

Estate of Steingart v Hoffman
2010 NY Slip Op 30561(U)
March 5, 2010
Supreme Court, New York County
Docket Number: 120875/2003
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Justice

Index Number : 120875/2003

STEINGART, DIANE

VS.

HOFFMAN, BARBARA

SEQUENCE NUMBER : 016

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

^{is} motion ~~and cross-motion~~ are decided in accordance with accompanying memorandum decision.

FILED

MAR 17 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: March 5, 2010

Saliann Scarpulla

SALIANN SCARPULLA *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 19

----- X
ESTATE OF GERTRUDE STEINGART,
DIANE STEINGART as
PERSONAL REPRESENTATIVE,

Plaintiff,

- against- .

Index No.:120875/2003
Submission Date:
3/03/2010

BARBARA HOFFMAN,

DECISION AND ORDER

Defendant.

----- X
For Plaintiff:
Eisen & Schulman, LLP
18 East 48th Street, 8th Floor
New York, NY 10017

Defendant, *pro se*:
Barbara Hoffman, Esq.
330 West 72nd Street
New York, NY 10023

FILED
MAR 7 2010
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion to confirm in part and modify in part the referee's report.

Notice of Motion 1
Aff in Support. 2
Mem of Law 3
Aff in Opp 4
Reply Aff 5,6

PRESENT: HON. SALIANN SCARPULLA, J.:

In this partition action, defendant Barbara Hoffman ("Hoffman") moves to confirm in part and modify in part the Report by Referee Thomas L. Tedeschi, dated March 19, 2009 (the "Referee's Report").

At issue is a cooperative apartment located at 220 West 72nd Street, New York, NY 10023, Unit 16N penthouse (the "apartment"). Hoffman and plaintiff Diane Steingart, as

personal representative of the Estate of Gertrude Steingart ("Steingart Estate") are owners of the apartment as tenants in common. The apartment was originally owned by Hoffman's father Israel Hoffman ("Mr. Hoffman"), and Gertrude Steingart ("Steingart"). Hoffman acquired her interest in the apartment by inheritance upon her father's death in 1997. Gertrude Steingart passed away during the course of this litigation, passing her interest to her Estate.

Mr. Hoffman and Steingart purchased the apartment together from the sponsor in the 1980s. At that time it was occupied by a rent controlled tenant, Anna Tulin ("Tulin"). Tulin remained in the apartment until her death in 2001. Subsequently, Hoffman and Steingart brought a holdover proceeding against Tulin's Estate. This action was settled in January 2003 for \$32,571.00 each to Hoffman and Steingart.

In 2003, the parties received notice from the Cooperative Corporation (the "Co-op") that they were required to abate certain conditions in the apartment which were allegedly causing water to leak into another unit in the building. As a result, Hoffman and Steingart commenced a Yellowstone proceeding ("the Yellowstone Action") in September 2003 against the Co-op. In mid-September Steingart withdrew from the lawsuit. Hoffman re-filed the Yellowstone Action alone, and the Co-op settled with Hoffman in August 2004 for \$50,000.00 (\$30,000.00 by check and the balance in maintenance credit towards the apartment and Unit 7B¹.)

¹ Hoffman resides in and owns Unit 7B in the same building, 220 West 72nd Street.

While the Yellowstone Action was pending, the parties agreed that, in an effort to abate the leaking condition, one set of doors and certain windows needed to be replaced. After consulting with architects and a window company, Hoffman authorized the installation of windows, sills and two sets of outer doors at the apartment.

Some time after Mr. Hoffman's death, Hoffman expressed interest in purchasing Steingart's shares of the apartment, but the parties did not come to an agreement. In December 2003, Steingart commenced this action for a partition sale of the apartment. The matter was first referred to the Referee by an order dated December 20, 2004 (Justice Lehner) for a determination pursuant to Real Property Actions and Proceedings Law ("RPAL") § 913 whether there was any creditor not a party to this action who had a lien on the interest of either party. The Referee issued a report on that issue on January 29, 2005.

During the course of this partition action the parties were still unable to agree to a price for Hoffman to purchase the apartment or to a procedure for sale of the apartment by a real estate broker. By order dated June 27, 2005, the Court (Judge Lehner) directed a sale of the apartment by the Referee at public auction as prescribed in RPAL § 231. The property was sold at a public auction on May 29, 2007. The closing of title took place on July 16, 2007, and a report of sale was issue on August 23, 2007.

By order dated September 26, 2007, the Court (Justice Lehner) directed the Referee to conduct a hearing and issue a report to ascertain the rights of the parties to the proceeds of the sale because the parties were unable to come to an agreement.

The referee conducted hearings on January 7-10, 14, 17, 23, 24 and February 22 and 26, 2008. During the course of the hearing ten witnesses testified, over 1500 pages of transcripts were generated, and 134 exhibits were admitted into evidence. The parties submitted post-hearing memoranda of law on July 2, 2008.

The Referee's Report, dated March 19, 2009, addresses several issues raised by the parties. Hoffman moves to confirm the Referee's Report in part, and modify in part. In addition, Hoffman now moves to limit the Referee's compensation to the statutory rate provided in CPLR 8003(a), and for the Steingart's Estate to pay 70%, instead of 50%, of the Referee's fee and the cost of transcripts.

In a separate motion sequence, Hoffman also moves to strike portions of the Steingart Estate's attorney's affirmation, and to consolidate the motion to strike with this motion. In addition, the Steingart Estate moved to order partial release of the proceeds of the auction sale held in escrow. In yet another motion, the Steingart Estate moved to confirm the Referee's Report; Hoffman responded with a cross-motion for sanctions. The Steingart Estate has subsequently withdrawn the motion to confirm (as it was time barred) but Hoffman's cross-motion for sanctions remains.²

Discussion

A Referee's Report shall be confirmed where "the Referee clearly defined the issues and resolved matters of credibility, and [there is] ample support of those findings in the

² During a conference with the Court, the Steingart Estate expressed that although its motion was untimely, it supports confirming the Referee's Report in its entirety.

record.” *Adelaide Productions, Inc. v. BKN Internat’l AG*, 51 A.D.3d 598 (1st Dep’t 2008). See also *Nager v. Panadis*, 238 A.D.2d 135, 135-136 (1st Dep’t 1997) (Referee’s Report “shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility since the Special Referee is considered to be in the best position to determine the issues presented.”) (citations omitted). In addition, pursuant to CPLR 4403, courts have the power to confirm, in whole or in part, the findings and recommendations of a Referee. See, e.g., *Galiber v. Previte*, 40 N.Y.2d 822,824 (1976).

Hoffman argues for modifying certain findings contained in the Referee’s Report. First, Hoffman seeks to modify the portion of the Referee’s Report which found that she was entitled to a greater portion of the net sale proceeds than the Steingart Estate. In the Report, the referee found that Hoffman was in fact due a greater share of the proceeds due to the repairs and improvements she made to the apartment as a result of the lawsuit against the Co-op and the settlement of that lawsuit. The Referee found that Hoffman was due an additional \$88,233.75 due to improvements she made.

Hoffman argues now, as she did before the Referee, that her share should be greater, but in the amount of \$400,000.00. Hoffman challenges the Referee’s Report even though she concedes it is “supported by the record.” The Referee explained that, after considering testimony and evidence from a number of witnesses “and taking into account the essential nature of the improvements to preserve the apartment, [he found] that it was solely due to

Ms. Hoffman's efforts in her lawsuit that the improvements to the [apartment] that amounted to \$59,000.00 were eventually undertaken by the Coop and that her decision to install new windows, sills and doors throughout increased the value by an additional \$58,467.50." (Referee's Report at p. 31.) The Referee added these two amounts together, and subtracted from that amount \$29,233.75, representing half the cost of improvements paid by Hoffman, to come to \$88,233.75.

Hoffman now urges the Court to reject the Referee's findings, and instead adopt what she calls the "real estate market value approach." Hoffman asserts that the total improvement made by her and the Co-op enhanced the value of the Apartment by 20%. However she offers no explanation or support for this assertion. She further argues that the value of the apartment in 2003 was \$1.3 million, 20% of which she calculates at \$240,000.00. Then, using the undefined "real estate market value approach and estimat[ing] a 20% increase in real estate prices from 2003 to 2007," Hoffman concludes that she increased the value of the apartment by \$400,000.00. As the Referee's finding is clearly stated and supported by the record, and Hoffman fails to submit adequate support for modifying the report on this finding, the motion to modify this portion of the Referee's Report is denied.

Hoffman next seeks to modify the Referee's report as it pertains to her legal fees in regard to the holdover proceeding against the Tulin Estate. Hoffman argues that the Referee's Report contains a computation error and that the Referee failed to credit \$3,000.00 paid to Hoffman's IOLA account. However, the Referee's Report expressly addresses this

point. The referee found that Steingart properly paid Hoffman \$3,135.00 for her share of Hoffman's legal fees associated with the Tulin holdover proceeding, and that the \$3,000.00 held in Hoffman's IOLA is to be applied to her legal fees in association with the Yellowstone injunction. The Referee's Report offers computations which support his conclusions regarding the allotment of the Tulin settlement and payment of Hoffman's fees. Hoffman does not offer any argument as to why the \$3,000 should not be applied to her fees in association with the Yellowstone Action. Therefore, her motion to modify the Referee's Report on this point is also denied.

Hoffman next argues that the Referee failed to apply the law of account stated regarding certain invoices for legal and other fees on the "Order to Show Cause" relating to the Yellowstone Action, and that she should receive prejudgment interest of 9% on the outstanding legal fees she is owed. Hoffman argues that she provided Steingart and/or her counsel with invoices dated September 22, 2003 for \$11,594.85 (billing Steingart \$5,797.43 for her portion) and October 27, 2003. Hoffman argues that the invoices were received and retained without objection, and that under the laws of account stated it is now too late to question or challenge these bills. Hoffman argues that she is owed \$11,688.93 for the outstanding invoice, plus 9% prejudgment interest for 5 years (\$5,260.00), totaling \$16,948.93.

The Referee found that there were a number of inconsistencies and errors contained in the invoices submitted by Hoffman. The errors, as Hoffman acknowledged, included:

inclusion of an amount allegedly owed to Caseworks for architectural services which Hoffman did not pay; doubling the amount Steingart was to pay for Caseworks services; and including certain paralegal services on the September invoice while omitting them on the October invoice. The Referee also found that certain items from the September 22, 2003 invoice were billed again on the October 27, 2003 invoice. The Referee also found that certain other charges, including the Casework fee for \$4654, should not have been charged to Steingart.³

After reviewing testimony and numerous exhibits, the Referee concluded that Hoffman was owed a total of \$8,393.75, representing \$523.75 for paralegal fees, \$1150 for expenses, \$3828 for legal fees, and \$2892 for Caseworks. The Referee then reduced the amount by \$3,000, the amount held in Hoffman's IOLA account, leaving the balance due at \$5,393.00.

In addition, the Referee rejected Hoffman's argument that Steingart's failure to contest the invoices created an account stated. The Referee found that, by Hoffman's own admission, the bills contained multiple errors (as discussed above); that the September 22, 2003 bill failed to state the period for which it was issued; the bill included a 10-hour charge with no explanation; and Hoffman failed to credit \$3,000 paid on the Tulin matter. Hoffman also testified that she failed to tell either Steingart or Steingart's attorney that her fee had increased from \$300 to \$330 per hour, and that she was not sure whether she told her that she

³ During her hearing testimony, Hoffman admitted that there were some errors in the invoices.

would charge \$35/hour for word processing. Under these circumstances, the Referee refused to apply account stated, and found it would be inequitable to impose prejudgment interest.

Hoffman fails to include or address any of these issue in her motion to modify, instead merely listing the amount she seeks to recover from the invoices. In light of the numerous and acknowledged errors in her bills and omissions regarding her fees to Steingart and her counsel, the Court declines to modify the Referee's findings on this point. Applying an account stated theory would result in Hoffman being paid blindly for bills Hoffman admits contains errors.

As the Referee's report clearly defined the issues, resolved matters of credibility, and is amply supported in the record, the Referee's Report is confirmed in its entirety.

Hoffman also seeks to limit the Referee's compensation to \$50 per day, the statutory amount contained in CPLR 8003(a). Hoffman argues that she did not consent to a referee, but had requested a Judicial hearing Officer ("JHO"), and that even if she had consented, the parties never agreed to an increased rate of compensation for the Referee.

