

**546-552 W. 146th St. LLC v Arfa**

2011 NY Slip Op 31610(U)

May 27, 2011

Sup Ct, NY County

Docket Number: 603041/06

Judge: Charles E. Ramos

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 6/15/2011

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

PRESENT: Ramos  
Justice

PART 53

546-552 West 146th St. LLC,  
et al

INDEX NO. 603041/06

MOTION DATE \_\_\_\_\_

Arja, et. al

MOTION SEQ. NO. 013

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is


Motion is decided in accordance with  
accompanying Memorandum Decision.

**FILED**

JUN 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/27/11

  
**CHARLES E. RAMOS** S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  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: COMMERCIAL DIVISION

-----x  
546-552 WEST 146<sup>TH</sup> STREET LLC, 522-536  
WEST 147<sup>TH</sup> STREET LLC, WEST 162<sup>ND</sup> STREET  
AND ACADEMY STREET LLC, 100-102 EAST 124<sup>TH</sup>  
STREET PACKAGE LLC, HARLEM I LLC and  
HARLEM II LLC,

Index No. 603041/06

Plaintiffs,

-against-

RACHEL L. ARFA, ALEXANDER SHPIGEL, GADI  
ZAMIR, HARLEM HOLDINGS, LLC, by and through  
its Court appointed Receiver, Lawrence A.  
Mandelker in his official capacity,  
AMERICAN ELITE PROPERTIES, LLC, MINTZ LEVIN  
COHEN FERRIS GLOVSKY & POPEO P.C., EDWARD  
LUKASHOK, AUBREY REALTY CO., and 42<sup>ND</sup> STREET  
REALTY LLC,

Defendants.

**FILED**

**JUN 15 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

-----x  
**Charles Edward Ramos, J.S.C.:**

Plaintiffs 546-552 West 146<sup>th</sup> Street LLC, and 100-102 East  
124<sup>th</sup> Street Package (together, Plaintiffs) move to reject  
Special Referee JHO Figueroa's report with recommendations on the  
calculation of legal expenses (the Report) (CPLR 4403).

Defendants American Elite Properties, Inc. (AEP), Rachel L.  
Arfa and Alexander Shpigel (together, the AEP Defendants) cross-  
move to confirm, in part, and modify, in part, the Report, and  
for an order directing the escrow agent to release funds,  
together with prejudgment and post-judgment interest.

Background<sup>1</sup>

\_\_\_\_\_  
<sup>1</sup> A full recitation of the factual background can be found  
in 546-552 West 146<sup>th</sup> Street LLC v Arfa (54 AD3d 543 [1<sup>st</sup> Dept],

This action is one of six related litigations before this Court. Previously, the AEP Defendants, who acted as managers and members of limited liability companies (LLCs), and promoters of transactions to acquire real property, sought indemnification of legal expenses under provisions contained within four of the seven LLCs' operating agreements. This Court denied the application for indemnification as premature until other claims asserted against them for wrongdoing pending in a related action by the LLCs' individual investors were adjudicated.

In February 2010, the First Department determined that the AEP Defendants were not required to wait until the claims of wrongdoing are adjudicated, and that they are entitled to indemnification of legal expenses incurred in this action (see *546-552 West 146<sup>th</sup> Street LLC v Arfa*, 70 AD3d 512 [1<sup>st</sup> Dept 2010]).<sup>2</sup>

The matter was remanded to this Court for calculation of legal expenses, and the issue was referred to a Special Referee to hear and report with recommendations (5/4/2010 Order, Exhibit

---

*lv dismissed in part, denied* 12 NY3d 840 [2008]), *Roni LLC v Arfa* (74 AD3d 442 [1<sup>st</sup> Dept], *affirmed* 74 AD3d 442 [2010]), and *Arfa v Zamir* (*Arfa v Zamir*, 75 AD3d 443 [1<sup>st</sup> Dept 2010]).

<sup>2</sup> Prior to the AEP Defendants' application for indemnification, the Court dismissed this action for lack of standing, as the claims against the AEP Defendants for wrongdoing belonged to the individual investors, at issue in the related *Roni LLC* action, which was later affirmed (*546-552 West 146<sup>th</sup> Street LLC v Arfa*, 54 AD3d 543 [1<sup>st</sup> Dept 2008]).

1, annexed to the Katz. Aff.).

The parties appeared before JHO Figueroa on June 28 and July 1, 2010 for an evidentiary hearing. Plaintiffs stipulated on the record that the customary hourly rates of Schlam Stone and Dolan LLP (SSD), counsel for the AEP Defendants, are reasonable. Lead counsel for the AEP Defendants, David Katz, Esq. (counsel), a partner at SSD, was the sole witness to testify.

Counsel submitted thirty-two unredacted invoices for time billed during the period August 2006 through March 2009, which was the period that counsel billed the AEP Defendants for defending this action. Indemnification is sought for nineteen of the invoices.

The billing entries reflect "block billing," in which all six related actions were billed under the same account number, and the invoices do not indicate how much of the billed hours are spent on each particular task or action (Katz Aff., ¶ 10). Counsel attests that he sought to allocate the amount of time that he reasonably believed to be related to the tasks that were subject to indemnification, at issue in this action only, based upon his recollections and handwritten entries recorded in his daily diary. In roughly half of the billing entries that are the subject of the fee application, an entry for a particular date includes time billed on this action and time billed on another, related action for which fees are not sought (6/28/10 Tr 62).

Of the activities for which counsel seeks fees, there were four motions filed or joined in by the AEP Defendants, including a motion to disqualify the firm of Plaintiffs' counsel, a motion to stay, a motion to quash subpoenas, and a motion to dismiss the complaint. In addition, fees are sought for appellate practice, global mediation and settlement negotiations involving this and the other actions.

Counsel represents that he reduced the fees sought with respect to the billing entries that include indemnifiable and non-indemnifiable tasks by nearly twenty-five percent, from \$180,553 to \$139,395. The total amount billed during this time period was \$742,660.07. The expenses sought in connection with the fee application, \$150,155.48 (\$139,395 of attorney's fees, and \$10,760 of disbursements), represents approximately twenty percent of the total expenses billed in these invoices.<sup>3</sup>

In the Report, JHO Figueroa noted that he "attempted a line by line assessment of the reasonableness of each work entry for which indemnification is sought, but after reviewing several dozen entries, it was found that this procedure did not lend itself to determining whether indemnification for a given entry

---

<sup>3</sup> Originally, Mr. Katz sought \$177,144.18, which included the expenses incurred in seeking indemnification, which is a category of fees that this Court denied and is the subject of a pending appeal (Katz Aff., ¶ 44).

was warranted" (Report, 3). Notwithstanding the use of block billing, JHO Figueroa "found the entries sufficiently informative to provide a reasonable basis for evaluation of the fee application," as to the "date, hours expended, and nature of work done" (Report, 4, 8). JHO Figueroa even noted that counsel for Plaintiffs used block billing in this action (Report, 8).

The Report recommends that the AEP Defendants receive a total of \$132,176.88 of the expenses requested, of which \$121,299 is for attorney's fees. The Report included a recommendation that deductions be applied to the fees sought in connection with the motion to disqualify Plaintiffs' counsel's firm and the motion to quash subpoenas directed at AEP's bank accounts.

#### Discussion

Under CPLR 4403, a court may confirm or reject, in whole or in part, the report of a referee, and may make new findings with or without taking additional testimony, and may even order a new hearing. Generally, a court will not disturb the findings of a special referee where those findings are supported by the record (*Atlantic Aviation Investment LLC v. Variq Logistica, S.A.*, 73 AD3d 467 [1<sup>st</sup> Dept 2010]). New York courts tend to look favorably upon a referee's report, inasmuch as the referee, as trier of fact, is considered to be in the best position to evaluate the extensive documentation and testimony offered as to the reasonableness of the legal fee incurred (*Williams v*

*Perretti*, 163 Misc 2d 770, 772 [1<sup>st</sup> Dept, App Tm 1995]).

