

Young Woo & Assoc., LLC v Kim

2012 NY Slip Op 33437(U)

August 1, 2012

Supreme Court, New York County

Docket Number: 652208/2010

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN BRANSTEN

PART 3

PRESENT: _____
Justice

Index Number : 652208/2010
YOUNG WOO & ASSOC., LLC
vs.
KIM, ANDREW Y.
SEQUENCE NUMBER : 009
REARGUMENT/RECONSIDERATION

INDEX NO. 652208/16
MOTION DATE 8/21/12
MOTION SEQ. NO. 009

The following papers, numbered 1 to _____, were read on this motion to for challenge attorneys' fees

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8-1-12



J.S.C.

HON. EILEEN BRANSTEN

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X
YOUNG WOO & ASSOC., LLC, and
YWA TWO EAGLES LLC,

Plaintiffs,

Index No. 652208/2010
Motion Date: 05/21/12
Motion Seq. No. 009

-against-

ANDREW Y. KIM,

Defendant.

-----X
BRANSTEN, J.

INTRODUCTION

Plaintiffs Young Woo & Assoc., LLC (“Young Woo”) and YWA Two Eagles LLC (“YWA”)(collectively, the “Plaintiffs”) were granted attorneys’ fees and costs for motion sequence numbers 4 and 5 pursuant to this court’s decision dated March 12, 2012. Upon Plaintiffs’ submission of costs and attorneys’ fees for payment from defendant Andrew Y. Kim and non-party Sahn Eagle LLC (“Sahn Eagle”), Kim and Sahn Eagle contest the amounts alleged owed.

In the instant Motion Sequence No. 009, Defendant and Sahn Eagle move to challenge the amounts Plaintiffs put forth as owed.

BACKGROUND

I. Procedural History

a. The Instant Action

On December 8, 2010, Plaintiffs brought a complaint (the “Complaint”) against Kim. Plaintiffs sought a permanent injunction enjoining Defendant from using Plaintiffs’

confidential and proprietary business and from deleting or modifying any electronically stored information in Defendant's possession. Complaint, ¶¶ 42-45. Plaintiffs also brought causes of action against Defendant for breach of fiduciary duty, unfair competition, conversion, misappropriation of trade secrets and conspiracy to cause injury to Plaintiffs. *Id.*, ¶¶ 46-72.

Plaintiffs alleged that upon Defendant's termination from employment at Plaintiff Young Woo, Defendant downloaded numerous Young Woo confidential and proprietary business files. *Id.*, at ¶ 9. The files included financial statements with projected cash flows, net revenues, expenses and invoices to Plaintiffs' suppliers. *Id.* Kumho Investment Bank ("KIB") hired Defendant shortly after his termination. *Id.*, at ¶ 8. Plaintiffs alleged that Defendant used the same "concepts, work product and development team that Plaintiffs had assembled" at his subsequent employment at KIB. *Id.* Plaintiffs argued that Defendant successfully convinced KIB to "oust" Plaintiffs from certain real estate development projects based on Defendant's representation of himself to KIB as Young Woo's "point man in charge of the [real estate] projects' redevelopment." *Id.*, at ¶¶ 8-10. Plaintiffs contend that Defendant's representation would not have been possible but for his alleged misappropriation of confidential and proprietary information. *Id.*

b. Previous Motions

On March 12, 2012, this court issued a decision on Plaintiffs' motion sequence numbers 001, 004 and 005, and Defendant's Cross Motion Sequence No. 1. March 12,

2012 Decision and Order on Motion Sequence Nos. 001, 004 and 005 (the “March 12 Decision”), p. 1.

In Motion Sequence No. 1, Plaintiffs moved for a temporary restraining order and preliminary injunction against Defendant. *Id.* Defendant opposed and cross-moved to dismiss the complaint. *Id.*

In Motion Sequence No. 4, plaintiffs moved for an order of contempt pursuant to CPLR § 5104 and Judiciary Law § 753 against Defendant and his counsel for failure to comply with this court’s orders of December 9, 2010 and February 24, 2011. *Id.*

In Motion Sequence No. 5, Plaintiffs moved for an order to prevent Defendant from working on a real estate development project at issue in the matter, for sanctions against Defendant pursuant to CPLR 3124 and § 3126 and for an order of contempt pursuant to CPLR § 5104 and Judiciary Law § 753 for failure to comply with multiple court orders. *Id.*, at pp. 1-2.

