

AQ Asset Mgt. LLC v Levine
2015 NY Slip Op 30612(U)
April 20, 2015
Supreme Court, New York County
Docket Number: 652367/2010
Judge: Shirley Werner Kornreich
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**SHIRLEY WERNER KORNREICH
J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X
AQ ASSET MANAGEMENT LLC (as Successor to Artist
House Holdings Inc.), ANTIQUORUM, S.A., ANTIQUORUM
USA, INC. and EVAN ZIMMERMANN,

Plaintiffs,

Index No. 652367/2010

-against-

DECISION & ORDER

MICHAEL LEVINE, HABSBURG HOLDINGS LTD.
and OSVALDO PATRIZZI,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Non-party Allen/Orchard LLC (Landlord) moves (Seq 052) to quash two subpoenas duces tecum and ad testificandum, dated March 3, 2015, that were served on the Landlord and its counsel, Rex Whitehorn & Associates, P.C. (Firm). Defendants consent in part and oppose in part.

The subpoenas were served in connection with a hearing before a Referee concerning the legal fees the Landlord incurred in opposing Defendants' contempt motion (Motion Sequence 044). In a September 3, 2014 order, entered on September 5, 2014, the motion was denied and the Landlord's cross-motion for sanctions was granted, on the ground that the contempt motion was frivolous. Doc 2017.

Both subpoenas contained the following document demand:

All records relating to legal fees incurred for legal services performed by [the Firm] in connection with this proceeding, including but not limited to time records, billing, statements, records of payments, copies of cancelled checks or other manner of payment, ledgers. All records relating to the rate(s) of legal fees charged by [the Firm] for legal services to [the Landlord] and/or S&H Equities (NY) Inc. during the calendar year 2014 for matters unrelated to this proceeding.

Doc 2272.

A prior order had authorized Defendants to subpoena the Landlord solely to obtain documents concerning a single, specified check, with the payor and date already identified. Doc 1637 and 1692.¹ However, Defendants' contempt motion alleged that the Landlord had not provided sufficient documents. Doc 2017. In denying the application, the court found that the Landlord had provided more documents than required by the subpoena about subjects beyond the scope of what the court had authorized, and that the Landlord had told Defendants that it had no further responsive documents. Doc 2017, pp 8-12. The court imposed a sanction and referred to a Referee the issue of the amount of the reasonable attorneys' fees and costs incurred by the Landlord in connection with the contempt motion. *Id.*, p18.

Prior to filing this motion, by letter dated March 17, 2015, the Firm asked Defendants to withdraw the subpoena served on the Landlord to avoid motion practice. Doc 2272, Ex D. They refused. After the Landlord's current motion was filed, Defendants agreed to withdraw the demand for the production of documents in the last sentence quoted above, relating to rates charged by the Firm for legal services rendered to the Landlord in "unrelated matters." Doc 2284, Affirmation of Kerry Gotlib, ¶9. Defendants claim that they withdrew this portion of the demand because the Landlord's attorney, Rex Whitehorn, had provided an affidavit of legal services on March 25, 2015 (Affidavit of Services) rendered in connection with the contempt motion. Doc 2285. The Affidavit of Services includes as an exhibit the Firm's record of time charges incurred in connection with the contempt motion.

¹ It has been the practice in this case, due to the need to protect third parties, to require prior court authorization for the service of third-party subpoenas relating to defendant Levine's accounting. Doc 546, 4/25/13 order. The subpoena to the Landlord related to a payment of \$120,000 reflected on Levine's accounting. However, giving Defendants the benefit of the doubt, the practice applied to discovery, not hearing subpoenas.

