

Lin Shi v Alexandratos
2017 NY Slip Op 31836(U)
August 31, 2017
Supreme Court, New York County
Docket Number: 160529/13
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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LIN SHI,

Plaintiff,

-against-

Index No. 160529/13
Mot. Seq. No. 004

PANAGIS ALEXANDRATOS, CAROL
ALEXANDRATOS and TERRY S. TRIADES,
ESQ. d/b/a TRIADES & TRIADES ATTORNEYS
AT LAW,

Defendants.
-----X

BARRY R. OSTRAGER, J.

Defendant Terry S. Triades moves for an order granting him a judgment against plaintiff Lin Shi¹ in the amount of \$52,799.16 for attorney’s fees and costs incurred in defendant’s successful defense of the claims asserted against him in this action.

BACKGROUND

The action stems from a failed real estate deal and Shi’s effort to recover his downpayment. Calica Mov Aff, ¶ 1. Shi was the purchaser under a Residential Contract of Sale (“the Contract”, attached to Calica Mov Aff as Exh E). He commenced this action against Panagis and Carol Alexandratos, as sellers of the property, and against the moving defendant Triades, and his law firm Triades & Triades, Esqs., as the sellers’ real estate counsel and the escrow agent for the downpayment. *Id.* By order entered May 13, 2014, the Honorable Lawrence K. Marks granted all defendants summary judgment

¹ Movant states that plaintiff Lin Shi is now also known as Phenix Pierre pursuant to an intervening name change proceeding. Calica Mov Aff, ¶ 1; Calica Reply Aff, ¶ 1. Plaintiff has confirmed he is now known as Phenix Pierre, per a name change. Opp Br at 1.

dismissing all claims against them, and that dismissal was unanimously affirmed by the Appellate Division, First Department. *Shi v. Alexandratos*, 137 A.D.3d 451 (1st Dep't 2016), *lv. denied* 28 N.Y.3d 905 (2016). The Appellate Division also affirmed that part of the trial court's decision which had awarded Triades judgment on his first counterclaim for attorney's fees and costs pursuant to section 6(b) of the Contract, quoted below.

Pursuant to that decision, Triades was awarded attorney's fees and costs incurred in connection with the dismissal of the action. He now moves for additional attorney's fees and costs incurred thereafter in the amount of \$52,779.16, with interest.

DISCUSSION

Triades alleges that, since the last award of fees, he has incurred additional fees defending against further litigation by plaintiff, including: (a) Shi's appeal to the First Department; (b) Shi's motion to reargue the Appellate Division decision, or for leave to appeal to the Court of Appeals; (c) Shi's motion to the Court of Appeals for leave to appeal; and (d) Shi's motion before the trial court to vacate the prior judgment for attorney's fees and costs. *Id.* at ¶ 3. He argues that the manner in which Shi's then counsel, who is no longer representing plaintiff,² handled these proceedings was aggressive, time-consuming, and disorganized, causing Triades significant time and expense associated with the defense, and he provides several examples. *Id.* at ¶ 4.

² Plaintiff's then counsel, Frank Xu, LLC, moved to be relieved as plaintiff's counsel in this action. *See* edocs ## 64-67. That motion was granted by the Hon. Lawrence Marks. *See* edoc # 71. Before moving to be relieved, counsel submitted papers opposing this motion. *See* edocs ## 68-70. There is no indication in the record, nor any communication to the Court, that plaintiff has since retained new counsel, so the Court is considering the previously filed opposition.

Triades argues he is entitled, under the Contract, to recover all attorney’s fees and costs incurred in the defense of this action. *Id.* at ¶ 9. The Residential Contract of Sale in ¶6(a) defines Panagis and Carol Alexandratos as “Seller” and Seller’s attorney as “Escrowee.” The Contract at ¶6(b) provides, in pertinent part, that:

The parties acknowledge that Escrowee is acting solely as a stakeholder at their request and for their convenience and that Escrowee shall not be liable to either party for any act or omission on its part unless taken or suffered in bad faith or in willful disregard of this contract or involving gross negligence on the part of Escrowee. *Seller and Purchaser jointly and severally (with right of contribution) agree to defend (by attorneys selected by Escrowee), indemnify and hold Escrowee harmless from and against all costs, claims and expenses (including reasonable attorney’s fees) incurred in connection with the performance of Escrowee’s duties hereunder, except with respect to actions or omissions taken or suffered by Escrowee in bad faith or in willful disregard of this contract or involving gross negligence on the part of Escrowee.*

(emphasis added). Not only did the Appellate Division affirm the trial court’s finding that ¶6(b) entitles Triades to attorney’s fees and costs incurred in this action, but the First Department in *Corazza v. Jacobs*, 277 A.D.2d 52, 53 (1st Dep’t 2000) confirmed the right of a defendant/escrowee to recover fees where the contract, like the Contract here, provided that “the escrowee be indemnified by the parties to the contract for all costs, expenses, etc., including attorneys’ fees, arising from its duties as their escrow agent.” And it cannot be disputed that costs, typically controlled by Articles 82 and 83 of the CPLR, are wholly distinct from attorney’s fees. *See, e.g., In re Kovler*, 253 B.R. 592, 601-02 (Bankr. S.D.N.Y. 2000), cited in *Calica Reply*, ¶7.

