

Warburg, Pincus Equity Partners, L.P. v Keane

2007 NY Slip Op 32717(U)

August 28, 2007

Supreme Court, New York County

Docket Number: 0602626/2003

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 : 602626/2003
WARBURG PINCUS EQUITY
vs
KEANE, MICHAEL DAVID
Sequence Number : 016
CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____
MOTION DATE 3/5/07
MOTION SEQ. NO. 010
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

FILED

AUG 3 1 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

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

Dated: 8/28/07

Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

-----X

WARBURG, PINCUS EQUITY PARTNERS, L.P., :

Plaintiff, :

- against - :

Index No. 602626/2003

MICHAEL DAVID KEANE, :

Defendant. :

-----X

HERMAN CAHN, J.:

Plaintiff Warburg Pincus Equity Partners, LP moves to confirm the report of the Special Referee, dated December 29, 2006, awarding Plaintiff specific damages for attorneys' fees and disbursements incurred as a result of Defendant Keane's contempt of court. Defendant cross-moves to vacate the report.

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BACKGROUND

This action, commenced on August 13, 2003, has been the subject of multiple decisions and orders, familiarity with which is presumed.

In brief, Plaintiff obtained a judgment against Defendant, in the amount of approximately \$750,000. 11/1/06 Hearing Transcript (hereinafter "Tr"), at 45. The judgment was affirmed on appeal. *Warburg Pincus Equity Partners, LP v Keane*, 22 AD3d 321 (1st Dep't). Defendant failed to pay the judgment and Plaintiff commenced enforcement proceedings. As a component of those proceedings, Plaintiff subpoenaed Defendant regarding his finances, seeking both documents and testimony. Defendant sought to quash the subpoena, which motion was denied

by the Court and he was ordered to comply with the subpoena. Thereafter, Plaintiff alleged that Defendant was withholding information responsive to the subpoena, and moved to hold him in contempt of both the subpoena and of the order directing his compliance thereunder.

The issue of Defendant's contempt was referred to Special Referee L. Lowenstein to hear and report. The Special Referee reported that although the Defendant turned over a substantial number of documents, he did not turn over all the documents required. 7/3/06 Order at 2. Referee Lowenstein's report, dated March 17, 2006, concluded that the failure to obtain these documents from Defendant required Plaintiff's counsel to spend time and effort which would not otherwise have been necessary and recommended that Plaintiff be entitled to recover the cost of such added expense. 7/3/06 Order at 2.

The Special Referee's findings, that the Defendant did not fully comply with the subpoena and should be held in contempt, were amply supported by the record and his report and recommendation was, therefore, confirmed by the Court. *Id.* at 1. However, at that time, the Special Referee had not heard sufficient testimony to find the amount of damages incurred by the Plaintiff because of Defendant's contempt. The issue of the amount of damages incurred by Plaintiff, in legal fees and disbursements, was again referred to the Referee Lowenstein to hear and report. *Id.*

A hearing was held before Referee Lowenstein on November 1, 2006, at which time arguments on the issue were presented by both counsel and witnesses were heard. Referee Lowenstein also permitted the parties to submit a post-hearing memorandum, in lieu of a summation at the hearing (Tr at 140), and both parties did so. His report, dated December 29,

2006, recommended an award to Plaintiff for Defendant's contempt in the amount of \$290,333.04. Report at 8.

Plaintiff and Defendant then made the instant motions, seeking, respectively, to confirm and reject the report.

DISCUSSION

The Special Referee's report is substantially supported by the record and, when that is the case, it "is well settled that a special referee's findings of fact and credibility will generally not be disturbed." *RC 27th Ave. Realty Corp. v New York City Housing Auth.*, 305 AD2d 135, 135 (1st Dep't 2003). *See also Rasmussen v Yellow River, Inc.*, 298 AD2d 322, 323 (1st Dep't 2002).

The Amount in the Report:

The Special Referee determined that the total value of the legal services rendered by Willkie Farr, Plaintiff's counsel, was \$283,227.02. Report at 7. He also awarded an additional sum of \$7,106.02 for disbursements and costs in the contempt proceeding. Report at 8.

Accordingly, he recommended that Plaintiff be awarded the sum of \$290,333.04. Report at 8.

Following the issuance of the report, counsel for Defendant raised a question about this calculation, separate and distinct from the other arguments. Counsel for Defendant noted and, after conferring, counsel for Plaintiff agreed, that the \$290,333.04 figure was derived through a mathematical error. Counsel for both parties agree that the amount requested by Plaintiff was for a total of \$283,227.02, which reflects \$276,121.00 of attorneys fees and \$7,106.02 of disbursements and costs. 3/9/07 Letter.

The Meaning of 'Incurred':

The precise language used in the Court's order confirming the Special Referee's finding of contempt and awarding attorney's fees and costs was: "the issue of the amount of the damage incurred by plaintiff in the form of legal fees is again referred to the Special Referee to hear and report said amount." 7/3/06 Order at 2.

