

<b>Vulcan Power Co. v Munson</b>
2015 NY Slip Op 31137(U)
June 29, 2015
Supreme Court, New York County
Docket Number: 600712/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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VULCAN POWER COMPANY, a Colorado  
Corporation,

Index No.: 600712/09

Plaintiffs,  
-against-

STEPHEN M. MUNSON, SOO MIN FAY,  
DOUG FROSH, GEORGE MARSHALL,  
CAL MITCHELL, and TIM SHEA,

Defendants.

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JOAN A. MADDEN, J.

Plaintiff Vulcan Power Company (“Vulcan”) moves for an order confirming the Report of Special Referee Helewitz dated September 18, 2014 (“the Report”). Defendants Soo Min Fay (“Fay”), Doug Frosh (“Frosh”), George Marshall (“Marshall”), and Tim Shea (“Shea”) (together “the Non Munson Defendants”)<sup>1</sup>, cross move to reject the Report.

Background

Vulcan is a Colorado corporation in the business of geothermal energy. Defendant Stephen M. Munson (“Munson”) is Vulcan’s former CEO. In early 2008, Vulcan and Munson began negotiations with certain institutional investors for a potential investment of \$100 million in Vulcan. Vulcan intended to use part of the investment to close on a drilling rig purchase with a third party. The investment was to be memorialized by several agreements, including (I) a Vulcan Power Company Series C Stock Purchase Agreement (“SPA”), (ii) a Vulcan Power Company Amended and Restated Stockholders Agreement (the “Stockholders Agreement”), and

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<sup>1</sup> The Report stated that Vulcan decided not to proceed against defendant Cal Mitchell (“Mitchell”) at the hearing as Mitchell had passed away and that no personal representative had been appointed for him.

(iii) a Stock Purchase Agreement concerning a sale of stock by defendant Munson (“the Munson Agreement”) (collectively the “Agreements”). The SPA and the Munson Agreement were signed by Munson only, while the Stockholders Agreement was signed by Munson and the Non Munson defendants.

The deal closed on July 25, 2008. As part of the deal, Vulcan received over \$100 million in cash and debt reduction from non parties which has never been returned. The drill rig purchase closed on July 25, 2008, with Vulcan using a portion of the \$100 million proceeds.

In November 2008, after Munson was terminated as CEO, he and a group of shareholders challenged the enforceability of the Agreements, asserting that the Agreements were not binding because they do not reflect the agreement made by the parties after negotiation. Vulcan then brought this action seeking a declaratory judgment that the Agreements are enforceable, and moved for summary judgment. Before this action was commenced the Non Munson defendants, Munson and others commenced an action against Vulcan and others in the State of Oregon asserting various claims, including for, *inter alia*, oppressive conduct, breach of fiduciary duty and reformation of contract. In light of the Oregon action, which arises out of the same agreements at issue in this action and involves substantially the same parties, Justice Richard B. Lowe, III, who was originally assigned to this action, issued an order staying discovery in this action pending a determination of a motion to dismiss in the Oregon action. Judge Lowe lifted the stay after the trial court in Oregon dismissed the majority of claims pending there on various grounds, including lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a cause of action.<sup>2</sup>

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<sup>2</sup>The Oregon court also granted a motion to compel arbitration of certain claims.

At a hearing on August 17, 2010, Judge Lowe granted Vulcan's motion to strike Munson's answer based on Munson's failure to comply with court orders and entered a default judgment against him. Judge Lowe subsequently denied the parties' joint request to stay discovery in the action pending Munson's appeal of the August 17, 2010 order. Following discovery, including the depositions of the Non Munson defendants, Vulcan moved for summary judgment on its complaint. The Non Munson defendants opposed the motion, and Munson submitted an affidavit in response to the motion. Vulcan moved to strike Munson's affidavit and by order dated October 18, 2010, the court granted this relief. By decision and order dated December 2, 2010, Judge Lowe granted Vulcan's motion for summary judgment, and deemed the Stockholders Agreement valid. In the decision, Judge Lowe noted that since the SPA and Munson Agreement were signed by Munson only and since Munson's answer was stricken and a default judgment entered against him, the only remaining issue on the motion concerned the validity of the Stockholders Agreement.

