's Exs 1-39; Respondents' Exs A-HHH2).[2] In his 41 page report, Referee Leventhal found that Seiden had committed neither waste nor misconduct, and that the violations of the order of appointment were either technical or de minimis, and resulted in no prejudice to the receivership property. In conclusion, the Special Referee recommended that the court: 1) fix Seiden's remaining commissions at $14,525.21, and surcharge him $15,356.68, resulting in a net surcharge of $831.47; 2) approve counsel fees of $35,868.76 for the work the Seiden firm; 3) approve counsel fees of $25,190 for the work of the GM firm; and 4) approve $9,281.25 in fees paid to the accounting firm which prepared the final accounting.

DISCUSSION

Confirmation of the Special Referee's report

"It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility, since the Special Referee is considered to be in the best position to determine the issues presented" (*Nager* v *Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997][internal citations omitted]). However, the court is not bound by the referee's recommendation and its determination (*Garrick-Aug* Assocs. *Store Leasing* v *Shefa Land Corp.*, *270* AD2d 68, 69 [1st Dept 20003). CPLR 4403 provides that the court has the power to confirm or reject "in whole or in part * * * the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing" ***(see also Galiber v***

[2]At the reference, the Special Referee designated Seiden as the petitioner and the defendants here as the respondents.

Previte, 40 NY2d 822, **824** [1976]; *Barrett* v ***Stone,*** 236 AD2d **323,324** [1st Dept 19971).

Seiden's commission **and** expenses

A. The Receiver's Commission

CPLR 8004(a) provides, in relevant part, that a receiver is entitled to a commission "not exceeding five percent, upon the sums received and disbursed by him, as the court by which he or she is appointed allows * * *." The receiver bears the burden of demonstrating that he or she has, in fact, **earned** the commission **(City** *of* ***New York*** *v* ***L.J.W.P. Realty Co.,*** *L.L.C.,* **269** AD2d 810 [4th Dept 2000]; ***De*** *Nunez* v *Bartels*, 264 AD2d 565,566 [1st Dept 1999]; ***Independent Props.*** *Co., Inc.* ***v*** *Mast* ***Prop. Investors. Inc.,*** **148** AD2d **849,** 849-50 [3rd Dept 19891). Here, the Special Referee recommended that Seiden receive a 1.5% commission, because Seiden **had** delegated most of the work to others, such **as** to a managing agent and to lawyers (Report at 40).[3] The Special Referee also surcharged Seiden for commissions paid to AIB, for renewing rent-stabilized leases and renting out rent-stabilized apartments, which he found were unreasonable (see p 21 ***infra).***

Seiden argues that the Referee should have awarded him a five percent cornmission, because he was allegedly instrumental in recovering about **$143,000** in tax certiorari refunds (Gaffin Affirm. ¶ **4).** Seiden also denies that he had delegated much of his responsibilities. Meanwhile, plaintiff and defendants argue that the Special Referee should not have given Seiden any commission at all, because the Referee had found that Seiden had violated the order of appointment. **As** they point out, the Special Referee found sufficient evidence to establish that,

[3]Contrary to Seiden's argument, the Special Referee clearly intended to award only a 1.5% commission, not a 3% commission.

contrary to the order of appointment, Seiden failed to maintain fire and liability insurance on the premises (Report at 23); did not pay taxes as they came due (*ibid.*); did not **keep** receivership funds in an account only in his name, but instead allowed the managing agent to open another account in its own name ***(id.*** at 27); and failed to obtain the countersignature of the surety on all the checks that he issued (*ibid.*).

"[I]t is proper for the court to consider the amount of work delegated to an agent when determining the receiver's fee" ***(First New York Bank For Business v 418 W. 49th Street Realty Corp., 252*** AD2d **460,461** [1st Dept 1998]). "Where day-to-day management **was** performed by **a** managing agent who was compensated out of the building's receipts, courts have sometimes held that a receiver is not entitled to the statutory maximum as commissions'' ***(De Santis*** v ***White Rose Associates,*** 152 Misc 2d 567, 573 **[Sup** Ct, NY County 1991][internal citation omitted]).

