

Village Realty v 135 W 13

2013 NY Slip Op 31364(U)

June 25, 2013

Supreme Court, New York County

Docket Number: 810207/2011

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Village Realty
-v-
135 W 13

INDEX NO. 810207/11
MOTION DATE 6/20/13
MOTION SEQ. NO. 006

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

In this action by plaintiff Village Realty Holdings, Inc. ("plaintiff") against defendants 135 W. 13 LLC ("135 West") and Daren Herzberg ("Herzberg") (collectively, "defendants") to foreclose on a mortgage on a property known as 135 W. 13th Street, New York, New York (the "building"), the Court-appointed Temporary Receiver Roberta Ashkin (the "Receiver") and her attorney Kucker & Bruh ("K&B") (collectively, the "movants") now move by order to show cause for an order permitting her to pay \$36,167.20 in attorneys' fees for services K&B rendered in connection with her Receivership.

Factual Background

In support, the movants contend that as Temporary Receiver, Ms. Ashkin was authorized to, *inter alia*, collect rent and commence legal actions to protect the building and its income. By subsequent order dated April 12, 2012, the Court authorized Ms. Ashkin to "retain counsel as she deems necessary, without further consent of the Court, the fees of such counsel to be paid by the parties equally . . . [and] the fees of such counsel shall be assessed at a further hearing before the Court upon completion of such services." The parties later agreed to permit Ms. Ashkin to pay her attorneys, K&B, \$40,000 from the Receiver's operating account for legal work K&B performed through September 12, 2012.

Since September 12, 2012, K&B has provided legal services in connection with Ms. Ashkin's leasing of the commercial space at the building; illegal eviction, rent overcharge, and

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

Dated: _____, J.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

failure to renew leases complaints; tax lien and foreclosure issues; removing certain property from the building; renewal leases; insurance issues; registering residential units with the Division of Housing and Community Renewal (“DHCR”); holdover and summary non-payment proceedings; rent demands; and a response to a DHCR complaint. Such services were reasonable and necessary and worth \$36,167.20, which include the making of this motion since the parties refused to give Ms. Ashkin permission to pay K&B. The operating account has \$100,000, which, after payment of the legal fees, would be sufficient to cover operation and maintenance costs of the building.

In opposition, defendants argue that the legal services were specifically disallowed by this Court, the Receiver and K&B knew that such services should not have been performed, the services are billed at a rate exceeding the reasonable charges for such services, the payment of the legal fees is premature, and the Receiver and K&B refused reasonable efforts of the parties to review the legal work performed. The Receiver was given the authority to hire counsel to perform duties not ordinarily performed by a Receiver, and without an explanation as to why the legal services were required, the Court lacks authority to find that any of the legal services should be paid by the parties.

Further, the issuance of leases is typical of a receivership, and a prior application by Ms. Ashkin to issue leases was denied approximately one year ago. Although the Court directed Ms. Ashkin to a more formal and detailed motion to issue any such leases, Ms. Ashkin issued such leases without making any motion. Since the Receiver cannot act outside her capacity and seek legal fees for such actions, legal fees for drafting, negotiating, and executing leases cannot be recovered.

Additionally, in the order dated September 28, 2011 appointing Ms. Ashkin as Receiver, the Court directed Ms. Ashkin to contract plaintiff’s counsel to ascertain the status of the foreclosure action and whether she should proceed with her duties prior to engaging in any action that may result in expenses being incurred, and there is no affidavit from Ms. Ashkin detailing any efforts she made to contact plaintiff’s counsel to perform the legal services alleged. When a receiver is an attorney, caselaw holds that he or she will perform customary legal duties connected with his or her receivership. The invoice from K&B indicates that the Receiver is performing no legal services at all, and there is no affidavit indicating her services performed or explaining the actual legal services she is qualified to perform. As such, she should not be paid.

In any event, the legal fees are excessive and malicious under the New York Rules of Professional Conduct, Rule 1.5.¹ Some of the excessive fees were for simply negotiating, reviewing, and collating leases, or for representing the Receiver in related landlord tenant proceedings despite this Court’s appointment of Kossoff and Unger. Such unauthorized work results in double billing for the building.

In reply, the movants argue that the legal work was authorized and calculated at a reasonable rate. There is no requirement that K&B provide its legal file to counsel prior to payment of fees, and the Receiver was given authority to issue leases. There is no double dipping since all of the legal work was performed by K&B. Further, Kossoff & Unger were only appointed to represent the Receiver in the underlying holdover proceeding. However, there was

¹ Plaintiff’s counsel adopts the arguments of defendants 135 West 13th Street and Herzberg.

additional litigation involving “Stollerman and Sandow for which Kossoff & Unger were not appointed counsel and which Kucker & Bruh, LLP represented the Receiver” (Reply, ¶7).