The Non Munson defendants appealed Judge Lowe's December 2, 2010 decision, which was affirmed by Appellate Division, First Department on November 10, 2011. They then sought leave to appeal to the Court of Appeals, which was denied by the First Department on January 26, 2012. They next moved the Court of Appeals for permission to appeal and such permission was denied on June 26, 2012.

Vulcan then moved to sever this action as against the Non Munson defendants, noting that this action has been stayed against Munson as a result of his pending bankruptcy proceeding, and to enter a judgment against the Non Munson defendants pursuant to CPLR 5012. Vulcan also moved for an award of costs and expenses, including attorneys' fees, incurred by it based a

provision in the Stockholders Agreement. Specifically, Vulcan relied on Section 19(g) of the Stockholders Agreement which provides that:

[I]f any party commences an action against any other party to enforce any terms, covenants, conditions or provisions of the Agreement, or because of a breach by any party of its obligations under the Agreement, the prevailing party in any such action shall be entitled to recover its costs and expenses, including court costs, reasonable fees of attorneys, accountants and other experts incurred in connection with the prosecution or defense of such action, from the losing party.

By decision and order dated April 11, 2014 (hereinafter “the April 2014 decision”), the court granted Vulcan’s motion to the extent of finding that Vulcan was entitled, under applicable Colorado law, to recover costs and expenses, including attorneys’ fees, incurred in connection with its claims seeking declaratory judgment with respect to the Stockholders Agreement, including those incurred with respect to the appeals by the Non Munson defendants.<sup>3</sup> However, the court found that insofar as Vulcan sought costs and expenses related to its request for declaratory relief against Munson with respect to his obligations under the SPA and Munson Agreement, the motion must be denied, as Section 19 (g) permits the prevailing party to recover fees to enforce the provisions and terms of the Stockholders Agreement only and no other agreements. Accordingly, the court found that any time expended by Vulcan’s attorneys in connection with its request for declaratory relief against Munson based on the SPA and the Munson Agreement, should be excluded from any fee award against the Non Munson defendants. On the other hand, the court noted that to the extent that the declaratory judgment action is addressed to the Stockholders Agreement which was signed by Munson and the Non

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<sup>3</sup>The court directed that part of Vulcan’s motion seeking an order severing the action as to Non Munson defendants, and entering a judgment against them be held in abeyance pending the determination of the amount of the judgment.

Munson defendants, the claims against Munson and the Non Munson defendants are inextricably interrelated so as to preclude apportionment among the defendants. There was no appeal of the April 2014 decision.

The court referred the issue of the amount of such costs, expenses and attorneys' fees to a Special Referee to hear and report with recommendations, and directed that at the hearing counsel for Vulcan was to provide copies of its 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 was to arrange for the requisition of the court files so as to be available at the hearing for the Referee's inspection and evaluation of written work performed.

The Non Munson defendants then moved to stay the hearing before the Special Referee based on an August 13, 2014 decision of the Court of Appeals of Oregon vacating the trial court's dismissal of certain claims in the Oregon action, and remanding the action to the trial court. They argued that because the Oregon action was filed before this action and involves substantially the same parties and the same agreements, the court should stay this action pending the outcome of the Oregon action as a matter of comity. By decision and order dated September 14, 2014, this court denied the stay, noting that the outcome of the Oregon action would not alter the result of this action which had already been decided in Vulcan's favor, particularly as defendants have exhausted all avenues of appeal.

The matter was then assigned to Special Referee Helewitz and a hearing was held on September 16, 2014. At the hearing, Daniel H. Tabak ("Tabak"), a partner at the law firm representing Vulcan, testified, and introduce various documents, including the retainer agreement entered into between Vulcan and the firm on February 25, 2009, which detailed the firm's billing

schedule and included an agreement by Vulcan to reimburse the firm for associated costs. Tabak also presented bills sent to and paid for by Vulcan which he testified excluded any fees and costs associated only with Munson and included a breakdown of charges. Tabak also testified as to the background of the attorneys who worked on the matter and submitted printouts of their backgrounds from the firm's website. Tabak testified that the firm was not seeking any fees or costs associated with Munson, including in connection with Judge Lowe's decision granting a default judgment against Munson in which Judge Lowe ordered preclusion of Munson's testimony and awarded Vulcan the cost of all hearings to try to procure Munson's deposition. Tabak provided all bills and invoices which were sent to Non Munson defendants which total \$863,802.70<sup>4</sup>, and which Tabak testified were paid by Vulcan. From the total amount billed, Vulcan subtracted \$6,353.30, which it maintained were the only fees relating to Munson alone. Tabak also produced bills for the costs of the litigation totaling \$35,090.10.