In fixing Seiden's commission at 1.5 percent, the Referee relied on ***Jacynicz*** v ***73 Seaman*** Assocs., **270** AD2d **83** [1st Dept 20001). In that case, a receiver conceded that "she had no personal involvement with the management of the building" ***(id.*** at **86).** The court reduced her commission to 1.5 percent "in view of the limited oversight of the property by the Receiver" ***(id.*** at **87).**

Here, the record supports the Special Referee's finding that Seiden had delegated much of the management of the 35 units to others. Seiden's summary of his activities as receiver, attached to the order to show cause seeking approval of his commission, indicates that his work consisted largely of reviewing the work of the managing agent, and conferring with counsel on recovering tax refunds **(see** Kook Affirm., **Ex** E). Because Seiden's activities were not so limited as the receiver in *Jacynicz*, the court would have been inclined to allow the receiver a 2½ percent

commission (see ***Central Hunover Bank and Trust Co.*** v ***Williams,*** 244 **App** Div 566 [1st Dept 1935][2½ percent commission **was** sufficient in view of the magnitude of the operation involved, and the fact that the receiver delegated many duties in accordance with the order of appointment]; *cf.* ***Dubiner v Goldman,*** 42 AD2d 843,844 [2d Dept 1973][awarding 2½ percent commission to receiver because receiver's attorney performed many of the services which receiver should have performed himself]).

However, the court is troubled that Seiden violated the order of appointment in several respects. "Receivership by its very nature involves a deep responsibility, and the failure to discharge it cannot be excused because of inadvertence, neglect, insufficient diligence or a misapprehension of legal principles" (*Morea* v *Muratore*, 214 NYS2d 491,494 [Sup Ct, Nassau County 19611, ***affd*** *without* ***opinion 15*** AD2d **671** [2d Dept 19621). Here, requiring Seiden to maintain a separate account for receivership funds in his name only was to ensure that receivership funds were not commingled, and that Seiden would oversee expenditures. Requiring the countersignature of the surety was a secondary control on Seiden's expenditures. By comparison, Seiden's choice to move those funds into an account in AIB's name had little or no financial controls, especially because the court (Saxe, **J.**) had dispensed with the countersignature requirement by an order dated May 14, 1996, two months after Seiden's appointment. Essentially, Seiden placed his trust entirely in AIB, but there is no evidence to show that AIB was on the Office of Court Administration's list of approved managing agents. Seiden's failure to ensure continuing fire coverage of the 35 units, though partly attributable to the hostile attitude and lack of cooperation from Arthur Wiener, put the 35 units at great **risk.** In light of these violations, the court accepts the Referee's recommendation that Seiden's

commission be fixed at 1.5 percent.

The court rejects plaintiff and defendants' argument that Seiden should forfeit his commission. It is true that a receiver who grossly mismanages the property in receivership or who commits a serious breach of fiduciary duty is not entitled to a commission ***(see Federal Deposit Ins.*** *Corp. v* ***65 Lenox Rd. Owners*** *Corp.*, *270* AD2d 303,304 [2d Dept 2000]). However, the record supports the Referee's finding that Seiden's violations of the order of appointment did not rise to the level of gross mismanagement or a serious breach of fiduciary duty.

Seiden's choice not to pay the property taxes due in July 1996 does not constitute a violation of the order of appointment, given the financial situation of receivership. Plaintiff and defendants fault the receiver for paying his own interim commissions and legal fees of the Seiden firm, instead of property taxes. The balance of the receiver's account as of April 1996 was $15,561, and Seiden collected $34,734.41 by July 15, 1996 (4/14/99 Tr. at 80). The parties agreed that the amount of taxes due in July 1996 was around $45,000 (*id.* at 79). Therefore, Seiden was faced with the difficult choice to use almost all of the rent proceeds to pay taxes, or to use the proceeds to pay his own interim commissions and the legal fees of the Seiden firm. Although Seiden acknowledged that paying taxes should be the first priority, the law allows for some flexibility. Outside of bankruptcy proceedings, "[t]he receiver's commissions are part of the expense of administration, and are entitled to priority" ***(Smith*** v *Adlerman*, 105 Misc 223, 224 [App Term, 1st Dept 1918]). This is true even where the receiver must choose between paying his own expenses and paying taxes due on the property ***(see Rosenzweig*** *v* ***Zirkatz Realty Corp.***, 145 Misc 653 [Sup Ct, Kings County 19321).

