

Cadel Co. v Court Living Corp.
2009 NY Slip Op 31039(U)
May 8, 2009
Supreme Court, New York County
Docket Number: 4736/1989
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHKE

PART 10

Justice

Index Number : 004736/1989

FIRST WOMEN'S BANK

VS.

COURT LIVING

SEQUENCE NUMBER : 018

CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 12 2009

COUNTY CLERK'S OFFICE
NEW YORK

MAY 08 2009

Dated: _____

J. Gischke
HON. JUDITH J. GISCHKE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Supreme Court of the State of New York
County of New York: Part 10

-----X
The Cadel Company, as assignee of The
First Women's Bank,

Plaintiff,

DECISION/ORDER

-against-

Index #4736/1989
Mot. Seq. #018

Court Living Corporation and
Louis V. Greco,

Defendants.

-----X
Hon. Judith J. Gische

FILED
MAY 12 2009

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PAPERS

Notice of Motion, SG affirm., exhibits.....	1
Notice of Cross-Motion, JEJ affirm, exhibit.....	2
SG Reply affirm.....	3

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff is the assignee of a judgment creditor of defendant Louis V. Greco ("Greco"). It previously moved, pursuant to CPLR §5226, for an order directing Greco to pay the money judgment in installments until the judgment is paid. In October 2006, the amount due on the judgment was \$449,076.93. Plaintiff claims that with the accruing interest, that amount now exceeds \$700,000. In a decision dated May 8, 2007, this Court held that plaintiff had established that Greco was rendering services to his wife's businesses, without reasonable compensation, entitling plaintiff to an order pursuant to CPLR §5226 directing that the judgment debtor make specified installment payments to the judgment creditor. The Court further referred to a Special Referee the issues of [1] the fair and reasonable value for the services rendered by Greco to his

wife's companies, and [2] what portion of such fair and reasonable compensation should be paid in installments to plaintiff.

Special Referee Nicholas Doyle Issued a report dated January 27, 2009 which has been filed with the court. In the report he recommends that this court find that the reasonable value of Greco's services to his wife's companies was \$300,000 per annum and that Greco be ordered to pay monthly Installments in the amount of \$20,000, until the judgment is fully paid off.

Plaintiff now moves to confirm the report and Greco cross-moves to reject the report. Greco argues that: [1] at the hearing, plaintiff failed to meet its burden of proving the fair and reasonable value of services provided by him to Linda Greco's companies; [2] the Special Referee failed to take into consideration certain relevant facts in making his report, and the [3] the Special Referee improperly permitted the plaintiff to call an expert witness at the hearing. For the reasons that follow the motion to confirm is granted and the cross-motion to reject the report is denied.

DISCUSSION

A. The Applicable Standard of Review

It is the function of a Special Referee to determine the issues referred, as well as to resolve conflicting testimony and matters of credibility. Pursuant to CPLR § 4403 the court may confirm or reject, in whole or in part, any report made by the Special Referee. The court may also make new findings with or without the taking of additional testimony, provided it has the benefit of the transcripts and trial exhibits (which it has in

this case). As a general rule, however, the court will not disturb the Special Referee's findings, and the report should be confirmed, if the findings are supported by the record and if the Special Referee has clearly defined the Issues, and fairly resolved matters of credibility. Sichel v. Polak, 36 AD3d 416 (1st dept. 2007); The Board of managers of Boro Park Village-Pahse I v. Boro Park, 284 AD2d 237 (1st dept. 2001); Kaplan v. Einy, 209 AD2d 248 (1st dept. 1994). The Special Referee's recommendations are entitled to great weight since he was the trier of fact and had the opportunity to see and hear the witnesses, and observe them on the stand. Frater v. Lavine, 229 AD2d 564 (2nd dept. 1996).

