

**Alayne Real Estate, Inc. v Lasher**

2009 NY Slip Op 32885(U)

December 3, 2009

Supreme Court, Kings County

Docket Number: 11134/00

Judge: Wayne P. Saitta

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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3<sup>rd</sup> day of December, 2009.

P R E S E N T:

HON. WAYNE P. SAIITA,

Justice.

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ALAYNE REAL ESTATE, INC. AND SETAM,

Plaintiffs,

- against -

Index No. 11134/00

ALAN D. LASHER, ET ANO.,

Defendants.

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The following papers numbered 1 to 9 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1- 2_____
Opposing Affidavits (Affirmations)_____	3- 4_____
Reply Affidavits (Affirmations)_____	5- 6_____
_____ Affidavits (Affirmations)_____	_____
Other Papers Plaintiffs' Memorandum of Law_____	7_____
Transcript of Inquest_____	8_____
Referee's Report_____	9_____

Upon the foregoing papers in this action by plaintiffs Alayne Real Estate Inc. (Alayne) and Setam Realty Associates, LLC (Setam) (collectively, plaintiffs) against defendants Alan D. Lasher (Lasher) and Angela Millwater (Millwater) (collectively, defendants) alleging breach of fiduciary duty, breach of contract, negligence, conversion, tortious interference

with business relations, and theft of business, and demanding damages and an accounting, plaintiffs move for an order, pursuant to CPLR 4403 and 22 NYCRR 202.44, confirming the report and recommendation of Referee Maxine Archer (the Referee) dated February 4, 2008 and issued on January 9, 2009, and, upon such confirmation, entering judgment: (1) in their favor as against defendants, jointly and severally, in the sum of \$1,246,709, plus interest at the rate of 9% per annum from December 9, 2004 through the date of the entry of judgment, and costs and expenses, and (2) in favor of Setam against Millwater in the sum of \$1,998.69, plus interest at the rate of 9% per annum from December 1, 1999 through the date of the entry of judgment, and costs and expenses.

Alayne is a corporation with a principal place of business at 3004 Avenue L, in Brooklyn, New York, which is in the business of managing primarily residential real estate in Brooklyn and Queens. The buildings managed by Alayne were originally owned by Seva Hoffman, and, in 1995, the ownership of these buildings were transferred to Setam, a limited liability company in which Seva Hoffman and her daughter, Cheryl Unterberg, held membership interests. Upon Seva Hoffman's death in April 1996, her membership interest in Setam was transferred to her husband, Jules Hoffman. Setam was the sponsor of a condominium located at 42-15 81<sup>st</sup> Street, in Elmhurst, New York. Alayne is the managing agent for both Setam and the condominium. David Unterberg is the principal of Alayne, and is the husband of Cheryl Unterberg and the son-in-law of Jules Hoffman.

In or about 1991, Alayne hired Gary Hoffman and, shortly thereafter, Sheldon Hoffman, who are the sons of Jules Hoffman, to help manage its clients' real estate investments. Since Unterberg lived outside the United States Gary Hoffman and Sheldon Hoffman controlled the day-to-day operations of Alayne. In or about March 1992, Alayne hired Millwater. Millwater's duties included entering into new residential and renewal leases with tenants in the buildings under Alayne's management; collecting rent and rent security deposits from tenants entering into leases and renewal leases; maintaining Alayne's records of tenants' rent and rent security deposits; hiring contractors for the day-to-day repair and maintenance of the buildings; hiring and firing employees of the buildings; maintaining records; and supervising Alayne's employees.

In 1999, Alayne commenced an internal investigation of its tenant rent security accounts because of certain discovered irregularities. In August 1999, Alayne, at Millwater's urging, engaged Lasher (who later married Millwater in 2001), an attorney, to represent it in connection with matters involving Setam and the 42-15 81<sup>st</sup> Street condominium, its own needs, and to perform an internal investigation of the tenant rent security deposit irregularities.