In addition, the record supports the Referee's finding that, under the circumstances, the failure to pay common charges on the 35 units by the first of each month did not amount to a violation of the order of appointment, Prior to the receivership, Arthur Wiener's managing agent both collected rent and processed payment of common charges by the first of the month. When the duty of collecting rents passed to the receiver, lag time between collecting rents and paying common charges was ineluctable. On this point, the Special Referee found that Seiden had agreed to pay common charges on the first of each month (Report at **24).**

Plaintiff and defendants' remaining allegations of violations of the order of appointment are either unsubstantiated or without merit. Contrary to Plaintiff's and defendants' argument, Seiden did file a notice of appointment and certification (see Gaffin Opp. Affirm., *Ex* **A).** Further, **as** discussed in more detail below, AIB's fees were reasonable.

As to the amount of Seiden's commission, the Special Referee calculated his commission to be 1.5 percent of both gross receipts totaling **$853,009** and disbursements of **$821,138. As** David Realty correctly points out, this was in error, because it amounts to a double commission **(see** WF ***Shirley,*** *LLC v William Floyd* ***Plaza Assocs.,*** **270** AD2d **255** [2d Dept 2000]; ***Coronet Capital Co.*** **v** ***Spodek,*** **202 AD2d 20, 26-27 [1st** Dept **19941).** Therefore, the court rejects the **part** of the Special Referee's report which calculated the Receiver's total commission as **$25,112.21,** excluding surcharges. Instead, the Receiver's commission will be calculated on such gross receipts, because the gross receipts exceed disbursements ***(see Eastrich Multiple*** *Investor* ***Fund,*** *L.P.* ***v Citiwide Dev.*** *Assocs.*, **218** AD2d **43, 44** [1st Dept 19961). Here, gross receipts should also include the tax certiorari refunds in the amount of **$120,179** held in escrow by the Podell firm (*cf.* ***Lubitz*** v *Mehlman* (95 AD2d **690 [1st** Dept 1983][receiver's commission calculated on settlement

proceeds that went directly to a third party]).

Although the Special Referee held that the tax certiorari refunds, which were **part of** the receivership estate, could not be included in the commission calculation because the Seiden firm received a contingency fee for the tax certiorari work (Report at 40), the Court rejects that finding, Seiden testified at the hearings that there was **an** oral agreement between himself and Alvin Schein, that he would not receive any share of profits that related to the receivership matters (4/19/96 Tr. at **37).** Because plaintiff and defendants presented no evidence to the contrary, and the Special Referee did not indicate that Seiden's testimony was not credible on this point, no evidence supports a finding of "double dipping."

Therefore, Seiden's total commissions, calculated as 1.5 percent of the sum of the gross receipts and tax certiorari proceeds ($973,188), is fixed at $14,597.82. Because Seiden received interim commissions of $10,587, the additional commission due is $4,010.82. Seiden is direct to submit to the court, within 30 days, an original Form **UCS** 875 (Statement of Approval of Compensation), with the applicable sections completed. Upon receipt of the form, Seiden is authorized to draw his remaining additional commission from the receiver's account.

Finally, Seiden argues that the Special Referee should not have surcharged him $15,356.68. According to Seiden, nothing in the record indicated that the receiver had breached his fiduciary duties, but rather the non-cooperation of the parties hindered his responsibilities (Gaffin Affirm. ¶ 13).

The Special Referee surcharged the receiver $400 for the cost of replacing a cracked sink in apartment 10C. The Special Referee believed the tenant should have paid for the repair, but Seiden directed that the full security deposit be returned (Report at **29).** The court disagrees. **A**

handwritten memo dated June 30, 1997, from the Seiden firm to AIB, reads: "Unit 10C – Sink in bathroom was cracked. Had to be replaced $400 w/installation. **Water damage due to building - not tenant's fault ___ JGS said** refund entire security deposit" (Respondents' Ex ZZ [emphasis added).

The remaining surcharges are based on $14,956.68 in commissions paid to AIB that the Special Referee found to be unreasonable **(see** Report at ***26).*** Seiden does not challenge the reasonableness of the amount of the surcharge, but rather argues that he should not be the one who is surcharged. In surcharging the receiver for AIB's unreasonable commissions, the Special Referee cannot be faulted for placing ultimately responsibility for the actions of the receiver's agents upon the receiver. However, the court, in its discretion, will direct AIB to return these commissions, which were highly improper charges,

B. The Receiver's Expenses

The court agrees with the Special Referee's recommendation to approve **$6,541** in expenses, for an appraisal of the 35 units that Seiden used in the tax certiorari proceedings **(see** Report **27-28).** The Special Referee rejected plaintiff **and** defendants' arguments and testimony that an appraisal was unnecessary, reasoning that the use of an appraiser was a strategic judgment by counsel that should not be second-guessed **(see *id.*** at **28).** The court also approves **$5,772.20** in disbursements for transcripts of the hearings before the Special Referee.

