

Solow Management Corp. v Tanger

2006 NY Slip Op 30048(U)

June 7, 2006

Supreme Court, New York County

Docket Number: 0004044/4044

Judge: Robert D. Lippmann

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

PRESENT: HON. ROBERT D. LIPPMANN
Justice

PART 21

SOLOW MANAGEMENT CORP.,
Plaintiff,

INDEX NO. 4044/91

MOTION DATE _____

- vs -

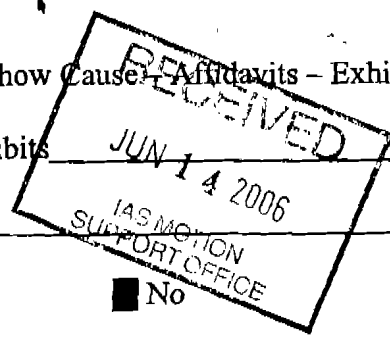
MOTION SEQ. NO. 012

STEVEN TANGER AND DEBRA TANGER,
Defendants.

MOTION CAL. NO. _____

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	_____
Answering Affidavits - Exhibits	_____
Replying Affidavits	_____
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	



Upon the foregoing papers, the sole issue presented is the amount of attorneys fees and disbursements to be awarded to plaintiff for the successful prosecution of the underlying eviction proceeding.

The parties have submitted post-hearing briefs at the conclusion of the second hearing, which was conducted pursuant to a June 21, 2005 decision of the Appellate Division, remanding the instant matter for a determination of attorneys' fees. Plaintiff Solow Management Corp. claims an entitlement to attorneys' fees and disbursements totaling \$767,225.81, exclusive of interests. Defendants Steven and Debra Tanger (the Tanger defendants) oppose the claim for attorneys' fees, arguing that plaintiff should not

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be reimbursed for attorneys' fees that were generated by wasteful and excessive litigation. For the reasons stated herein, plaintiff is awarded a \$652,141.94 fee award, exclusive of interests, as this is the amount of fees actually incurred for work performed and billed by counsel for plaintiff and which was established to be reasonable in the context of the nature of this extended litigation.

This action has a long protracted history (*see e.g. Solow v Wellner*, 86 NY2d 582 [1995]). The litigation arose out of a tenant rent strike and subsequent eviction proceedings involving the Tanger defendants and approximately 70 other tenants. Without conducting a hearing, the court initially awarded plaintiff \$5,000 in attorneys' fees, which was vacated by the Appellate Division (*Solow Mgt. Corp. v Tanger*, 1 AD3d 165 [1st Dept 2003]). Two years later, the action was again remanded by the Appellate Division because the trial court "erred in holding [that] the reasonableness of the charged fees [were] irrelevant" in view of the language of the Appellate Division's initial remand order (*Solow Management Corp. v Tanger*, 19 AD3d 225 [1st Dept 2005]). Accordingly, upon remand for the second time, this court must determine "the reasonableness of the charged fees," which are to be based on work that was actually performed and billed."

In addition, the Appellate Division also directed that pre-judgment interest on the attorney's fees should be calculated from November 28, 2001 -- the date on which the right to interests on the fee award accrued.

As the prevailing party in the underlying action, plaintiff is entitled to recover fees and disbursements, pursuant to Section 234 of New York Real Property Law, which includes fees for services performed on the fee application itself and on appeal. It is settled that the fee awarded should be calculated by the “lodestar method,” pursuant to which the court determines the reasonable number of hours which should have been expended and multiplies that figure by what the court finds to be a reasonable hourly rate, thereafter adjusting the fee upward or downward by consideration of several subjective factors, including the relationship of the fee to the amount at issue in the lawsuit (*see Juste v New York City Tr. Auth.*, 5 AD3d 736 [2d Dept 2004]) [concluding that a reasonable attorneys’ fee is based upon factors including “time and labor required, the difficulty of the issues involved, the skill required to handle the matter, and the effectiveness of the legal work performed”]). In determining what constitutes a “reasonable” attorney fee to be awarded, the court may consider various factors, including the complexity of the case, the experience of counsel, the skill exercised in handling the case, and the results obtained (*see Bleecker Charles Co. v 350 Bleecker Street Apt. Corp.*, 212 F Supp 2d 226 [SDNY 2002] [providing the following 12 factors to be considered in determining reasonable legal fees: (1) time and labor required, (2) difficulty of questions, (3) skill required to perform legal service, (4) preclusion of other employment by the attorney due to acceptance of the case, (5) customary fee, (6) whether the fee is fixed or contingent, (7) time imposed by client or circumstances, (8) the amount involved, (9) experience reputation and ability of

the attorney, (10) undesirability of the case, (11) nature and length of relationship with client, (12) reimbursement awards in similar cases]). In applying the lodestar method, the award of reasonable counsel fees may be based on an hourly rate greater than that billed to a client where the actual charge was below the market rate.