Regrettably, in light of the subpoenas' demand for rates charged for unrelated matters, which was withdrawn only after this motion was made, and the subpoena on the Landlord, which did not provide legal services, it is evident that the sanction for the contempt motion failed to deter Defendants' future frivolous conduct. In assessing the reasonable value of legal services, the proof required is the quantum meruit value of the services rendered. *Bankers Fed. Savings Bank FSB v Off W. Broadway Developers*, 224 AD2d 376, 378 (1st Dep't 1996). The relevant factors are the nature and extent of the services, the actual time spent, their necessity, the nature of the issues involved, the professional standing of counsel, and the results achieved. *Id.*

The motion to quash is granted. Based upon the legal standard, the Landlord's testimony and documents were not necessary to determine the reasonable value of the legal services of the Firm. Further, the subpoena to the Firm was overbroad. It sought all records of the Firm relating to legal services provided in this proceeding, not just those involved in the contempt application. Payments, cancelled checks, ledgers and records relating to rates charged for the year 2014 in unrelated matters involving the Landlord were beyond the scope of legitimate inquiry regarding the value of services rendered by the Firm in connection with the contempt application. Finally, the court agrees with the Firm that there was no need to serve it with a subpoena to compel it to produce a witness and time records. As the Firm points out, if it failed to present time records and a witness, it would not be able to support its fee application. *Bankers Fed. Savings Bank FSB, supra*. Accordingly, the subpoenas will be quashed.

The court will impose on Defendants, as a further sanction, the reasonable costs and attorneys' fees incurred by the Landlord in making this motion, which was requested in the moving affirmation. *Rex Whitehorn Affirmation*, ¶26, Doc 2271. Defendants' failure to withdraw the subpoena to the Landlord without the necessity of a motion was frivolous because

its documents and testimony clearly were not required under the standard in *Bankers Fed. Savings Bank FSB, supra*. Further, the document demand in the subpoena served on the Firm was overbroad and it was not necessary to subpoena the Firm because its proof at the hearing necessarily would have had to include its testimony and the actual time it spent. *Id.*

Finally, in reviewing the record, the court finds that while the body of the decision on Motion Sequence 044 stated that issue referred to the Referee was the reasonable value of the Landlord's legal fees and costs in making the motion, the ordering language was limited to fees and costs incurred in opposing the motion. The order that follows will clarify that the issue referred to the Referee is the reasonable amount of fees and costs incurred by the Landlord in connection with both the motion in chief and the cross-motion relating to Motion Sequence 044. Accordingly, it is

ORDERED that the motion by Allen/Orchard LLC to quash is granted and the two subpoenas annexed to the moving papers, dated March 3, 2015, are hereby quashed; and it is further

ORDERED that the court awards to Allen/Orchard LLC, as a sanction to be paid by Defendants for their conduct necessitating this motion, the reasonable amount of attorneys' fees and costs incurred by Allen/Orchard in prosecuting this motion, and the issue of the amount of said fees and costs is referred to the Special Referee assigned to the hearing with regard to Motion Sequence 044; and it is further

ORDERED that within 1 day of the date of this decision and order, Allen/Orchard LLC shall serve a copy of it with notice of entry, as well as a completed information sheet,² on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the

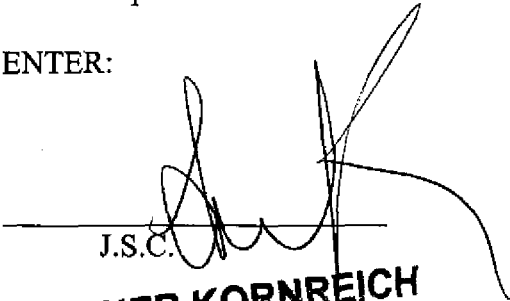
² Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".

calendar of the Special Referee's part, to be heard with the related reference regarding Motion Sequence 044, currently scheduled for April 23, 2015; and it is further

ORDERED that the court hereby modifies the second decretal paragraph in the order dated January 9, 2015, NYSCEF Document 2017, by substituting the words "in opposing Motion Sequence 044" with the words "in connection with Motion Sequence 044".

Dated: April 20, 2015

ENTER:


J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.