This court granted Plaintiffs’ motion for a preliminary injunction and temporary restraining order. *Id.*, at pp. 26-27. Defendant was enjoined from working on certain real estate development projects. *Id.* The court denied Defendant’s cross-motion to dismiss. *Id.* Further, the court granted Plaintiffs’ Motion Sequence No. 004, and found Defendant, Sahn Eagle and their counsel in contempt of court. *Id.*, at p. 27. Defendant and Sahn Eagle were directed to pay Plaintiffs’ costs, including attorneys’ fees, of bringing the

motion. *Id.* Finally, this court found Defendant and Sahn Eagle in contempt of court in connection to Motion Sequence No. 5, and ordered that Defendant and Sahn Eagle cure this contempt by paying Plaintiffs' costs, including attorneys' fees, of bringing the Motion Sequence No. 005. *Id.*, at pp. 27-28. Plaintiffs were required to present to Defendant and Sahn Eagle an itemized bill of costs and fees pursuant to the March 12 Decision for costs and attorneys' fees for motion sequence number 004 and 005. *Id.*, at p. 28.

Pursuant to the March 12 Decision, on April 13, 2012, Plaintiffs' counsel, Peter M. Ripin provided Defendant with an itemized bill of costs, including attorneys' fees, that Plaintiffs aver they incurred in connection with motion sequence numbers 4 and 5. Peter M. Ripin Affirmation in Opposition to Order to Show Cause (the "Ripin Aff."), Ex. B (Peter M. Ripin Affirmation Itemizing Costs).

Plaintiffs' counsel allege that they incurred attorneys' fees of \$25,710 and disbursements of \$2,949 in connection with Motion Sequence No. 4, for a total cost of \$28,659. *Id.* at ¶ 4. Plaintiffs' counsel further avers that they incurred attorneys' fees of \$203,488 and disbursements of \$7,134 in connection with Motion Sequence No. 5, for a total cost of \$210,622. *Id.* at ¶ 7. Plaintiffs' counsel states that it provided its clients a "courtesy discount" of approximately 39%, lowering the total costs to \$17,482 and \$128,479 for Motion Sequence Nos. 4 and 5, respectively. *Id.*, at ¶¶ 4-7.

Plaintiffs also seek recompense for their use of T&M Protection Resources (“T&M”) as computer forensic experts for use in motion sequence numbers 004 and 005. *Id.*, at ¶ 8. Plaintiffs incurred costs in the amount of \$48,788 for T&M’s forensic analyses. *Id.* However, T&M provided Plaintiffs with a courtesy discount of 14%. *Id.* Applying the discount, Plaintiffs allegedly incurred a total cost of \$41,958 for T&M’s services. *Id.* Plaintiffs contend that they reviewed T&M’s time sheets and excluded any time unrelated to motion sequence numbers 004 and 005. Ripin Aff., ¶ 15.

Plaintiffs allege that the total cost of bringing Motion Sequence Nos. 4 and 5, including experts and with discounts, was \$170,437. *Id.*, at ¶ 9. In an email sent to Defendant’s counsel, and provided in opposition to this motion, Ripin was “confident that the original billed amounts were fair and reasonable.” Ripin Aff., Ex. B (April 13, 2012 Email). Ripin further contended that “in light of the substantial discounts, there can be no dispute concerning this fact [that the billed amounts were reasonable].” *Id.*

c. The Instant Motion

Defendant brings the instant Motion Sequence No. 9 to challenge the attorneys’ fees and costs that Plaintiffs contend Defendant and Sahn Eagle owe to Plaintiffs pursuant to the March 28 Decision. Defendant Andrew Kim and Non-Party Sahn Eagle LLC’s Memorandum of Law in Support of Order to Show Cause (“Def. Mem.”), p. 2. Defendant and Sahn Eagle contend that Plaintiffs have not met their burden to prove that the fees and costs for which Plaintiffs’ counsel documented and seek reimbursement for

were reasonable, necessary and related to motion sequence numbers 004 or 005 (collectively, the “Contempt Motions”). *Id.*

Defendant and Sahn Eagle argue that Plaintiffs inappropriately seek costs and fees not related to the Contempt Motions. *Id.*, at p. 7. In support of this argument, Defendant claims that the Ripin Affirmation, which describes the fees that Plaintiffs’ counsel states that it submitted to its client for the Contempt Motions, includes descriptions of tasks performed that are “unsupported by any contemporaneous records, are largely generic, are insufficient to show whether the time spent was reasonable, and in many cases do not appear to relate directly to either [of the Contempt Motions].” *Id.*, at p. 4. The generic nature of the descriptions, Defendant contends, prohibits this court from definitively concluding whether the time spent was “necessary or related to either of the [Contempt Motions].” *Id.*, at p. 5.

Defendant and Sahn Eagle further argue that the computer forensic expert fees which Plaintiffs submit as reimbursable as applicable to the Contempt Motions “should have been minimal.” *Id.*, at p. 6. In support of this argument, Defendant alleges that the “only costs of Plaintiffs’ forensic computer expert that could plausibly be related to the [Contempt Motions] are the costs that related to identification of the three flash drives that were allegedly plugged into Plaintiffs’ computer and not produced by [Defendant]” *Id.* Defendant and Sahn Eagle cite the fact that Plaintiffs included charges for examining images of Sahn Eagle’s computers and electronic devices as evidence of

Plaintiffs' inappropriate billings. *Id.* "It is obvious that these costs cannot have been related to the sanctions for Sahn Eagle's failure to produce the images in a timely manner because the cost of examining the images would have been incurred regardless" *Id.*

In opposition, Plaintiffs aver that they reviewed "the underlying work product corresponding to the time entries to ensure that [they] only included time relating to the [Contempt Motions]." *Id.* Plaintiffs further allege that they reviewed T&M's time sheets and "similarly excluded time unrelated to the [Contempt Motions]." *Id.* Thus, Plaintiffs argue that the attorneys' fees sought were actual, accurate, necessary, and, therefore, reasonable, and are properly reimbursable pursuant to the March 12 Decision.

STANDARD OF LAW

Upon a finding of contempt, the court may impose a fine in order to allow the contemnor to purge himself of the contempt. The fine may not exceed "the amount of the complainant's costs and expenses." Judiciary Law § 773. "Counsel fees and other professional fees are properly included as items of such costs and expenses." *Holskin v. 22 Prince St. Assoc.*, 178 A.D.2d 347, 348 (1st Dep't 1991)(citing *Glanzman v. Fischman*, 143 A.D.2d 880 (2d Dep't 1988)). The court properly awards attorneys' fees in connection with contempt proceedings upon an affidavit that specifies "in detail the time spent, the hourly rate and the nature and extent of the services rendered." *Blau v. Blau*, 309 A.D.2d 672, 673 (1st Dep't 2003)(citing *Skidlesky v. Sidlesky*, 279 A.D.2d 356 (1st Dep't 2001)). "Before ordering one party to pay another party's attorneys' fees, the

court always has the authority and responsibility to determine that the claim for fees is reasonable.” *Solow Mgmt. Corp. v. Tanger*, 19 A.D.3d 225, 226 (1st Dep’t 2005).