According to plaintiffs, Millwater had either directly converted or aided the Hoffmans' conversion of tenant security deposits belonging to Alayne and its clients or had been negligent in her handling of the tenant rent securities so that such monies were lost. Plaintiffs assert that Lasher, who, as noted above, had been retained in 1999 to investigate

the missing tenant security monies, either directly participated in the theft of those monies or aided Millwater and the Hoffmans in the conversion of such monies. Plaintiffs claim that Lasher breached his obligation as an attorney to Alayne both by participating in the conversion of the tenant rent security monies and by not disclosing the thefts to Alayne.

According to plaintiffs, in or about mid-December 1999, defendants entered into a scheme or common plan with Gary Hoffman, Sheldon Hoffman, and Jules Hoffman to raid Alayne's property management customers, to improperly remove Alayne as the managing agent of its properties, to steal Alayne's clients and business, to loot Alayne's key employees, and, ultimately, to compete directly with Alayne through a management company owned by the Hoffmans. Plaintiffs claim that defendants, while employed by them, divulged their confidential information to Jules Hoffman, Gary Hoffman, and Sheldon Hoffman, for use against them.

In addition, Lasher, while still representing plaintiffs, commenced six legal actions (the first of which was commenced in 1999) against them, on behalf of Jules Hoffman (the Hoffman actions). Lasher was later disqualified from serving as counsel as well as co-counsel in the Hoffman actions based on a conflict of interest due to his prior representation of plaintiffs and the fact that Lasher was privy to confidential financial information concerning plaintiffs, which he was not legally permitted to divulge to Jules Hoffman. After plaintiffs had incurred substantial attorneys' fees in defending the Hoffman actions, these actions were ultimately settled by a settlement agreement dated December 15, 2005.

On March 30, 2000, plaintiffs, based upon the above, filed this action against defendants, alleging breach of fiduciary duty, breach of contract, negligence, conversion, tortious interference with business relations, and theft of business, and demanding damages and an accounting. Defendants interposed their respective answers, and plaintiffs sought discovery and production of the documents pertinent to their claims and to take defendants' depositions.

By decision and order dated December 9, 2004, Justice Randolph Jackson granted a motion by plaintiffs to strike defendants' answer and grant a default judgment in plaintiffs' favor due to defendants' egregious, willful, and contumacious failure to provide disclosure to plaintiffs. The court found that defendants, for almost two and one-half years, had consistently sought to avoid their obligations to produce documents and appear for depositions in disregard of multiple court orders, and that Lasher had allowed spoliation of evidence by permitting the Hoffmans to take computer files and boxes full of documents from his home in order to avoid producing them. Although defendants moved to reargue the December 9, 2004 order, that motion was denied, and defendants' subsequent appeal of that order was dismissed.

By order dated December 13, 2005, plaintiffs' motion to schedule an inquest to assess damages was granted, and this court referred this matter to the Referee to hear and report with recommendations with respect to the issue of the assessment of damages to be awarded against defendants. An inquest to assess plaintiffs' damages was held before the Referee for

ten days, i.e., on June 14, July 7, September 13 and 14, October 18, 19, and 20, and November 28, 2006, and January 11 and 12, 2007. During this inquest, David Unterberg, Casib Balic (who was a superintendent for Alayne), Gary Hoffman, Jules Hoffman, Lasher, and Millwater testified. In addition, documentary evidence was submitted to the Referee. After hearing and considering the extensive testimony and documentary evidence introduced during the inquest, the Referee, in her report dated February 4, 2008 and issued on January 9, 2009, rendered her recommendation to this court.

In her Referee's report, the Referee initially noted that due to the default by defendants, they were deemed to have admitted the factual allegations of the complaint, including the basic allegation of liability. The Referee, therefore, noted that defendants had not been permitted to introduce evidence directed at the merits of plaintiffs' causes of action as such evidence was impermissible on an inquest concerning solely the issue of the damages sustained by plaintiffs as a result of defendants' improper conduct, which plaintiffs had alleged in the complaint and which had been deemed admitted by defendants.

The Referee, in her report, addressed each of the elements of damages sought by plaintiffs. Among the damages sought was the sum of \$32,957.94 for security deposits which, plaintiffs alleged, had been converted by Millwater.

