

**Belkin Burden Wenig & Goldman, LLP v
Kingsbridge Hgts. Care Ctr., Inc.**

2010 NY Slip Op 33626(U)

December 29, 2010

Supreme Court, New York County

Docket Number: 112512/07

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN
J.S.C.

PART 11

Index Number : 112512/2007

BELKIN BURDEN WENIG

vs
KINGSBRIDGE HEIGHTS CARE

Sequence Number : 004

CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED

JAN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

December 29, 2010

[Signature]

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: PART 11

-----X
BELKIN BURDEN WENIG & GOLDMAN, LLP.,

Plaintiff,

INDEX NO. 112512/07

-against-

KINGSBRIDGE HEIGHTS CARE CENTER, INC.
d/b/a KINGSBRIDGE HEIGHTS REHABILITATION
AND CARE CENTER,

FILED

JAN 07 2011

Defendant.

-----X
JOAN A. MADDEN, J.:
NEW YORK
COUNTY CLERK'S OFFICE

In this action to recover attorney's fees due and owing pursuant to a retainer agreement, plaintiff law firm moves for an order pursuant to CPLR 4403 confirming in part and modifying in part the report of Special Referee Louis Crespo, dated December 10, 2009. Defendant has defaulted on the motion. Defendant also defaulted on plaintiff's prior motion for summary judgment, and failed to appear at the inquest conducted by the Referee.

It is well settled that the court is "vested with broad power" to confirm or reject, in whole or in part, the Special Referee's report, including the power to make its own findings with or without taking additional testimony, provided it has the benefit of the transcripts and exhibits. Sage Realty Corp. v. Proskauer Rose LLP, 288 AD2d 14 (1st Dept 2001); accord Taveras v. General Trading Co., 73 AD3d 659 (1st Dept 2010); Interlink Metals & Chemicals, Inc. v. Kazdan, 222 AD2d 55 (1st Dept 1996). Although the court should defer to the referee's determination when it "turns upon an assessment of witnesses' credibility," the court may reject the referee's findings to the extent such findings are not supported by the record. Taveras v.

General Trading Co., supra.

Although plaintiff seeks to confirm the portion of the Special Referee's Report recommending damages in the amount of \$51,077.22, plaintiff objects to the portion of the Report disallowing fees in the amount of \$31,595.93. Plaintiff asserts that the record does not support the Referee's rationale that the disallowed fees were duplicative, and that the Referee ignored the fact that plaintiff's efforts resulted in defendant saving more than \$7 million in rent, and use and occupancy sought by the landlord in the underlying holdover proceedings.

The court has reviewed the transcript of the hearing and the exhibits annexed to plaintiff's motion papers. Based on the retainer agreement and the billing statements, the court finds that the Referee did not discover the error in plaintiff's billing statements which improperly increased the hourly rates as of January 1, 2007. The May 25, 2006 retainer agreement clearly states that the 2006 billing rates shall remain in effect through May 31, 2007. Thus, all charges for services rendered from January 1, 2007 through May 31, 2007, must be recalculated to reflect the 2006 hourly billing rates.

The Referee also improperly concluded that plaintiff was entitled to interest "as of the date of the finding of liability by the court, that is, August 10, 2009." In his Findings of Fact, the Referee specifically noted that "[i]n the complaint, plaintiff demands interest be calculated as of May 1, 2007," but found that "[t]here was no testimony at the hearing as to how plaintiff arrives at the May 1, 2007 calculation of interest date." Under CPLR 5001(b), pre-judgment interest "shall be calculated from the earliest ascertainable date the cause of action existed." The Referee's findings state that "Rifkin testified that the law firm terminated its services in or about April 2007, after defendant failed to make payments on fees and disbursements then due and

owing.” The record clearly establishes that plaintiff’s final invoice to defendant is dated April 30, 2007. Even though the invoice does not specify a date on which payment is due, the law implies a reasonable time for payment, which in these circumstances would have been 30 days. See Savasta v. 470 Newport Associates, 82 NY2d 763, 765 (1993). Therefore, at the earliest, plaintiff’s cause of action accrued on June 1, 2007, and plaintiff is entitled to pre-judgment interest from that date.

The court further finds that the Referee’s disallowance of the fees for services rendered by Rifkin, the only witness to testify at the inquest, is not supported by the record, especially in view of the additional affirmation from attorney Lindenberg, which plaintiff submits with its motion papers. The Referee disallowed the majority of the amounts billed for Rifkin’s work on grounds of “duplication,” based on Rifkin’s testimony that both he and Senior Partner Lindenberg billed on the matter, he or Lindenberg did the majority of the work, and he second seated Lindenberg at the trial, but Lindenberg did the trial. The Referee concluded that “I do not find it reasonable to charge the defendant for entries billed by both attorney [sic], when one attorney’s time is sufficient or where it appears the entry is duplicative.” Notwithstanding the foregoing conclusion, the Referee expressly found “no evidence of ‘padding’ by the attorneys of the law firm,” that Rifkin was a credible witness, and that the underlying holdover proceedings “involved complex issues of standing as well as authority of the landlord to commence the Holdover Proceedings.”

