

Tsabbar v 17 East 89th St. Tenants, Inc.
2008 NY Slip Op 32914(U)
October 21, 2008
Supreme Court, New York County
Docket Number: 108901/05
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN
Justice

PART 11

TSABBAR, ZION
- v -
17 EAST 89TH STREET TENANTS, INC,
ET AL.

INDEX NO. 108901/05
MOTION DATE 6-5-08
MOTION SEQ. NO. 8
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 is decided in accordance with the attached Memorandum Decision & Order.

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

FILED
OCT 27 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 24, 2008

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
ZION TSABBAR,,

Index No. 108901/05

Petitioner,

- against -

17 EAST 89TH STREET TENANTS, INC., KURZMAN,
KARELSON & FRANK, LLP and BALBER PICKARD
BATTISTONI MALDONADO & VAN DER TUIN, P.C.,

Respondents.

-----X
JOAN S. MADDEN, J.:

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

Respondent 17 East 89th Street Tenants, Inc. (“the co-op”) moves for an order confirming the referee’s report dated March 25, 2008. Tsabbar, who is pro se, opposes the motion and requests that he be permitted to seek damages against the co-op.

Background

Tsabbar is a dentist, who, beginning in November 3, 1995, held a proprietary lease for apartment 1D (“the Apartment”) at the an apartment building located at 17 East 89th Street, New York, NY, owned by the co-op, out of which he operated a private dental practice. A dispute between Tsabbar and the co-op arose concerning Tsabbar’s subletting of his Apartment without the co-op’s written approval in violation of the parties’ lease (“the Lease”). After approximately six years of litigation, which included multiple actions filed by Tsabbar in an attempt to relitigate issues decided against him, on April 8, 2003, the co-op obtained an order restoring it to possession of the Apartment occupied by Tsabbar, and finding Tsabbar liable for use and

occupancy (i.e. maintenance charges), attorney's fees, and rent arrears.¹ Tsabbar subsequently moved to "vacate" the court's decision and order dated April 8, 2003. By decision and order dated April 14, 2004, the court denied the motion and wrote that "as it appears that Tsabbar has exhausted all viable avenues of litigation concerning this matter, he shall be required to obtain permission from the court before bringing any further litigation related to this matter in this court."

Tsabbar's appeal of the April 8, 2003 decision and order was denied by the Appellate Division, First Department. See 17 East 89th Street Tenants, Inc. v. Tsabbar, 6 AD3D 309 (1st Dept 2004). In addition, by decision and order dated February 16, 2006, the Appellate Division, First Department denied Tsabbar's motion to vacate certain prior orders which dismissed his claims as barred by the doctrines of res judicata and collateral estoppel. Tsabbar v. Auld, 26 AD3d 233 (1st Dept 2006). The court described Tsabbar's motion to vacate as "the most recent installment in his protracted, highly litigious and uniformly unsuccessful quest to sublet his professional cooperative apartment without board approval" and imposed sanctions against Tsabbar in the amount of \$5,000 for frivolous conduct, together with costs for attorneys' fees and reasonable expenses as were reasonably incurred by respondents in responding to the motion. Id., at 234.

Tsabbar sought relief in federal court and also moved to vacate the order and appealed it, but was unsuccessful. He was subsequently ejected from the Apartment, which was sold at auction to a third party on December 22, 2005, and a new proprietary lease and shares of stock in

¹The full history of the litigation is set forth in this court's decision and order in this proceeding dated June 2, 2006, and it will not be repeated here.

the Apartment were issued. The net proceeds of the sale totaled \$690,000, and the money placed in escrow. In accordance with the court's decisions and orders dated June 2, 2006 and October 2, 2007 certain of the funds were distributed Tsabbar and to the co-op for attorney's fees, outstanding maintenance and other expenses. In addition, certain of the money was held in escrow pending determination of a Special Referee regarding amounts owed to the co-op by Tsabbar.