David Unterberg testified at the inquest regarding the issue of security deposits. The Referee found David Unterberg's testimony to be credible. The Referee also reviewed the tenant leases and the bank statement for Alayne's security account. The Referee found that

by this testimony and documentary evidence, plaintiffs had established that tenants' rent security deposits in the amount of \$32,957.94 were collected by Millwater, but never deposited into Alayne's security account. The Referee, thus, found that as a result of Millwater's failure to deposit the tenants' security, plaintiffs were damaged, and have been and in the future will be required to expend monies to cover the loss of such deposits, including incurring the cost of making repairs, covering unpaid rent, and reimbursing tenants for security deposits that otherwise would have been paid from the missing rent security. The Referee, therefore, recommended that the court issue a judgment awarding plaintiffs missing rent security deposits in the amount of \$32,957.

The Referee next addressed the issue of whether plaintiffs were entitled to recover, as an element of their damages, the reasonable value of the attorneys' fees and other expenses, which they incurred in defending the six Hoffman actions. The Referee relied upon David Unterberg's testimony that defendants had assisted Jules Hoffman in commencing multiple lawsuits against plaintiffs in breach of their fiduciary and contractual duties while engaged by plaintiffs. The Referee noted that the evidence established that as a result of the Hoffman actions, plaintiffs incurred legal fees and expenses, from December 1999 through March 2006, in the amount of \$1,213,751.94. The Referee further noted that Lasher had commenced the actions for Jules Hoffman, as his attorney, after acting as the attorney for plaintiffs, and, that he, through his wife, Millwater, had become privy to confidential financial information concerning plaintiffs. The Referee also relied upon David Unterberg's further testimony that each of the defendants misappropriated and removed, or

assisted in the removal of documents and proprietary information belonging to plaintiffs and, thereby, assisted Jules Hoffman in the Hoffman actions brought by him against plaintiffs' interests.

The Referee, citing the well recognized rule that one may recover reasonable attorneys' fees and other expenses incurred if, through the wrongful conduct of its present adversary, it was involved in earlier litigation with a third person in defending an action to protect its interests (*see Shindler v Lamb*, 25 Misc 2d 810, 812 [1959], *affd* 10 AD2d 826 [1960], *affd* 9 NY2d 621 [1961]), found that plaintiffs were entitled to recover reasonable attorneys' fees from defendants since, due to their wrongful conduct, they were forced to defend the Hoffman actions. In determining the reasonable compensation for attorneys' fees, the Referee considered the "time and labor required; the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*Matter of Freeman*, 34 NY2d 1, 9 [1974]). Based on the evidence and testimony introduced at the inquest, including a review of plaintiffs' attorneys' billing statements and the testimony given about such legal services, the Referee recommended that the court issue a judgment awarding plaintiffs reasonable attorneys' fees in the sum of \$1,213,751.

The Referee, in her report, next recommended the denial of that portion of plaintiffs' claim for damages which sought to recover an \$800,000 premium paid by them in settlement

of the Hoffman actions based upon the fact that the final settlement agreement and release made no mention of a premium or excess payment and since plaintiffs had signed a confession of judgment in the amount of \$1,850,000 if they failed to pay the \$1,650,000 within 120 days of signing the December 15, 2005 settlement.<sup>1</sup> The Referee also recommended the denial of that portion of plaintiffs' claim for damages which sought \$19,924 in lost business revenues from Byrdley Realty due to defendants' tortious interference. The Referee predicated this recommendation on her finding that the management agreement between Alayne and Brydley Realty permitted Brydley Realty to terminate on 30 days' notice, and that David Unterberg's testimony had failed to establish the date when that agreement was terminated, why it was terminated, or by whom it was terminated.<sup>2</sup>

The Referee also addressed the element of plaintiffs' claim for damages which sought recovery against Millwater for an unpaid loan obligation. Millwater conceded that she received a \$6,000 loan from Setam and that the balance of \$1,998.69 was due and owing to Setam. The Referee, thus, recommended that the court issue a judgment awarding Setam damages on the unpaid loan claim in the amount of \$1,998.69.