Here, the second attorneys' fees hearing, which is the subject of the instant post-hearing briefs, commenced on or about January 20, 2006 and continued for approximately ten days. The parties were given ample opportunity to submit documentary proof and to present witnesses. At the hearing plaintiff submitted voluminous billing records demonstrating that approximately 2500 hours was expended in connection with the litigation of this matter. From April 15, 1991 to on or about August 18, 2001, the law offices of Borah, Goldstein, Altschuler & Schwartz, PC (BGAS) expended 819.30 hours representing plaintiff on this matter at fees ranging from \$115 to \$250; the law offices of Rosenberg & Estis, PC (R&E) expended 1270.60 hours from April 6, 1998 to December 29, 2005 in representing plaintiff, at fees ranging from \$70 to \$575 an hour; and the law offices of Jack Newton Lerner (Lerner) expended 171.15 hours at an hourly rate of \$275. Proof adduced at trial was extensive and included cancelled checks and detailed billing records from the three law firms that represented Solow Management during the 15 or more years that this litigation has extended, as well as expert testimony regarding, *inter alia*, the reasonableness of the charged fees. In support of plaintiff's claim for fees, David Rosenberg, an attorney with 30 years of relevant experience, testified that the

hourly rate and number of billable hours that were charged by BGAS, R&E and Lerner were all reasonable and necessary. David I. Berkey, who appeared as an expert witness on behalf of the Tanger defendants to challenge the necessity and reasonableness of the attorneys fees and disbursements, presented, *inter alia*, that the case could have and would have settled years earlier had plaintiff been so inclined to avoid litigation.

At the hearing, counsel for plaintiff demonstrated that the approximately 2500 hours of time expended by BGAS, R&E and Lerner was a result of the firms working largely in tandem. Specifically, BGAS handled the matter from its inception until about June 1999, when R&E was retained as co-counsel. Lerner thereafter was substituted for BGAS and the trial was conducted by R&E and Lerner. Proof adduced at the hearing supports plaintiff's contention that there was an appropriate division of labor throughout the litigation.

In addition, BGAS presented at the hearing that it expended 21.7 hours in preparation for and time spent at the second fee hearing. Counsel for BGAS testified that his present billing rate is \$425 per hour, although he had billed Solow Management at a discounted rate of \$250 during the course of the litigation. Counsel for BGAS claims that an additional \$9,222.50 in charges to be added to the total amount of fees and disbursements of \$153,946.44, should be awarded to Solow Management.

Similarly, counsel for R&E claims an additional \$21,565.50 in fees incurred preparing and attending the second fee hearing; 27.3 hours for on attorney at an hourly

rate of \$335 and 21.6 hours billed for another attorney at \$575 per hour. R&E also seeks \$5,929.50 for additional fees incurred in the preparation of the of the post hearing brief (17.7 hours at an hourly rate of \$335). R&E further requests \$13,575.20 in expert witness fees. Accordingly, R&E claims a total of \$560,471.76 in attorneys' fees and disbursements.

Finally, Lerner, who was rendered ill and unable to appear in court for the fee hearing, submits an additional bill for \$1,196.25 for time spent reviewing documents and preparing for the hearing and contributing to the post-hearing brief. The total bill for Lerner's services amounts to \$39,232.41.

In light of the foregoing facts, and mindful of the legal standards regarding the reimbursement of legal fees, as set forth by the Appellate Division orders of November 13, 2003 (directing the court to "determine the amount of attorney fees actually incurred by plaintiff") and June 21, 2005 (enunciating the settled principle that "the recoverable fees are those that are reasonable"), the court awards legal fees in the amount of \$652,141.94, exclusive of prejudgment interest. The Court has reviewed the contemporaneous time records submitted by plaintiff as well as reviewed the expert testimony of Rosenberg, an accomplished real estate attorney who has handled numerous landlord-tenant matters, and finds that a downward adjustment of the lodestar amount is warranted in consideration of the fact that though undeniably extensive, the litigation concerned claims for unpaid rent and did not involve complex or novel legal issues. A

downward modification of the fees is further warranted in light of the fact that the amount in controversy, as indicated by the amended complaint for the underlying landlord tenant action, was \$180,313.57 in accrued rent and interest as specified per the Tanger defendants' lease. Moreover, the court cannot ignore that the Tanger defendants – similar to other tenants involved in litigation with plaintiff concerning substantially the same issues -- attempted unsuccessfully to settle the claim and due to the delay tactics and excessive litigiousness that was committed by both sides of the dispute (*see e.g. 601 West Assocs. LLC v Kleiser-Walczak Constr.*, 2004 WL 1117901 [SDNY 2004]; *Gatti v Community Action Agency of Greene County, Inc.*, 263 F Supp 2d 496, 518-519 [NDNY 2003]; *cf Measom v Greenwich and Perry Street Housing Corp.*, 8 Misc 3d 50, 798 NYS2d 298 [App Term 2005]). Accordingly, the court finds in its discretion that it will reduce the final award by 15 percent.

To the extent that downward modification does not take into consideration Tanger defendants' objections to the total amount of attorney' fees and disbursements awarded to plaintiff, the court finds unpersuasive the claims that Solow's global litigation warrants a more substantial reduction of legal fees and that plaintiff's use of three law firms was unnecessary. As previously stated, the court finds no showing that BGAS, E&R and Lerner duplicated work. Indeed, there appears to be a relatively clear division of labor. In any event, "many tasks require or benefit from the attention of more than one attorney" and the decision to have "more than one attorney research and participate in drafting a

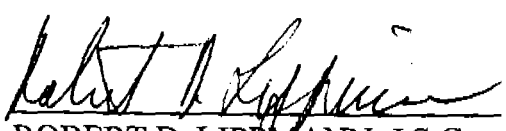
brief is common practice and there not necessarily duplicative" (*Bleeker Charles Co.*, 212 F Supp 2d 226, 230 [SDNY 2002]).

Accordingly, the court finds that Solow Management is entitled to attorney fees and disbursements and therefore awards plaintiff \$652,141.94, to which sum, interest at the rate of 11 percent is to be added from November 28, 2001. Plaintiff is directed to settle judgment forthwith.

This decision constitutes the judgement and order of the court.

Dated: June 7, 2006

ENTER:


ROBERT D. LIPPMANN, J.S.C.
HON. ROBERT D. LIPPMANN
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE