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| Tregerman v Auerbach |
| 2015 NY Slip Op 30131(U) |
| January 22, 2015 |
| Supreme Court, New York County |
| Docket Number: 650969/10 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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IRV TREGERMAN D.D.S.,

Plaintiff,

-against-

Index No. 650969/10

NEAL AUERBACH, D.D.S.,

Defendant.

-----X
Joan A. Madden, J.

Defendant Neil Auerbach, D.D.S. (“Auerbach”) moves for an order (1) confirming the Report and Recommendation of Hon. Ira Gammerman, dated March 5, 2014 (“the Report”), and (2) granting judgment in favor of Auerbach and against plaintiff Irv Tregerman, D.D.S. (“Tregerman”) in the amount of \$100,880.93, representing attorneys’ fees and expenses, as recommended by JHO Gammerman, together with \$3,231.50, representing additional attorneys’ fees and expenses incurred in connection with the attorneys’ fees hearing and this motion. Tregerman opposes the motion, and cross moves to reject the Report, and for a judgment in his favor for \$4,923.60, representing its share of the unpaid printing cost for a joint record on appeal.

Background

On or about June 28, 2000, Tregerman and Auerbach, who are both licensed dentists within the State of New York, formed a partnership, Neal J. Auerbach D.D.S. & Irv Tregerman D.D.S. (the “Partnership”), to conduct the business of dentistry together pursuant to a written partnership agreement (the “Partnership Agreement”) dated June 28, 2000. Auerbach and Tregerman each owned a 50% interest in the Partnership with profits and losses divided equally between them.

This action arises out of the dissolution of the Partnership, and, in particular, a partnership dissolution agreement (“the Dissolution Agreement”) dated August 25, 2009, under which Auerbach agreed to retire from the practice and to cease practicing dentistry effective July 1, 2009,¹ in exchange for a payment of \$360,000, to be paid in installments of \$36,000 per month, beginning October 1, 2009 and continuing in 59 equal installments plus interest commencing on November 1, 2009, which amounts were secured by a promissory note. Dissolution Agreement, Section 2.

Tregerman issued the promissory note contemplated under the terms of the Dissolution Agreement (the “Note”), on October 1, 2009. Of relevance here, the Note provides that if Tregerman fails to make payment pursuant to the Note after a period of more than 7 days notice, “[he] shall be responsible for any legal fees incurred [by Auerbach] in enforcing [Auerbach’s] rights under the terms of this Note.” *Id.* at ¶ 4. Tregerman made the initial payment of \$36,000 and made timely payments on the Note through March 2010, before he stopped paying, allegedly based on his belief that Auerbach was, *inter alia*, breaching the restrictive covenant in the Dissolution Agreement relating to his practice of dentistry. On August 26, 2010, Tregerman served a verified complaint containing causes of action for breach of contract, breach of fiduciary

¹ Under section 11 of the Dissolution Agreement, Auerbach agreed that, commencing July 1, 2009, he will no longer practice dentistry in any form or capacity, whether as an employee, associate [dentist], partner in another dental practice, etc., within a three-mile radius of the Partnership’s current office. Should [Auerbach] breach this covenant, in addition to all other damages, he will forfeit any remaining payments which may be due him pursuant to the terms of the Note. [Auerbach’s] employment by Lincoln Hospital as Program Director of the hospital’s General Practice Residency shall not be deemed to violate this Section 11, provided [Auerbach] does not receive compensation for procedures performed as a dentist.”

duty, conversion, breach of restrictive covenant, and fraudulent inducement.

In his answer, Auerbach denied the allegations in Tregerman's complaint and asserted two counterclaims. The first counterclaim alleges Tregerman's failure to make timely payments under the terms of the Note and seeks the payment of the entire principal due under the Note by virtue of this default. The second counterclaim seeks attorneys' fees.

There was no discovery in this action, which was resolved through motion practice. The motions included: Auerbach's motion for summary judgment dismissing the complaint and for judgment on his first and second counterclaims (motion seq. 001), Auerbach's motion for an attachment (motion seq. no 002), Tregerman's motion to vacate and to reargue (motion seq. no. 003), and this motion by Auerbach to confirm, and Tregerman's cross motion to reject, the Report (motion seq. no. 005).

