

**Durst Bldg. Corp. v J P R 2, Inc.**

2009 NY Slip Op 31614(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 602077/2007

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

*Motion*

Index Number : 602077/2007

**DURST BUILDINGS CORP.**

VS.

**J P R 2 INC**

SEQUENCE NUMBER : 005

CONFIRM/REJECT REFEREE REPORT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

1
2, 3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is denied with prejudice with the usual disbursements.*

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

**FILED**

JUL 21 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/17/09

JUSTICE SHIRLEY WERNER KORNREICH

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: IAS PART 54

-----X  
 THE DURST BUILDINGS CORPORATION,

Plaintiff,

- against -

J P R 2, INC. and MICHAEL MASTROPIETRO

Defendants.

-----X  
 SHIRLEY WERNER KORNREICH, J.:

FILED  
 JUL 21 2009

Index No. 602077/2007

COUNTY CLERKS OFFICE  
 NEW YORK

Following a Special Referee's issuance of a report recommending the award of \$63,648.78 to plaintiff for legal expenses incurred in collecting payment on a promissory note, plaintiff moves, pursuant to CPLR 4403 and Uniform Rules for Trial Courts (22 NYCRR) § 202.44 (Rule 202.44), for an order: (1) confirming the report insofar as it recommended that \$63,648.78 be awarded, but (a) rejecting the report insofar as it did not recommend that \$102,648.78, the entire amount which plaintiff sought, be awarded or (b) in the alternative, rejecting the report insofar as it recommended that \$39,000.00, rather than a lesser amount, be deducted from the award as the amount attributable to plaintiff's unsuccessful motion for summary judgment in lieu of complaint; (2) in the alternative, confirming the report in its entirety; (3) rejecting the report insofar as it did not recommend that plaintiff be awarded prejudgment interest, and awarding plaintiff prejudgment interest pursuant to CPLR 5001; (4) awarding plaintiff the fees and disbursements incurred by it in connection with the instant motion; and (5) in any event, directing entry of the appropriate judgment in plaintiff's favor.

Defendants cross-move, also pursuant to CPLR 4403 and Rule 202.44, for an order: (1) confirming the report insofar as it recommended that deductions be made from plaintiff's award for legal expenses that plaintiff did not reasonably and necessarily incur; and (2) rejecting the report insofar as it did not recommend that more than \$39,000.00 be deducted from the total amount that plaintiff sought.

### BACKGROUND

Plaintiff, The Durst Buildings Corporation (Durst), brought this action to recover \$400,000.00 that was owed on a promissory note (the Note) after defendants J P R 2, Inc. (JPR) and Michael

Mastroddi, the makers of the Note, failed to pay that amount by the Note's due date of April 20, 2007. Durst originally moved for summary judgment in lieu of complaint, pursuant to CPLR 3213, but that motion was denied. Durst then moved for summary judgment, pursuant to CPLR 3212. That motion was granted by an April 28, 2008 decision and order (the Prior Order), which directed entry of judgment in Durst's favor in the amount of \$400,000.00 together with interest. Defendants' motion for leave to renew and/or reargue was denied on July 28, 2008. In the interim, JPR paid the \$475,903.43 judgment on the Note from proceeds allocated to it on or about May 7, 2008, in an arbitration proceeding.

Pursuant to a provision contained in the Note, defendants agreed to "pay ... all costs of collecting or attempting to collect [the] Note, including attorneys' fees and disbursements" (Note, Lycoyannis Reply Affirm., Ex. B, ¶ 5). The Prior Order referred the issue of reasonable attorney fees to a Special Referee (the Referee), to hear and report with recommendations. Following a hearing, the Referee issued a report, dated October 28, 2008 (the Report), which recommended that Durst be awarded \$63,648.78 for legal fees and expenses.

#### DISCUSSION

"A referee's report should be confirmed if its findings are supported by the record" (*Barrett v Toroyan*, 45 AD3d 301, 301 [1st Dept 2007]). The record of the proceeding before the Referee supports the Report's recommendation that Durst be awarded \$63,648.78 for legal expenses, but also supports a finding that Durst be awarded an additional sum which brings Durst's total attorneys' fees award to \$67,909.61.

