

**938 Nicholas Ave. Lender, LLC v 936-938 Cliffcrest
Hous. Dev. Fund Corp.**

2019 NY Slip Op 31335(U)

April 10, 2019

Supreme Court, New York County

Docket Number: 850011/13

Judge: Joan A. Madden

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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: IAS PART 11

-----X **Decision and Order**

938 NICHOLAS AVENUE LENDER. LLC,

Plaintiff,

-against-

Index No. 850011/13

936-938 CLIFFCREST HOUSING DEVELOPMENT
FUND CORPORATION, THE DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT
OF THE CITY OF NEW YORK, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, AND JOHN AND JANE DOES\
1-10, ABC LLC 1-10, XYZ CORP. 1-10,

Defendants.

-----X

936-938 CLIFFCREST HOUSING DEVELOPMENT
FUND CORPORATION,

Third-Party Plaintiff

-against-

THE WAVECREST MANAGEMENT TEAM
LTD., COMMUNITY CAPITAL BANK n/k/a
CARVER FEDERAL SAVINGS BANK, LEE
WARSHAVSKY, SHUHAB HOUSING
DEVELOPMENT FUND CORPORATION,
JOHN AND JANE DOES 11-20, the identity of
such persons being unknown to the Third-Party
Plaintiff, but intended to describe those persons
who corruptly influenced their employer,
THE DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT OF
THE CITY OF NEW YORK to look away from
their defalcations of the Third-Party Plaintiff's
funds,

Third-Party Defendants.

-----X

JOAN A. MADDEN, J.

In this mortgage foreclosure action, Neuman Ferrara LLP ("NFLLP") moves for approval of, and authorization for, the Receiver and/or the plaintiff to pay NFLLP \$173,385.15 for legal fees and expenses related to its representation as counsel for the Receiver in certain landlord

tenant matters. Plaintiff opposes the motion, arguing that the total amount of fees sought is excessive and unreasonable, and specifically that \$33,073.12 of the total is not recoverable as this amount is sought for legal work in connection with NFLLP's efforts to recoup its legal fees. Defendant 936-938 Cliffcrest Housing Development Fund Corp. ("Cliffcrest") also opposes the motion, arguing that the fees sought are unreasonable and duplicative.¹

Cliffcrest is tenant owned development company and the owner of the property located at 938 St. Nicholas Avenue, New York, New York ("the Property"). The original plaintiff, Peny Co. ("Peny") commenced this foreclosure action against Cliffcrest on or about January 23, 2013, by filing a summons and complaint. At the same time, Peny made an ex parte order for the appointment of a Receiver.²

By order dated March 17, 2015, Daniel Milstein of Greenberg Traurig LLP was appointed the Receiver, which order authorized him, upon court approval, to retain counsel to, *inter alia*, institute and prosecute legal proceedings for the collection of maintenance and/or rents necessary for the protection of the Property, and to pay the reasonable value of counsel's service from monies received. By interim order dated April 17, 2015, and upon consent of counsel for plaintiff and for Cliffcrest, the court approved the Receiver's request to retain NFLLP as counsel for the Receiver with respect to the litigation of landlord tenant matters relating to the Property, provided that counsel's compensation for services rendered to the Receiver were approved by the court.

¹Cliffcrest also argues that fees are premature as the receivership has not yet been terminated. However, this argument is moot as the receivership is now being terminated.

² Peny initially agreed to forebear on the appointment of a receiver provided Cliffcrest complied with certain stipulated conditions.