Plaintiff and defendants point out that neither the order of appointment nor subsequent orders permitted Seiden to engage an appraiser. Nor do the prior orders authorize the receiver to pay for transcript expenses. The absence of judicial approval, however, does not preclude the court, in the exercise of its discretion, from approving the receiver's unauthorized, but

appropriate, expenses *(Constellation Bank, N.A. v Binghumton Plaza, 236* AD2d **698,698-699** [3d Dept **19971).**

Attorney's **Fees** to the Seiden firm

The Special Referee recommended that the court approve $35,868.75 in counsel fees to the Seiden Firm, for legal services for the period December 1, 1996 until the termination of the receivership (Report at 41).[4] The Seiden firm performed nearly **136.50** hours of work (sea Kook Affirm., **Ex** N [Spector Aff.] ¶ **21;** see *also* Petitioner's **Ex 1** [time sheets and invoices]), which the Special Referee found had benefitted the estate (Report at **41).**

The record shows that the Seiden firm sought court orders directing the Podell firm to turn over to Seiden some tax certiorari refunds for several prior tax years, sought an order allowing the Seiden firm to file an **tax** certiorari application for tax year 1996-1997, and handled a few landlord-tenant issues ***(see generally*** Spector Aff.). The hearing testimony supports the Referee's finding that these services benefitted the estate. **As** discussed above, the receivership barely had enough income (or an insufficient amount) to cover all its expenses, until the Seiden had secured turnover of the tax certiorari refunds from prior tax years **(see 4/14/99** Tr. **26).**

Plaintiff and defendants argue that the Seiden firm did not provide any unusual or special legal services that Seiden himself could not do. They also allege that the Seiden firm provided no services of any value whatsoever with regard to the tax certiorari proceedings. Because the Seiden firm had a fee-splitting arrangement with another firm regarding tax certiorari refunds to the Property (including the 35 units), plaintiff and defendants further contend that the Seiden firm

---

[4] In a decision dated May **21, 1997,** the court (Saxe, J.) had previously approved interim counsel fees for the Seiden firm, for the period April **29, 1996** through November **30,** 1996 ***(see*** Report at 13).

received sufficient compensation.

The Special Referee reasoned that, because Justice Crane had ruled that Seiden and the Seiden firm could file a tax certiorari application for the 35 units, it was law of the case that the Seiden firm's fees should be approved (*see* Report at 28, 34). On some level, it would be inconsistent for the court to authorize legal representation but to deny payment of those services. And yet, plaintiff and defendants correctly argue that the fact of appointment itself does not lead to the conclusion that the court cannot inquire into the reasonableness of counsel fees.

However, the record indicates that the legal services to be approved here do not include the Seiden firm's representation of the receiver in the tax certiorari proceedings, which was handled on a contingency fee basis, to be split with the Podell firm (4/19/99 Tr. at 50). No testimony was offered as to what the Podell firm or the Seiden firm would receive from that matter (4/28/99 Tr. at 134), or the hours that the Seiden firm spent on it. Therefore, the quality of the representation in that matter, as well the compensation, have no bearing on approval of the legal fees here. In this court's view, Seiden has not presented a complete application for approval the contingency fees in that matter.

Given all the above, the court adopts the Special Referee's recommendation to approve $35,868.75 in counsel fees to the Seiden firm. "It is the rule that a Receiver who is a lawyer is expected to perform customary legal duties connected with his tenure" (Strober v Warren, 84 AD2d 834 [2d Dcpt 1981][citing Sunrise Fed. Sav. & Loan Assn. v West Park Ave Corp., 47 Misc 2d 940])." However, while it appears that the receiver, a lawyer, could have handled some landlord-tenant matters, such as letters and notices to tenants, plaintiff and defendants do not specify the number of hours spent on those matters for the court to consider granting a reduction.