In his affirmation, Lindenberg asserts that the fees rejected by the Referee “were necessary and absolutely warranted,” as the landlord in the underlying holdover proceedings was represented by the firm of Rosenberg & Estis, P.C., and that two of their senior partners, Warren

Estis and Howard W. Kingsley, proceeded “to over-litigate” the proceedings, and “we were forced to reply in kind.” Lindenberg explains that his firm represented defendant as the tenant in two commercial holdover proceedings that were commenced in May 2006; at that time defendant had not paid rent since the expiration of the leases in 2004. He states that the holdover was a “complicated matter, involving five siblings, all of whom as executors of the Estate of their father Michael Tenebaum were the equal shareholders of the corporate general partner and are the trustees of the limited partner, the Estate of Michael Tenebaum.” Lindenberg states that they successfully defeated the landlord’s motion for ongoing use and occupancy at the rate of \$153,000 per month, since the court fixed the rate of use and occupancy at \$53,000 per month, commencing July 1, 2006; the landlord appealed that determination, which the Appellate Term and the Appellate Division affirmed. He also states that through his firm’s efforts, the tenant remained in operation for an additional three years, and saved over \$7 million in rent, and use and occupancy.

Lindenberg explains that during the course of the holdover proceedings, he and Rifkin appeared in court for a total of 19 days, before several judges and referees. He states that the holdover proceedings “involved extensive litigation,” which culminated in a three-day jury trial, and that every court hearing involved four attorneys, he and his partner Rifkin on behalf of the respondent/tenant, and Estis and Kinglsey for the petitioner/landlord. Lindenberg states that the holdover proceedings “were not a simple commercial holdover proceeding and could not be handled by only one attorney,” and that the exhibits and documents were “voluminous” and needed to be transported to court by car. He states that he was “lead chair” at trial, but his “partner, William M. Rifkin was not a glorified baggage carrier for me” and that they “both attended every

court hearing . . . were present and actively engaged in jury selection that took a full week,” and that Rifkin “assisted me in handling the voluminous exhibits and he orally argued before the court on Defendant’s motion to dismiss the Holdover Proceedings at the conclusion of defendant’s direct case.” Lindenberg explains that Rifkin presented the tenants’ central defense, and argued that the holdovers should be dismissed on the ground that the landlord failed to establish that the corporate general partner had the authority to commence the proceedings. He states that the court was initially inclined to dismiss the proceedings, but then permitted the landlord to re-open its direct case, over the tenant’s objections.

Lindenberg also states that Chayie Sieger, the president and sole shareholder of the tenant, was a “very demanding client.” He explains that the defense “was hampered by the fact that Ms. Sieger deemed her personal grievances against her siblings and personal alleged claims against them as belonging to Kingsbridge,” and that Ms. Sieger “was oblivious to the fact that the two leases involved did not contain any provision for extending the lease term.” Lindenberg states that they also spent a “great deal of time” drafting e-mails and letters to Ms. Sieger, and conferring with other attorneys representing Kingsbridge before the New York State Department of Health, and representing Ms. Sieger in her litigation against her brother.

In view of the record, as supplemented by the additional affirmation submitted by attorney Lindenberg, the court finds that plaintiff is entitled to recover the fees for the work performed by Rifkin, which the Referee disallowed as duplicative. Notably, the Referee not only found Rifkin to be a credible witness, but also found no evidence of padding and that the case involved “complex” issues. Curiously, the Referee gave no weight to the undisputed fact that Lindenberg and Rifkin obtained positive results for defendant, which included millions of dollars

in savings.

Under these circumstances, the court concludes that the Referee's Report is confirmed to the extent that the recommended damages in the amount of \$51,077.22 are recalculated using the 2006 rates that remained in effect through May 31, 2007, and the recalculated amount of damages is \$46,801.99. The Referee's Report is modified to the extent of determining that plaintiff is also entitled to damages in the amount of \$22,579.00 for the services performed by attorney Rifkin.¹ Plaintiff, therefore, is awarded damages in the total amount of \$69,380.99, together with interest from June 1, 2007.

Accordingly it is

ORDERED that plaintiff's motion is granted in the absence of opposition, to the extent indicated herein above; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Belkin Burden Wenig & Goldman, LLP, and against defendant Kingsbridge Heights Care Center, Inc. d/b/a Kingsbridge Heights Rehabilitation and Care Center, in the amount of \$69,380.99, together with interest from June 1, 2007 as computed by the Clerk, and costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

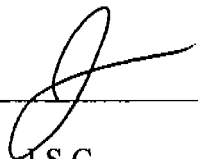
DATED: December 29, 2010

FILED

ENTER:

JAN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

¹The fees for Rifkin's services have been recalculated using his 2006 hourly rate for the services performed through May 31, 2007. To the extent plaintiff objects to any other amounts disallowed by the Referee's Report, the motion to modify the Report is denied.