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<sup>4</sup>According to the Report the breakdown of the charges in this matter were as follows:  
 Preparing the complaint, February and March, 2010: 31 hours of attorney time, 7 hours of paralegal time;  
 Opposing defendants' motion to dismiss or stay the proceedings, April, 2009 through August, 2010: 430.5 hours of attorney time, 26.1 hours of paralegal time;  
 Discovery, June, 2009 through January 2011: 848 hours of attorney time, 150.3 hours of paralegal time;  
 Addressing defendants' motion to stay, August, 2010 to October, 2010: 48.25 hours of attorney time;  
 Plaintiff's summary judgment motion, May to December 2010: 398.85 hours of attorney time, 31 hours of paralegal time;  
 Opposing defendants' appeal, November 2010 through June, 2012: 283.4 hours of attorney time, 8.7 hours of paralegal time;  
 Settlement and mediation, August, 2010 through May 2012: 17.2 hours of attorney time;  
 Withdrawal of defendants' first counsel, June to August, 2010: 5.1 hours of attorney time, 1.4 hours of paralegal time;  
 Entry of Oregon judgment against defendants, October, 2010: 9.6 hours of attorney time, 2.5 hours of paralegal time;  
 Miscellaneous, May 2009: 1.6 hours of attorney time.

At the hearing, the Non-Munson defendants also argued that the April 2014 decision precluded the award of attorneys' fees for work performed by Vulcan's attorneys which related to the SPA and Munson Agreement, and that Vulcan failed to provide a breakdown of the categories of legal services provided, and the hours attributed to each category of services as required by the April 2014 decision which would have permitted the Special Referee to determine which legal services applied to which agreement.

The Non Munson defendants did not challenge the amount of time the firm billed or the fees charged, but objected to certain items appearing in the invoices that they argued indicated work done for Munson alone, as well as work associated with a case in Oregon commenced by the defendants. The Non Munson defendants asserted that the bills for the period from July 13, 2010 through August 16, 2010, totaling \$13,480.50, should be deleted because they related to Vulcan's preparations to depose Munson, costs for which Vulcan was to seek reimbursement from Muson as per Judge Lowe's order. With respect to the Oregon case, the Non Munson defendants contended that these costs, which totaled \$17,009.50, should be sought in Oregon and were not part of this action.

Tabak, on the other hand, testified that the work identified as "Munson" on the bills was identified this way because Munson was either the lead defendant or the lead plaintiff (in the Oregon case), or the bills related to preparing Munson's deposition. In addition, Vulcan maintained that even though the firm did not appear in the Oregon matter, it reviewed all the materials in that action to determine the effect on this action. Tabak also testified on cross examination that the billing cannot separate between expenses incurred for the Stockholders Agreement as opposed to the SPA and Munson Agreement. Specifically, he stated that the three

agreements were part of “one larger transaction [and therefore] discovery had to take place on all three contracts. So even after Munson was no longer in the case the defendants were citing the other contracts and we, obviously had to do discovery on those and deal with the larger transaction ” (Hearing Tr, at 33-35).

After the hearing the Special Referee determined that the Non Munson defendants were jointly and severally liable to Vulcan for attorneys’ fees in the amount of \$850,322.20 and costs of \$35,090.10. The Special Referee found that “Tabak’s testimony to be credible regarding the entries marked as ‘Munson’ wherein Tabak asserted those items related to all the defendants, the word ‘Munson’ being used because he was the lead named party.” At the same time, however, the Special Referee “agree[d] with defendants that the costs involved in preparing Munson’s deposition are properly charged to Munson alone, pursuant to Judge’s Lowe’s order regarding the impositions of sanctions against that defendant.” Report, at 8-9. He therefore subtracted \$13,480.50 from the total billing. As for the \$17,009.50 charged for the review of the materials in the Oregon case, the Special Referee allowed such charges, writing, that “[t]he lawsuit in Oregon was started by defendants, and defendants sought to stay the instant proceedings based on that litigation. Under these circumstances, it was incumbent upon plaintiff to review those materials so that it could oppose defendants’ motion to stay or dismiss the New York case, especially since that opposition was successful.” *Id.*, at 9.