As of October 3,2003, the balance remaining in the receiver's account was $26,155.68 (Gaffin Affirm. ¶ 19). The Special Referee found that the balance had been $31,872.63 (Report at 7), but did not take into account disbursements for transcripts of the hearings before him (see Gaffin Affirm., Ex D). The court hereby authorizes Seiden to pay the fees from the receiver's account (after the receiver has been paid his commission of $4,010.82). Because the receiver's account does not have sufficient funds to pay the entire balance, the court permits the remaining unpaid balance to be reimbursed from tax certiorari refunds held in escrow by the Podell firm. The court also remands the issue of the reasonableness of the Seiden firm's contingency fee arising from representation in the tax certiorari proceeds to the Special Referee to hear and report.

Attorneys Fees for the G&M firm

The G&M firm represented Seiden in the final accounting. The Special Referee recommended that the court approve $25,190 in fees for services rendered up to October 1998 (Report at 41). The G&M firm also seeks additional fees of $140,270 for services rendered from October 1998 to the present. However, the Special Referee recommended that the reasonable value of those services be remanded for further hearings (Report at 41). Contrary to plaintiff and defendants' argument, the Special Referee did not rule at the hearings on July 26, 1999, that was no factual or legal basis for the G&M firm's fees. The Special Referee specifically stated, "I make no finding and there should be no attempted reading between the lines as to what I am saying." (7/26/99 Tr. at 32).

As plaintiff and defendants point out, nothing in the order of appointment nor subsequent orders permit Seiden to retain counsel in connection with the final accounting. "In the absence of

a court order authorizing the employment **of** an agent, upon a showing **of** the necessity therefor, a receiver is not entitled to reimbursement for [the] agent'scommissions" (*Kitt v D.M.V. Estates,* 7 AD2d 291, 292 [1st Dept 19591). However, "the court may authorize the retention of counsel by a temporary receiver, nunc pro tunc, and the payment of an attorney's fee" (*Bozewicz v Nash Metal Ware Co., 280* AD2d 443, 444 [2d Dept 20011; *see also Constellation Bank N.A.,* 236 AD2d at 698-699). Receivers should nevertheless take heed that courts in this judicial department have frowned upon this practice:

> "We have here an instance of a practice, occurring all too frequently, where a receiver in foreclosure turns over to an agent the task of collecting rents and employs counsel to advise the receiver, without first obtaining permission of the court, relying upon the court's ultimate approval of these expenditures. It is a practice which imposes serious and unnecessary burdens upon the estate, and should be discontinued"

(*Niagara Life Ins. Co. v Lincoln Mortgage* Co., 175 App Div 415,416-417 [1st Dept 19161).

Accordingly, courts in this judicial department have ratified retention of counsel where the funds in the hands of the receiver are insufficient to pay the attorneys' fees, and the receiver demonstrates "special circumstances" (*see Aloi* v *Lizeric Realty Corp.,* 260 AD2d 192 [1st Dept 19991; *see also Kraizberg v Frank,* 170 AD2d 306,308 [1st Dept 1991][court did not abuse its discretion to ratify the unauthorized hiring of counsel, if the situation was "'pregnant' with unusual circumstances"]). Here, there are insufficient funds in the receiver's account to pay the G&M firm's fees. As discussed above, the receiver's account has a balance of $26,155.68 (Gaffin Affirm. ¶ 19). "Among the additional factors that bear on the existence of special circumstances are the degree of necessity of the expenses, and the benefit received by the party who moved for the receivership" (*Litho Fund Equities v Alley Spring Apts.,* 94 AD2d 13, 17 [2d

Dept 1983][citations omitted]).

With this in mind, the court approves, nunc pro tunc, Seiden's engagement of the G&M firm. Though Seiden himself is an attorney, outside counsel was necessary given the especially protracted hearings and the parties' demonstrated animosity towards Seiden throughout the final accounting process. In addition, G & M firm's representation of the receiver in the final accounting and during the 20 days of hearings has greatly facilitated the accounting process.

Plaintiff and defendants incorrectly contend that Justice Sklar had directed Seiden not to hire any attorneys at proceedings before him on September 26, 1997. They rely on the following excerpt of the record:

> Mr. Vandenberg: And by your order relieving them of all active management and so on as receiver means that as of today no further work is done by any of their attorneys, accountants, et cetera.
>
> The Court: I will say as of the end of the day because I don't know what is being done back in the shop. And I don't want to cut them off from entitlement to any work that may done today, as of 5 p.m. today.

