

Evans v Perl

2010 NY Slip Op 31363(U)

May 17, 2010

Sup Ct, NY County

Docket Number: 602898/05

Judge: Judith J. Gische

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3.26.10

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. Justice

PART 10

Index Number : 602898/2005
PERL, SHARI
vs.
ANDREA PERL
SEQUENCE NUMBER : 051
CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 051
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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
MAY 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/17/10

J. G.
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION J.S.C.

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: Trial Term 10

-----X
Martin Evans, as guardian of the property
of Shari Perl, individually and on behalf of
Shari Perl as trustee of the Shari Perl
Family Trust and derivatively
on behalf of Perl Properties, Inc.

Index # 602898/05

Decision/Order

Plaintiff,

-against-

Mot. Seq.: 051

Andrea Perl, individually and as a trustee
of the Shari Perl Family Trust, Gerald Shallo,
145-147 Mulberry Realty Co. LLC,
Perl Properties Inc., 494 Broadway
Realty Co., LLC, 256-258 West 36th
Street Realty Co. LLC, 223-227 West 36th Street Realty
Co., LLC; Perlrose Realty Co., 143
Mulberry Realty Co., LLC and Conrad Roncati,

Defendants,

Bridget Hannah Herman, a minor, and Rebecca Perl,

Nominal Defendants.

-----X
Gische, J:

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

Pursuant to CPLR 2219(a) the following papers were considered on this motion:

PAPERS	NUMBERED
Notice of Motion, RRH affd., exhibits.....	1
Amended Notice of Cross-Motion, KMM affd., exhibits.....	2
JVH affirm. in opp., exhibits.....	3
KMM reply affirm.....	4
KMM affirm.....	5
JVH reply affirm.....	6

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

The law firm of Platzer, Swergold, Karlin, Levine, Goldberg and Jaslow, LLC

("PSKLGJ") moves to confirm in part and reject in part the March 1, 2010 report ("report") of Special Referee Louis Crespo concerning its request for legal fees . PSKLGJ also moves for the entry of a money judgment in its favor. Plaintiffs cross-move to reject the report. Andrea Perl has interposed limited opposition to the motion.

By decisions and orders, respectively dated September 30, and October 29, 2009, the issue of the amount of reasonable legal fees to be awarded to PSKLGJ was referred to a Special Referee for hearing and a report back to the court. The period considered for the services rendered was June 27, 2008 through October 29, 2009, the date PSKLGJ was ultimately relived as counsel. The report contains a recommendation that PSKLGJ receive an award of attorneys fees, including costs and disbursements, in the total amount of \$126,014.40. PSKLGJ seeks to confirm the award to the extent of the fees and disbursements allowed. It seeks, however, to reject that part of the report which disallowed its request for the fees it incurred in connection with obtaining an award of its fees.

Plaintiffs cross-motion is predicated upon the positions it advanced on the original motion for legal fees. Plaintiffs' position was rejected by the court in its September 30, 2009 decision and order. By virtue of the doctrine of law of the case (People v. Evans, 94 NY2d 499 [2000]) and based also upon the reasoning in the court's September 30, 2009 decision and order, the cross-motion is denied outright. Plaintiffs otherwise oppose PSKLGJ's motion to the extent that they seek fees on their fees.

Andrea Perl's opposition to the motion in chief is limited to opposing the request for fees on fees and also to the extent that PSKLGJ seek a judgment entered against her personally.

DISCUSSION

The referee's function is to determine the issues referred to him (or her), 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. As a general rule, however, the court will not disturb the Referee's findings, and the report should be confirmed, if his or her findings are supported by the record and if s/he has clearly defined the issues, and fairly resolved matters of credibility. Kaplan v. Einy, 209 AD2d 248 (1st dept. 1994); Freedman v. Freedman, 211 AD2d 580 (1st dept. 1995); The Board of Managers of the Boro Park Village-Phase I v. Boro Park, 284 AD2d 237 (1st dept. 2001). The Referee's recommendations are entitled to great weight since s/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).

At bar, no party has provided the court with the transcripts of the proceedings held before Special Referee Louis Crespo. Consequently, all findings of fact and credibility are confirmed. The court confirms that part of the award finding that PSKLGJ is entitled to attorney fees and disbursements in the amount of \$126,014.40. Brookman & Brookman PC v. Joseph Fleischer Natural Coiffures, Inc., 13 AD3d 196 (1st dept. 2004).

The court rejects, however, PSKLGJ's position that it is entitled to the legal fees it incurred in connection with perusing its claim for fees. An award of "fees on fees" must be based on a statute or on an agreement. Sage Realty Corp. v. Proskauer Rose LP, 288 AD2d 14 (1st dept. 2001). Since neither circumstance is present, the Special Referee

rightfully declined to award same.

The final issue for consideration on this motion is whether any judgment entered in connection with the confirmation of the report should be entered against Andrea Perl, individually, as well as the separate business entities or against the business entities only. In his report Referee Crespo states that he decided the legal issues surrounding Andrea Perl's individual liability in his prior report regarding PSKLGJ's legal fees (Crespo Report and Determination dated June 11, 2009). In that report Referee Crespo determined that PSKLGJ was originally hired to represent Andrea Perl individually and as co-trustee. They were also hired to represent the separate business entities named as defendants. In December 2007 Andrea Perl retained separate counsel to represent her personally. Referee Crespo found, however, that because the services could not be distinguished as being for Andrea Perl or the business entities, they were jointly and severally liable for them. He also decreased the fees due to duplication after Andrea Perl hired her own attorneys.

Since the time period involved in this motion concerns a time when Andrea Perl had her own separate counsel, none of the services were for her personal benefit. PSKLGJ acknowledged at the recent hearing that it has not billed for any services to the trust during the relevant time period. PSKLGJ's general statements that Andrea Perl promised to personally pay PSKLGJ's bills is not a legally enforceable obligation. No written guarantee or enforceable contract has been put before the court. See: GOL §5-701; Carey & Associates v. Ernst, 27 AD3d 261 (1st dept. 2006). The court therefore holds that there is no basis for a judgment to be entered against Andrea Perl personally.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that Platzer, Swergold, Karlin, Levine, Goldberg and Jaslow, LLC's motion is granted in part and denied in part, and it is further

ORDERED that Plaintiffs' cross-motion is denied, and it is further

ORDERED that the March 1, 2010 Report of the Referee is confirmed in its entirety, and it is further

ORDERED that the clerk of the court is directed to enter a money judgment in favor of Platzer, Swergold, Karlin, Levine, Goldberg and Jaslow, LLC and against 145-147 Mulberry Realty Co. LLC, Perl Properties Inc., 494 Broadway Realty Co., LLC, 256-258 West 36th Street Realty Co. LLC, 223-227 West 36th Street Realty Co., LLC; Perlrose Realty Co., 143 Mulberry Realty Co., LLC in the amount of \$ 126,014.40 and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, NY
May 17, 2010

SO ORDERED

J.G. J.S.C.

JUDITH J. GISCHE, J.S.C.

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE