

Steven J. Kaye Assoc. v Mitchell N. Kay, P.C.

2013 NY Slip Op 30849(U)

April 15, 2013

Supreme Court, New York County

Docket Number: 601443/2008

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN
Justice

PART 36

Steven J. Kaye Associates, P.C.

INDEX NO. 60443/08

-v-

MOTION DATE _____

The Law Offices of Mitchell N. Kay, P.C.

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for Confirm Referee's Report

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1, 2

Answering Affidavits — Exhibits _____ | No(s) 3

Repeating Affidavits _____ | No(s) 4, 5

Interim orders dated 10/12/11, 11/19/12 & 12/11/12

Upon the foregoing papers, it is ordered that this motion is by plaintiff to confirm
the Special Referee's Report is denied, in accordance
with the attached memorandum decision.

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

FILED

APR 23 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/15/13


_____, J.S.C.
DORIS LING-COHAN

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- NEW YORK COUNTY
PRESENT: Hon .DORIS LING-COHAN, Justice PART 36

STEVEN J. KAYE ASSOCIATES,
Plaintiff,

-against-

INDEX NO. 601443/2008
MOTION DATE
MOTION SEQ. NO. 005
MOTION CAL.NO.

MITCHELL N. KAY, P.C.,
Defendant,

This case involves a contract dispute with respect to the sale of plaintiff's law practice to defendant. Given that this case is between law firms, this court diligently attempted to settle this matter, in the interest of justice and for the sake of the parties.¹ The court notes that, generally, matters of this nature, involving fees allegedly owed to counsel, are resolved amongst counsel, without the need for court intervention. However, as the parties were unable to settle this matter, the court renders the below decision, on plaintiff's motion to confirm the "report" of the Special Referee.

FILED
APR 23 2013

Background

By decision/order dated January 9, 2012, plaintiff's summary judgment was granted to the extent that, *inter alia*, partial summary judgment was awarded on plaintiff's breach of contract claim and on its two (2) claims for declaratory judgment, "with the issue of the calculation of damages thereon to be referred to a Special Referee to hear and determine pursuant to

NEW YORK
COUNTY CLERK'S OFFICE

¹ The court notes that, upon initial review of the within submissions, and, in particular, the transcript from the hearing before the Special Referee, this court spent considerable time attempting to settle this matter, in the interest of the parties and to conserve the court's resources, since, as detailed herein, a new hearing is necessary.

CPLR 4317(b)"². Notice of Motion, Exh A. In such decision/order, plaintiff was also awarded "an attorneys' lien, in accordance with Judiciary Law 475, in an amount to be determined by the Special Referee, on the attorney settlements pursuant to paragraph 5 of the contract...". *Id.*

Modification of this Court's Decision/Order by the Special Referee

Pursuant to this court's January 9, 2012, a hearing was held before a Special Referee (Hon. Ira Gammerman, J.H.O.). Despite the clear language in this court's January 9, 2012 decision/order that the reference to the Special Referee was "to hear and determine pursuant to CPLR 4317(b)", the Special Referee modified this court's decision/order and conducted a hearing in which he decided that he would instead "hear and report" his recommendations to the court. Thus, a motion to confirm or reject the Special Referee's "report" became necessary, as required by CPLR §4403.

Specifically, at the hearing, rather than reviewing this court's January 9, 2012 decision/order, the Special Referee merely asked the parties, whether the matter was referred for a determination or for a report. Notice of Motion, Exh. 1, Transcript, at 10, lines 17-26; at 11, lines 2-3. The Special Referee did not appear to have read the written decision, prior to conducting the

² CPLR §4317, titled "[w]hen reference to determine may be used", provides, in relevant part, as follows:

"(b) [w]ithout consent of the parties. On a motion of any party or on its own initiative, the court may order a reference to determine a cause of action or an issue where the trial will require the examination of a long account...or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law".

hearing, since he needed to ask the parties, at a point well into the hearing (at page 23 of the transcript), "Do you have a copy of her decision? Is there a written decision" [Notice of Motion, Exh. 1, Transcript, at 23, lines 3-8]. In fact, prior to such time in the hearing, the Special Referee refused a copy of the marked pleadings (which contained the decision), stating on the record "I don't need them". [Notice of Motion, Exh. 1, Transcript, at 2, lines 12-14].

