

Eastern Consol. Props., Inc. v Lynbrook Sunrise Realty LLC

2016 NY Slip Op 32319(U)

November 23, 2016

Supreme Court, New York County

Docket Number: 653531/2015

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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EASTERN CONSOLIDATED PROPERTIES, INC.,

Index No.: 653531/2015

Plaintiff,

DECISION & ORDER

-against-

LYNBROOK SUNRISE REALTY LLC, 5 EAST 59
REALTY HOLDING COMPANY, LLC, and WORLD
PROPERTIES LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Eastern Consolidated Properties, Inc. (ECP) moves, pursuant to CPLR 4403, to confirm the report of J.H.O. Ira Gammerman (the JHO) entered on July 8, 2016 (the Report). *See* Dkt. 28.¹ Defendants Lynbrook Sunrise Realty LLC (Lynbrook), 5 East 59 Realty Holding Company, LLC (5 East Realty), and World Properties, LLC (World Properties) oppose the motion. Plaintiff's motion is granted in part and denied in part for the reasons that follow.

The court assumes familiarity with its April 13, 2016 summary judgment decision (the SJ Decision), which sets forth the facts of this case brought under Article 52 of the CPLR and the New York Debtor and Creditor Law (DCL) to enforce a judgment entered in ECP's favor in a prior action. *See* Dkt. 19. It was undisputed on the summary judgment motion that:

5 East Realty's sole asset was a building located at 5 East 59th Street in Manhattan (the Property). 5 East Realty sold the Property as part of numerous like-kind exchanges, which resulted in net proceeds of \$19,382,091.20. However, the sole owner of 5 East Realty, non-party Alexander Demetriades, caused the proceeds to be paid to another of his companies, non-party Exchange Solutions, Inc. (Exchange), without any consideration being paid to 5 East Realty.

¹ References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Demetriades also is the sole owner of the purchaser of the Property, defendant World Properties. A portion of the net proceeds, \$3,783,390.79, was used to purchase the equity of defendant Lynbrook, title to which was placed in the name of World Properties. 5 East Realty is now judgment proof. ECP contends these transfers were fraudulent because they were made without consideration and rendered 5 East insolvent.

See Dkt. 19 (SJ Decision at 2). The court granted summary judgment to ECP because there was no question of fact about defendants' liability under DCL §§ 273 and 276:

ECP made the requisite *prima facie* showing. ECP submitted proof that the subject transfers violate DCL § 273 (constructive fraudulent conveyance) because they were made without any consideration to 5 East Realty and rendered it insolvent. Moreover, Demetriades was on both sides of the transactions, which were accompanied by myriad badges of fraud, rendering the transfers intentionally fraudulent under DCL § 276. Defendants' failure to oppose ECP's summary judgment motion constitutes an admission of all material facts and a failure to meet its burden shifting obligations.

See Dkt. 19 (SJ Decision at 4-5) (citations omitted). Since defendants' liability was established under DCL § 276, the court held that, pursuant to DCL § 276-a, ECP is entitled to recover its reasonable attorneys' fees [*see Apparel Corp. (Far E.) v Sheermax LLC*, 126 AD3d 413, 414 (1st Dept 2015)], the calculation of which was referred to a special referee to hear and report.

The JHO held a hearing on May 31, 2016, at which ECP's counsel testified about his billing records. In the Report, the JHO recommends that ECP's requested fees be deemed reasonable, but that such fees should be discounted by 20% due to the use of block billing. See *J. Remora Maint. LLC v Efromovich*, 103 AD3d 501, 503 (1st Dept 2013) ("Block billing did not render the invoiced amounts per se unreasonable and the evidence before the special referee adequately presented him with the opportunity to assess the reasonableness of the fees"), citing *546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 123 (1st Dept 2012); see also *RMP Capital Corp. v Victory Jet, LLC*, 40 Misc3d 1243(A), at *11 (Sup Ct, Suffolk County 2013) ("on the

single issue of substantial use of block-billing, courts have ordered a 15% reduction to billed hours, or even a 25% reduction”) (citations omitted). In total, the JHO recommends that ECP be awarded \$24,720.25 for the pre-reference work. Based on the court’s review of the record before the JHO, the court agrees. *See Atlantic Aviation Inv. LLC v Varig Logistica, S.A.*, 73 AD3d 467, 468 (1st Dept 2010) (where there is “ample evidence supporting the reasonableness of the fees charged,” “a court will not disturb the findings of a special referee where those findings are supported by the record”); *see also Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 (1st Dept 1985) (“New York courts will look with favor upon a Referee’s report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented”), quoting *Holy Spirit Assn. v Tax Comm’n of the City of New York*, 81 AD2d 64, 70-71 (1st Dept 1981).

The JHO also found that ECP incurred \$11,783 in reasonable attorneys’ fees preparing for the reference, but left the issue of whether these so-called “fees on fees” can be recovered for this court to decide. Then too, ECP seeks its fees for attending the hearing and for preparing the instant motion. The court will not assess the reasonableness of the \$11,783 amount or the amount of counsel fees expended for this motion because, as defendants correctly contend, the First Department prohibits the awarding of fees on fees where, as here, no agreement or statute² expressly provides for such recovery. *See Gottlieb v Gottlieb*, 138 AD3d 575, 577 (1st Dept 2016) (“the award of attorneys’ fees incurred in making and pursuing the motions ... and in participating in the [hearing] should be vacated as impermissible ‘fees on fees.’”), citing *Sage*

² DCL 276-a permits the recovery of attorneys’ fees, but does not expressly provide for fees on fees.

Realty Corp. v Proskauer Rose LLP, 288 AD2d 14, 15 (1st Dept 2001) (“recovery of ‘fees on fees’ should not be permitted under the circumstances of this case. **It has been established that an award of fees on fees must be based on a statute or on an agreement.**”) (emphasis added); *see also Batsidis v Wallack Mgmt. Co.*, 126 AD3d 551, 553 (1st Dept 2015) (“The [contract] does not contain unambiguous language providing for the recovery of fees on fees. Because it is not ‘unmistakably clear’ from the parties’ agreement that fees on fees were contemplated, such an award is not allowed.”); *Jones v Voskresenskaya*, 125 AD3d 532, 534 (1st Dept 2015) (same).

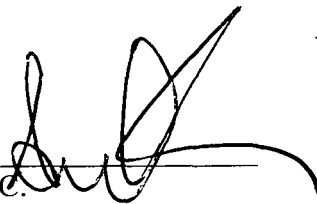
The court has considered defendants’ remaining arguments and finds them unavailing. Accordingly, it is

ORDERED that the motion by plaintiff Eastern Consolidated Properties, Inc. to confirm the Report is granted and its request for fees on fees is denied, and the Clerk is directed to enter judgment in favor of said plaintiff, and against defendants Lynbrook Sunrise Realty LLC, 5 East 59 Realty Holding Company, LLC, and World Properties, LLC, jointly and severally, in the amount of \$24,720.25.

Dated: November 23, 2016

ENTER:

J.S.C.



SHIRLEY WERNER KORNREICH
J.S.C.