A court is not obliged to defer to a special referee when awarding attorney's fees where the recommendations do not depend on the credibility of witnesses, but rather, is based solely on counsel's billing records (*David Z. Inc. v Timur on Fifth Ave., Inc.*, 7 AD3d 257, 258 [1<sup>st</sup> Dept 2004]).

In a fee application, the burden is on counsel to keep and present records from which the court may determine the nature of the work done, the need for it, and the amount of time reasonably required; where adequate contemporaneous records have not been kept, the court should not award the full amount requested (*Jordan v Freeman*, 40 AD2d 656, 656-57 [1<sup>st</sup> Dept 1972]).

Otherwise, if the pervasive use of block billing makes it exceedingly difficult for the court to identify whether the amount of time spent on a particular task is reasonable, a reduction of fees requested may be warranted (*LV v New York City Dept. of Educ.*, 700 F Supp 2d 510 [SD NY 2010]).

In addition to finding that the billing entries were "sufficiently informative to provide a reasonable basis for evaluation of the fee application," JHO Figueroa credited counsel's testimony. To this extent, the recommendations as to appropriate fees are entitled to deference (*Brookman & Brookman P.C. v Joseph Fleischer Natural Coiffures, Inc.*, 13 AD3d 196, 197 [1<sup>st</sup> Dept 2004]; compare *David Z. Inc.*, 7 AD3d at 258).

In the Report, JHO Figueroa categorized the recommendations of fees by the 1) motion to dismiss; 2) resulting appellate practice; 3) motion to disqualify; 4) stay motion; 5) motion to quash; 6) mediation; and 7) settlement negotiations. The Court notes at the outset that the total amount of fees recommended, \$121,299, does not correspond with the amount of fees recommended per category, which totals \$117,899 by this Court's calculation. This discrepancy warrants a modification which is easily remedied by re-totaling the fees recommended (see generally *Poster v Poster*, 4 AD3d 145, 145-46 [1<sup>st</sup> Dept 2003]).

Otherwise, the main contentious issue between the parties is whether fees incurred in this action, at a time when parallel work was performed in related actions where indemnification is not available, is properly allocable to this action alone. In addition, the parties spar over the propriety of the deductions recommended by JHO Figueroa, and the availability of pre-judgment interest.

#### A. Allocation of Fees

It is uncontroverted that a portion of the fees that JHO Figueroa recommended were incurred for time spent on behalf of the AEP Defendants in both this matter and related matters, although counsel seeks to allocate the entirety of the fees incurred to this matter.

Counsel argues that it is clear from the record that he

would have done the same work for those defendants (the AEP Defendants) entitled to indemnification in this action even if he had not been representing these same defendants in the related actions, and that the fees would have been the same even if this action would have been the only action pending.

In addition, he represents that it was often impossible to allocate precisely the time between tasks billed in this action and tasks billed in the other actions because the Court would often schedule appearances in the several actions on the same date. As a consequence, he argues that no allocation is necessary with respect to fees incurred on the motion to dismiss, global mediation and settlement negotiations, although at the time that the latter two events occurred, this action had already been dismissed for nearly a year and was subject to an appeal.<sup>4</sup>

---

<sup>4</sup> Of the \$33,313.75 in fees that SSD claims it incurred in connection with preparing the motion to dismiss and opposing Plaintiffs' cross-motion to amend the complaint, Plaintiffs calculate that \$18,187.50 sought is for time spent on the parallel motion to dismiss in the related *Arfa v Zamir* action, which was briefed and argued at the same time (7/1/10 Tr 73:12-26, 94:9-13). Nonetheless, all of the time spent on the motions to dismiss in both actions is allocated to this action (7/1/10 Tr 74:11-26). According to counsel, although billed together in one entry, he actually spent a de minimis amount of time preparing the motion to dismiss in the *Arfa v Zamir* action, because counsel for the defendant in that action researched and drafted the papers, while counsel spent all of the time billed for the motion to dismiss in this action (7/1/10 Tr 752-26, 76:2-21).

