

Hoffman v Biltmore 47 Assoc., LLC

2010 NY Slip Op 32052(U)

July 27, 2010

Sup Ct, NY County

Docket Number: 108095/06

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

LEONARD HOFFMAN and ROSALIA HOFFMAN,
Plaintiffs,

Index No.: 108095/06

Motion Date: 07/13/10

- v -

Motion Seq. No.: 08

BILTMORE 47 ASSOCIATES, LLC, MANHATTAN
THEATRE CLUB, INC., THE BILTMORE THEATER
CORP., THE BILTMORE THEATRE GR., INC.,
SWEET CONSTRUCTION CORP., BILTMORE THEATER
INDEPENDENT MANAGER CORP., BILTMORE
THEATRE, LLC., THE JACK PARKER CORP.,
BILTMORE TOWER, LLC, PARKER SECOND, LLC,
PARKER THEATRE ASSOCIATES, LLC., and
SWEET CONSTRUCTION of LONG ISLAND, LLC.,
Defendants.

Motion Cal. No.: 46

The following papers, numbered 1 to 3 were read on this motion for a hearing.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

FILED
AUG 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiffs' outgoing counsel moves for a hearing to determine the amount of its "attorney's lien." The movant fails to specify whether it is seeking a common law retaining lien or a charging lien (Judiciary Law 475). However, as the affirmation in support of the motion refers to fees sought in exchange for plaintiffs' file, the court shall treat the current application

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):

as one seeking a retaining lien.

Plaintiffs oppose the application on the grounds that the movant was discharged "for cause."

The court shall direct a hearing. As stated by the Court of Appeals

A client has an absolute right to discharge an attorney at any time. If the discharge is with cause, the attorney has no right to compensation or to a retaining lien. If the discharge is without cause before the completion of services, then the amount of the attorney's compensation must be determined on a quantum meruit basis. . . . A hearing is required to determine if he was discharged for cause or, if he was discharged without cause before completion of the services, for a determination of his fee on the quantum meruit basis.

Teichner by Teichner v W & J Holsteins, Inc., 64 NY2d 977, 979 (1985) (citations omitted). "Of course, at such hearing plaintiff is entitled to offer substantiation of his contention that he discharged [the law firm] for cause, and that [the law firm] is therefore not entitled to any attorney's fees. While differences of opinion concerning strategy do not constitute cause for discharging an attorney, plaintiff has the right to attempt to show that the law firm's conduct constituted a failure to properly represent his interests rather than the exercise of its strategic judgment." Costello v Kiaer, 278 AD2d 50 (1st Dept 2000); see Marschke v Cross, 82 AD2d 944 (3d Dept 1981).

The court shall therefore resolve this motion by granting the movant's motion to the extent of directing a hearing before a Special Referee to hear and report on the issues of (1) the

amount of attorney's fees earned by the movant on a quantum meruit basis during the period movant represented the plaintiffs in this action and (2) whether the plaintiffs' discharge of the movant firm was "for cause" as set forth in the cases. Upon a motion to confirm the referee's report the court shall determine the issues presented with respect to the lien. The movant and plaintiffs of course remain free to stipulate to such amount at any time.

Accordingly, it is

ORDERED that the motion is GRANTED to the extent set forth below; and it is further

ORDERED that the issues of (1) the amount of attorney's fees earned by the movant on a quantum meruit basis during the period movant represented the plaintiffs in this action and (2) whether the plaintiffs' discharge of the movant firm was "for cause," are referred to a JHO/Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the JHO/Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spre1@courts.state.ny.us) for placement at the earliest possible

date upon the calendar of the Special Referee Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for the movant shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part; and it is further

ORDERED that the determination of the issues so referred on this motion is held in abeyance pending receipt of the report and recommendations of the JHO/Special Referee and a motion to

confirm order disaffirm the Report of the JHO/Special Referee timely made pursuant to CPLR 4403 and Section 202.44 of the Uniform Rules for Trial Courts; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for a reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part.

This is the decision and order of the court.

Dated: July 27, 2010

ENTER:

Debra A. James J.S.C.
HON. DEBRA A. JAMES

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