Plaintiffs, by their instant motion, now seek confirmation by this court of the Referee's recommendation, which awarded plaintiffs a total damages award against

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<sup>1</sup> Plaintiffs do not oppose the confirmation of the Referee's report with respect to this recommendation.

<sup>2</sup> Plaintiffs also do not oppose the confirmation of the Referee's report with respect to this recommendation.

defendants, jointly and severally, in the sum of \$1,246,709, and an additional award of damages solely against Millwater in the sum of \$1,998.69. Plaintiffs also seek an award of interest on these sums.

Pursuant to CPLR 4403, “[u]pon the motion of any party . . . the judge required to decide the issue may confirm or reject, in whole or in part, . . . the report of a referee to report.” “The report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved all issues of credibility” (*Capili v Ilagan*, 26 AD3d 354, 354 [2006], quoting *Stone v Stone*, 229 AD2d 338, 388 [1996]; see also *Board of Trustees of Maha Lakshmi Mandir, Inc. v Dubey*, 56 AD3d 504, 504 [2008]; *Spodek v Feibusch*, 55 AD3d 903, 903 [2008]; *Royal & Sun Alliance v New York Cent. Mut. Ins. Co.*, 29 AD3d 886, 887 [2006]; *Matter of Gargano v City of N.Y. Dept. of Fin.*, 26 AD3d 329, 330 [2006]; *Shen v Shen*, 21 AD3d 1078, 1079 [2005]; *Thomas v Thomas*, 21 AD3d 949, 949 [2005]).

In opposition to plaintiffs’ motion, Lasher has submitted his own affidavit. Lasher, in his affidavit, argues that Justice Jackson had based his decision and order dated December 9, 2004 on the mistaken information that he had been suspended from the practice of law for five years due to his breach of his ethical obligation to plaintiffs while representing them as their attorney. Lasher points out that his suspension from the practice of law was, in fact, the result of unrelated misconduct by him. Lasher asserts that the December 9, 2004 order was highly prejudicial to defendants because it was purportedly based upon this mistaken information as to the reason for his suspension.

Lasher's argument, however, is without moment since Justice Jackson's decision to strike defendants' answer was not based upon Lasher's suspension or the reason therefor, but, rather (as noted above), was based upon defendants' willful and contumacious failure to comply with discovery in blatant violation of multiple court orders. Moreover, Lasher was afforded an opportunity to challenge Justice Jackson's December 9, 2004 order, and did so by making a motion to reargue, which was denied, and by filing a subsequent appeal, which was dismissed.

As noted by the Referee, in her report, where, as here, a default judgment has been entered against a defendant, the defendant "admits all factual allegations of the complaint and all reasonable inferences therefrom" (*Fleet Bank v Powerhouse Trading Corp.*, 267 AD2d 276, 277 [1999], quoting *Silberstein v Presbyterian Hosp. in City of N.Y.*, 96 AD2d 1096, 1096 [1983]). This includes the basic allegation of liability (*see Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663, 665 [2004]). Thus, as a matter of law, the issue of Lasher's liability to plaintiffs was conclusively determined and the allegations of plaintiffs' complaint deemed admitted, including the basic allegation of his liability to plaintiffs.

Lasher further asserts that there was no testimony at the inquest that he misappropriated any security deposits or participated in the misappropriation of security deposits. Lasher claims that the allegations of plaintiffs' complaint do not state that he had anything to do with security deposits, but, instead, only mention Millwater. Lasher argues that since he was not involved with the occurrence regarding the missing security deposits,

the Referee's recommendation that he be found jointly liable with Millwater for missing security deposits should be rejected by the court.

