

Barrett v Toroyan

2006 NY Slip Op 30079(U)

Supreme Court, New York County

Decided: December 11, 2006

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. RICHARD B. LOWE, III

Index Number : 112012/2004
BARRETT, PATRICK D.
vs.
TOROYAN, KEVORK
SEQUENCE NUMBER : 010
CONFIRM/REJECT REFEREE REPORT

C

PART 56

INDEX NO. _____
MOTION DATE 11/9/06
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

NYS SUPREME COURT
REVIEWED
DEC 15 2006
E-FILING DEPT.

FILED
DEC 13 2006
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 12/11/06

HON. RICHARD B. LOWE, III
[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
PATRICK D. BARRETT, individually and as a
Limited Partner of Delma Associates, LP, for the
benefit of Delma Associates, LP,

Plaintiff,

Index No. 112012/2004

-against-

KEVORK TOROYAN, DELMA ASSOCIATES, LP,
DELMA PROPERTIES, INC., DELMA ASSOCIATES
II, LLC, NABIL SHAWWA, WA'EL KHOURY, and
ISSAM HOURANI,

Defendants.

FILED
DEC 13 2006
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Hon. Richard B. Lowe, III:

Defendant moves pursuant to CPLR § 4403 for an order confirming the report of the Special Referee dated July 20, 2006. The plaintiff opposes the motion arguing that counsel did not have an opportunity to conduct discovery on the issues before the Special Referee.

In its March 21, 2006, this court referred to a referee the amount of litigation fees paid by Delma Associates, LP (Delma) for the defense of the individual defendants in this matter. Having found such payment, if any, improper, the court referred the amount paid to the referee and directed said amount would thereafter be paid back to Delma by the individual defendants.

At the hearing, the defendant presented one witness, and the plaintiff presented no witnesses. The Special Referee concluded that no monies had been advanced for the litigation costs of the individual defendants by Delma (Report, p 52). Defendant now moves to confirm the report.

On a motion to confirm a Referee's report, a court should confirm if the record supports the referee's findings (*Baker v Kohler*, 28 AD3d 375 [1st Dept 2006]). A Referee's report is granted deference because it is the Referee who had the opportunity to observe the demeanor and credibility of the witnesses (*Wilkenfeld v Rowen*, 262 AD2d 28 [1st Dept 1999]). It is the referee, as the trier of fact, who is at liberty to believe or disbelieve witnesses and best weigh and analyze the evidence on the record in reaching his conclusion (*See Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 46 NY2d 528, 534).

Plaintiff's primary argument, in opposition to the application, is his inability to obtain discovery on the relevant issue. Plaintiff first made a request for an adjournment to allow time to obtain discovery before the Presiding Justice of the Special Referee's Part 50-R. This application was denied (Report, p. 9). This same issue was addressed before the Special Referee who, pursuant to CPLR § 4201, has the authority to direct discovery under circumstances which he/she feels appropriate. Said request was denied after the referee found Plaintiff waived his right to the discovery. The referee denied the request on two grounds. First, that the request had been already denied by the administrative judge. Second, the referee denied the request finding that at no time did plaintiff "serve a formal request for document discovery or subpoena as provided for by Article 31 of the CPLR" (Id.).

Furthermore, the Special Referee noted plaintiff's violation of the Canon of Ethics and rules of civility requiring counsel to allow for reasonable requests for extensions by opposing counsel. Defendant, because of a conflict, requested an adjournment from the plaintiff on two occasions, but was denied. Thereafter, on the trial date, plaintiff sought an adjournment on his own behalf in order to obtain discovery (Report p. 9). The referee found, "Having denied

[defendant's] request for an adjournment of today's hearing because of conflict, [plaintiff] cannot now be heard to complain about the lack of an adjournment (Report, p.9).

This court finds the Special Referee was proper in denying plaintiff's counsel an adjournment in order to take additional discovery. The referral order was dated March 21, 2006 and the date for the hearing was July 20, 2006. At no time during the four interim months did plaintiff's counsel serve a subpoena request seeking the defendant's billing records, nor did he serve any discovery requests. Lastly, plaintiff will not be allowed to use the instant motion to confirm as a third bite at the apple in order to obtain discovery which he has been dilatory in seeking. Therefore, plaintiff was properly denied an adjournment.

Having reviewed the proceedings before the Special Referee, this court finds the report well supported by the record. The Special Referee heard the testimony of Defendants' witness, the Corporate Controller of Delma Properties, Inc. The Special Referee found his testimony to be credible. Based on this testimony, the Referee found no monies had been paid by Delma for the litigation costs of the individual defendants. Plaintiff introduced no evidence to refute the testimony or the referee's findings. Rather, when asked by the referee if he was ready to put on his case, the plaintiff responded, "No" (Report at 10).

Lastly, plaintiff suggests that this issue should not have been referred to a Special Referee. No such objection was made to the Special Referee. More significantly, this issue was never raised on appeal of the underlying decision (Gottehrer Aff., Ex. 2)(Plaintiff's Notice of Appeal). Therefore, plaintiff is precluded from objecting now to the referral.

Therefore, based on the foregoing, it is hereby

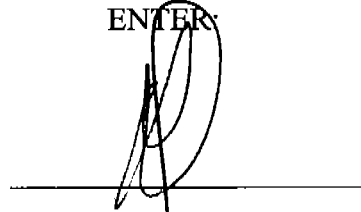
ORDERED the motion to confirm the report of the Special Referee dated July 20, 2006 is

granted.

This shall constitute the order and decision of the court.

Dated: December 11, 2006

ENTER

A handwritten signature in black ink, appearing to be 'R. B. Love, III', is written over a horizontal line.

J.S.C.

HON. RICHARD B. LOVE, III

FILED

DEC 13 2006

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