The Special Referee rejected the Non Munson defendants’ argument that the April 2014 decision precluded the award of attorneys’ fees for work performed by Vulcan’s attorneys which related to the SPA and Munson Agreement, finding that based on the ordering language in the April 2014 decision, that such fees may be awarded as long as they were made “in connection”

with Vulcan's claim seeking a declaratory as with respect to the Shareholders' Agreement. (See Hearing Tr., at 34).

Vulcan now moves to confirm the Report, arguing that the Special Referee's conclusion was supported by the record during the hearing.

The Non Munson defendants cross move to reject the Report, arguing that the Report failed to comply with the April 2014 decision as it included litigation expenses related not only to the enforcement of the Stockholders Agreement but also to the enforcement of the SPA and the Munson Agreement, even though in the April 2014 decision specifically found that Vulcan was not entitled to costs and expenses related to its request for declaratory relief with respect to his obligations under these agreements.

### Discussion

"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 (1<sup>st</sup> Dept 1994). However, 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 (1<sup>st</sup> Dept 2010).

Here, the Report must be rejected insofar as the Special Referee recommended that Vulcan be awarded litigation expenses, including attorneys' fees, expenses and costs incurred in this action without regard to whether such fees and expenses were related to enforcement of the Stockholders Agreement or the SPA and Munson Agreement. Such recommendation is contrary to court's holding in the April 2014 decision, that under the fee-shifting provision in the Stockholders Agreement, the Non Munson defendants were liable only for those litigation

expenses incurred in enforcing the Stockholders Agreement, and not the SPA or the Munson Agreement. In light of this holding, the Special Referee erred in interpreting the ordering to permit the award fees and expenses incurred in enforcing the SPA or the Munson Agreement.

While the court recognizes that the apportionment of the litigation expenses among the three agreements cannot be accomplished with exactitude given that Vulcan sought the enforcement of the separate agreements as part of one integrated action, this fact does not permit Vulcan to recover litigation expenses beyond that contemplated by the fee-shifting provision of the Stockholder's Agreement. Instead, the court finds that Vulcan is entitled to recover litigation expenses of this action from the Non-Munson defendants as follows: (1) one-third of the fees, expenses and costs incurred from the commencement of this action until August 17, 2010, when Judge Lowe struck Munson's answer and entered a default judgment against him; and (2) after August 17, 2010, all of the fees, expenses and costs incurred, including those expended with respect to the Non Munson defendants' appeal of the summary judgment decision to the First Department and the Court of Appeals, with the exception of the amounts incurred to strike Munson's affidavit in opposition to the summary judgment motion. As for the litigation expenses incurred in this action relating to the Oregon action, the court also finds Vulcan may recover those expenses in accordance with the above methodology.


This methodology, however, does not apply to the \$6,353.30, which Vulcan acknowledges should be excluded from the amount of fees sought as such amounts relate to Munson alone. It also does not apply to the \$13,480.50 which the Special Referee properly excluded from the amount awarded to Vulcan on the ground that such amounts were attributable to preparation for Munson's deposition, were properly charged to Munson alone, pursuant to

Judge's Lowe's order regarding the impositions of sanctions against Munson.

The Special Referee also correctly found that the reference to Munson on the time sheets is not dispositive of whether the work performed related to the Stockholders Agreement since Munson was a party to that agreement. Such finding is also consistent with the the April 2014 decision, which held that the claims against Munson and the Non Munson defendants, as they related to the Stockholders Agreement, are inextricably interrelated so as to preclude apportionment of litigation expenses among the defendants.

Vulcan shall settle an order on notice providing for its recovery of attorneys' fees, expenses and costs in this action which is consistent with the foregoing and attach to the order a detailed schedule explaining the basis for the amounts sought for the two time periods delineated by this decision and order.

Dated: June 29, 2015

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