Counsel also seeks to charge all of the fees incurred in global mediation (\$18,657), and settlement negotiations (\$7,425) to this action, although they both occurred during the period 12/11/07-1/15/08, which was nearly a year after this case was

In support of this argument, counsel cites to *Ficus Investments, Inc. v Private Capital Mgt., LLC* (63 AD3d 611, 611-12 [1<sup>st</sup> Dept 2009]).

The Court rejects the applicability, and counsel's interpretation of, *Ficus Investments, Inc.* (*Id.*). In that case, the court noted that the invoices for fees submitted by three law firms who also represented other defendants not entitled to advancement of fees "had been reduced, pursuant to stipulation, to eliminate expenses either attributable to other defendants or not incurred because of Donovan's [the indemnitee's] having been an officer of the company" (*Id.*). On this basis, the court held that "the evidence was uncontroverted that the remaining expenses reflected legal work that was performed by the three law firms for Donovan's benefit and would have been performed regardless [of] whether the firms also represented the other defendants" (*Id.*).

In contrast, the invoices submitted by counsel do not reflect the amount of work spent on behalf of the AEP Defendants in this matter, in which they are entitled to indemnification, as opposed time spent on non-indemnifiable tasks in matters where fees are not recoverable. To this extent, *Ficus Investments, Inc.* (*Id.*) is distinguishable.

---

dismissed, although subject to an appeal (July Tr 77:10-18, 78:3-8, 79:14-21, 81:16-19, 25-26, 82:2-4).

Moreover, counsel's representation alone, that he would have performed the same legal work in this matter even if the other matters were not pending, does not warrant dispensation with the well-established rule that, in a fee application, the burden is on the counsel seeking fees to keep and present contemporaneous records from which the court may determine the amount of time expended. Counsel has presented no authority for this proposition, nor is it equitable to charge *all* of the fees incurred with respect to several non-indemnifiable matters to this indemnifiable matter. Reinforcing this conclusion is the uncontroverted fact that a significant portion of fees sought in this matter are for global mediation and settlement negotiations conducted at a time when this matter was already dismissed, although subject to an appeal.

Therefore, because the time entries submitted by counsel make it exceedingly difficult for the court to identify the amount of time spent on tasks for which fees are recoverable, the Court determines that the findings recommended with respect to the motion to dismiss, mediation and settlement negotiations are not supported by the record. Accordingly, reduction of the fees sought in these categories to a fifty-fifty split allocation is both reasonable and appropriate, and is the result supported by the record (*TAG, LLC v. ComMet 380, Inc.*, AD3d, 2011 NY Slip Op 02538 [1<sup>st</sup> Dept 2011]; see also *E\*Trade Financial Corp. v*

*Deutsche Bank AG*, 2010 WL 423111, \*4 [SD NY 2010] [where counsel was relying upon an indemnification provision, and was thus aware of its burden to prove its reasonable fees, to the extent it failed to allocate time spent on non-indemnifiable claims as the time was incurred, its fee request is appropriately subject to reduction]).

#### B. Fees Awarded to Non-Indemnitees

Plaintiffs additionally argue in support of a \$27,581.25 deduction in the recommended fees. This portion of fees sought were incurred in connection with SSD's pursuit of reargument on behalf of AEP stemming from this Court's denial of its motion to quash a subpoena of its bank records and a subsequent untimely appeal. Plaintiffs assert that these fees were incurred solely on behalf of AEP, who is not an indemnitee under the applicable LLCs' operating agreements, and otherwise, the motion and appeal were without merit and should not have been made.

First, the issue of AEP's entitlement to indemnification has already been decided by the First Department, who determined that the managers and sole members of the LLCs (Arfa, Shpigel and AEP) are entitled to indemnification (*546-552 West 146<sup>th</sup> Street LLC*, 70 AD3d 512). This is law of the case and is binding.

Moreover, JHO Figueroa already recommended a forty percent reduction in fees sought for this work, which is reasonable, supported by the record and clearly defined (*Nager v Panadis*, 238

AD2d 135, 135-36 [1<sup>st</sup> Dept 1997]). Plaintiffs' other arguments in favor of further deductions of other categories of recommended fees have been carefully considered and are rejected.