In support of this motion, counsel for Triades submits the detailed records of the attorneys' time expended, including information regarding who billed for each task, the billing rate, the date and time spent on each task, and the calculated costs for each entry. Calica Mov Aff, Exh H. Counsel for Triades further provides educational and work history information on three attorneys who billed for the work. Calica Mov Aff, ¶¶ 12-17. They also note that they successfully performed the tasks done on behalf of Triades. *Id.* at ¶ 3. The same document itemizes each cost by date, which individual incurred the costs, a description of each, and the specific expense. Together, these fees and costs total the \$52,779.16 sought in this motion.

In opposition, Shi correctly argues that the Appellate Division, First Department denied his appeal "without costs." Opp Br at 1. *Shi v. Alexandratos*, 137 A.D.3d 451 (1st Dep't 2016). Plaintiff argues that this Court cannot, thereafter, grant additional costs and legal fees. Opp Br at 1. Plaintiff also correctly argues that the Court of Appeals denied his motion for leave to appeal "with one hundred dollars costs and necessary reproduction disbursements." *Shi v. Alexandratos*, 28 N.Y.3d 905 (2016). Shi asserts that the defendants did not move for those costs, have waived them, and are now estopped from seeking to recover them. Opp Br at 2.

However, the cases plaintiff cites in support of this argument are all distinguishable because, in part, they do not involve a contract that expressly requires the indemnification of a party's costs and attorney's fees, as does the Contract here. Opp Br

at 1, citing, *Sander v. N.Y. & H.R. Co.*, 56 A.D. 273 (1st Dep’t 1900)³; *Deli of Lathan, Inc. v. Freije*, 133 A.D.2d 889 (3d Dep’t 1987).⁴ Nor does plaintiff’s memorandum of law and supporting papers raise any facts relating to those cases not apparent from the decisions themselves.

In a recent federal, but analogous case, a District Court denied attorney’s fees and costs, relying principally on the Circuit Court’s instruction in a prior appeal that each side “bear its own costs”. *Hines v. City of Albany*, 862 F.3d 215 (2d Cir. 2017), cited in Calica Reply, ¶ 8. Noting that the District Court had erroneously concluded that the Circuit Court’s language “foreclosed the possibility of an award of attorneys’ fees” despite that attorneys’ fees were permitted by the governing statute 42 USC § 1988, the Second Circuit held that “the American rule [that attorney’s fees ordinarily are not among the costs that a winning party may recover] is not absolute; it yields to a federal statute authorizing an award of attorneys’ fees to a prevailing party.” *Id.* at 219-20. As such, the Second Circuit vacated the District Court order and remanded for a determination of the amount of fees incurred in both the underlying case and later appeal. *Id.* at 223. In the

³ The *Sander* case, from 1900, has a Lexis Headnote that indicates a “reversal ‘without costs’ means costs of the appeal only.” The one paragraph decision tends to support the movant, stating that the prevailing party in a second trial was entitled to all costs of the action, except those expressly excluded by the decision of the Appellate Division. 56 A.D. at 274.

⁴ In this case, the Appellate Division reversed a trial court’s judgment on an earlier appeal, and specified it was doing so “without costs.” *Deli of Lathan*, 133 A.D.2d at 890. On a later appeal, the Appellate Division found that the costs relating to the first appeal, or the appeal to the Court of Appeals, could not be recovered due to the earlier language.

instant case, there is no controlling statute, but there is the controlling Contract that explicitly provides for indemnification of attorney's fees incurred by Triades.

Shi argues that "it is well-established that the successful party in a lawsuit may not recover attorneys' fees from the losing party unless such an award is authorized 'by agreement between the parties or by statute or court rules.'" Opp Br at 4 [quoting *Mount Vernon City School Dist. v. Nova Cas Co.*, 19 N.Y.3d 28, 39 (2012) and *Rossmann v. Windermere Owners LLC*, 111 A.D.3d 429, 430 (1st Dep't 2013)]. However, as previously indicated, the Contract in this case contains precisely that form of authorization by agreement between the parties. Calica Mov Aff, Exh E, ¶ 6(b). Moreover, Shi does not address why the attorney's fees sought in this motion would not be authorized by the same contractual language relied upon by the Court when attorneys' fees and costs were previously awarded in this case. *Shi v. Alexandratos*, 137 A.D.3d 451 (1st Dep't 2016), *lv. denied* 28 N.Y.3d 905 (2016) (attached to Pl Opp Br, Exh A-B).