ANALYSIS

The amount of attorneys’ fees awarded is a matter of discretion of the court. 542 *E. 14th St. LLC v. Lee*, 66 A.D.3d 18, 24 (1st Dep’t 2009)(finding that the Appellate Division should not disturb this discretionary power of the trial court “absent an abuse thereof”)(citing *11 Park Place Assoc. v. Barnes*, 220 A.D.2d 339 (1st Dep’t 1995)). “The relevant factors in the determination of the value of legal services are the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the results achieved.” *Id.* (quoting *Jordan v. Freeman*, 40 A.D.2d 656, 656 (1st Dep’t 1972)).

The complainant has the burden to show by sufficient evidence that the attorneys’ fees sought are reasonable. *Dresses for Less, Inc. v. Lenroth Realty Co.*, 260 A.D.2d 220, 221 (1st Dep’t 1999). The fees must be a “direct product of the contempt proceeding . . . [to be] properly recoverable.” *Holskin*, 178 A.D.2d at 348 (citing *Glanzman v. Fischman*, 143 A.D.2d 880 (2d Dep’t 1988)). Thus, the court must limit recovery of attorneys’ fees to the costs and fees related to the contempt. *1319 Third Ave. Realty Corp. v. Chateaubriant Rest. Dev. Co.*, 57 A.D.3d 340, 341 (1st Dep’t 2008).

Plaintiffs mischaracterize the nature of the issue in the instant motion. Plaintiffs respond to Defendant's argument that Plaintiffs did not "attempt to allocate [the May 2011] hearing attendance costs based on the time that was actually related to litigating the [contemptuous] conduct" by pointing the court to *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249 (2d Cir. 1987). Plaintiffs' Memorandum of Law in Opposition to Order to Show Cause ("Plaintiff Mem."), pp. 7-8 (citing Def. Mem., p. 9). Plaintiffs argue that *Dominic* is controlling because the Second Circuit refused to exclude attorneys' fees on time spent on unsuccessful claims that were "inextricably intertwined" and involve "a common core of facts or are based on related legal theories." Plaintiff Mem., p. 8 (quoting *Dominic*, 822 F.2d at 1254). Plaintiffs argue that all of their claims are "related to Defendant's misconduct as a faithless fiduciary and were inextricably intertwined." *Id.*

Defendant and Sahn Eagle contend that "the overwhelming majority of both the hearing and the post-hearing briefs [were] devoted to the Preliminary Injunction Motion." Def. Mem., p. 9. However, Plaintiffs argue that that the evidence required refute Defendant's allegations and establish his "utter lack of credibility was no different" for the project that was the subject of the Preliminary Injunction Motion than it was for Plaintiffs' other projects. Plaintiff Mem., p. 9

The issue is not whether Plaintiffs have "inextricably intertwined" claims, but whether they have shown by sufficient evidence that the fees and costs sought necessary

and a direct product of the Contempt Motions. *See 542 E. 14th St. LLC*, 66 A.D.3d at 24. This court finds that Plaintiffs have not carried their burden of showing that all of the attorneys' fees sought are directly attributable to the Contempt Motions. This court must consider the "relevant factors" enumerated in *542 E. 14th St. LLC* and find that the attorneys' fees are sufficiently "supported by the record" in order to award the requested fees in full. *542 E. 14th St. LLC*, 66 A.D.3d at 25 (citing *1050 Tenants Corp. v. Lapidus*, 52 A.D.3d 248, 248 (1st Dep't 2008)).

Many of Plaintiffs' submissions are supportable and sufficiently specific in detail to allow for the award of attorneys' fees and costs based thereon. As a result, the court can reasonably conclude that a number of Plaintiffs' billing entries are directly attributable to the Contempt Motions. For example, Mr. Ripin's March 2, 2011 entry describes his work as "[p]repar[ing] motion for contempt; confer[ring] with L. Lutchter; [and a] telephone conversation with and e-mail to client." Ripin Aff., Ex. B (Ripin Affirmation Itemizing Costs), p. 2. As a further example, Mr. Ripin's March 8, 2011 is: "Prepare for oral argument on contempt motion." *Id.* These two entries illustrate a level of specificity which allows this court to definitively find that the entries relate directly to the Contempt Motions.