Discussion

The Order of Appointment dated September 28, 2011 directed the Receiver collect from the building’s tenants all rents due and unpaid, and authorized her to institute legal proceedings “necessary for the protection of said premises or to recover possession of the whole, or any part thereof, and to institute and prosecute suits for the collection of rents now due or hereafter to become due and summary proceedings for the removal of any tenants or other persons therefrom.” The Receiver was also authorized to “procure liability insurance” and “from time to time, rent or lease all or any part of the Mortgaged Premises for terms not exceeding two (2) years pursuant to applicable rent rules or such longer terms as may be otherwise authorized by law; and keep said Mortgaged Premises insured against loss or damage, as well as to pay the taxes, assessments and water rates and sewer rents thereon.”

By Order dated April 12, 2012, the Court authorized Ms. Ashkin to “retain counsel as she deems necessary, without further consent of the Court, the fees of such counsel to be paid by the parties equally . . . [and] the fees of such counsel shall be assessed at a further hearing before the Court upon completion of such services.” Therefore, the Receiver’s retention of counsel as she deemed necessary was expressly authorized by this Court

The Receiver sufficiently established the need to retain outside counsel to perform numerous duties falling outside the scope of duties customarily performed by a receiver. As stated before, issues related to leases and rent stabilization law that arise support the use of counsel.

The Court notes that “a receiver who is a lawyer is expected to perform customary legal duties connected with his [or her] tenure” (*Strober v Warren Property Co.*, 84 AD2d 834, 444 NYS2d 475 [1st Dept 1981] *citing Sunrise Fed. Sav. & Loan Assn. v. West Park Ave. Corp.*, 47 Misc 2d 940, 263 NYS2d 529). And, where “the services rendered by counsel do not appear to have been extraordinary in any sense, the amount awarded as compensation therefor should . . . [be] deducted from the sum awarded to the receiver as his [or her] commissions” (*Strober v Warren Property Co.*, 84 AD2d at 836) (where counsel engaged by the receiver, who was also an attorney, read the file and spoke with several of the disputing partners, “the services rendered by counsel do not appear to have been extraordinary in any sense”). However, the efforts undertaken by the Receiver’s counsel in this case “were anything but ‘customary’. Unlike the services at issue in *Strober*—merely reviewing a file and making a few phone calls,” K&B counseled the Receiver in successfully commencing two non-payment proceedings, advised her on the tax lien and foreclosure issues, offered the defense of the rent overcharge and failure to renew DHCR complaints filed by certain tenants in the building, and conducted various collection activities and other efforts to recover funds. Such activities “constitute the ‘extraordinary’ efforts that the court in *Strober* was attempting to distinguish” (*Commodity Futures Trading Com'n v Korbean Intern. Inv. Corp.*, 1998 WL 770516, *2+ (SDNY Nov 02, 1998)). Therefore, the application for attorneys’ fees sought is warranted.

Turning to whether the fees sought are excessive, the New York Rules of Professional Conduct, Rule 1.5, Fees and Division of Fees, which prohibits a lawyer from entering an agreement for, charging, or collecting excessive fees (Code of Professional Responsibility, DR

2-106 FN9 (22 NYCRR 1200.11).

“This provision, in relevant part and as raised by defendants, sets forth that:

(b) A fee is excessive when, after a review of the facts, lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee may include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. . .

(3) The fee customarily charged in the locality for similar legal services. . .

(7) The experience, reputation and ability of the lawyer or lawyers performing the services.

(See also *Lawrence v Miller*, 48 AD3d 1, 853 NYS2d 1 [1st Dept 2007])

Here, based on the submissions, and in light of this Court’s previous order stating that “the fees of such counsel shall be assessed at a further hearing . . . ,” the Court finds that a hearing is necessary to determine the reasonableness of the fees (*see Kraizberg v Frank*, 170 AD2d 306, 565 NYS2d 817 [1st Dept 1991] (the IAS court abused its discretion in “ordering plaintiff to pay attorney’s fees for this appeal, without first determining the necessity and reasonableness of such fees”)).

Conclusion

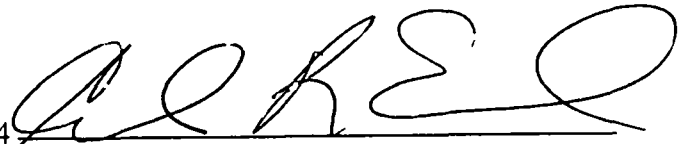
Based on the foregoing, it is hereby

ORDERED that the order to show cause by the Court-appointed Temporary Receiver Roberta Ashkin, and her attorney Kucker & Bruh for an order permitting her to pay \$36,167.20 for her attorneys’ fees for services they rendered in connection with her Receivership is granted, and the issue of the reasonableness of and amount of attorneys’ fees to be awarded from September 12, 2012 to date are referred to J.H.O. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for the Receiver shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to J.H.O. Ira Gammerman.

This constitutes the decision and order of the Court.

DATED: 6/25/13

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HON. CAROL EDMOAD J.S.C.

1. CHECK ONE :

2. CHECK AS APPROPRIATE :

3. CHECK IF APPROPRIATE :

DO NOT POST

CASE DISPOSED

MOTION IS: GRANTED

SETTLE ORDER

FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

DENIED

SUBMIT ORDER

GRANTED IN PART

OTHER

REFERENCE