Lasher's argument is belied by the allegations of plaintiffs' complaint (Complaint ¶ 13, 14, 25, 38, and 39). Plaintiffs' complaint alleges that Alayne commenced an internal investigation of its tenant rent security accounts because of certain discovered "irregularities," and that Lasher, who had been retained in 1999 to investigate the missing tenant rent security monies, either directly participated in the theft of such monies or aided Millwater and the Hoffmans in the conversion of such monies. Plaintiffs' complaint also alleges that Lasher breached his obligation as an attorney to Alayne both by participating in the conversion of the tenant rent security monies and by not disclosing the thefts to Alayne. Based on these facts, plaintiffs' third cause of action seeks damages for defendants' negligence in executing the duties they owed to plaintiffs and plaintiffs' fourth cause of action seeks damages for Lasher's aiding and abetting Millwater's conversion of the missing rent security deposits. Since these allegations are deemed admitted by virtue of the December 9, 2004 order, the scope of the inquest was properly limited to the issue of plaintiffs' damages as a result of Lasher's deemed admitted participation in the misappropriation of tenant rent security deposits (*see Suburban Graphics Supply Corp.*, 5 AD3d at 665). The sum of \$32,957.94, recommended by the Referee, is supported by the record, including the testimony and evidence introduced during the inquest. Consequently, this portion of the Referee's report should be confirmed and her recommendation adopted by the court (*see Capili*, 26 AD3d at 354).

Lasher opposes confirmation of the Referee's recommendation as to the damages award for attorneys' fees. Lasher argues that while the Referee stated the requisite criteria for determining the amount of reasonable attorneys' fees to be awarded, there was no testimony regarding plaintiffs' lawyers' experience, ability and reputation, the customary fee charged by the Bar for similar services, or the contingency or certainty of compensation. Lasher also states that the result obtained by plaintiffs' attorneys was that plaintiffs paid Jules Hoffman \$1,650,000, which was \$800,000 more than what was owed.

Contrary to Lasher's argument, however, plaintiffs submitted evidence as to all of their attorneys' experience, as well as case law establishing that the courts in this State have approved hourly rates similar to those charged by their attorneys. An attorney's customary fee for similar services is presumptively appropriate (*see Getty Petroleum Corp. v G.M. Triple S. Corp.*, 187 AD2d 483, 483-484 [1992]). There was no necessity for testimony regarding contingency fees because plaintiffs' attorneys' did not charge plaintiffs a contingency fee, but, rather, charged them an hourly rate. The Referee considered the time and labor required to handle the problems presented and the amount involved. The Referee also considered the benefit resulting to plaintiffs from the legal services provided, which was the discontinuance and settlement of the Hoffman actions. Defendants provided no evidence that any of plaintiffs' attorneys' entries did not accurately depict the work that was actually performed by them or that there was any impropriety in plaintiffs' attorneys' billings for their work (*see Williams v New York City Hous. Auth.*, 975 F Supp 317, 328 [SD NY 1997]).

Lasher takes issue with the Referee's reference, in her report, to the fact that defendants had failed to offer any evidence that the work performed was improper, unnecessary, or inappropriate, or that would justify any valuation of plaintiffs' attorneys' services other than by using their standard fees. Lasher argues that there was no testimony by plaintiffs on these items, and, therefore, there was nothing on which to offer evidence to refute or contradict. Contrary to this argument, however, plaintiffs' attorneys' legal bills, which were produced at the inquest, and David Unterberg's testimony demonstrated that plaintiffs had incurred \$1,213,751.94 in reasonable attorneys' fees in defending the Hoffman actions.

Lasher additionally argues that the Referee improperly refused to allow his attorneys to ask any questions whatsoever, on cross-examination of David Unterberg, regarding his credibility. Lasher contends that this was an error and requires a mistrial.

Lasher's contention is devoid of merit. The questions asked were entirely irrelevant and had no bearing upon the issue of plaintiffs' damages (*see* Transcript at 558-559). Thus, the Referee properly sustained the objections by plaintiffs' attorney to defendants' attorney's improper line of questioning. In any event, the Referee, in her report, specifically states that she, in fact, evaluated David Unterberg's testimony and found it to be "credible." Moreover, the record reflects that Lasher was afforded an opportunity to cross-examine David Unterberg, and Lasher's counsel, together with Millwater's counsel, in fact, did cross-examine him over the course of six days. Such cross-examination included line-by-line questioning of plaintiffs' legal bills.