The Retainer Agreement between the Receiver and NFLLP provides, in relevant part, that while NFLLP's customary hourly rate for partners is \$550-\$750, as a professional courtesy, it is reduced to \$475, and for associates is reduced from \$375-\$475 to \$375.³ It further provides that in accordance with the order appointing the Receiver, all amounts due under the Retainer Agreement are subject to court approval. This application for legal fees is for the period from March 1, 2016 to March 31, 2018;⁴ however, the legal work relating to landlord-tenant matters (as opposed to general non-litigation) was performed during a five month period between March 1, 2016 and August 1, 2016.⁵

As noted above, on this motion, NFLLP seeks approval of, and authorization for, the Receiver and/or the plaintiff to pay it \$173,385.15, for attorneys' fees and expenses. In the second to last paragraph of its moving papers, NFLLP breaks down the amount sought as follows: "(a) fees in the approximate sum of \$153,566.25 (based upon approximately 412.45 hours of work at \$375.00 per hour); (b) expenses and advances in the approximate sum of \$19,806.90."⁶ In support of the fee application, NFLLP submits the affirmation of its Managing

³During NFLLP's representation, associate, Ricardo M. Vera, was named partner and NFLLP asserts that, as a professional courtesy, it did not raise his rate to the partnership rate.

⁴A prior motion by the Receiver authorizing the payment of attorneys fees to NFLLP for the period between April 16, 2015 through February 29, 2016 (motion seq. 012), in the amount of \$76,664.00 was approved to be paid in three installments by order dated September 12, 2016. The order inadvertently authorized payment for the period from April 16, 2016, instead of from April 16, 2015.

⁵NFLLP contends that it refrained from filing the motion for fees since August 2016, due to a good faith effort to resolve the fee claim without motion practice. In or around September 2017, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. was substituted as Receiver's counsel.

⁶NFLLP states that it is also entitled to \$28,989.58 of finance charges, which it is waiving. However, as the Receiver notes in its opposition, NFLLP is not entitled to fees under

Partner, Jonathan H. Newman. Notably, NFLLP fails to submit an affirmation from Ricardo Vera, the attorney who performed the majority of services for which NFLLP is seeking payment.⁷

According to Mr. Newman, the services were with respect to internal NFLLP account numbers (account nos. 2811.0001, and 2811.0003 to 2811.0027). The first account (account no. 2811.0001), is in the amount of approximately \$50,000 for general litigation services “related to general landlord-tenant issues and Property-related matters, as well as receivership-related matters and motions.”⁸ For the remaining accounts (account nos. 2811.0003 to 2811.0027), NFLLP seeks the amount of \$122,647.77 for landlord tenant work related to specific apartments, consisting of \$105,036.50 in attorneys’ fees, \$13,306.27 for expenses, and \$4,305.00 for advances.

With respect to account no. 2811.0001, plaintiff contends, and NFLLP does not dispute, that \$33,073.12 of the approximately \$50,000 billed in this account, including for expenses, is for motions and work in connection “fees on fees,” that is the amounts for NFLLP’s efforts to collect attorneys’ fees for work it performed. In support of this contention, plaintiff submits a chart setting forth NFLLP’s billing entries related to NFLLP’s collection efforts, which chart includes the date the fees were incurred, a description of services provided, the amount of time

the Retainer Agreement, until the court approve such fees, thus finance charges have not accrued.

⁷Submissions indicate that work was also performed by two associates, Noe Solorzano and Jonathan Ozarow. While the hourly rates for these associates are not stated, presumably the \$375 hourly rate charged for Mr. Vera’s services also applies to their work. Neither plaintiff nor Cliffcrest object to this hourly rate for Mr. Vera and the two associates.

⁸In footnote five of his affirmation, Mr. Newman states that “NFLLP billed fees in the sum of \$48,230 and incurred expenses of \$1,714.13...in connection with account number 2811.0001.”

spent, and the amount billed.

It is well settled that “an award of fees on fees must be based on a statute or on an agreement.” Sage Realty Corp v. Proskauer Rose, LLP, 288 AD2d 14,15 (1st Dept 2001), lv denied 97 NY2d 608 (2002). Here, NFLLP fails to point to any provision of the Retainer Agreement (or other agreement), or a statutory basis for its request for fees on fees.⁹ In fact, a review of the Retainer Agreement shows there is no provision for NFLLP to recover fees incurred in its efforts to collect its fees. Accordingly, the court finds that NFLLP is not entitled to \$33,073.12 it seeks for fees related to its efforts to collect its own attorneys’ fees, nor is it entitled to the \$1,714.13 in expenses detailed in this account as these expenses are unexplained and presumably were incurred in connection with its collection efforts. Thus, as to this account, after deducting the forgoing amounts, the balance of \$15,212.95 remains. As to this amount, the entries in the account indicate that the majority of these services relate to conferences with the Receiver, and conferring with process servers regarding service of the rents demands and FDCPA notices. The court finds that a reasonable amount for such fees is \$8,000.

