

Nahzi v Lieblich

2009 NY Slip Op 33192(U)

January 13, 2009

Supreme Court, New York County

Docket Number: 112000/2006

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 112000/2006
NAHZI, FRON
vs.
LIEBLICH, GERALD
SEQUENCE NUMBER : 011
CONFIRM/REJECT REFEREE REPORT

INDEX NO. 112000/2006
MOTION DATE 10/29/09
MOTION SEQ. NO. 011
MOTION CAL. NO. 83

n this motion to/for _____

PAPERS NUMBERED

1
2
3

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

FILED

JAN 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/13/2010
3:05 pm

Paul G. Feinman
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

FRON NAHZI, f/k/a FRON NAZI
Plaintiff,

Index Number 112000/2006

-against-

Mot. Seq. 011

GERALD LIEBLICH and LOT 1555 CORP.,
Defendants.

DECISION AND ORDER

-----X

For the Plaintiff:
Roy A. McKenzie, Esq.
641 Lexington Avenue, 27th floor
New York, NY 10022

For the Defendant:
Peter J. Pruzan, Esq.
48 Wall Street, 26th floor
New York, NY 10005

Papers considered in review of this motion to confirm in part and vacate in part the recommendations of the special referee:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

FILED
JAN 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

PAUL G. FEINMAN, J.:

Plaintiff moves pursuant to CPLR 4403 for an order confirming in part and ~~vacating~~ granting in part the April 28, 2009 report and recommendations of the Special Referee, and granting the plaintiff an additional judgment of \$91,368.00 against the defendants, with interest from January 1, 1998. For the reasons which follow, the motion is granted in part, and otherwise denied, and the findings of fact and conclusions of law of the Special Referee confirmed in their entirety.

Background

Pursuant to a decision and order of another justice of this court dated December 24, 2008, the plaintiff was awarded judgment against defendants in the amount of \$466,982.89 with interest (Decision/Order, (Kapnick, J.) 12/24/08 [mot. seq. 007]).¹ This initial judgment was based on the

¹By decision dated January 7, 2010, the Appellate Division, First Department, unanimously affirmed the court's decision as to liability and the amount of the award (*Nahzi v Lieblich*, 2010 NY Slip Op 00066).

plaintiff's status as 25 percent shareholder of the defendant Lot 1555 Corp., and the defendants' sale of 1555 Bruckner Boulevard, Bronx, New York without compensating plaintiff (Mot. McKenzie Aff. ¶ 1). The same decision referred the matter to a Special Referee to hear and report with recommendations on whether the plaintiff was entitled to an additional recovery of \$199,266.65, based upon plaintiff's assertion that this sum represented his share of the profits of a parking lot enterprise which was being operated on the premises during the term of his part ownership thereof (Mot. McKenzie Aff. ¶ 3).

Following a hearing, Special Referee Leslie R. Lowenstein issued his Report and Recommendations dated April 27, 2009, and entered on April 28, 2009. (Mot. Ex. A, hereinafter Referee Report). After hearing the testimony from Ronald Eletto, the owner of the accounting firm which maintains the books of defendant Lot 1155 Corp., the referee concluded that none of the corporate income tax returns filed on behalf of the defendant corporation between 1994 and 2005 were reflective of any stream of income that might have been achieved as the result of a parking lot business or any other business activities that might have been operated at that premises. (Referee Report pp. 6-7). On the basis of testimony by defendant Gerald Lieblich, the referee also concluded that although there was sufficient evidence to establish that a parking lot business operated at 1555 Bruckner Boulevard, Bronx, New York as recently as 2001, plaintiff failed to establish that any business at this location resulted in corporate or other income to which plaintiff would have any entitlement in terms of a recovery by reason of his status as a 25 percent shareholder (Referee's Report p. 7). The report further found insufficient proof, testimony, and evidence adduced at the hearing to establish the precise extent of any income, even if it were determined that plaintiff was entitled to a recovery (Referee's Report p. 7).

Plaintiff moves for an order confirming that portion of the referee's report concluding that defendants operated a parking lot business at 1555 Bruckner Boulevard, Bronx, New York as recently as 2001, and vacating that portion of the report finding that plaintiff is not entitled to a recovery from defendants of any sums beyond the amount previously awarded to the plaintiff by the court with respect to the sale of the premises. Defendants oppose, and request that the court deny plaintiff's motion in its entirety on the basis that he failed to meet his burden of proof.

Analysis

CPLR 4403 provides that upon motion or on its own initiative, a court may confirm or reject, in whole or in part, the report of a referee to report, may make new findings with or without taking additional testimony, or order a new trial or hearing. "It is the function of a referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility," and "[g]enerally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record...because, as the trier of fact, he [or she] has an opportunity to see and hear the witnesses and to observe their demeanor." *Poster v Poster*, 4 AD3d 145, 145 (1st Dept 2004), quoting *Frater v Lavine*, 229 AD2d 564, 564 (2nd Dept 1996).

In the instant case, the special referee observed the testimony of Ronald Eletto, the owner of the accounting firm maintaining the books of defendant Lot 1155 Corp. and preparer of defendants' tax returns, and defendant Lieblich, both called by plaintiff as witnesses. According to the report, Eletto testified that he was familiar with the business and was unaware of any income produced at the Bruckner Boulevard location, other than the income derived from the sale of the premises. Lieblich testified about the parking lot business without being able to recall details with specificity (Referee's Report pp. 4-5).

Plaintiff argues that the report's conclusion that defendants ran a parking lot business as recently as 2001 should be confirmed, but that the conclusion that there was no income produced for which plaintiff must be compensated, should be denied. Plaintiff's attorney argues that defendants' tax filings for the years in question misrepresented the facts, and offers "reasonable projections of income" based on the figures derived from a company owned by plaintiff which he argues the court should grant him (Mot. McKenzie Aff. ¶¶ 5-12). However, other than Eletto's admission that he had never visited the premises, and plaintiff's argument that Eletto had no direct knowledge of the business's operations, plaintiff fails to put forth any evidence that would undermine the special referee's credibility assessment of Eletto's conclusion that none of corporate income tax returns filed on behalf of the defendant corporation between 1994 and 2005 were indicative of any income streams from a parking lot business or any other business. As a result, the referee's conclusion that "plaintiff has insufficiently established any entitlement to the recovery of an additional sum of \$199,266.25 or any other additional sums in this action by reason of any business enterprise that might have operated from the 1155 Bruckner Boulevard, Bronx, New York location for the period running from 1994 through 2005, when the property at the foregoing location was sold" (Referee's Report p. 7), shall remain undisturbed. It is

ORDERED that Report and Recommendation of Special Referee Leslie R. Lowenstein, dated April 27, 2009, and entered on April 28, 2009, is confirmed in its entirety, and the branch of plaintiff's motion seeking to disaffirm part of the report is denied.

This constitutes the decision and order of the court.

Dated: January 13, 2010 *JAS*
 New York, New York

Paul J. Dennis
 J.S.C.

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