By decision and order dated September 13, 2011, this court granted Auerbach's motion for summary judgment dismissing the complaint and for a judgment on his first counterclaim for the entire amount due under the Note, and as to liability on his second counterclaim. The court denied Auerbach's motion for attachment. Tregerman moved to reargue and vacate the September 13, 2011 decision and order, and also filed a notice to appeal. Auerbach sought to dismiss the appeal. By decision and order dated June 11, 2012, the court granted Tregerman relief to the extent of finding that the entire amount on the Note was not due and owing, and that, instead, he was liable only for the payments due to date. Subsequently, after Auerbach settled an order in accordance with the June 11, 2012 decision and order, Auerbach requested that interest run not from the date of the breach, since the court found he had a right to withhold payments,

but from the date of the June 11, 2012 decision. The court granted his request for this relief, in a supplemental order dated July 16, 2012. On August 29, 2012, a judgment was entered in Auerbach's favor on his first counterclaim in the sum of \$174,322.27.

Auerbach appealed, arguing that he was entitled to the accelerated amount granted in the court's original decision and Tregerman filed a cross appeal from the court's September 13, 2011 order granting summary judgment in Auerbach's favor. By decision dated November 13, 2013, First Department denied both appeals and affirmed the court's decision and order dated September 13, 2011 as modified by its decision and order dated June 11, 2012. See Tregerman v. Auerbach, 111 AD3d 503 (1st Dept 2013).

On March 5, 2014, counsel for the parties appeared for a hearing before the Hon. Ira Gammerman, who presided as a JHO to hear and report as to the issue of the amount of attorneys' fees incurred by Auerbach in enforcing his rights under the Note. At the hearing, Auerbach's attorneys, Stuart Birbach and Ira Daniel Tokayer testified, and were cross examined by counsel for Tregerman and documentary evidence was introduced regarding the amount of attorneys' fees and expenses sought, including time records from Tokayer's firm, Tokayer's resume, a summary and breakdown of the categories of legal services provided and the hours attributable to each category of services provided by Tokayer, a legend for the time sheets, a breakdown of expenses, a bill from attorney Daniel Hartmen, who made an appearance before the First Department, Hartmen's resume, and a bill from Stuart Birbach.

After the hearing, the JHO Gammerman recommended that Auerbach be paid a total of \$99,550 for attorneys' fees consisting of: \$14,000 for Auerbach's summary judgment motion,

\$7,000 for his motion for an attachment, \$14,000 for Auerbach's response to Tregerman's motion for reargument, \$3,500 for entry of judgment, \$7,000 for the Referee hearing, \$2,100 for response to Tregerman's motion to enlarge time to appeal, \$2,800 for Auerbach's motion to dismiss Tregerman's first appeal, \$7,000 for Auerbach's response to Tregerman's motion to enlarge time to appeal, \$6,000 for Auerbach's motion to dismiss Tregerman's second appeal, \$5,400 for his motion to stay or adjourn Tregerman's second appeal, \$2,100 for his motion to adjourn the second appeal, \$2,800 for motion to dismiss cross appeal, and \$19,250 for the second appeal. JHO also awarded Auerbach \$6,600 for Mr. Birbach's services, and \$1,330.93 for expenses.² In reaching this determination, JHO Gammernan rejected Tregerman's argument that Auerbach be awarded attorneys' fee only with respect to those motions and appeals in which Auerbach prevailed.

Auerbach now moves to confirm the Report and also seeks an additional \$3,231.50 representing additional fees and expenses allegedly incurred in connection with the hearing before JHO Gammernan and this motion.

Tregerman opposes the motion and cross moves to reject the Report, arguing that to the

²Auerbach sought a total of \$106,700 in attorneys fees, and \$1,330.93 in expenses. The fees sought consisted of \$14,980 for his summary judgment motion, \$7,087 for his motion for an attachment, \$15,260 for response to Tregerman's motion for reargument, \$3,587.50 for entry of judgment, \$7,752.50 for the Referee hearing, \$2,310 for response to Tregerman's motion to enlarge time to appeal, \$2,957.50 for his motion to dismiss Tregerman's first appeal, \$8,225 for his motion for response to Tregerman's motion to enlarge time to appeal, \$6,457.50 for his motion to dismiss Tregerman's second appeal, \$5,775 for his motion to stay or adjourn Tregerman's second appeal, \$2,275 for his motion to adjourn the second appeal, \$3,010 for motion to dismiss cross appeal, and \$19,547.50 for the second appeal. Auerbach also sought \$6,600 for Mr. Birbach's services and \$875 for Mr. Hartmen's services. The JHO did not award anything for Mr. Hartmen's services.

