

Grayson v Fruchter

2018 NY Slip Op 31974(U)

August 10, 2018

Supreme Court, New York County

Docket Number: 603272/2006

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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ROBERT GRAYSON,
Plaintiff,

INDEX NO. 603272/2006

- v -

MOTION
DATE

STEPHEN FRUCHTER, STEPHEN FRUCHTER,
as Executor for the Estate of PHILLIP FRUCHTER,
MONTAUK RUG & CARPET CORPORATION,
and 111 WEST 24TH STREET LP,

MOTION SEQ.
NO. 009

Defendant.

DECISION AND ORDER

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HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 216, 217, 218, 219, 220, 221, 222, 235, 237, 238, 239, 240 were read on this motion to/for APPROVE/SETTLE ACCOUNTING

In the above-captioned action (2006 Action), by order dated October 7, 2011, this court (Fried, J.) appointed David Rosenberg, on consent of the parties, as temporary receiver pending the determination of this action, of defendant Montauk Rug & Carpet Corporation (Montauk), "but for the assets of 111 West 24th Associates a/k/a [defendant] 111 West 24th Street, L.P." (Associates). By order of the same date, this court (Fried, J.) appointed Mr. Rosenberg, on consent, as temporary receiver of all of the rents and profits due and unpaid issuing out of the premises located at 111 West 24th Street (the premises). In a related action brought by Lilian Grayson, who was substituted after her death by Robert Grayson as Representative of the Estate of Lilian Grayson (102120/2008 [2008 Action]),¹ also by order dated October 7, 2011, this court (Fried, J.) appointed David Rosenberg, on consent, as temporary receiver pending the

¹ Such substitution was made by order of this court (Friedman, J.) dated March 12, 2013.

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determination of the 2008 Action, of Montauk, “but for the assets of [Associates].” By order of the same date, this court (Fried, J.) appointed Mr. Rosenberg, on consent, as temporary receiver in the 2008 Action of all of the rents and profits due and unpaid issuing out of the premises. By order dated December 23, 2011,² this court (Fried, J.) authorized Mr. Rosenberg to engage attorneys from Marcus Rosenberg & Diamond (MRD) to assist with “matters relating to Associates and Montauk.”

By stipulation dated August ____, 2015, the parties agreed to “terminate the receivership.” The stipulation further stated that the parties had entered into a Settlement Agreement and had agreed to discontinue both actions. By order dated August 21, 2015, the court (Friedman, J.) directed that Mr. Rosenberg “forthwith cease to perform any services at or for [Montauk] and [Associates]” and that he move, no later than October 2, 2015, for formal termination of the receivership and for approval of a final accounting.

By letters so-ordered on September 30, 2015 and November 5, 2015, the court granted Mr. Rosenberg’s requests for an extension of time to comply with the August 21, 2015 order until January 15, 2016. On January 15, 2016, Mr. Rosenberg filed his report and final accounting, sworn to on the same date. (Jan. 15, 2016 Report of David Rosenberg [2006 Action, NYSCEF Doc. No. 195; 2008 Action, NYSCEF Doc. No. 75].) By order dated February 10, 2016, the court directed that Mr. Rosenberg file a motion, by February 29, 2016, for approval of a final accounting and of any requested fees.

On February 29, 2016, by motions in both actions returnable on April 5, 2016, Mr.

² This order was only filed in the 2006 Action and not in the 2008 Action.

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Rosenberg sought an order, pursuant to CPLR 8004, awarding him receivership commissions in the amount of \$970,972.54, and directing Montauk and Associates to pay MRD attorney's fees and disbursements in the amount of \$209,980.14. Mr. Rosenberg's affidavit in support of the motions, sworn to on February 29, 2016 (2006 Action, NYSCEF Doc. No. 200; 2008 Action, NYSCEF Doc. No. 80), also seeks approval of the final accounting.

The motion was heard on July 20, 2016. In a decision on the record, the court held that commissions to Mr. Rosenberg should be awarded pursuant to CPLR 8004 and not, as the parties had argued in opposition to Mr. Rosenberg's motion, pursuant to BCL 1217. The court directed supplemental papers on the requested legal fees and directed Mr. Rosenberg to file supplemental papers in support of the accounting and a letter of no objection from the surety. (July 20, 2016 Transcript, at 30-34.)

No papers were filed as of December 2016. At that time, the court was informed of the death of Paul Grayson and, by order dated December 19, 2016, stayed all proceedings pending substitution of the decedent's personal representative. No such substitution was made. On its own motion and on further consideration of governing legal authority, the court ruled, by decision and order dated March 9, 2018, that the stay should be lifted. The court also directed that the supplemental submissions, specified in the July 20, 2016 transcript, be served and filed by April 20, 2018. The parties complied with this submission schedule.