Defendant objects to the Special Referee's report arguing that the Court's use of the word "incurred" has a precise meaning, one that has already been clarified by the First Department. In *Jamie v Jamie*, 19 AD3d 330, 331 (1st Dep't 2005), the court held that the party awarded costs "are not entitled to any attorneys' fees for work performed after . . . the date of the order referring the matter to a Special Referee, or to any other costs and expenses incurred after that date" because the order there held that they "shall be entitled to the attorney's fees, along with the costs and disbursements, which they have *incurred* in prosecuting this contempt motion." *Id.* (emphasis in the original). The court then found that the "use of the past tense plainly limits recovery to the date of the order." *Id.*

Referee Lowenstein's December 29, 2006 Report awarded Plaintiff fees and expenses beyond the July 3, 2006 date when the Court's Order was issued. Accordingly, it is clear that Plaintiff may recover from Defendant only those fees and disbursements incurred prior to July 3, 2006. If the Court chooses to award fees and expenses following a contempt hearing, but intends the damages to continue through a Special Referee's proceeding, the Court will so indicate, and did not do so here.

Additionally, the last time the Court awarded fees to Plaintiff against Defendant in this case, the Court proceeded in this manner. Pursuant to the May 19, 2005 Order, Plaintiff was

awarded fees and expenses, incurred as a result of Defendant's default on the July 9, 2004 judgment against him. 5/19/05 Order at 1-2, 5. At that time, Plaintiff also sought "fees on fees," seeking fees and expenses that were incurred following being awarded fees and expenses, including specifically seeking fees and costs incurred in during Referee Lowenstein's hearing on the amounts of fees and expenses to award Plaintiff. Then too Plaintiff's claim for same was denied. *Id.* at 5-6.

The Amount of Damages:

As to the amount of damages, the fees and disbursements, as calculated by Plaintiff, extend through at least October 30, 2006. Thomas Aff, Exh D. Defendant, however, calculated that of the 562 hours of time for which Warburg seeks recovery, 202.9 were incurred following Referee Lowenstein's March 17, 2006 report, following the contempt hearing. With this calculation, Defendant contends that Plaintiff's attorneys fees should be cut by \$132,466. Opp Br at 3. However, Defendant should have calculated fees to cease following the July 3, 2006 Order of the Court, not Referee Lowenstein's Report of March 17, 2006

The Court reduces the award of fees and costs by the \$132,466 put forth by Defendant. The award to Plaintiff is therefore reduced to \$150,761.02.¹ Although the Special Referee found that testimony on the appropriateness of these rates to be credible, it is also true that the reasonableness of charges to a client is not synonymous with the reasonableness of the charges when the costs are awarded against opposing counsel. *See Daiwa Special Asset Corp v Desnick, MD*, 2002 WL 31767817, at *2 (SDNY Dec 3, 2002). *See also Pennsylvania v Delaware Valley*

¹ The sum remaining after reducing \$283,227.02, the corrected figure agreed to by both parties, by \$132,466 .00.

Citizens' Counsel for Clean Air, 478 US 546, 565 (1986).

More importantly, despite the fact that the Court has previously refused to award Plaintiff "fees on fees," Plaintiff failed to calculate its fees and expenses from the July 3, 2006 date. Indeed, Plaintiff failed to reply at all to Defendant's contention that the fees and expenses had to be cut, and the case law cited by same. This is particularly noteworthy here, where Plaintiff filed reply papers, but chose not to address these issues, even in the alternative. As it is Plaintiff's obligation to prove his fees and expenses (*Blum v Stenson*, 465 US 866, 895 (1984), *Private Sanitation Union Local 813 Int'l Brotherhood of Teamsters v Gaeta-Serra Assoc., Inc.*, 2005 WL 2436194 (EDNY 2005)), the Court will use the numbers provided in Defendant's un rebutted testimony. *Holskin v 22 Prince Street Assoc., et al.*, 178 AD2d 347, 348 (First Dep't 1991).

The Court has considered Defendant's other arguments in opposition to the motion to confirm the Special Referee's report, and finds them unavailing.

Accordingly, it is

ORDERED that Plaintiff's motion to confirm the report of the Special Referee, recommending the amount that Plaintiff recover, in attorneys' fees and disbursements, as damages for Defendant's contempt of court is granted in part and denied in part; and it is further

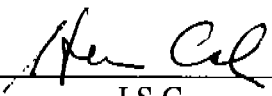
ORDERED that the amount of money awarded to Plaintiff from Defendant for attorneys' fees and expenses is set at \$150,761.02; and it is further

ORDERED that the Defendant's cross-motion to reject the report of the Special Referee is denied; and it is further

ORDERED that the clerk shall enter judgment in favor of Plaintiff against Defendant accordingly.

Dated: August 28 , 2007

ENTER:



J.S.C.

FILED
AUG 31 2007
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