extent that Auerbach was not the “prevailing party” with respect to certain motions and appeals, he is not entitled to recover attorneys’ fees. Tregerman also argues that Auerbach did not adequately substantiate his claim for attorneys’ fees or present evidence required by the court’s order referring this matter for hearing which required Auerbach to provide “copies of [his firm’s] specific billing and time records, together with a summary and breakdown of the categories of legal services provided, and the hours attributed to each category of services” and to “arrange for the requisition of the Court files so that they are available at the hearing for the Referee’s inspection and evaluation of written work performed .” In addition, Tregerman points out that under 600.11 of the Rules of the Appellate Division, “[t]he cost of the joint record or joint appendix on appeal [is to] be borne equally by the parties,” but that Auerbach failed to pay his share of the cost of the joint record on appeal, which is \$4,923.60.

Discussion

As a preliminary matter, as for Tregerman’s argument that Auerbach did not adequately substantiate his claim for attorneys’ fees or present evidence required by the court’s order, the court notes that “it is well-established that report of a referee shall be confirmed whenever the findings contained therein are substantially supported by the record...and the referee has clearly defined the issues and resolved matters of credibility.” Kaplan v. Einy, 209 AD2d 248, 250-251 (1st Dept 1994). Moreover, the court is “vested with broad power to accept or reject the Special Referee’s report.” Tavares v. General Trading Co., Inc., 73 AD3d 659 (1st Dept 2010). Here, a review of the transcript of the hearing and the documentary evidence shows that JHO Gammerman’s findings as to the amount of reasonable attorneys’ fees and expenses are

substantially supported by the record.

Next, Tregerman's argument that Auerbach can only recover attorneys' fees with respect to those motions and appeals on which Auerbach was the prevailing party is unavailing.

"Under the general rule in New York, an attorney's fee is an incident of litigation and is not recoverable by a prevailing party in a lawsuit unless such an award is authorized by agreement between the parties, statute, or court rule," American Motorist Ins. Co. v. Trans Intern. Corp., 265 AD2d 280, 281 (2d Dept 1999), citing Breed, Abbott & Morgan v. Hulko, 139 AD2d 71, 73 (1st Dept 1988), aff'd 74 NY2d 686 (1989). "[T]o be considered a prevailing party (entitled to recover attorneys' fees) there must be success with respect to the central relief sought." 25 East 83 Corp v. 83rd Street Associates, 213 AD2d 269 (1st Dept 1995). Moreover, "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the ... court did not adopt each contention raised" Senfeld v. I.S.T.A. Holding Co., Inc., 285 AD2d 345, 346 (1st Dept 1997), lv denied 92 NY2d 818 (1998), quoting Hensley v. Eckerhart, 461 U.S. 424, 440 (1983). Here, Auerbach prevailed on the central relief sought in this action, which was to recover amounts due and owing to him under the Note.³ Accordingly, Auerbach is entitled to recover attorneys' fees in accordance with the relevant provision of the Note.

While the right to recover attorneys' fees under a promissory note is well established,

³Moreover, RSB Bedford Assoc. LLC v. Ricky's Williamsburg, 112 AD3d 526 (1st Dept 2013). on which Tregerman relies, is not to the contrary, as in that case the provision relating to attorneys' fees expressly provided for their recovery "by the successful party." And, significantly, unlike here, in RSB Bedford Assoc. LLC, the party seeking attorneys' fees did not prevail on all its claims, and thus the Special Referee denied fees with respect to those unsuccessful claims.

such provisions are strictly construed to permit the recovery of attorneys' fees only insofar as such fees are related to the enforcement of the relevant note. See Tudisco v. Duerr, 89 AD3d 1372, 1376 (4th Dept 2011)(awarding attorneys' fees related to defendants claims and counterclaims to enforce their rights under the note but denying recovery for attorneys fees' related to causes of action for conversion of construction equipment where such claims were unrelated to the enforcement of the note); Gizzi v. Hall, 309 AD2d 1140 (3d Dept 2003)(holding that defendants were entitled to counsel fees related to their counterclaims to enforce their rights under the note, but not for any fees related to plaintiffs' claims, as those fees are related to defending defendants' actions in procuring the note and mortgage, not enforcing rights thereunder); see generally, 4B NY Prac., Com. Litig. in New York State Courts § 75:98, Attorney's fees, (3d ed. 2014).