The Referee arrived at the \$63,648.78<sup>1</sup> figure by adding \$93,260.76 (which Durst claimed to be the reasonable value of the legal expenses that were incurred in collecting payment on the Note) to \$9,387.94 (which the Referee found to be the reasonable value of the legal expenses that were incurred in connection with the hearing before the Referee), and then subtracting from that sum

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<sup>1</sup>Due to an error in transcription, the Referee arrived at the figure of \$63,648.78 rather than \$63,648.70 as the amount of the recommended attorneys' fees award.

the amount of \$39,000.00 (which the Referee found to be the reasonable value of the legal expenses that were incurred in connection with Durst's unsuccessful motion for summary judgment in lieu of complaint).

Although Durst claimed that it had incurred \$93,260.76 in legal expenses in connection with its attempts to collect payment on the Note, the evidence in the Record supports a finding that Durst incurred only \$90,726.11. According to Durst, \$93,260.76 was the sum of the total amounts due on the monthly invoices which Durst's counsel issued during the period March 2007 through August 2008, after deducting \$350.00 from that sum for certain costs which had already been recovered (*see* Lycoyannis Affirm., Ex. A, Report, at 5-6; Ex. H, Pl. Post Hearing Brief, at 13-14). The actual sum of the total amounts due on those monthly invoices, after the \$350.00 deduction, appears to be \$93,261.11.<sup>2</sup> However, the August 2008 invoice includes \$2,535.00 in charges for expenses that were incurred from August 25th through 28th, not in connection with efforts to collect payment on the Note, but in connection with the hearing before the Referee.<sup>3</sup> Thus, the invoices indicate that Durst did not incur \$93,261.11 in legal expenses in connection with its attempts to collect payment on the Note, but only \$93,261.11 minus \$2,535.00, or \$90,726.11, in such legal expenses.

The Referee correctly deducted from Durst's recovery an amount attributable to Durst's unsuccessful motion for summary judgment in lieu of complaint. While Durst is entitled to an

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<sup>2</sup>\$1,375.00 (March 2007 invoice) + \$501.00 (April 2007 invoice) + \$528.00 (May 2007 invoice) + \$4,936.75 (June 2007 invoice) + \$1,524.75 (July 2007 invoice) + \$13,370.00 (August 2007 invoice) + \$419.00 (September 2007 invoice) + \$4,542.85 (October 2007 invoice) + \$16,449.67 (November 2007 invoice) + \$60.90 (separate November 2007 invoice for disbursements) + \$12,890.50 (December 2007 invoice) + \$7,329.94 (January 2008 invoice) + \$2,332.25 (April 2008 invoice) + \$9,993.22 (May 2008 invoice) + \$11,663.76 (June 2008 invoice) + \$2,240.49 (July 2008 invoice) + \$3,453.03 (August 2008 invoice) - \$350.00 (deduction for costs already recovered by Plaintiff) = \$93,261.11 (*see* Lycoyannis Affirm., Exs. D; H, at 14 n 2; J).

<sup>3</sup>The \$2,535.00 amount represents 8.8 hours of work performed by Alexander Lycoyannis, which was billed at the rate of \$280.00 per hour, and .2 hours of work performed by Howard Kingsley, which was billed at the rate of \$355.00 per hour ( $[8.8 \times \$280.00] + [.2 \times \$355.00] = \$2,535.00$ ) (*see* Lycoyannis Affirm., Exs. G, J).

attorneys' fee award pursuant to the Note, "[a]n award of attorneys' fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered" (*Yonkers Rib House, Inc. v 1789 Cent. Park Corp.*, 58 AD3d 618, 618 [2d Dept 2009] [citation and internal quotation marks omitted]). Insofar as attorneys' fees were expended in connection with Durst's unsuccessful CPLR 3213 motion, the amount so expended was not reasonable and warranted. The Note expressly required that reference be made to a "Pledge, Assignment and Security Agreement" to define the term "Event of Default," as that term was used in the Note. Motions for summary judgment in lieu of complaint have routinely been denied with respect to such instruments, because they have been deemed not to qualify as "instrument[s] for the payment of money only" warranting CPLR 3213 treatment (*see e.g. Bonds Fin., Inc. v Kestrel Tech., LLC*, 48 AD3d 230, 231 [1st Dept 2008]; *Larkfield Manor v KBK Enters.*, 5 AD3d 444, 445 [2d Dept 2004]; *Manufacturers Hanover Trust Co. v Hixon*, 124 AD2d 488, 488-489 [1st Dept 1986]). Thus, the amount that was incurred for attorneys' fees in connection with the CPLR 3213 motion was not reasonable and warranted because, under well-settled legal authority, it could not reasonably be expected that Durst would prevail upon that motion.