Specifically, in its decision and order dated June 2, 2006, as modified on October 5, 2006, the court appointed Special Referee Leslie Lowenstein to hear and report and make recommendations on various issues, including (i) the amount of reasonable attorneys fees attributable to the legal work performed for the co-op by Jeffrey Goldberg, Esq. in various matters; (ii) whether the legal work performed in certain of these matters was sufficiently related to Tsabbar's default under the proprietary lease to warrant the recovery of attorneys fees, (iii) the calculation of interest due and owing the co-op for outstanding maintenance and electrical charges, and (iv) the amount of attorneys' fees attributable to the law firm of Kurzman, Karelson & Frank, LLP ("the Kurzman firm").

In his report and recommendation dated March 5, 2007, the Referee Lowenstein recommended that the co-op be awarded: (i) \$37,500 for the legal services rendered by Mr. Goldberg, (ii) interest upon Tsabbar's maintenance arrears in the amount of \$22,562.77, and (iii) \$41,235.14 for fees and legal services rendered by the Kurzman firm. The co-op then moved for an order confirming the report, and also sought additional attorneys' fees of \$37,166.08 related to the hearing before Referee Lowenstein.

By decision and order dated October 2, 2007, the court granted the co-op's motion to

confirm the report and directed that a judgment be granted in the co-op's favor in the amount of \$101,279.91. The court also found that the co-op was entitled to attorneys' fees incurred by the co-op for time spent by counsel seeking the fee award before Special Referee Lowenstein (Senfeld v. I.S.T.A. Holding Co., 235 AD2d 345 [1st Dept 1997], lv dismissed, 91 NY2d 956 [1998]), but that the amount of those fees could not be determined based on the record before it. Accordingly, the court referred the issue to Special Referee Lowenstein to hear and report with recommendations and directed that any fees incurred during the hearing be sought during the hearing before the Special Referee.

The matter was placed on the Special Referee's calendar for November 21, 2007. On November 18, 2007, Tsabbar advised the Special Referee in writing and by telephone that he was too ill to attend the hearing due to an automobile accident. The matter was then adjourned to December 5, 2007. Tsabbar sent the Special Referee a second letter dated November 25, 2007, stating that he was too ill to attend the hearing on December 5, and requesting that the Special Referee recuse himself. By letter dated November 28, 2007, the Special Referee wrote to Tsabbar and counsel to the co-op that recusal was not possible under the circumstances and stating that the hearing would proceed on December 5, 2007 as scheduled.

In the meantime, on December 1, 2007, Tsabbar moved by order to show cause seeking an order (1) directing that Special Referee Lowenstein recuse himself from a hearing regarding the amount of reasonable attorneys' fee owed by petitioner to the respondent cooperative apartment, (2) annulling a prior judgment against him, and (3) granting the recusal of this court from this matter.

On the December 4, 2007, Tsabbar faxed a letter to the court stating that he would not

appear at the December 5, 2007 return date of his order to show cause or at the attorneys' fees hearing scheduled for later that day since "the court has abrogated my right and basically denied the order to show cause to recuse Referee Lowenstein from the hearing," and that he was moving by order to show cause in the Federal Court for Eastern District of New York "to stop the state proceedings."

On December 5, 2007, the federal action referred to in Tsabbar's December 4, 2007 fax, was dismissed by order of Federal District Court Judge Dora L. Irizarry for lack of subject matter jurisdiction. Judge Irizarry also wrote that "it appears that [Tsabbar] seeks to raise the very issues he previously raised before the United States District Court, Southern District of New York, which in turn, raise issues already decided by the state courts. [Tsabbar] is advised that, even if this Court had subject matter jurisdiction over this action, such litigation evidently aimed at vexing the defendants would be dismissed under res judicata principles."

On December 5, 2007, the co-op's counsel appeared for the hearing before the Special Referee while Tsabbar pursued an appeal of Judge Irizarry's decision to the Second Circuit, which was unsuccessful. The hearing was then adjourned to January 2, 2008. On that date, Tsabbar called the Special Referee to inform him that he would be not attending since he had the flu. The Special Referee advised Tsabbar that a physician's affidavit would be required by January 4, 2008 attesting to such illness. Tsabbar never produced such an affidavit.² The hearing was adjourned to January 16, 2008. Tsabbar appeared on that date and the hearing was held.