Accordingly, the Court holds that Triades is entitled to recover all costs and expenses, including reasonable attorney's fees, as expressly covered by the Contract.

With regard to the amount of costs and attorney's fees Triades seeks, plaintiff does not address any of the specific costs claimed or the reasonableness of the attorney's fees. The Court thus finds that plaintiff has waived the right to object to specific tasks, time spent, hourly rate, and other particulars submitted by counsel for Triades.

In any event, the Court itself fully reviewed the submissions by Triades and finds them reasonable. As the First Department stated:

The courts have the inherent power to supervise the legal fees charged for services and regulate the practice of law... Furthermore, the determination of reasonable counsel fees is a matter within the sound discretion of the trial court and, in the absence of an abuse of discretion, will be upheld...

Matter of Thomas B. v. Lydia D., 120 A.D.3d 446, 446 (1st Dep't 2014) (citations omitted). No hearing is necessary where the party seeking counsel fees provides a detailed affidavit of services that provides an adequate basis for an assessment of the reasonable value of the legal services rendered, at least where the papers in opposition do not raise any particular factual issues. *Paganuzzi v. Primrose Mgt. Co.*, 268 A.D.2d 213 (1st Dep't 2000). The detailed affidavit of services presented in this case provides a more than adequate basis for assessing the value of the services. Further, and as noted above, the papers in opposition did not raise specific factual issues or questions regarding the value of the legal services. As such, no hearing is needed.

The standard for the Court's review is well established. The reasonableness of a request for attorneys' fees is based on several factors: the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the results achieved. *See, Bankers Federal Sav. Bank FSB v. Off West Broadway Developers*, 224 A.D.2d 376, 378 (1st Dep't 1996); *Matter of Freeman*, 34 N.Y.2d 1, 9 (1974); *Jordan v. Freeman*, 40 A.D.2d 656, 656 (1st Dep't 1972). The moving papers establish each of the criteria.

In reviewing the time entries from counsel for Triades, however, one issue emerges. There are three entries for work done by an individual with the initials "GBK."

and identified in a summary section as George B. Kordas. Calica Mov Aff, Exh H at 1-2, 7. Unlike the other three individuals whose work is reflected in the time records, Mr. Kordas is not specifically addressed in the accompanying affidavit, nor is his role or professional experience delineated. *See* Calica Mov Aff, ¶¶ 10-17. From the papers, little is known about Mr. Kordas. The billing rate for Mr. Kordas is lower than that for the other individuals, with Mr. Kordas being billed at \$275 per hour, while the other three individuals billed at \$385, \$425, and \$475 (for Robert J. Howard, Edward M. Ross, and Robert M. Calica, respectively). Calica Mov Aff, Exh H at 7.

The lack of further information regarding Mr. Kordas's role might have prompted this Court to consider striking the entries for his time, but the Court declines to do so. As previously noted, plaintiff failed to raise any specific opposition, factual or otherwise, to these entries. Further, out of 132.25 hours for which counsel for Triades billed, only 5.10 of those hours were billed by Mr. Kordas. Calica Mov Aff, Exh H at 7. Most importantly, however, the tasks for which Mr. Kordas billed are reasonable tasks. These tasks include a call to the Court, preparation for a conference with the Special Master at the Appellate Division, and drafting such documents as notice to a bank and a subpoena. Calica Mov Aff, Exh H at 1-2. These are reasonable tasks, and as they were billed by the individual with the lowest billing rate, the Court finds that the fees for the work are also reasonable. Notably,

The court may consider its own knowledge and experience concerning reasonable and proper fees and in the light of such knowledge and experience, the court may form an independent

judgment from the facts and evidence before it as to the nature and extent of the services rendered, make an appraisal of such services, and determine the reasonable value thereof.

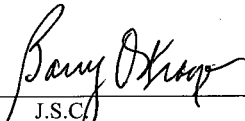
Jordan v. Freeman, 40 A.D.2d 656, 657 (1st Dep't 1972).

The Court is therefore granting the motion by defendant Triades for additional costs and attorney's fees in the amount of \$52,779.16, plus interest at the statutory rate from September 1, 2015, the midpoint date of the period at issue. The Court has considered the parties' other arguments, most of which were previously raised and rejected, and finds them unavailing.

Accordingly, it is

ORDERED that the motion ^{by} defendant Terry S. Triades for additional costs and attorney's ^{fees} is granted; and the Clerk is directed to enter judgment in favor of defendant Terry S. Triades against plaintiff Lin Shi, also known as Phenix Pierre, in the amount of \$52,779.16, plus statutory interest of 9% per annum, as calculated by the Clerk, from September 1, 2015 through the date of entry of judgment.

Dated: August 31, 2017



J.S.C.
BARRY R. OSTRAGER
JSC