

**Marin v Constitution Realty LLC**

2017 NY Slip Op 30705(U)

April 11, 2017

Supreme Court, New York County

Docket Number: 111531/2007

Judge: Kathryn E. Freed

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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 2**

-----X  
JOSE MARIN and ADA MARIN,

Plaintiffs,

-against-

CONSTITUTION REALTY LLC, INDEPENDENCE LLC,  
KOEPEL COMPANIES, LLC and GENERAL  
RESTORATION ASSOCIATES, INC.,

Defendants.  
-----X

**KATHRYN E. FREED, J.S.C.**

**DECISION/ORDER**  
Index No. 111531/2007  
Mot. Seq. No. 013

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION, REFERENCED THROUGHOUT ACCORDING TO THE DOCUMENT NUMBERS ASSIGNED TO THEM BY THE NEW YORK STATE COURTS ELECTRONIC FILING SYSTEM (NYSCEF):

PAPERS	NUMBERED
ORDER TO SHOW CAUSE, AFF. IN SUPP. AND EXHIBITS ANNEXED .....	342, 322-340
FRIEDMAN AFF. AND EXHIBIT ANNEXED .....	345-346
BREAKSTONE AFF. IN SUPP. AND EXHIBIT ANNEXED .....	357-358
MENKES AFF. IN OPP. ....	361
BREAKSTONE REPLY AFF. ....	362

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This is a dispute regarding attorneys' fees that has endured since the personal injury action on which it is based settled on May 31, 2013 for \$8 million. Sheryl Menkes, Esq. was counsel of record for plaintiffs and, pursuant to her contingency agreement with plaintiffs, the total net amount of the settlement available for attorneys' fees came to \$2.6 million. In early 2009, Menkes, who is a solo practitioner, entered into two agreements with Jeffrey Manheimer, Esq. to aid her in representing plaintiffs. Pursuant to the agreements, Menkes agreed to pay Manheimer 20% of the net attorneys' fee if the case settled before trial. In August 2009, Menkes unilaterally terminated

Manheimer and informed him that any payment to him at the conclusion of the case would be on a quantum meruit basis. After obtaining summary judgment in favor of plaintiffs on the issue of liability, Menkes engaged David Golomb, Esq. to aid in mediation, and Menkes and Golomb agreed that Golomb would receive a share of the net attorneys' fees.

Menkes moved for an order establishing the attorneys' fees, and Manheimer and Golomb both cross-moved to set the fees in an alternative fashion. Menkes argued that Manheimer was only entitled to receive fees on a quantum meruit basis, rather than the 20% to which they had agreed. This Court (Edmead, J.), directed that Golomb keep the entirety of the attorneys' fees in an escrow account pending the resolution of the claims to the fees. (Doc. No 325.) It then ruled in Manheimer's favor, finding that he was entitled to 20% of the net attorneys' fees based on their written agreements. 42 Misc 3d 1227(A), 2014 NY Slip Op 50206(U) (February 20, 2014). On appeal to the Appellate Division, First Department, the Court unanimously ruled that Manheimer was entitled to 20%, but split with two justices dissenting on the issue of the amount to which Golomb was entitled. 128 AD3d 505 (1st Dept 2015). Based on the two-justice dissent, Menkes appealed, as of right, to the Court of Appeals on all issues decided in the order. *See* CPLR 5601 (a). The Court of Appeals upheld the award with respect to Manheimer's estate, as Manheimer had passed away during the pendency of the appeal. 28 NY3d 666 (2017).

Upon remittal to this Court, Golomb now moves for an order approving an accounting of funds, permission to disburse the attorneys' fees to Manheimer's estate, permission to pay Menkes's share of the fees into court, and a discharge from liability with regard to the settlement proceeds. After oral argument before this Court, the parties stipulated to the majority of the issues encompassed by Golomb's motion. Namely, the parties stipulated to Golomb's accounting, that the balances of the fees due to Golomb, Manheimer and Menkes are correct, that Golomb may pay

himself and Manheimier's estate the attorneys' fees due to them, that Golomb may make certain payments to Menkes's creditors that have an interest in her share of the fees, that Ballard Spahr, LLP (a law firm that Menkes retained and with which she has an ongoing dispute) pay itself as well as Menkes their respective shares, and then retain \$200,000 in escrow. (Doc. No. 365.) The \$200,000 in escrow is in anticipation of the only issue that remains for this Court's resolution: the request by Manheimer's estate for predecision interest on his share of the attorneys' fees pursuant to CPLR5001.

Predecision interest is imposed in order to compensate a party that "has been deprived of the use of money to which he or she was entitled." *Love v State of New York*, 78 NY2d 540, 545 (1991). It is available to the prevailing party in a dispute between attorneys concerning the shares of legal fees. *See Samuel v Druckman & Sinel, LLP*, 12 NY3d 205, 210 (2009). Furthermore, contrary to Menkes's contentions, predecision interest is available even where disputed funds are "deposited in an escrow account during the pendency of [a dispute], and [the party against whom interest is imposed] received no benefit from the disputed [funds] while they were held in escrow." *Ross v Ross Metals Corp.*, 111 AD3d 695, 697 (2d Dept 2013); *see J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117-118 (2012).

Menkes occasioned the excessive delay that hampered the ability of Manheimer, and now his estate, to collect on what their agreements provided. Indeed, Menkes initially attempted to exclude Manheimer completely by failing to serve him with her notice of motion to fix the fees — conduct that caused a justice of this Court to sanction her. Every court to consider the issue has held that the agreements between Mankes and Manheimer controlled the distribution of fees, and that Manheimer was entitled to 20% of the net attorneys' fees. Menkes's baseless attempts to argue otherwise are the sole reason why both Manheimer, and now his estate, have been deprived of the

use of the funds to which he was entitled. Thus, Manheimer's estate is entitled to predecision interest at the statutory rate from the date when the amount was fixed, or May 31, 2013.

The amounts to which the estate are entitled are as follows: (1) on the \$50,000 advance from the date of the settlement (May 31, 2013) until the date of the disbursement (December 16, 2014), a total of \$6,953.42; and (2) on the \$476,051.62 due to the estate from the date of the settlement (May 31, 2013) until the return date of this application (April 4, 2017), a total of \$164,805.16. Thus, the total due to the estate in excess of the amounts to which the parties have stipulated is \$171,758.58.

Accordingly, it is hereby:


ORDERED that Manheimer's estate is entitled to \$171,758.58 from the \$200,000 retained by Ballard Spahr, LLP, with the remainder going to Menkes, which payments Ballard Spahr, LLP shall make once the transfer from Golomb is completed; and it is further

ORDERED that counsel for Manheimer's estate shall serve a copy of this order with notice of its entry on all parties within 10 days after it is entered; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: April 11, 2017

ENTER:

  
KATHRYN E. FREED, J.S.C.