Also on December 5, 2007, the attorney for co-op appeared for return date for Tsabbar's

²Tsabbar did, however, provide a physician's note dated November 21, 2007 stating that he suffered from back pain and an upper respiratory infection.

order to show cause, and this court noted on the record that Tsabbar did not appear and was technically in default, and the order to show cause should be denied on this ground.

By decision and order dated December 7, 2007, the court found not only that the order to show cause should be denied based Tsabbar's non-appearance, but also considered and rejected the relief sought in the order to show cause on its merits.

On December 12, 2007, Tsabbar served another motion which, like the order to show cause, sought this court's recusal and an order vacating and annulling the prior judgments of this court.³ Upon receiving service of the motion, the co-op wrote a letter to Tsabbar requesting that he withdraw the motion, asserting that the motion seeks the same relief as that denied by the court in its December 7, 2007 decision and order, and provided no additional law or facts upon which the court might reconsider its earlier denial of the motion, and that failure to withdraw the motion would result in the co-op seeking sanctions. Tsabbar refused to withdraw the motion, and the co-op, in addition to opposing the motion, cross moved for sanctions.

By decision and order dated March 13, 2008, the court denied Tsabbar's motion and granted the cross motion to the extent of imposing costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys' fees resulting from conduct determined to be frivolous and directing that Tsabbar pay the sum of \$610 to the co-op's counsel.

On March 25, 2008, Special Referee Lowenstein issued his report recommending that the co-op be awarded attorneys' fees in the amount of \$35,000 based on quantum meruit, and that a sanction of \$10,000 be imposed against Tsabbar based on, inter alia, his unexcused failure to

³At oral argument of the motion and cross motion, this court stated on the record that all further motions by either party in connection with this proceeding or other matter related to the dispute between the co-op or Tsabbar must be made by order to show cause.

appear at scheduled hearings, and his frivolous efforts to have Special Referee Lowenstein removed from hearing the matter.

On June 26, 2008 the Appellate Division, First Department issued an order denying Tsabbar's appeals of this court's decisions dated October 2, 2007 and March 13, 2008, and remanding the matter to this court for determination of appropriate sanctions and attorneys' fees against Tsabbar in connection with these appeals.

By decision and order dated August 22, 2008, the court held that co-op was entitled to \$4,947.00 as the reasonable amount of attorneys' fees incurred in connection with plaintiff's appeal of this court's decisions dated October 2, 2007 and March 13, 2008, together with \$100 in costs. With respect to the determination of the appropriate sanctions, the court reserved decision so that appropriate sanction could be determined in connection with this motion which also seeks sanctions.

Discussion

"[I]t is well-established that report of a referee shall be confirmed whenever the findings contained therein are substantially supported by the record...and the referee has clearly defined the issues and resolved matters of credibility." Kaplan v. Einy, 209 AD2d 248, 250-251 (1st Dept 1994).

Here, a review of the transcript of the hearing held on January 16, 2008 indicates that the Special Referee's findings were supported by the record. The record reveals that the co-op's counsel sought \$76,264.79⁴ for attorneys' fees for 306.3 hours of work done by attorneys and

⁴In his post-hearing submission, respondent sought a total of fees on fees recovery of \$77,425.43.

paralegals in the Tsabbar matter for the period between August 2006 and January 14, 2008.⁵ In support of its position, the co-op introduced billing records and narrative testimony from its attorney Steven Blivess regarding the credentials of the partners and associates working on the Tsabbar matter, their billing rates, and the type of work performed and the number of hours spent on such work.