With respect to the accounts related to specific apartments (account nos. 2811.0003 to 2811.0027), a review of the record reveals that the majority of services NFLLP performed pertained to negotiations of stipulations of settlement, appearances in landlord tenant court, motion practice, and the drafting of various litigation related documents, notices and pleadings. Mr. Newman’s affirmation indicates that NFLLP served rent demands and/or FDCPA notices

⁹While the proprietary leases include provisions whereby the tenants are required to reimburse the landlord for legal fees incurred by reason of the tenant’s default, such provisions are not at issue here as NFLLP seeks payment of the fees pursuant to the Retainer Agreement and not pursuant to the proprietary leases that were the subject of the underlying proceedings.

and/or commenced or prosecuted various summary non-payment proceedings in Civil Court on the Receiver's behalf involving 21 apartments at the Property. In his affirmation, Mr. Newman states that NFLLP appeared approximately 32 to 35 times in connection with these proceedings.¹⁰ In ten of these matters,¹¹ NFLLP served a rent demand and FDCPA notice, commenced a summary non payment proceeding resolved the proceeding by a stipulation of settlement; in four of the matters,¹² NFLLP prepared and/or served a rent demand and FDCPA notice; and in seven of the matters,¹³ NFLLP served a rent demand and FDCPA notice and commenced a summary proceeding. With regard to the cases resolved by stipulation of settlement, in many instances, the stipulation provided for the payment of arrears in installments, and the entry of a possessory and monetary judgment, with execution of the warrant of eviction stayed pending compliance with the payment obligations in the stipulation.

A party seeking approval of its attorneys' fees must demonstrate that the fees sought are reasonable. Bankers Fed Sav Bank v. Off W. Broadway Development, 224 AD2d 376, 377 (1st Dept 1996)(modifying trial court order approving parties' stipulation requesting attorneys fees, as

¹⁰In his affirmation, Mr. Newman states the approximate number of appearances and in connection with one of the matters stated that there were "multiple appearances."

¹¹Apartment nos. 4, 28, 25, 34, 37, 33, 47, 65, 66, and 67. With regard to Apartment 34, certain section 8 issues were analyzed.

¹²Apartment nos. 31, 48, 1A and 44. With regard to Apartment 48 there were Section 8 issues and an HP proceeding was instituted by the lessee. With regard to Apartment 1A, the lessee paid the arrears in full upon demand.

¹³Apartment nos 35, 1C, 42, 45, 56, 8, and 24 With regard to Apartment 35, the matter was referred to Adult Protective Services. With regard to Apartment 42, there were section 8 subsidy issues. With regard to Apartment no. 8, the matter was rendered moot after the lessee paid the arrears. As for Apartment no. 24, there was motion practice.

there was no showing as to the reasonableness of such fees). In determining the reasonableness of attorneys' fees, the court considers "the necessity of the services rendered, the benefit achieved, the difficulty of the issues involved, or any other of the considerations normally involved in calculating attorneys' fees" Key Bank of New York v. Anton, 241 AD2d 482, 484 (2d Dept 1997). The absence of novel or complex issues is relevant in determining the reasonableness of an attorneys' fees award. See e.g. Diaz v. Audi of America, Inc., 57 AD3d 828, 831 (2d Dept 2008)(in determining that \$7,500 was a reasonable award for attorneys' fee for a 29-page brief, the court noted that brief "did not involve any novel or complex issues, but rather the application of general principles of disclosure to the facts of the dispute").