(Kook Affirm., Ex D at 11).

Although Justice Sklar directed the Receiver to stop all "active management" duties as of 5 p.m. on that day, which is reflected in his written order dated October 21, 1997 (*see* Respondents' Ex GGG), he did not confirm Mr. Vandenberg's understanding of the scope of the receiver's "active management." Nor is this reflected in the written order. Justice Sklar only confirmed the time when the receiver should end his management duties. The lack of confirmation is critical, because it raises a question of whether Justice Sklar had heard everything that Mr. Vandenberg had said. Indeed, when the parties were before Justice Sklar the

week before, he said, "You will have to **look up,** the acoustics in this Court have generously been described as atrocious. If you look down there is not a shot" (Respondent **Ex** FFF at 3-4). Therefore, plaintiff and defendants fail to show that Justice **Sklar** made a clear directive not to hire any attorneys,

The record indicates that three attorneys from the G&M firm rendered **82.7** hours worth of legal services for Seiden through October **1998, and** that their billing rates ranged from **$200** to $350 per hour ***(see*** Petitioner's **Ex** 1 [Gaffin Affirm. ¶ 3]). Having reviewed the time and billing records of the G&M firm **(see** Petitioner's **Ex** 1 at Tab Exhibit **1** [time slips from attorneys at the G&M firm]; ***see also*** Petitioner's **Ex** 2B at Tab Exhibit G [summary and detailed slip listing dated March 24, 1998]), the court finds that the legal fees incurred were reasonable.

Therefore, the court adopts the Special Referee's recommendation to approve **$25,190** in **fees** for services rendered **up** until October **1998** ***(see*** Report at **41).** Accordingly, the court permits these fees to be reimbursed from tax certiorari refunds held in escrow by the Podell firm. The court also adopts the Special Referee recommendation that the reasonable value of services rendered from October **1998** to the present be remanded to him for further hearings **(see** *ibid.*).

Accounting Fees

The Special Referee recommended that the court approve a total of $9,281.25 in accounting fees (Report at **41).** Plaintiff and defendants again argue that the accounting fees cannot be justified in light of Justice Sklar's alleged direction on September **26,** 1997, and that Seiden had represented to Justice Sklar that the final accounting **was** "substantially finished."

As discussed above, plaintiff and defendants' arguments are unpersuasive. Justice **Sklar** stated:

> "The receiver is to do the accounting. The receiver as I understand it, is an attorney. Even if not an attorney there are people who could prepare an accounting probably **far** better than I, and it is not saying that they have to retain an accountant to do that. If they are able to do that on their own, fine. And usually an accountant–I am *sorry* an attorney who practices in the area and who **has** been designated by a colleague, whom the colleague trusts and has confidence whom the colleague trusts and has confidence in his ability, I would assume is able to prepare an accounting. That is not saying it will pass muster with our accounting clerk on the first shot by any matter or means, but very few have yet passed our accounting clerk on the first shot"

(Kook Affirm., **Ex** D).

It appears that Justice Sklar wanted Seiden to prepare the financial compilations for the accounting, and he hoped that Seiden was capable of doing it. He also emphasized that a receiver is not entitled, ***per*** **se**, to engage an accountant in connection with a final accounting. However, Justice Sklar did not issue a unambiguous directive to Seiden not to engage an accountant, in part because he relied on an assumption of Seiden's ability to prepare financial statements. The record does not reflect that Justice **Sklar** assessed whether the final accounting of the receivership was, in fact, uncomplicated, or whether he realized that this was Seiden's first receivership.

Nevertheless, the Referee's recommendation of the amount of **$9,281.25** is rejected due to an arithmetic error. The Referee stated that Seiden paid $3,556.25 to Friedman Alpren & Green, LLP (Report at 12, 28), which is supported in the record ***(see*** Respondents' **Ex** DD; ***see also*** 4/19/99 Tr. at **27-28 [2** payments of **$1,806.25** and $1,7501). It appears that figure of $9,281.25 includes $3,556.25 paid to the accounts and $5,725 paid to the Seiden firm ***(see*** Report at ***6)*.** Also, the Special Referee included the **$9,281.25** in the sums to be deducted from remaining proceeds held in escrow to be disbursed ***(see*** Report at **41).** However, no

reimbursement is necessary given that the Special Referee acknowledged that the accountants have already been paid (*see ibid).*

Therefore, the court approves the sum of $3,556.26 in fees that were already **paid** to the accounting **firm** Friedman, Alpren & Green, LLP.