C. Other Deductions Recommended by JHO Figueroa

In the Report, JHO Figueroa recommends that the AEP Defendants should not receive all of the fees incurred in moving to disqualify Plaintiffs' counsel (\$5,385), and a forty percent reduction of fees incurred in moving to quash subpoenas directed at AEP's bank accounts (\$12,711), discussed above. The motions to quash and disqualify were ultimately denied by this Court.

Counsel for the AEP Defendants urges the Court to reject these recommendations and award the full amount of fees that he seeks. Counsel is correct in his recitation of the law insofar as he asserts that a mechanical award or denial of fees on the basis of counsel's success or failure on particular issues is not the sole determinative factor in a fee application, but is merely one factor to consider (*see Deep v Clinton Cent. School Dist.*, 48 AD3d 1125 [4<sup>th</sup> Dept 2008]).

Nonetheless, the Court determines that JHO Figueroa's findings upon which his recommendations to deduct are based are reasonable, supported by the record and clearly defined (*Nager*, 238 AD2d at 135-36). Thus, the Court will not disturb the findings of the Special Referee in this regard.

D. Prejudgment interest

The AEP Defendants also seek prejudgment interest under CPLR 5001. They point out that, although no New York state court has expressly ruled on whether prejudgment interest can be awarded with respect to a successful motion for indemnification of a corporate officer's or director's legal fees, New York's federal courts are divided on this issue (see e.g. *Wells Fargo Fin., Inc. v Fernandez*, 2001 WL 58010, \*2 [SD NY 2011]; *Baratta v S.D. Cohn & Co.*, 656 F Supp 1, 6 [SD NY 1985]).

Under CPLR 5001, interest is recoverable "upon a sum awarded because of a breach of performance of a contract." The Court finds that the predicate for an award of prejudgment interest does not exist here, insofar as there has been no finding of a "breach" of the applicable indemnity provisions.

Plaintiffs sought to challenge the AEP Defendants' entitlement to indemnification of legal fees because claims for wrongdoing asserted against them remain pending in another action. Although Plaintiffs' challenge has undoubtedly delayed resolution of this matter, "interest is not a penalty," and is not meant to punish a party for delaying resolution of a matter in its pursuit of a legal theory (*Manufacturer's & Traders Trust Co. v Reliance Ins. Co.*, 8 NY3d 583, 588-89 [2007]). Therefore, the Court denies the request for prejudgment interest.

In conclusion, while the Report is substantially supported by the record, rejection of a portion of the fees recommended is

appropriate as to those categories of fees that are not supported by the record.

Finally, the Court denies Plaintiffs' request to stay the award pending resolution of the parties' claims against one another in the related matters. Consistent with the First Department's decision, the AEP Defendants are not required to wait until these claims are resolved prior to obtaining indemnification (*546-552 West 146<sup>th</sup> Street LLC*, 70 AD3d 512).

Accordingly, it is

ORDERED that plaintiffs' motion to reject Special Referee Figueroa's report with recommendations on the calculation of certain legal expenses is denied; and it is further

ORDERED that defendants' cross-motion to confirm in part and reject in part, is granted in part and denied in part, and the motion is otherwise denied; and it is further

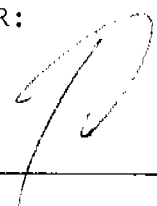
ORDERED that the report with recommendations dated January 14, 2011 of JHO Figueroa is confirmed, in part, and modified, in part; and it is further

ORDERED that the parties shall submit a proposed order or a stipulation to be "So Ordered" which sets forth the corrected calculation of legal fees and expenses consistent with this Court's decision within twenty days of defendants' service of a copy of this order with notice of entry upon plaintiffs' counsel within twenty days, whereupon the Court shall direct the escrow

agent to release the appropriate amount of funds being held in escrow.

Date: May 27, 2011

ENTER:



J.S.C.

**CHARLES E. RAMOS**

**FILED**

**JUN 15 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**