Nonetheless, the Referee erred in deducting the amount of \$39,000.00 from Durst's recovery. It is clear from the record, and defendants concede, that \$39,000.00 was the approximate amount of the legal expenses that were incurred in connection with Durst's successful motion for summary judgment. The amount of the legal expenses for the unsuccessful CPLR 3213 motion was only between \$21,000.00 and \$23,000.00 (*see Klein Affirm.*, ¶¶ 5, 9, 29; *Lycoyannis Affirm.*, ¶¶ 8, 10 and Ex. I, Def. Post-Hearing Mem., at 3; Ex. L, Klein E-mail dated Nov. 6, 2008; *see also* Transcript of the Hearing Before the Referee [hereinafter, the Hearing Transcript], at 30-31). The record supports a finding that the amount which Durst incurred for legal services in connection with the CPLR 3213 motion was \$22,816.50, the sum of the invoices for the months of May 2007 through September 2007 plus the charges that were set forth in the October 2007 invoice for October 19th

through 26th.<sup>4</sup> Although Durst has asserted that \$22,947.50 was incurred for legal services in connection with the CPLR 3213 motion, that amount appears to be predicated upon: (1) Alexander Lycoyannis, Esq. having spent 7.5 hours working on the motion from October 19 through 26, 2007, whereas the invoices indicate that he spent only 7.1 hours working on the motion during that period, accounting for a difference of \$104.00 (*see* Lycoyannis Affirm., ¶ 8 n 1 and Ex. D); and (2) some other discrepancy, in the amount of \$27.00, which the court is unable to ascertain. Accordingly, the amount which should properly be deducted from Durst's total award in connection with the unsuccessful CPLR 3213 motion is \$22,816.50.

Durst argues that \$6,653.50 of the legal expenses that were incurred in connection with the CPLR 3213 motion should not be deducted from its recovery because: Durst incurred that amount in connection with the preparation of a summons and the moving papers; upon denial of that motion, the court deemed the moving papers to be the complaint; and Durst would have been entitled to recover attorneys' fees expended in connection with the preparation of a summons and complaint, which are generally necessary for the commencement of a civil action.

The moving papers in support of Durst's CPLR 3213 motion apparently included a one and one-half page notice of motion, an attorney's affirmation of four or five pages and a two-page client affidavit (*see* Hearing Transcript, at 28). Inasmuch as the attorneys' fees which would have been incurred in connection with the preparation of a complaint would presumably have been less than the attorneys' fees that were incurred in connection with the preparation of the three separate documents which comprised the moving papers on the CPLR 3213 motion, Durst has failed to

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<sup>4</sup>\$528.00 (May 2007 invoice) + \$4,936.75 (June 2007 invoice) + \$1,524.75 (July 2007 invoice) + \$13,370.00 (August 2007 invoice) + \$419.00 (September 2007 invoice) + \$2,038.00 (from October 2007 invoice, for services rendered from October 19 through 26) = \$22,816.50 (*see* Lycoyannis Affirm., Ex. D). The \$2,038.00 for services rendered from October 19 through 26 represents 7.1 hours of work performed by Alexander Lycoyannis, which was billed at the rate of \$260.00 per hour, and .4 hours of work performed by Luise Barrack, which was billed at the rate of \$480.00 per hour ( $[7.1 \times \$260.00] + [.4 \times \$480.00] = \$2,038.00$ ) (*see* Lycoyannis Affirm., ¶ 8 n 1 and Ex. D).

demonstrate that the \$6,653.50 should not be deducted from the total amount of Durst's recovery. Further, Durst, having submitted no evidence as to what a complaint in this action would reasonably have cost to prepare, has failed to establish that it is entitled to recover any portion of the \$22,816.50 that was incurred for attorneys' fees in connection with the CPLR 3213 motion.

