

Cocolicchio v Rizzo

2007 NY Slip Op 32200(U)

July 16, 2007

Supreme Court, New York County

Docket Number: 0600173/2004

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN
Justice

PART 49

Index Number : 600173/2004
COCOLICCHIO, SALVATORE
vs
RIZZO, CHARLES
Sequence Number : 006
CONFIRM AWARD

INDEX NO. _____
MOTION DATE 3/8/07
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK

Dated: 7/16/07 Herman Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

-----X

SALVATORE COCOLICCHIO, Individually
and Derivatively on Behalf of CHARLES
RIZZO & ASSOCIATES, INC., JEROME
SCANLON and MARTIN BUTLER,

Plaintiffs,

-against-

Index No. 60017-04

CHARLES RIZZO, MARIE RIZZO, CHARLES
RIZZO & ASSOCIATES OF NY, INC., RALPH
HOCHBERG SKOLNICK & HOCHBERG, P.C.,
and CHARLES RIZZO & ASSOCIATES, INC.,

Defendants.

FILED
JUL 20 2007
NEW YORK
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-----X

CAHN, J.:

This action arises out of the dissolution of Charles Rizzo & Associates, Inc. ("CRA"), a closely-held corporation engaged in the business of expediting the procurement of construction permits for developers and contractors.

Plaintiff Salvatore Cocolicchio moves to confirm the Report and Recommendations of Special Referee Louis Crespo (the "Referee") dated October 17, 2006 (the "Report"), which recommended that CRA be directed to supplement, amend and correct its accounting in various respects, CPLR § 4403. Plaintiff further seeks, on reply, a judgment declaring that based upon the Referee's findings the net assets of CRA are \$2,209,344. Defendants oppose confirmation to the extent that the Report allegedly fails to reflect \$623,095 in expenses, and improperly attributes \$555,070.76 in additional work to CRA. Defendants also object to entry of a judgment as beyond the scope of the confirmation proceeding, and note that the proposed judgment overstates the amount of available insurance proceeds.

The facts of this matter have been discussed in prior orders of this court, familiarity with

which is presumed. As is relevant here, by order dated November 21, 2005 the court directed the Referee to hear and report on various accounting issues relating to CRA. Specifically, the court referred the questions of (1) what income belonged to CRA from on and after September 4, 2003, (2) what expenses were properly allocated to CRA from on and after September 4, 2003, (3) what assets were left or should belong to CRA as of September 4, 2003 and (4) what was the value of any assets that were conveyed by CRA to Charles Rizzo ("Rizzo") or Charles Rizzo & Associates of NY ("CRA NY") or any corporation in which he had an interest, or were taken by Cocolicchio.

In anticipation of the hearing, by order dated January 9, 2006, defendants were directed to provide an accounting and reply to any objections thereto submitted by plaintiff. After several conferences, the hearing was held on May 17 and 18, 2006. Four witnesses testified: CRA accountant James Wasenius; CRA/CRA NY employee Robert Gordon; plaintiff (and former CRA employee) Jerome Scanlon; and plaintiff's expert witness, John Bonora, CPA. In lieu of submitting memoranda of law, the parties made closing arguments.

After reviewing the entire record and assessing the credibility of the witnesses, the Referec issued a 61-page Report which found the accounting insufficient in a number of respects. He recommended that CRA be directed to supplement, amend and correct the accounting as follows:

- (a) \$55,000 conceded by CRA to be added to "Total Accts Receivable and WIP" column and the \$1,140,809.47 adjusted to \$1,195,809.47;
- (b) CRA to adjust and account the sum of \$220,119.64 and to add the same to "Total Accts Receivable and WIP" column and the \$1,195,809.47 be adjusted to \$1,415,929.11;
- (c) CRA to adjust and account the sum of \$334,951.12 and to add the same to "Total Accts Receivable and WIP" column and the \$1,415,929.11 be adjusted to \$1,750,880.23;
- (d) CRA to adjust and account as a credit from CRA NY the reimbursable expenses of \$44,013.13;