Despite that the Special Referee was informed by the parties that the matter was referred for purposes "to hear and determine", pursuant to CPLR 4317(b), and the clear language of this court's order of January 9, 2012, the Special Referee nonetheless asked the parties for their "consent" for him to make a determination (which was not required, as it was a referral pursuant to CPLR 4317[b]), and "consent" was denied by defendant. *Id.* at 10, lines 23-24. Specifically, the Special Referee stated to the parties, incorrectly, that "both sides have to agree for [him] to make a determination" [*id.*], and, thus, the Special Referee concluded, "so I'll report...[i]t doesn't make a difference". *Id.* at 11, lines 2-3; see CPLR §4317(b).

Significantly, the court notes that the 11 page January 9, 2012 decision/order issued by this court, which referred this matter to a Special Referee "to hear and determine", *inter alia*, the calculation of damages, was not appealed by either party; nevertheless, the Special Referee, *sua sponte*, modified this court's prior decision/order.

**The Necessity for this Motion to Confirm the Special Referee's
"Report"**

Thus, presently before this court is plaintiff's motion to confirm the "report" of the Special Referee, made necessary by the Special Referee's non-compliance with this court's prior order.

Accordingly, the court will turn its attention to whether there is a basis to confirm the "report" of the Special Referee.

"It is well settled that that *the report* of a Special Referee shall be confirmed whenever the *findings contained therein* are supported by the record and the Special Referee has *clearly defined the issues* and resolved the matters of credibility...". *Nager v. Panadis*, 238 AD2d 135 (1st Dept 1997) (citations omitted) (emphasis supplied). Here, for a multitude of reasons, as detailed below, this court is constrained to deny plaintiff's motion.

No Report Issued

For a court to consider whether a "report" should be confirmed, there first must have been the issuance of a "report".

Significantly, contrary to the provisions of CPLR §4320, after the hearing was conducted in this case, a "report" was never issued by the Special Referee.

CPLR §4320(b), titled "Report; transcript", *specifically provides*, as follows:

"The referee shall file his *report, setting forth findings of fact and conclusions of law*, within thirty days after the cause or matter is finally submitted. Unless otherwise stipulated, a transcript of the testimony *together with the exhibits or copies thereof shall be filed with the report*".

[*6]

This court never received any report from the Special Referee, much less "a transcript...together with the exhibits", nor has any report been "filed". As further explained below, the court also has not clearly been presented with the exhibits which were admitted into evidence. Instead, rather than rendering a "report", detailing the findings of fact and conclusions of law, as specifically required by CPLR §4320(b), the Special Referee, merely "so ordered" the transcript from the hearing, which does not comply with the mandates of the applicable law, and did not file or forward such transcript to this court, with the exhibits, as required. As stated, CPLR §4320(b), specifically requires that the Referee "file his report" with "a transcript...together with the exhibits", rather than requiring that the Referee simply "so order" the transcript, as was done herein. CPLR §4320(b).

It is noted that, neither side provided to the court, as part of their submissions, a written report, or citations to cases in which a "so ordered" transcript was permitted to substitute as a report pursuant to the CPLR.³ Thus, unlike in the case of *Nager v. Panadis*, 238 AD2d 135, 136 (1st Dept 1997), given that no report was rendered here, this court is unable to confirm that the Special Referee "cogently and concisely analyzed the issues presented", by reading a "report" issued by the Special Referee.⁴

³ Nor is this a situation in which a report, in compliance with CPLR §4320(b), was dictated into the record and the transcript provided.

⁴ In *Nager, supra*, the Appellate Division held that the trial court "erred when it declined to confirm the report as a review of the report reveal[ed] that [the] Special Referee... cogently and concisely analyzed the issues presented, and evaluated and credited the defendants' testimony". However, as stated herein, since this court was not given a "report" by the Special Referee or the parties, it is, therefore, impossible for this court to determine whether the Special Referee's recommendations should be confirmed or rejected.

The Submitted Transcript Cannot Substitute as a "Report"

Even if this court was to deem the "so ordered" transcript, as the Special Referee's "report" which was required to have been filed pursuant to CPLR §4320, the transcript/report is not in proper form, as it fails to include any findings of fact or conclusions of law made by the Special Referee, *as specifically required by the statute*. See CPLR §4320(b).

No Clarity as to Which Documents Were Admitted/Considered

Additionally, on a motion to confirm a referee's report, "the record before the court...should contain *the documents considered by the [r]eferee in arriving at his recommendations...*". In the *Matter of Charles F.*, 242 AD2d 297 (2nd Dept 1997) (citations omitted). Not only has this court not received a report from the Special Referee, it is also unclear from the submissions, which documents were admitted into evidence at the hearing. Plaintiff's moving papers, which are over three inches in thickness, contain many documents, with no explanation as to the significance of each document, and no reference to the transcript indicating which of the documents submitted to this court with the moving papers were actually admitted into evidence at the hearing and "considered by the Special Referee in arriving at his recommendations". *Id.*

Further, based upon the submissions and transcript, there is a discrepancy as to which exhibits were actually admitted into evidence by the Special Referee.⁵ Without referring to the

⁵ As indicated, CPLR §4320(b) requires that the Special Referee file the exhibits with the report, unless the parties have

transcript with any specificity, plaintiff claims that Exhibits A-F⁶ of the moving papers were introduced into evidence [¶9, Livingston Affirmation], which defendant disputes. A review of the transcript attached to plaintiff's motion indicates that only Exhibits 1 and 2 and defendant's Exhibit A were admitted into evidence at the hearing.⁷ Notice of Motion, Exh. 1, Transcript. As stated, the court received no "filed" report, transcript or any exhibits from the Special Referee, as per CPLR §4320(b), rendering it utterly impossible for this court to confirm the Referee's "report".

Conduct of the Hearing

It is evident from the transcript that the Special Referee based his recommendations that, *inter alia*, this court enter judgment in plaintiff's favor in the amount of \$148,375.84 (plus interest in the amount of \$58,923.81), on the limited and conclusory testimony of witnesses, without any documentary proof admitted to support such monetary amounts, and with the absence of any cogent testimony as to how such numbers were in fact calculated by the

agreed otherwise; here, nothing was filed with the court by the Special Referee.

⁶ Consisting of Marked Pleadings, Contract of Sale, Transfer Agreement, Closing Statements and canceled checks, invoices for legal services and a summary statement of damages.

⁷ While the transcript seems to refer to three exhibits admitted into evidence during the hearing (plaintiff's Exhibit 1 and 2 and defendant's Exhibit A), *it is unclear from the transcript and from the moving papers*, what such exhibits were comprised of. The court speculates that plaintiff's Exhibit 1 and 2 may have consisted of the purchase agreement between the parties and an alleged list of cases transferred dated May 31, 2006 (presumably prepared shortly after the signing of the purchase agreement); however, the court is unable to determine defendant's Exhibit A. Nevertheless, *none* of the exhibits, which may have been submitted into evidence, appear to support the award suggested by the Special Referee. Moreover, many of plaintiff's unexplained submissions attached to the moving papers, appear not to have been submitted into evidence at the hearing or reviewed by the Special Referee, in rendering his award.

witnesses, as the witnesses were interrupted.⁸ In essence, lump sum figures were stated by the witnesses, which were, thereafter, simply "recommended" by the Special Referee.

Additionally, notwithstanding that defendant objected at the hearing to the Special Referee's recommendation that this court enter judgment in plaintiff's favor in the amount of \$148,375.84 (plus interest in the amount of \$58,923.81), arguing that plaintiff failed to prove damages, and that plaintiff merely gave the Special Referee a number, without any documentation, the Special Referee rebutted by stating "I don't need it. I'm the trier of fact" and proceeded to testify on plaintiff's behalf that "[The witness] is an honest man, I accept his testimony". Notice of Motion, Exh. 1, Transcript, at 13, lines 9-20. Significantly, at the hearing, no closing statement documents were produced, or *any other documentary proof*, to support plaintiff's claimed damages.

Interestingly, at one point during the hearing, the Special Referee suggested to defendant that defendant "get copies of all closing statements...and compare the closing statements with the

⁸ Often the witness' testimony was interrupted by the Special Referee. For example, on cross examination by defendant Mitchell N. Kay, the testimony proceeded as follows:

"Q. As matter of fact, these documents were forwarded from the period May 31st to September 30th, 2006, which was some time after the original agreement was signed, is that correct?

