

Unitrade Mktg. Group, Inc. v 200 Fifth LLC

2008 NY Slip Op 32856(U)

October 10, 2008

Supreme Court, New York County

Docket Number: 603856/05

Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 12

Index Number : 603856/2005

UNITRADE MARKETING

vs

200 FIFTH LLC

Sequence Number : 022

CONFIRM/REJECT REFEREE REPORT

INDEX NO. 003856/05

MOTION DATE _____

MOTION SEQ. NO. 022

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**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/10/08


BARBARA R. KAPNICK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION *18.C.*

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 : IA PART 12

-----X
UNITRADE MARKETING GROUP, INC., et al.,
Plaintiff,

DECISION/ORDER
Index No. 603856/05
Motion Seq. No. 022

- against -

200 FIFTH LLC,

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141B).

BARBARA R. KAPNICK, J.:

By Decision/Order on mot. seq. no. 020 dated May 11, 2007, this Court referred out for a hearing the issue of whether the law firm of Jaroslawicz and Jaros should be entitled to retain the 10% legal fee paid by defendant 200 Fifth LLC on behalf of Laurie Schacht and her company Adventure Publishing Group ("Adventure"), one of the plaintiffs in this action represented by Jaroslawicz & Jaros, as part of the settlement of her claims with the defendant, or should be required to return 4% of the legal fee to defendant or distribute any amount of that fee to Ms. Schacht and her company.

Jaroslawicz & Jaros now moves, pursuant to CPLR § 4403, for an order confirming the report of Special Referee Sue Ann Hoahng, dated February 29, 2008, which concluded that "the firm of Jaroslawicz & Jaros is entitled to retain the 10% legal fee paid by defendant 200 Fifth ... LLC on behalf of Laurie Schacht and her company Adventure Publishing Group ." Jaroslawicz & Jaros also seeks a finding that its fee "shall be ten percent (10%) as paid by the landlord."

[*3]
The Retainer Agreement between Jaroslawicz & Jaros and Adventure Publishing Group dated January 31, 2006, provided, inter alia, that

2. J&J shall act as counsel in exchange for a 6% contingency fee on any moneys paid by 200 Fifth LLC for an early termination of Tenants lease, including any moneys for moving expenses, fixture expenses, relocation costs and any reason. J&J will be entitled to the percentage as set forth herein whether by way of settlement or verdict, plus all legitimate case expenses incurred, including filing fees and depositions.

After extensive negotiations between the parties and counsel, Adventure, by its principal Laurie Schacht, entered into a written settlement agreement with defendant dated March 6, 2007, which provided, among other things, that Jaroslawicz & Jaros would act as the Escrow Agent to receive the amounts to be paid by the defendant 200 Fifth LLC, and to disburse them to Adventure in conformance with the terms of the settlement.

Subsequently, a dispute arose between Jaroslawicz & Jaros and Adventure as to the sum that Jaroslawicz & Jaros was entitled to retain as its fee. Jaroslawicz & Jaros brought on an Order to Show Cause which led to the order of reference.

Generally, a court will confirm the report of a referee when his or her findings are supported by the record and where the referee has clearly defined the issues and resolved matters of credibility. *Thomas v Thomas*, 21 AD3d 949 (2d Dept 2005); *Kardanis v Velis*, 90 AD2d 727 (1st Dept 1982).

The settlement agreement provides that the defendant would pay Adventure "the total sum of" \$1,265,500, and return Adventure's security deposit, as well as certain moneys that Adventure had paid for rent, additional rent, electricity, and other rental charges for the period between November 1, 2006 and February 28, 2007. Neither the amount of the security deposit, nor that of the rental charges that were to be returned, is set forth in the settlement agreement.

Nataschia Ayers, an attorney at Jaroslawicz & Jaros, testified at the hearing before the Referee that, at a settlement conference before this Court, Ms. Schacht sought to obtain more than the proposed settlement amount of \$1,150,000, and that the defendant refused to increase that amount, but agreed that it would pay Jaroslawicz & Jaros' legal fee so Ms. Schacht would not have to pay any legal fees directly out of her share. Ms. Ayers testified that when the defendant's attorney asked, at that conference, whether the fee was the "usual 10%," "[n]ot even thinking, completely forgetting because I had so many of them, that it was only 6 percent, Ms. Schacht said, yes, in her mind, she said, what she indicated to [Ms. Ayers], I will get to keep the 4 percent because I'm basically lying to the landlord, and the settlement was 1.150, plus the attorney's fee."

Ms. Ayers further testified that at a subsequent settlement conference, the defendant's principal again refused to increase the settlement amount, but agreed to return the security deposit and

the rental charges that are described in the agreement. Ms. Ayers' testimony was undisputed, the defendant did not appear at the hearing and Ms. Schacht, who was present, did not testify.

Adventure argued to the Referee that Jaroslawicz & Jaros was obligated to pay over the settlement agreement amount of \$1,265,500 to Adventure, and contended that Jaroslawicz & Jaros's fee should be limited to 6% of that amount, as provided for in the Retainer Agreement.

In a series of e-mails sent to Ms. Ayers after the settlement was entered into, Ms. Schacht confirmed that she had stated to the defendant that Jaroslawicz & Jaros' fee was 10%, because, as she put it in one of the e-mails, "[t]hat meant in the end, more for you and more for me. The higher my settlement is, the more money you get." There is no dispute that the defendant believed that Jaroslawicz & Jaros' fee was 10% and that the settlement figure reflects that understanding. The Referee had a sound basis for concluding, on the evidence presented to her, that the defendant's agreement to pay Jaroslawicz & Jaros' legal fee by adding to the settlement amount 10% of the sum that it had agreed to pay Adventure, rendered Adventure's contingency fee agreement with Jaroslawicz & Jaros irrelevant inasmuch as Adventure would now pay no legal fee out of its share to Jaroslawicz & Jaros.

In addition, given defendant's failure to appear at the hearing, and in light of Ms. Ayers's testimony that the defendant

[*6]

paid Jaroslawicz & Jaros a 10% fee on behalf of many of the other tenants in the Toy Building whom Jaroslawicz & Jaros was representing, it was reasonable for the Referee to recommend that Jaroslawicz & Jaros not be required to return any portion of the 10% fee to the defendant or distribute any amount of that fee to Ms. Schacht.

Accordingly, it is hereby

ORDERED that the February 29, 2008 report of Special Referee Sue Ann Hoahng is confirmed; and it is further

ADJUDGED and DECLARED that the fee to Jaroslawicz & Jaros, LLC shall be the 10% fee as paid directly to Jaroslawicz & Jaros by the defendant/landlord 200 Fifth LLC.

This constitutes the decision and order of this Court.

Dated: October 10, 2008



BARBARA R. KAPNICK
J.S.C.

BY
BARBARA R. KAPNICK
J.S.C.

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