However, the court finds that Plaintiffs have not provided sufficient detail of the "nature and extent of the services [Plaintiffs' counsel] rendered" that would permit this court to conclude that all of the attorneys' fees that Plaintiffs seek are attributable directly to the Contempt Motions and are thus reasonable. *Blau*, 309 A.D.2d at 673.

Although Plaintiffs allege that they provided Defendant with an itemization of cost that included only time related to the Contempt Motions, Ripin Aff., ¶ 15, the record before the court is unclear. Numerous entries do not provide sufficient and specific detail to allow this court to conclude that they relate only to the Contempt Motions. For example, Mr. Ripin alleges that Plaintiffs should be entitled to reimbursement for six hours of Mr. Ripin's time as detailed in an April 11, 2011 entry that reads: "Emails to client, Ms. Rodriguez and T&M; review computer forensic data, including emails to or from Kim." Ripin Aff., Ex. B, p. 4. Another deficient example is Mr. Ripin's April 18, 2011 entry, which states, without more: "Review emails; write in response." *Id.*, at p. 5. These descriptions exemplify the type of entries that are too vague to allow this court to conclude that the record supports their inclusion in Plaintiffs' award of attorneys' fees. The court cannot be certain, without further explanation, that these entries relate directly to the Contempt Motions.

Further, Plaintiffs submit billings that commingle various tasks and are thus insufficiently detailed to allow this court to provide remuneration therefor. *See Flanagan v. Flanagan*, 267 A.D.2d 80, 81 (1st Dep't 1999)(finding that billings consistently commingled with "various tasks within a given number of hours without setting forth the amount of time devoted to each task" are insufficiently detailed). For instance, Plaintiffs seek fees from an April 25, 2011 entry that purports to show that Mr. Ripin spent more than 10 hours "confer[ring] with L. Hatcher; [sending] emails to client and T&M;

prepar[ing] affidavits of Carney, Lewis and Ahn and memorandum of law in support of motion” that he previous describes as “motion papers for temporary restraining order, preliminary injunction, sanctions and contempt.” Ripin Aff., Ex. B, p. 5. This entry cannot be found to be attributable only to the Contempt Motions, as the temporary restraining order and preliminary injunction were not part of the motions at issue: motion sequence numbers 004 or 005,.

This court finds that insufficient evidence exists showing that the costs and attorneys’ fees requested by Plaintiffs are directly and sufficiently attributable to the Contempt Motions to order payment of the requested amounts. However, the court is mindful of the averment of the Plaintiffs in support of their request, and the nature of legal billing. The court therefore directs the parties to a hearing before a Special Referee in order to allow the Special Referee to hear and determine the costs and attorneys’ fees attributable to the Contempt Motions. *See Bankers Trust Co. of Cal., N.A. v. West Shore Apt. Corp.*, 281 A.D.2d 351, 352 (1st Dep’t 2001)(“Since the defendant objected to the amount sought, a hearing should have been conducted to determine the reasonableness of the fee claimed”)(citing *Kumble v. Windsor Plaza Co.*, 128 A.D.2d 425 (1st Dep’t 1987)).

ORDER

Accordingly, it is hereby

ORDERED, that defendant Andrew Y. Kim and non-party Sahn Eagle LLC's ("Sahn Eagle") motion to challenge the amount of reasonable attorneys' fees and costs that plaintiffs Young Woo & Assoc., LLC and YWA Two Eagles LLC (collectively, the "Plaintiffs") may recover against Defendant and Sahn Eagle is GRANTED; and it is further

ORDERED that the issue of the amount of reasonable attorneys' fees and costs that Plaintiffs may recover against Defendant and Sahn Eagle is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for Defendant and Sahn Eagle shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the Decision and Order of the court.

Dated: New York, New York
August 1, 2012

ENTER



Hon. Eileen Bransten, J.S.C

¹ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.