Judicial Hearing Officer: The agreement is dated May 18. Let's move on.

Q. Isn't that correct?

Judicial Hearing Officer: That's correct, counselor".

Notice of Motion, Exh. 1, Transcript, at 6, lines 11-18; see also e.g., *id.*, at 5, lines 3-9; at 7, lines 4-8; at 8, lines 15-24; at 12, lines 7-10; at 13, lines 15-20; at 14, lines 2-5, 16-19; at 19, lines 9-11; at 21, lines 20-22.

cases listed on Exhibit 2, and you'll see what amounts are due the attorney, the plaintiff, and see if he calculated it correctly". *Id.* at 15, lines 17-24. However, the procedure suggested by the Special Referee - that defendant review plaintiff's documentation (*which had not been admitted into evidence*), to determine the correct amount of plaintiff's claimed damages - is contrary to the law, which places the burden on the *plaintiff* to prove any damages. See *Berley Industries, Inc. v. City of New York*, 45 NY2d 683 (1978). Instead, the Special Referee placed the burden on defendant to review documentation, which had not even been admitted into evidence (but was allegedly "in defendant's lap"), to disprove plaintiff's conclusory figures. Notice of Motion, Exh. 1, Transcript, at 35, lines 23-24.

Furthermore, given that the Special Referee failed to set forth the basis for his "recommendations", this court is unable to evaluate the appropriateness of such "recommendations, on the limited and disputed record now before the court, which fails to include a report with findings of fact and conclusions of law, and any of the exhibits which the Special Referee may have considered to base his recommendations. See *Matter of Charles F*, 242 AD2d at 298 (remittur necessary given failure to "set forth the basis" for award of attorney fees and, thus, court was "unable to evaluate the appropriateness of [the] award on the record" before the court).

Moreover, at the hearing, despite that the Special Referee *specifically acknowledged* that this court lacked jurisdiction over the three (3) non-party law firms which plaintiff claims are holding money in escrow, the Special Referee nonetheless recommended that this court somehow direct these non-parties to turn-over such funds. Notice of Motion, Exh. A, Transcript, at 21,

11]
lines 21-26; at 26, lines 21-23; at 27, lines 12 -17.⁹

Further, despite, *inter alia*, the language in this court's order dated January 12, 2012 which awarded plaintiff an attorneys' lien in accordance with Judiciary Law §475, and directed the Special Referee to determine the amount of the lien, it appears that no testimony was taken or proof admitted into evidence, during the hearing, as to the lien amount and no determination or recommendation of a lien amount was made by the Special Referee.

The court notes that in its opposition to the within motion, defendant raised additional objections to the manner in which the Special Referee conducted the hearing, citing numerous examples, including the Referee's refusal to allow plaintiff's witness to respond to defendant's cross-examination questions, with the Special Referee instead responding for the witness, without even answering defendant's question. Affirmation of Mitchell N. Kay, ¶7. As noted, the testimony was often interrupted by the Special Referee. See Footnote 8, *supra*. However, the court need not address the balance of defendant's numerous concerns as to the conduct of the hearing, as it has already determined that there is no "report" to confirm and a new hearing is being ordered, as detailed below.

Thus, based upon the above, it is

ORDERED that plaintiff's motion to confirm the report of the Special Referee is denied and, in accordance with CPLR §4403, a new hearing is directed, with a new Special Referee appointed,

⁹ The proposed judgment submitted by plaintiff is rejected, in that it seeks, *inter alia*, that this court direct non-parties, over which this court indisputably lacks jurisdiction, to turn-over money to plaintiff.

which shall be conducted in accordance with this court's decision/order of reference, dated January 9, 2012; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiff with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon the Clerk of the Judicial Support Office, to arrange a calendar date for the reference to a Special Referee; and it is further

ORDERED that, prior to such hearing date, counsel shall provide a copy of this court's decision/order dated January 9, 2012 and this decision/order to the newly assigned Special Referee.

Dated: 4/15/13


Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION
 DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

FILED

J:\REFEREE_RECEIVER\Kaye v. Kay\kaye v. kay.MOTION TO CONFIRM REPORT.wpd

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