In his report, Special Referee Lowenstein found that the evidence introduced by the co-op was insufficient to resolve the issue of the amount of reasonable attorneys' fees incurred by the co-op in connection with the hearing held before him that resulted in his award of \$101,279.91 to the co-op, and the subsequent proceedings related to seeking those fees. He wrote that:

I find upon due examination, that [the coop's] counsels' billing records are insufficiently accurate with respect to the litigation involved with regard to the court's order of reference dated June 2, 2006, which subsequently resulted in the hearing before the undersigned, the issuance of the undersigned report, and the proceedings the matter. With regard to the foregoing, the undersigned finds that [the co-op's] counsel's contention that more than 306 hours of legal services were expended at a cost in excess of \$77,000 in the instant matter is not reasonably justified under the totality of the circumstances presented at the hearing and the recovery sought by the [co-op] is therefore excessive. It is significant to note that the recovery obtained by the [co-op] as awarded to it in the court's decision and order dated October 2, 2007 in the instant litigation was \$101,297.91. The undersigned is mindful that the sum sought herein in as and for counsel fees as set forth in [the co-op's] memorandum of law is \$77,425.43. The two figures appear to be incongruous and fail to bear a reasonable relationship to each other.

⁵While the co-op sought \$81,874.79 in attorneys' fees which included fees not yet incurred, but anticipated as a result of the litigation, the Special Referee stated on the record that he would only recommend that attorneys' fees be awarded to the extent it could be shown by the end of the hearing that the fees were incurred "for the actual time that has been expended." (Hearing Transcript, at 41).

(Referee's report, at 7).

Upon finding that the reasonable value of the services rendered to the co-op by its attorneys could not be "accurately gauged" based on the evidence before him, Special Referee Lowenstein determined the amount of attorneys' fees to be awarded to the co-op based on quantum meruit.⁶ Thus, after examining the record adduced upon the hearing and the post-trial submissions, Special Referee Lowenstein found that the co-op counsel should be credited with 140 hours of legal work at a rate of \$250 dollars per hour for a total of \$35,000.

In fixing an award of legal fees based on quantum meruit, the factors to be considered are "evidence of the time and skill required in that case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit for services, and the fee usually charged by other attorneys for similar services." DeGregorio v. Bender, 52 AD3d 645, 646 (2d Dept 2008). Under this standard, the court finds that upon review of the record that the reasonable value of services performed was fairly determined based on the nature, quality, and quantity of the work performed. See Ziprkowski v. Goodman, 193 AD2d 389 (1st Dept 1993)(finding that the value of the services performed by the outgoing attorneys was fairly fixed by Special Referee based on the fair and reasonable value of the services rendered and the nature and quality of the work).

The court notes that during the hearing, Mr. Blivess testified that he did the majority of work on the matter, and that he spent 170.7 hours on the matter between November 2006 and

⁶Although the legal authority cited by the Special Referee for applying quantum meruit under these circumstances is arguably inopposite (see e.g., Rondinelli v. Tetsuto Yabuki, 224 AD2d 404 [2d Dept 1996]) as the standard for awarding attorneys' fees under the quantum meruit doctrine is substantially the same as that for determining the amount of reasonable attorneys' fees, the court need not reach the issue, particularly as neither party objects to the Special Referee's report on this ground.

January 16, 2008, and that he billed \$255 per hour, a rate that this court previously found reasonable in its decision dated March 13, 2008. Moreover, a review of time records reveals that Mr. Blivess spent at least 150 hours on work related to the fee hearings at issue, and that other attorneys and paralegals worked on the matter and who billed at rates ranging from \$120 to \$395 per hour. Given the nature and difficulty of the work at issue, and the fact that the key legal issues had previously been addressed, the record supports the Special Referee's reduction in the average billing rate and time expended in determining the value of the legal work performed. In fact, the co-op does not object to the amount of fee awarded, even though it is less than half the amount it sought.

In opposition, Tsabbar does not challenge the evidence introduced by the co-op but, instead, argues that the fees sought herein are not related to the breach of the proprietary lease and should not be permitted. This argument is based on this court's decision and order dated June 2, 2006, which held that under the proprietary lease the co-op was entitled to recover attorneys' fees incurred as a result of Tsabbar's default under the Lease, but not those fees incurred in connection with its defense of the instant proceeding commenced by Tsabbar to enjoin the sale of the Apartment. However, the fees recommended by the Special Referee are not related to the defense of this proceeding which has been decided in the co-op's favor but, instead, arise out of the co-op's efforts to obtain the fees that the court found it was entitled to recover under the proprietary lease. Notably, in its decision and order dated October 2, 2007, the court specifically found that the co-op could recover such fees and directed that a hearing be held to determine the amount to be awarded.