Lasher further argues that plaintiffs have not shown how their damages flowed from his acts. Lasher avers that plaintiffs did not prove that the damages were caused by the specific documents or the proprietary information that he and Millwater gave to Jules Hoffman. Lasher contends that plaintiffs were unable to name any specific confidential or proprietary documents that were stolen or given to Jules Hoffman or how the taking of any document could have caused them damages. Lasher argues that plaintiffs should have been able to identify specific documents given by him to Jules Hoffman which caused him damages. Lasher asserts that while Justice Jackson found that defendants gave documents to Jules Hoffman, he did not state what these documents were. Lasher also asserts that the general ledger and cancelled checks, which were a few of the documents among those taken, were accessible by everyone in the office, including Jules Hoffman and his two sons who worked at Alayne.

Plaintiffs' complaint, however, expressly alleges that Lasher misappropriated and removed or aided in the misappropriation or removal of documents and proprietary information belonging to plaintiffs and thereby assisted Jules Hoffman in the Hoffman actions against plaintiffs. Specifically, plaintiffs' complaint alleges that commencing in December 1999, Lasher, while employed by plaintiffs, as their attorney, divulged plaintiffs' confidential information to Jules Hoffman and his sons for use against plaintiffs, including "litigations . . . against the interests of plaintiffs" and commenced these litigations against them on behalf of the Hoffmans (Complaint ¶ 21). Based upon these allegations, the complaint contains a cause of action against Lasher for breach of fiduciary duty and seeks

damages in excess of one million dollars. Since Lasher is deemed to have admitted these allegations, Justice Jackson's December 9, 2004 order had the legal effect of determining that Lasher breached his fiduciary duties to plaintiffs when he gave confidential information to the Hoffmans and then commenced litigation against plaintiffs on behalf of Jules Hoffman while simultaneously representing plaintiffs.

The default judgment is tantamount to a finding that Jules Hoffman had commenced the Hoffman actions against plaintiffs due to Lasher's improper acts, as alleged in the complaint. Thus, since Lasher is deemed to have admitted all of the allegations of the complaint, plaintiffs were not obligated to demonstrate what documents Lasher admittedly took and used to assist Jules Hoffman in commencing the Hoffman actions.

Lasher cannot relitigate the previously resolved issue of his liability in the guise of an argument that plaintiffs have failed to show causation. The issue of causation cannot be raised at a damages inquest (*see Rich-Haven Motor Sales v National Bank of N.Y. City*, 163 AD2d 288, 290 [1990]; *Harper v Donald*, 2001 NY Slip Op 50071 [U], \*2 [App Term 2001]). The sole issue at the inquest was to determine the extent of the damages sustained by plaintiffs, and defendants were properly precluded from contesting the fact that they caused these damages (*see Rich-Haven Motor Sales*, 163 AD2d at 290; *Harper*, 2001 NY Slip Op 50071 [U], \*2). Defendants were properly prohibited by the Referee from introducing testimony or evidence in an attempt to contradict the judicial admissions deemed previously made by them (*see Harper*, 2001 NY Slip Op 50071 [U], \*2). Moreover, defendants cannot rely upon plaintiffs' inability to point to all of the specific documents

taken by Lasher when such inability resulted from defendants' spoliation of evidence and refusal to produce these documents in discovery (which, as previously noted, was the very reason defendants' answer was stricken).

Lasher complains that the Referee sustained objections and did not allow certain testimony by Jules Hoffman regarding the documents given to Jules Hoffman. However, the questions asked pertained to liability rather than to damages. Thus, the Referee properly rejected defendants' attempts to relitigate the underlying facts of this case and the issue of their liability, and properly limited the scope of the inquest to the sole issue of plaintiffs' damages as a result of defendants' improper conduct (*see Rokina Opt. v Camera King*, 63 NY2d 728, 730 [1984]). Consequently, the Referee's recommendation that the court issue a judgment to plaintiffs awarding them attorneys' fees damages as against Lasher is supported by the record and must be confirmed and adopted by the court (*see Royal & Sun Alliance*, 29 AD3d at 887; *Capili*, 26 AD3d at 354).