AIB's fees

As a threshold matter, plaintiff and defendants object to AIB's appointment as managing agent. They point out that no court order specifically authorized Seiden to retain AIB, and thus argue that Seiden "circumvented" Rule 36.1 of the Chief Judge, which requires the appointing judge to make all appointments. They also contend that AIB is not on the Chief Administrator's list of approved persons designated to **perform** services for the receiver.

These arguments are unavailing. Judge Saxe's order of appointment, dated March **4,** 1996, specifically provides that "the receiver be and hereby is authorized to appoint a managing or other agent to act in any manner herein authorized with respect to the mortgaged premises" **(see** Plaintiff and Defendants' **Ex** B at **6).** The order therefore obviated the need for a separate, specific order naming AIB as the managing agent. Although the Special Referee noted that no documentary evidence was presented that AIB was on the Chief Administrator's approved list (Report at 5), it does not follow that a person or institution not on the approved list is not entitled to fees, Rather, the version of rule **36.1** in effect had further provided that

> "should the appointing judge decide that a person or institution not included on the list of applicants is better qualified for appointment in a particular matter, * * * the judge may appoint that person or institution, and in such instance shall place the reasons for such appointment and the qualifications of such appointee on the record"

(Rules of the Chief Judge [22 NYCRR] § 36.1, ***reprinted in*** Civil Practice Annual of New York

at 10-17 [1996]). Obviously, this procedure was not followed here. However, no one appealed the order of appointment, and the record does not indicate whether anyone ever bothered to bring the irregularity of AIB's appointment to Judge Saxe's attention. Because plaintiff and defendants do not demonstrate any prejudice to a substantial right flowing from this irregularity, it will be disregarded (see CPLR 2001; *cf.* ***Mutter of Jasmine A., 295*** AD2d 504 [2d Dept 2002][Family Court failed to issue statutorily required warnings]; *cf. Standifer v Goord*, 285 AD2d **912 [3d** Dept 2001][Supreme Court issued order to show cause omitting service upon respondents]).

Next, plaintiff and defendants object to AIB's fees as unreasonable. The Special Referee found that Seiden had paid AIB a five percent commission on the total rents collected, and that the commission, which amounted to $30,286.45, was reasonable (Report at 25). However, plaintiff and defendants argue that AIB should have received a two percent commission, because the building was managed by its own managing agent, and because the building was in "excellent" condition when Seiden was appointed as Receiver.

The court confirms the Referee's finding that AIB's five percent commission was reasonable. The fact that the building had its own managing agent does not lead to the conclusion that AIB is entitled to a lesser commission. Under Seiden's agreement with AIB, AIB was required to provide necessary services when the building's managing agent failed to do so. Seiden's agreement with AIB provides, in relevant part:

> "It is mutually understood and agreed that certain services and obligations * * * are currently provided by the managing agent of the Condominium. Agent [AIB] shall use its best efforts to insure that the Board of Managers of the Condominium and/or its managing agent continue to perform these services. To the extent that the Board of Managers of the Condominium or its managing agent fail to perform such services and obligations as are necessary to preserve and protect the Units, Agent shall provide such services, Required Services shall include the obligation

> to maintain, repair and replace the plumbing fixtures, refrigerator, range, dishwasher, if any, lighting fixtures and other equipment and appliances in the Units and to paint the Units as and when required by applicable law"

(Respondents' Ex E). The record does not show that the building's managing agent had, in fact, performed most of the building services. On the contrary, the Special Referee found the superintendent, Mr. John Fitzpatrick, to be hostile to the Receiver (Report at 19). For example, by a letter dated December 12, 1996, AIB had advised Mr. Fitzpatrick that he should not perform repairs without AIB's authorization (Respondents' Ex GG), but Fitzpatrick interpreted the letter as an instruction not to do any more work at all (4/27/99 Tr. 111).

The court also adopts the Referee's recommendation to disallow $7,206.68 in commissions that AIB charged Seiden for renewing leases and $7,750 in commissions for renting vacant apartments (see Report at 26). The record supports the Referee's finding that these commissions were commercially unreasonable. However, instead of surcharging these amounts to Seiden, as the Referee recommended, the court directs AIB to return these funds to David Realty.