In accordance with these holdings, Auerbach's right to recover attorneys' fees must be limited to those incurred by him in enforcing his rights under the Note.⁴ With respect to Auerbach's summary judgment motion, that motion addressed not only Auerbach's counterclaims seeking recovery under the Note but also Tregerman's claims. However, as Auerbach's ability to recover on the Note was dependent on the dismissal of certain of these claims, he is entitled to recover three-quarters of the reasonable attorneys' fees that JHO Gammerman found were incurred in connection with the summary judgment motion (i.e.

⁴As indicated above, the Note provides that "if the Maker [i.e. Tregerman] fails to make payment pursuant to the Note after a period of more than 7 days notice, Maker shall be responsible for any legal fees incurred by the Holder [i.e. Auerbach] in enforcing [Auerbach's] rights under the terms of this Note."

\$10,500, three quarters of 14,000), and in connection with Tregerman's appeal of the summary judgment motion (i.e. \$8,925, three quarters of \$11,900). With respect to Tregerman's motion for reargument, the court similarly finds that Auerbach is entitled to three-quarters of the reasonable attorneys' fees incurred by him for his opposition to the motion (i.e. \$10,500, three quarters of \$14,000) and in connection with the appeal and cross appeal related to the reargument motion (\$26,662.50, three quarters of \$35,550). As for Auerbach's motion for attachment for which JHO Gammerman recommended that Auerbach be paid \$7,000 in attorneys' fees, the court finds that such fees should not be awarded as the attachment motion, which was without merit, related to the enforcement of ~~any~~^{the} judgment and not Auerbach's rights under the Note.

The remainder of reasonable attorneys' fees recommended in the Report, including those in relation to (1) the entry of judgment in Auerbach's favor (\$3,500), (2) the hearing before JHO Gammerman (\$7,000), (3) Mr. Birbach's services (\$6,600) should be confirmed as recommended by JHO Gammerman since such fees were incurred by Auerbach to enforce his rights under the Note. In addition, the court finds that Auerbach is entitled to \$2,975 in reasonable attorneys' fees for the instant motion to confirm the Report.

With respect to expenses, while the Note provides for recovery of attorneys' fees incurred in enforcement of the Note, it does not mention expenses and therefore Auerbach is not entitled to recover them based on the Note. Finally, as Tregerman argues, under 600.11 of the Rules of the Appellate Division, Auerbach is liable to him for the half the cost of the joint record on appeal, which is \$4,923.60, and Auerbach provides no evidence to the contrary. Accordingly, this amount shall be deducted from the amount of attorneys' fees awarded to Auerbach.

Conclusion

In view of the above, it is

ORDERED that the motion to confirm the Report is granted to the extent that the court finds that Auerbach is entitled to recover from Tregerman attorneys' fees in the amount of \$68,763.90 (i.e. \$73,687.50 less \$4,923.60 for Auerbach's portion of the cost for the joint record on appeal), and the cross motion to reject is granted only to the extent that the court finds that Auerbach cannot recover those attorneys' fees not attributable to Auerbach's enforcement of his rights under the Note or expenses as indicated herein; and it is further

ORDERED that the motion is granted to the extent that Auerbach seeks an additional \$2,975. for attorneys' fees incurred since the issuance of the Report; and it is further

ORDERED that Auerbach is entitled to recover \$71,738.90 (i.e. \$68,763.90 plus \$2,975) on his second counterclaim for attorneys' fees, and the Clerk is directed to enter judgment in his favor and against Tregerman in this amount, including interest at the statutory rate from that date of this decision and order, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.⁵

DATED: January 22, 2015


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

⁵The court notes that in connection with the judgment on the first counterclaim entered on the August 20, 2012, Auerbach was already awarded \$340 in costs and disbursements.