Next, Tsabbar's arguments relating to the issues that have been previously decided in this

proceeding and related actions, including his request for damages arising out of the sale of the Apartment, are barred by the doctrines of collateral estoppel and res judicata.

Referee Lowenstein also found that Tsabbar should be sanctioned for “delaying [the] hearing without cause, [his] attempts to intimidate the undersigned with baseless threats of filing complaints with official agencies for official misconduct as well as the institution of likewise baseless civil rights litigation against the undersigned in the Federal court all constitute frivolous conduct as defined at 22 NYCRR 130-1.1(c)(3) of the Rules of the Chief Administrator,” (Referee’s report, at 8) and recommended that the most severe possible sanction be imposed on Tsabbar, as permitted by the Rules of the Chief Administrator, i.e. \$10,000.

Under Part 130, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification and reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

In considering whether specific conduct is frivolous, courts are required to examine “whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent.” 22 NYCRR 130-1.1 [c]; Navin v. Mosquera, 30 AD3d 883 (3d Dept 2006); see also, Melnitzky v. Uribe, 33 AD3d 373 (1st Dept 2006)(confirming Referee Report which awarded sanctions against pro se litigant based on his frivolous conduct).

Here, the Special Referee’s report contains sufficient facts from the record to support an award of sanctions, including Tsabbar’s repeated and baseless attempts to stay the fee hearing. Moreover, as previously indicated, in denying Tsabbar’s appeals of these decisions dated October

2, 2007 and March 13, 2008, which relate to his attempts to prevent the Special Referee from proceeding with the hearing related to fees on fees, the Appellate Division, First Department remanded the matter to this court for determination of appropriate sanctions and attorneys' fees.

That being said, however, the court finds that the Special Referee's recommendation that a sanction be imposed on Tsabbar in the amount of \$10,000 is excessive under the circumstances here. Instead, a sanction in the amount of \$1,000 should be imposed on Tsabbar for his conduct in connection with the hearing before the Special Referee and an additional \$1,000 for his pursuit of frivolous appeals.

Finally, the co-op's request for fees incurred in connection with this motion to confirm the report is granted to the extent of awarding the co-op \$765.00 for three hours of legal work performed by Mr. Blivess at a rate of \$255.00 an hour.

In view of the above it is

ORDERED that the Clerk is directed to enter judgment in favor of respondent 17 East 89th Street Tenants, Inc. against petitioner Zion Tsabbar in the amount of \$35,765.00; and it is further

ORDERED that the firm of Balber Pickard Battistoni Maldonado & Van Der Tuin, P.C., as escrowee of the proceeds of the sale of the Apartment, shall disburse any sums remaining in the escrow account in full or partial satisfaction of the judgment; and it is further

ORDERED that the motion to confirm that part of the Special Referee's report recommending that sanctions be imposed on petitioner Zion Tsabbar is granted to the extent of directing that on or before November 21, 2008, petitioner Zion Tsabbar shall pay the sum of \$1,000.00 to the Clerk of the Court (in the form of cash or certified check payable to the New

York County Clerk), and provide a copy of this order, for transmittal to the New York State Commissioner of Taxation and Finance; and it is further

ORDERED that on or before November 25, 2008, proof of such payment be provided to the Clerk of Part 11, and to counsel for respondent 17 East 89th Street Tenants, Inc.; and it is further

ORDERED that based on petitioner Zion Tsabbar's frivolous appeals of this court's decision and orders dated October 2, 2007 and March 13, 2008, sanctions are imposed against petitioner Zion Tsabbar in the amount of \$1,000; and it is further

ORDERED that on or before November 21, 2008, petitioner Zion Tsabbar shall pay the sum of \$1,000 to the Clerk of the Court (in the form of cash or certified check payable to the New York County Clerk), and provide a copy of this order, for transmittal to the New York State Commissioner of Taxation and Finance; and is further

ORDERED that on or before November 25, 2008, proof of such payment be provided to the Clerk of Part 11, and to counsel for respondent 17 East 89th Street Tenants, Inc.

DATED: October 21, 2008


J.S.C.

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