Applying these standards for assessing the reasonableness of NFLLP's attorneys' fees, I conclude that nature of the work performed was neither novel nor complex, but rather related to straight forward landlord tenant issues. This conclusion is supported by a review of the work involved in drafting rent demands, FDCPA notices, and prosecuting non payment proceedings, many of which concluding with stipulations of settlements. Based on the forgoing, neither the time expended nor the amount of fees sought are justified. Accordingly, in connection with the landlord tenant matters, the court finds that \$85,000 is a reasonable attorney's fee, and that NFLPP is entitled to expenses in the amount of \$8,872,¹⁴ and advances in the amount of \$4,059.¹⁵

With regard to the responsibility for paying the attorneys' fees, expenses and advances, as

¹⁴This amount reduces the \$13,306.27 sought for expenses by one-third, in part based on the court's finding that \$0.25 for photocopying, which made up the bulk of the expenses, is excessive in this receivership matter.

¹⁵This amount excludes \$246, related to "additional advances" which are not related a particular apartment and are otherwise unexplained.

NFLLP points out the payment of the fees are, in the first instance, to be made from the Receiver's funds. As noted above, the order appointing the Receiver authorizes the Receiver to, *inter alia*, collect all maintenance and/or rents arrears, and to pay the reasonable value of counsel's service from monies received upon court approval.

Under CPLR 8004(b),¹⁶ the court may direct at the termination of the receivership that the party who moved for the appointment of Receiver to pay, *inter alia*, the fees of the Receiver's attorney when there are insufficient funds in the Receiver's account to pay such sum. In this case, plaintiff moved for the appointment of the Receiver, and as the receivership is being terminated, and as funds in the Receiver's account are depleted,¹⁷ and as plaintiff has received payments of accrued interest during the Receivership, plaintiff is to pay NFLLP attorneys' fees as

¹⁶CPLR 8004(b) provides, in relevant part that:

(b) Allowance where funds depleted. If, at the termination of a receivership, there are no funds in the hands of the receiver, the court, upon application of the receiver, may fix the compensation of the receiver and the fees of his attorney, in accordance with the respective services rendered, and may direct the party who moved for the appointment of the receiver to pay such sums, in addition to the necessary expenditures incurred by the receiver....

¹⁷As explained in the Receiver's supplemental affidavit dated April 8, 2019, while the bank statements dated July 2018, submitted with the final accounting show an ending cash balance of \$16,837.54, the actual cash balance was \$8,727.08, as indicated in his prior affidavit after adding all sums received and checks written to pay Receiverships through July 31, 2018, which checks had not yet cleared. Moreover, the balance was subsequently reduced to \$7,132.98 for Finger Management's payroll expenses in the amount of \$1,594.10, which accrued the week ending in July 27, 2018, which were not paid until August 3, 2018. Furthermore, as indicated by the Receiver in his supplemental affidavit there are a total of \$25,726.00 in unpaid Receivership expenses. As the court will direct in the order terminating the receivership and settling the final account that the remaining funds in the Receiver's account will be used to pay these expenses, thus depleting the account.

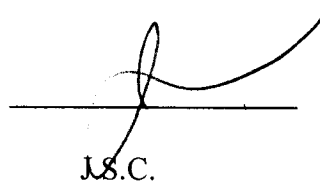
directed below. See Bankers Fed Sav Bank v. Off W. Broadway Development, 224 AD2d at 378 (equities support requiring the party seeking the appointment of receiver in foreclosure action to pay legal fees of Receiver's attorney based on benefit received as a result of attorney's efforts); Sun Beam Enters v. Liz Realty Corp., 210 AD2d 153 (2d Dept 1994)(trial court properly found that "special circumstances" existed to require the party seeking the appointment of the receiver to pay the receiver the amount of deficit in receiver's account, including for money expended for reasonable attorneys' fees, where money expended was authorized by the court and beneficial to the party moving for the receiver's appointment).

In view of the above, it is

ORDERED that the court approves and authorizes the payment of \$93,000 in attorneys' fees, \$8,872 in expenses and \$4,059 in advances in connection with services rendered by NFLLP concerning the Property for the period between March 1, 2016 to March 31, 2018; and it is further

ORDERED that plaintiff shall pay this amount to NFLLP within ten days of service upon it of a copy of this order with notice of entry.

DATED: April 16, 2019



J.S.C.

HON. JOAN A. MADDEN

J.S.C.