A. Burden of Proof

Greco claims that there was insufficient evidence to prove that he should be paid \$300,000 per annum for the work he undertakes on behalf of his wife's companies. There was ample testimony from both Greco himself and his wife to establish that she knows virtually nothing about her own companies and that he effectively runs them. There was testimony sufficient for the Special Referee to reach the conclusion that, contrary to Greco's contention, Greco worked full time for the businesses. Greco himself testified that if he worked full time for his wife, his services would be worth \$300,000 per annum. Greco cannot now distance himself from his own testimony by claiming that his testimony was "off the cuff."

B. Failure to consider Relevant facts

Greco's claims that the Special Referee failed to consider relevant facts is

rejected. As the trier of facts, the Special Referee was free to accept that portion of the testimony he found credible and reject that portion of the testimony he found unworthy of belief. People v. Rosa, 57 Ad3d 1018 (3rd dept. 2008); 780 PP Associates v. State of New York DHCR, 11 AD3d 392 (1st dept. 2004). Contrary to Greco's position, the Special Referee was free to find that his testimony concerning what his rate of compensation for full time employment at this wife's company would be, while otherwise rejecting other parts of Greco's testimony. The Special Referee did not fail to consider Greco's claim that he only worked part time for his wife, the Special Referee found such testimony incredible. Greco's claims that the Referee should have set his "Income" based upon what other people with similar jobs were being paid and that the Special Referee should have taken into account the downturn in the economy. There is no legal requirement that such "facts" need to be taken into account. In any event it appears that the Special Referee did give consideration to the salaries being paid to others and decided that Greco's experience and responsibilities in the company justified Greco being charged with receiving a higher salary.

Greco's claim that the compensation attributable to him should be tax impacted is ludicrous. The gravamen of this entire motion is that Greco is not reporting income for the services he is actually providing to his wife's company. He is not paying taxes and, therefore, the fact that the Special Referee did not tax impact the monies is not significant on this motion.

Likewise, his claim that the Special Referee's findings violate the rules about

garnishment is also rejected. The underpinning of CPLR §5226 is that the Garnishee is manipulating reported compensation to avoid paying a judgment. Where, as here, such a finding is made, the rules regarding the limits on garnishment, simply do not apply.

C. The use of an Expert Witness

At hearing the plaintiff offered an expert witness. Greco objected, claiming that he was not provided with advance notice of the expert. Greco claims he previously made a demand for the identity of all witnesses. Plaintiff denies that such a demand was made. No copy of the actual demand is provided. A demand for the identity of witnesses, however, is not the same thing a demand for expert disclosure under CPLR §3101(d). In the absence of a demand for disclosure of expert witness information, there is no obligation to provide it. Collins v. Greater New York Savings Bank, 194 AD2d 514 (2nd dept. 1993).

Moreover, in the absence of an intentional or willful failure to disclose or prejudice to Greco, the Special Referee's decision to permit the expert testimony to go forward was within his discretion. See: Tronolone V. Praxair, Inc., 39 Ad3d 1146 (4th dept. 2007). The issue about the need for expert witnesses in forensic accounting was raised by the Special Referee himself at a court appearance that preceded the hearing by several months. The expert was retained at or about the time of that earlier conference. The Special Referee, at that earlier appearance, gave Greco the opportunity to make a motion to find out the identity of and depose plaintiff's expert. Greco made no attempt to do so. Given that the hearing was not before a jury, Greco

could have sought, but did not seek, a continuance to obtain his own expert once the plaintiff's expert testimony was allowed. Thus, the retention of an expert by plaintiff was at the Special Referee's behest, and Greco was not prejudiced because he could have sought a deposition in advance of hearing or otherwise hired his own expert.

CONCLUSION

In accordance herewith it is hereby:

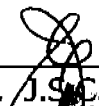
ORDERED that plaintiff's motion to confirm the Special Referee's report is granted in all respects and it is further

ORDERED that defendant Louis V. Greco's motion to reject the referee's report is denied in all respects and it is further

ORDERED that any issue raised but not expressly addressed herein is denied and that this shall constitute the decision and order of the Court.

Dated: New York, NY
May 8, 2009

SO ORDERED:



J.G. J.S.C.

FILED
MAY 12 2009
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