"While CPLR 8003(a) provides for a statutory rate of \$50 compensation per day, it also allows for the court or the parties to set a Referee's fees beyond the statutory rate. The provision authorizing the court to so fix a different, *i.e.*, higher compensation does not require the compensation to be established before the referred matter is heard." *Garay v. Soling*, 169 A.D.2d 616, 618 (1st Dep't 1991) (citations omitted). *See also H&Y Realty Co. V. Baron*, 193 A.D.2d 429, 430 (1st Dep't 1993) ("The IAS Court was authorized to

determine the referee's compensation after commencement of the reference . . ."). The Court therefore rejects Hoffman's motion to compensate the Referee at \$50 per day.

The Referee submits two Affirmations of Services. One, dated August 23, 2007, stems from work performed pursuant to the June 27, 2005 Order of Reference, and the Referee requests payment for services in connection with the auction and sale of the apartment, totaling 35.05 hours of work. The second, dated June 20, 2009, stems from the September 20, 2007 Order of Reference, and the Referee requests payment for services in connection with the hearing and recommendations on the division of the proceeds of the sale of the apartment, totaling 285.3 hours. The Referee notes that his customary billing rate is \$265.00 per hour. Therefore, for 320.35 hours of work, the Referee is seeking compensation in the amount of \$84,892.75.

The Referee's request for fees in this action must be considered in light of the extent of services performed, the number of hours worked, the complexity of the case, and the referee's background and qualifications. *See Garay*, 169 A.D.2d at 618. This partition action has been before the Referee since 2005, included an auction sale and a ten-day hearing, review of 1500 pages of transcripts, 134 exhibits, and post-hearing memoranda of law submitted by both parties.

Considering all these factors, the Court finds that the referee's award should be \$77,000.00 (reflecting a reduction of approximately 10%), to be divided equally between the parties. *See H&Y Realty Co.*, 193 A.D.2 at 430 (equal apportionment of the Referee's fee

appropriate, even if parties have unequal shares of subject property, where neither side prevailed completely.) Similarly, the cost of the transcripts of the hearing is to be evenly divided between the parties.

In addition, Hoffman's cross-motion for sanctions against Steingart's Estate is denied as moot. Hoffman moved for sanctions because the motion to confirm by Steingart's Estate was untimely and counsel for Steingart refused to withdraw the motion, as Hoffman requested. The Steingart Estate has subsequently withdrawn its motion to confirm.

Similarly, the Steingart Estate's motion for partial release of the Escrow funds is denied as moot. As a result of this decision and order, all funds will be distributed from the Escrow account.

In accordance with the foregoing, it is

ORDERED that the Report of Referee Thomas L. Tedeschi, dated March 19, 2009, is confirmed in its entirety; and it is further

ORDERED that defendant Barbara Hoffman's motion to confirm in part and modify in part the referee's Report is granted to the extent that the report is confirmed, and denied to the extent that no portions of the report are modified, that the Referee will be compensated in the amount of \$77,000.00, that such compensation will be divided evenly between the parties, and that the parties will evenly divide the costs of the hearing transcripts; and it is further;

ORDERED that Referee Thomas L. Tedeschi is to disburse the funds held in escrow, to the extent not already distributed, as set forth in his Report dated March 19, 2009, which is as follows:

- (1) to defendant Barbara Hoffman \$1,338,234.95 (net proceeds of \$1,376,734.95 less \$38,500.00 for one-half referee's fee);
- (2) to plaintiff Diane Steingart \$1,047,959.22 (net proceeds of \$1,086,459.22 less \$38,500.00 for one-half referee's fee);
- (3) any amount in excess due to interest earned on the funds held in escrow to be divided evenly between Barbara Hoffman and Diane Steingart; and
- (3) to himself for his fees as referee \$77,000.00; and it is further

ORDERED that defendant Barbara Hoffman's motion to strike is denied; and it is further


ORDERED that plaintiff Diane Steingart's motion to order partial release of escrow funds is denied; and it is further

ORDERED that plaintiff Diane Steingart's motion to confirm the Referee's Report is denied as withdrawn; and it is further

ORDERED that defendant Barbara Hoffman's cross-motion for sanctions is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 5, 2010

ENTER:

Saliann Scarpulla, J.S.C.

FILED
MAR 17 2010
NEW YORK
COUNTY CLERKS OFFICE