With respect to Millwater, Millwater's opposition papers do not address those portions of the Referee's report, which recommended that a judgment be entered against her in the amount of \$32,957.94 for missing rent security damages and \$1,998.69 for her failure to repay in full a personal loan made by her to Setam. Thus, Millwater has offered no opposition to these portions of the Referee's report. Therefore, since these recommendations are supported by the record, confirmation of these recommendations is warranted (*see Capili*, 26 AD3d at 354).

Millwater, however, has submitted her attorney's affirmation, which opposes plaintiffs' motion to confirm the Referee's report with respect to the Referee's recommendation of the award of attorneys' fees to plaintiffs. Millwater argues that the damages of attorneys' fees, which the Referee recommended should be assessed against her, should be rejected because plaintiffs' complaint, upon which the Referee's report is based, never requested legal fees. Millwater claims that the Referee's recommendation awarding damages of attorneys' fees was, therefore, beyond the scope of the Referee's authorization in this action.

This argument by Millwater is without merit because plaintiffs are not seeking to recover the legal fees that they incurred in defending this action. Rather, the legal fees sought to be recovered by plaintiffs and recommended by the Referee were those incurred by them in defending the Hoffman actions. Such legal fees, thus, constitute the damages sustained by plaintiffs due to defendants' breach of fiduciary duties and improper acts, as alleged in their complaint. Such legal fees are, therefore, encompassed within the scope of the relief sought in plaintiffs' complaint.

Millwater also asserts that plaintiffs' complaint did not refer to the Hoffman actions. This assertion lacks merit. Paragraph 21 of plaintiffs' complaint references the litigations brought against plaintiffs' interests by the Hoffmans, and plaintiffs' complaint seeks all damages arising from defendants' conduct and breaches of fiduciary duties as alleged in the complaint. Thus, plaintiffs' complaint encompasses the attorneys' fees incurred due to such **conduct and breaches**.

Millwater does not dispute that there is a well recognized exception to the prevailing rule that in the absence of any contractual or statutory liability therefor, attorneys' fees and expenses incurred in litigating a claim are not recoverable as damages (*see Shindler*, 25 Misc 2d at 812). This exception, referred to as the *Shindler* exception, provides that "[i]f, through the wrongful act of [a plaintiff's] present adversary, a [plaintiff] is involved in earlier litigation with a third person in . . . defending an action to protect [its] interests, [it] is entitled to recover the reasonable value of attorneys' fees and other expenses thereby suffered or incurred" (*id.*; *see also Hermann v Bahrami*, 236 AD2d 516, 516 [1997]; *Coopers & Lybrand v Levitt*, 52 AD2d 493, 496 [1976]; *New York Cooling Towers, Inc. v Goidel*, 10 Misc 3d 219, 222 [2005]).

Millwater argues, however, that the *Shindler* exception to the prevailing rule is inapplicable in this case. Millwater asserts that this is because there is no allegation or showing by plaintiffs that her wrongful actions necessarily caused the Hoffman actions. Millwater claims that there was no finding by the Referee as to causation between her actions and the attorneys' fees damages incurred by plaintiffs. Millwater asserts that defending the Hoffman actions was not the natural and proximate cause of the breach of fiduciary duty by her.

Specifically, Millwater argues that the Hoffmans were in the same office with David Unterberg, and had access to all of the same information that plaintiffs claim Lasher gave to the Hoffmans. Millwater contends that because of this access, it is equally plausible that the Hoffmans removed the documents and proprietary information themselves. Millwater asserts

that there was no evidence presented at the inquest that she gave information to the Hoffmans that they did not already have.