Finally, the court agrees with the Special Referee's recommendation that no fees are to be disbursed until Seiden, the Seiden firm, Friedman, Alpren & Green, LLP, AIB, and the G&M firm have filed the requisite UCS forms, and they are directed to do so within 30 days.

Accordingly, it is

ORDERED that the motion of plaintiff and defendants to reject the Special Referee's report dated September 18, 2003 (Motion Seq. No. 18), and the motion of Jay G. Seiden to confirm in part, and deny in part, the report (Motion Seq. No. 19), are both granted to the extent as set forth in this decision; and it is further

ADJUDGED that the total commissions of the receiver, Jay G. Seiden, is approved and fixed at **$14,597.82,** and the remaining commissions due to the receiver, Seiden is fixed at **$4,010.82;** and it is further

ADJUDGED that the reasonable expenses of the receiver, Seiden (previously paid) are approved and fixed at $12,313.20; and it is further

ADJUDGED that, upon filing of the Notice of Appointment and Certification of compliance (Form UCS 872), the reasonable fees paid to Friedman, Alpren & Green LLP are deemed approved and **fixed** at $3,556.25; **and** it is further

ADJUDGED that, upon filing of the Notice of Appointment and Certification of Compliance, the reasonable legal fees paid to the law firm of Seiden & Schein, PC. are deemed approved and fixed at $35,868.75; and it is further

ADJUDGED that, upon filing of the Notice of Appointment and Certification of Compliance, the reasonable commissions paid to AIB Management Company, for property management services, are deemed approved and fixed at $30,286.45; and it is further

ORDERED and ADJUDGED that AIB Management Company shall be surcharged $15,356.68, and AIB Management Company is directed to turn over $15,356.68 to plaintiff David Realty & Funding LLC within 45 days of service of a copy of this order with notice of entry; and it is further

ADJUDGED that upon filing of the Notice of Appointment and Certification of .Compliance, the reasonable legal fees paid to the law firm of Gaffin & Mayo, P.C. for legal services rendered to October 1998 are deemed approved and fixed at **$25,190;** and it is further

ORDERED that the issue of the reasonable fees of Gaffin & Mayo, P.C. for legal services

rendered from October 1998 through the present, and the issue of the reasonableness of the contingency fee earned by Seiden & Schein, P.C., are remanded to the Special Referee to hear and report; and it is further

ORDERED that the receiver, Seiden shall submit to the court (Chambers Room 551) originals of Form UCS 875 (Statement of Approval of Compensation), with applicable sections completed, for himself, Friedman, Alpren & Green, LLP, Seiden & Schein, PC., AIB Management Company, and Gaffin & Mayo, P.C. within 30 days of the date of this decision; and it is further

ORDERED that the Seiden firm, Friedman, Alpren & Green, LLP, AIB, and the G&M firm file the requisite **UCS** forms within **30** days and submit copies of filed forms to the court (Chambers Room **55**1); and it is further

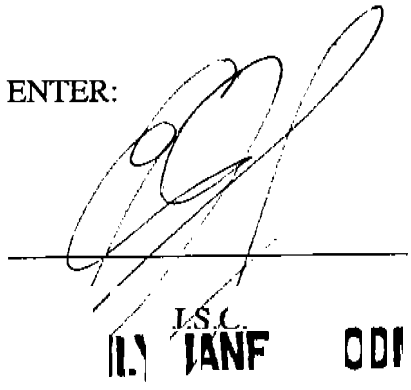
ORDERED and ADJUDGED that, upon Seiden's submission to the court of the **UCS** 875 forms, and proof of filing of all the **UCS** 872 forms, the law firm of Podell, Schwartz, Shecter & Banfield may release to Jay G. Seiden so much of the tax certiorari funds held in escrow as necessary to pay the approved legal fees of Seiden & Schein, and Gaffin & Mayo, P.C., and thereafter shall maintain the balance in escrow pending a decision confirming or rejecting the remaining issues remanded to the Special Referee; and it is further

ORDERED that the receiver, Seiden serve a copy of this Decision and Order, with notice of entry, on all parties, and on the Office of the Special Referee for referral back to Howard

Leventhal, within ***60*** days.

Dated: May 24,2004

ENTER:



J.S.C.