After hearing the parties on a telephone conference on the record on August 8, 2018, the court determined that the branch of the motions for legal fees payable to MRD for services in connection with the receivership should be referred to a Special Referee. The court also confirmed that no party had any objection to the final accounting—the January 15, 2016 Report

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of David Rosenberg as supplemented by his February 29, 2016 affidavit and annexed exhibits (2006 Action, NYSCEF Doc. Nos. 201-205; 2008 Action, NYSCEF Doc. Nos. 81-85), and his March 23, 2018 affidavit (2006 Action, NYSCEF Doc. No. 235; 2008 Action, NYSCEF Doc. No. 108).³ The court accordingly held that the final accounting will be approved subject to (1) the filing of a letter of no objection by the surety or, if Mr. Rosenberg is unable to obtain such a letter, further proceedings affording the surety an opportunity to be heard; (2) the filing of a UCS-872 Notice of Appointment and Certification of Compliance for Mr. Rosenberg in the 2008 Action; and (3) the filing of the UCS-872 Notice for MRD in both actions.

Finally, the court reserved decision on the branch of the motions for commissions. The court now holds that this branch of the motions should be referred to a Special Referee. CPLR 8004 states that a receiver "is entitled to such commissions, not exceeding five per cent upon the sums received and disbursed by him, as the court by which he is appointed allows. . . ." The Appellate Division has held that "the receiver must earn his fee and it is his burden to demonstrate that he has in fact earned it." (De Nunez v Bartels, 264 AD2d 565, 566 [1st Dept 1999], citing Key Bank of New York v Anton, 241 AD2d 482, 483 [2d Dept 1997]; accord City of New York v L.J.W.P Realty Co., LLC, 269 AD2d 810, 810 [4th Dept 2000].)

While Mr. Rosenberg undeniably performed valuable services to Montauk and Associates over a period of nearly four years, there are disputes of fact as to the extent of the services he performed, the sufficiency of the documentation of those services, and whether certain services within the scope of the receiver's responsibilities were performed by MRD (e.g.,

³ All of the parties in both actions were present at the telephone conference, with the exception that no personal representative has to date been substituted in either action for decedent Paul Grayson.

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approval of checks).⁴ These issues cannot be determined on the record before the court.

It is accordingly hereby ORDERED that the following issues are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the foregoing issues:

1. The amount of commissions payable to David Rosenberg, temporary receiver, including but not limited to whether commissions should be awarded at the rate of five percent or whether that percentage should be reduced; and whether interest should be awarded on the commissions and, if so, the date from which such interest should be awarded, and

2. The amount of reasonable attorney's fees, costs, and disbursements payable to Marcus Rosenberg & Diamond LLP, including but not limited to the date from which attorney's fees should be awarded; the services for which such fees should be awarded; the amount of such fees; and whether interest should be awarded on such fees and, if so, the date from which interest should be awarded; and it is further

ORDERED that, within 15 days from the date of entry of this decision and order, Mr. Rosenberg shall serve a copy of this decision and order with notice of entry upon all parties by NYSCEF, unless any party is exempt, and by overnight mail, and shall e-file proof of

⁴ It is noted that the October 7, 2011 appointing orders in the 2006 and 2008 Actions provided that "Montauk's employees shall operate Montauk's retail carpet business in all respects except as limited herein." Defendants oppose an award of five percent commissions to Mr. Rosenberg based in part on the fact that he was not involved in the day-to-day management of the business. While that fact may be considered in determining the proper amount of commissions, it is not a per se basis for declining to award commissions. (See generally First New York Bank for Bus. v 418 W. 49th St. Realty Corp., 252 AD2d 460, 460-461 [1st Dept 1998] [in awarding commissions, a court may properly consider the amount of work performed by the receiver or delegated to others].)

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compliance within 10 days after the aforesaid service; and it is further

ORDERED that counsel for the parties shall promptly inform Mr. Rosenberg of the identity and addresses for any executor(s) appointed for Paul Grayson and of the names and addresses of any counsel retained by such executor(s); and it is further

ORDERED that, within 15 days of the date on which Mr. Rosenberg is provided by counsel for the parties with the aforesaid information regarding the executor(s) for Paul Grayson and their counsel, if any, Mr. Rosenberg shall serve a courtesy copy of this decision and order with notice of entry by overnight mail upon such executor(s) and counsel, and shall e-file proof of compliance within 10 days after the aforesaid service; and it is further

ORDERED that, within 30 days of the date of entry of this decision and order, Mr. Rosenberg shall serve a copy of this decision and order with notice of entry on the Clerk of the Special Referee's Office (Room 119); and it is further

ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report.

8/10/2018
DATE


MARC S. FRIEDMAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	