(e) CRA to adjust and account as an asset the sum of \$25,879.44 and to cancel out the same amount from its books and records as a “business expense”;

(f) CRA to adjust and account as an asset the balance of the insurance proceeds in the sum of \$366,243.000 and to journal the \$100,000 paid to CRA as an outstanding loan thereunder;

(g) CRA to adjust, account and “back out” the \$25,000 legal billing that Wasenius concedes was incorrectly journaled and to be redeposited in CRA’s bank account;

(h) CRA to adjust, account and “back out” the claimed “debt” of \$34,720 as none exists, and

(i) CRA to adjust and account as a management/salary expense the sum of \$143,640.00, representing the reasonable costs incurred for invoicing and collecting the sum of \$555,070.76.

(Report at 58-60).

The Report is confirmed, except to the extent that the matter is remanded for a determination regarding defendants’ claim that CRA should be credited with \$623,095 in expenses agreed upon before the hearing. The report of a referee will be confirmed whenever the findings contained therein are substantially supported by the record (see, Sichel v Polak, 36 AD3d 416 [1st Dept 2007]) and the referee has clearly defined the issues and resolved matters of credibility (see, Poster v Poster, 4 AD3d 145, 145 [1st Dept 2003]; Einy v Robert Elevator Co., 209 AD2d 248 [1st Dept 1994]; Namer v 152-54-56 West 15th Street Realty Corp., 108 AD2d 705 [1st Dept 1985]). “The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor” (Poster, 4 AD3d at 145).

Defendants raise no substantial challenge to the factual findings of the Report. The issue regarding the attribution of approximately \$555,000 in additional work to CRA was examined in detail by the Referee (see, Report at 42-43, 53). Insofar as it rests on an interpretation of the evidence and the credibility of witnesses, it will not be disturbed.

However, defendants' claim that the equity on CRA's balance sheet needs to be reduced by certain expenses which were reflected in the profit and loss statements annexed to the accounting, requires further clarification. Defendants assert that of approximately \$781,000 in expenses at issue prior to the hearing, a total of \$623,095 was conceded by plaintiff's objections to the accounting. Defendants thus claim that only the balance of approximately \$160,000 was the subject of dispute at the hearing. Defendants state that they attempted to resolve this issue with plaintiff's new accountants after the Report was issued, but that they refused to agree to the adjustment. The issue was alluded to in various e-mails sent to the Referee in December 2006, but was not squarely addressed or resolved.

Defendants do not directly dispute that \$623,095 of the expenses were agreed upon in advance of the hearing. Rather, they argue that there was no binding agreement between the parties or their attorneys regarding the expenses pursuant to CPLR § 2104.

The court cannot resolve the issue on the present record. If, in fact, the asserted expenses are not reflected in the Report because the parties' prior agreement brought them outside the scope of the hearing, an adjustment to the balance sheet may be required. The court therefore remands the issue to the Referee to report on (1) whether the parties entered into any agreement, stipulation or understanding regarding the \$623,095 in allegedly conceded expenses and, if not (2) whether the alleged \$623,095 in expenses was within the scope of the hearing and accounted for in the Report.

Finally, plaintiff asserts that the Report incorrectly lists the insurance proceeds as \$366,242.95. Plaintiff notes that after the hearing, payments were made from those funds to professionals so that as of January 2007, only approximately \$208,000 remains available. Furthermore, plaintiff argues that it is beyond the scope of this confirmation motion to enter a judgment with respect to particular items identified in the Report. Defendants do not address these issues in their papers.

A judgment is not appropriate at this juncture. Although the court will confirm the Report to the extent indicated above, a settlement of the judgment must await further proceeding relating to post-hearing adjustments and the resolution of the issue of expenses remanded to the Referee.

Accordingly, is it

ORDERED, that the report of the Special Referee dated October 17, 2006 is confirmed to the extent set forth above, and it is further

ORDERED, that the matter is remanded to the Referee for further proceedings consistent with this order.

Dated: July 16, 2007

ENTER:



J.S.C.

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