Additionally, although the Referee's Report recommended that Durst's attorneys' fees include \$9,387.94 for legal expenses incurred in connection with the proceeding before the Referee, Durst is not entitled to recover that amount. Courts have generally held that a party is not entitled to recover attorneys' fees that were incurred in prosecuting a claim to recover attorneys' fees, so-called "fees on fees," except: (1) in instances where the right to recover attorneys' fees was created by statute (*see e.g. Sage Realty Corp. v Proskauer Rose*, 288 AD2d 14, 15 [1st Dept 2001]; *Senfeld v I.S.T.A. Holding Co.*, 235 AD2d 345, 345-346 [1st Dept 1997]; *Podhorecki v Lauer's Furniture Stores*, 184 AD2d 1066, 1067 [4th Dept 1992]); or (2) where a contractual provision specifically provides for the recovery of such fees on fees, and is not merely a general agreement for the recovery of attorneys' fees (*see e.g. Swiss Credit Bank v International Bank*, 23 Misc 2d 572, 573-574 [Sup Ct, NY County 1960]; *F.H. Krear & Co. v Nineteen Named Trustees*, 810 F2d 1250, 1266 [2d Cir 1987] [applying New York law]; *United States for Use of Fid. and Deposit Co. of Maryland v Suffolk Constr. Co.*, 2000 WL 10412, \*3 [SD NY 2000] [applying New York law]; *cf. Davld Z. Inc. v Timur on Fifth Ave.*, 7 AD3d 257, 258 [1st Dept 2004]; *Getty Petroleum Corp. v G.M. Triple S. Corp.*, 187 AD2d 483, 484 [2d Dept 1992]). Inasmuch as the provision in the Note which provides for Durst's recovery of attorneys' fees is general in nature and does not specifically authorize Durst's recovery of fees on fees, Durst is not entitled to recover either the \$9,387.94, which was allegedly incurred for legal expenses in connection with the proceeding before the Referee, or an additional \$10,280.21, which Durst claims to have incurred for subsequent legal expenses relating substantially to the instant motion (*see Lycoyannis Affirm.*, ¶ 47).

For the foregoing reasons, Durst is entitled to recover attorneys' fees in the total amount of \$67,909.61, that being the value of the legal expenses that were incurred in connection with efforts

to collect upon the Note (\$90,726.11) minus the value of the legal expenses that were incurred in connection with the unsuccessful CPLR 3213 motion (\$22,816.50).

Defendants argue that the Referee's report should be rejected in whole or in part, on various other grounds, but have failed to establish that the Report should be wholly or partially rejected on any of those grounds. First, defendants contend that the Referee's report should be rejected insofar as it recommends that Durst be awarded any attorneys' fees, because Durst's commencement and prosecution of this entire action was wholly unnecessary. Defendants assert that they repeatedly advised Durst that the Note would be paid with interest, from the proceeds that JPR would receive from a pending arbitration proceeding. Defendants assert that this is precisely what happened when JPR satisfied the judgment on the Note by paying Durst \$475,903.43 from the proceeds of the arbitration award which was issued on or about May 7, 2008, in JPR's favor. Defendants argue that "even if Durst had taken no legal action whatsoever to recover under the [Note], [Durst] still would have been paid the same \$475,000 it ultimately received in the lawsuit, and it would have recovered that sum on the same exact date" (Klein Affirm., ¶¶ 3, 20).

Defendants also argue that certain portions of the legal fees which Durst seeks to recover should be disallowed because certain of the particular legal expenses for which Durst seeks to be reimbursed were unnecessary and/or because Durst could have mitigated its expenses by not authorizing its counsel to perform those services. Defendants assert that Durst should not be permitted to recover approximately: (1) \$39,000.00 in legal expenses which were incurred in connection with Durst's summary judgment motion, because Durst continued to pursue that motion despite the fact that defendants offered, on December 12, 2007, to settle the action by paying Durst the \$400,000.00 principal owed on the Note, plus interest and attorneys' fees, immediately upon JPR's receipt of the proceeds from the pending arbitration proceeding; (2) \$15,000.00 in legal expenses which Durst incurred in opposing defendants' motion for reargument of Durst's successful motion for summary judgment, inasmuch as defendants would allegedly not have had to bring their motion for reargument, and Durst would not have had to oppose it, if Durst had not pursued its

motion for summary judgment; and (3) \$12,000.00 in legal expenses which Durst incurred in entering, enforcing and collecting its judgment on the Note, because Durst incurred those expenses after JPR advised Durst, on May 20, 2008, that the arbitration award had been issued allocating sufficient funds to JPR to satisfy the full amount of the judgment, and to pay Durst its reasonable attorneys' fees.

Defendants' arguments are without merit. Defendants agreed, pursuant to the terms of the Note, to repay the monies owed under the Note, on or before April 20, 2007. They, however, breached that agreement. Durst had no obligation to refrain from or delay commencing or prosecuting an action on the Note, or to accept defendant's settlement offer. Defendants could not guarantee when the arbitration proceeding would be concluded, that they would be successful in that proceeding or that the amount of any award they might receive from the arbitration would be sufficient to satisfy defendants' obligations under the Note.