Millwater additionally argues that the Referee's report fails to acknowledge that Lasher's actions in bringing the Hoffman actions against plaintiffs was an intervening factor in causing damages with respect to the attorneys' fees incurred. Millwater asserts that since Lasher was the attorney for plaintiffs, she was entitled to give him whatever documentation he required. Millwater also asserts that Lasher was given free access to Alayne's records to conduct a review. Millwater claims that it was Lasher who had the conflict of interest, and any wrongdoing would be attributable to her husband, Lasher, not to her.

Millwater's argument must be rejected. Plaintiffs' complaint alleges that Millwater had access to Alayne's books, records, and proprietary information and controlled Alayne's daily operations and management activities, along with Gary Hoffman and Sheldon Hoffman, that she removed and/or assisted the Hoffmans' removal of documents from Alayne's offices, participated in a scheme with the Hoffmans, and breached her fiduciary duty to plaintiffs. As noted above, plaintiffs' complaint references the litigation commenced by the Hoffmans against plaintiffs' interests. Therefore, contrary to Millwater's argument, plaintiffs' complaint alleges liability against, and seeks damages from Millwater as well as from Lasher.

Thus, Millwater's arguments improperly seek to controvert the allegations of plaintiffs' complaint which, as a matter of law, Millwater already has been deemed to have admitted (*see Rokina Opt. Co.*, 63 NY2d at 730; *Surburban Graphics Supply Corp.*, 5 AD3d at 665; *Fleet Bank*, 267 AD2d at 277). Millwater is precluded from contesting the fact that

she caused plaintiffs' damages (*see Rich-Haven Motor Sales*, 163 AD2d at 290; *Harper*, 2001 NY Slip Op 50071 [U], \*2). Consequently, since the Referee's findings are substantially supported by the record, and the Referee clearly defined the issues and resolved all issues of credibility, confirmation of her recommendation as to the award of plaintiffs' attorneys' fees as against Millwater is warranted (*see Royal & Sun Alliance*, 29 AD3d at 887; *Capili*, 26 AD3d at 354).

Defendants do not address the argument, contained in plaintiffs' moving papers, that plaintiffs are entitled to 9% interest on both the \$1,213,715 award for the attorneys' fees incurred by them in defending the Hoffman actions, and the \$32,957 award for missing rent security damages. CPLR 5002 provides that "[i]nterest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment."

Liability is established when a defendant's answer is stricken, and prejudgment interest runs from that date, regardless of any delay in determining damages (*see O'Brien v Barretta*, 44 AD3d 731, 733 [2007]; *Van Nostrand v Froehlich*, 44 AD3d 54, 65 [2007]; *Hayes v City of New York*, 264 AD2d 610, 611 [1999]). The applicable rate of interest in this matter is 9% per annum (CPLR 5004). Thus, interest must be computed from December 9, 2004 to the date of entry of the final judgment at the rate of 9% on both the \$1,213,751 award for attorneys' fees and the \$32,957 award for missing rent security damages.

With respect to the interest on the award of \$32,957 for missing rent security damages, pursuant to CPLR 5001 (b), “[i]nterest shall be computed from the earliest ascertainable date the cause of action existed.” Interest on an unpaid loan that does not contain a maturity date accrues upon demand for repayment at the statutory rate (9%) applicable for interest on a judgment (*see Romito v Panzarino*, 11 AD3d 444, 444 [2004]; *Hestnar v Schetter*, 284 AD2d 499, 501 [2001]). Therefore, plaintiffs are entitled to interest at the rate of 9% per annum from December 1, 1999 through the date of entry of judgment herein on the sum of \$1,998.69.

Accordingly, plaintiffs’ motion to confirm the Referee’s report is granted, and the court hereby directs that judgment shall be entered: (1) in favor of plaintiffs against defendants, jointly and severally, in the sum of \$1,246,709, plus interest at the rate of 9% per annum from December 9, 2004 through the date of the entry of judgment, and (2) in favor of Setam against Millwater in the sum of \$1,998.69, plus interest at the rate of 9% per annum from December 1, 1999 through the date of the entry of judgment.

This constitutes the decision, order and judgment of the court.

E N T E R,



**HON. WAYNE P. SAITTA**  
**J.S.C.**