Even after the arbitration proceeding had concluded, Durst had no obligation to forego enforcement or collection of the judgment on the Note in reliance upon any representation defendants may have made that they would pay the judgment on some future date. Indeed, to deny Durst recovery of the attorneys' fees which it reasonably incurred in prosecuting this action to collect upon the Note, would improperly nullify the provision in the Note to "pay ... all costs of collecting or attempting to collect [the] Note, including attorneys' fees and disbursements" (Note, Lycoyannis Reply Affirm., Ex. B, ¶ 5).

Defendants further argue that the attorneys' fees are unreasonable, or alternatively, excessive, because: the attorneys' fees, as set forth on the invoices issued by Durst's counsel, include charges for services by 13 partners, associates and support staff; the attorneys' fees which Durst incurred in prosecuting this action were substantially more than the attorneys' fees, allegedly amounting to less than \$25,000.00, which defendants incurred in defending the action; and Durst did not establish the reasonableness of certain of the individual expenses which it seeks to recover -- i.e., certain messenger charges, calendar search charges, overtime word-processing charges and research

charges -- at the hearing before the Referee.

These arguments also are without merit. The invoices indicate that each of 13 individuals performed some work in connection with this action and, by far, the substantial part of that work was performed by one supervising partner and two associates. Defendants have not established that the legal work which was performed in prosecuting this action was less efficient, or that it involved any unreasonable duplication of effort, merely because it entailed work by more than one attorney. That Durst may have incurred an amount of attorneys' fees in prosecuting this action which was greater than the amount of attorneys' fees which defendants incurred in defending this action does not alone establish that the amount of Durst's attorneys' fees was unreasonable in view of, *inter alia*, the fact that Durst bore the initial burden of proof. Additionally, Durst has submitted documentation which adequately supports the reasonableness of the particular individual disbursements -- for messenger charges, calendar search charges, overtime word-processing charges and research charges (*see* Lycoyannis Reply Affirm., ¶ 28 and Ex. C).

Finally, Durst is entitled to recover prejudgment interest upon the amount of its attorneys' fees award (*see e.g. Miller Realty Assoc. v Amendola*, 51 AD3d 987, 990 [2d Dept 2008]). The attorneys' fees were incurred between March 19, 2007 and August 12, 2008, and the Prior Order -- which directed entry of judgment in Durst's favor for the amount owed on the Note -- was issued on April 28, 2008. Attorneys' fees "represent a conditional award or prerogative which does not mature until the underlying action or proceeding has been determined"; the right to interest on an award of attorneys' fees is ordinarily deemed to begin running on the date when the party seeking the fees was determined to be the prevailing party (*Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226-227 [1st Dept 2005] [citation and internal quotation marks omitted]). Thus, Durst's right to interest on the attorneys' fees would have commenced on April 28, 2008.

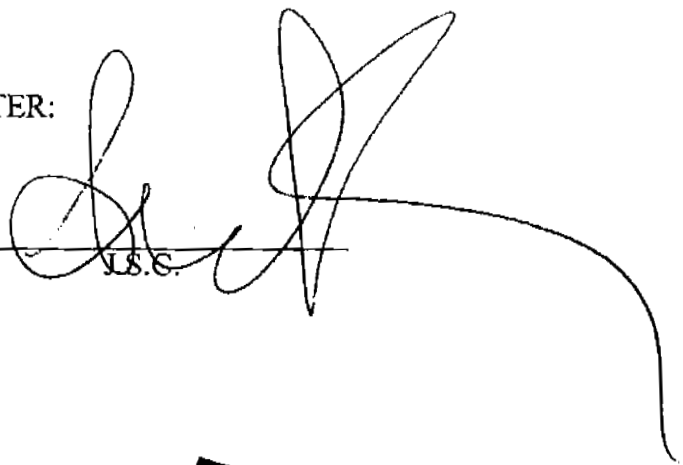
However, additional attorneys' fees were incurred between April 28, 2008 and August 12, 2008. CPLR 5001 (b) provides that, "[w]here such damages were incurred at various times," interest may be computed "upon all of the damages from a single reasonable intermediate date." Thus, the

award of attorneys' fees granted to Durst herein will include prejudgment interest running from June 20, 2008, which the court deems to be a reasonable intermediate date between April 28, 2008 and August 12, 2008. For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion and defendants' cross motion are each granted in part and denied in part, and the report of the Special Referee dated October 28, 2008 is confirmed in part and rejected in part, to the extent that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants J P R 2, Inc. and Michael Mastroddi, jointly and severally, in the amount of \$67,909.61, together with interest at the rate of 9% per annum from the date of June 20, 2008 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: July 17, 2009

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