

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

2019 NY Slip Op 31336(U)

April 10, 2019

Supreme Court, New York County

Docket Number: 850011/13

Judge: Joan A. Madden

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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.

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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.

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JOAN A. MADDEN, J.

The Receiver in this mortgage foreclosure action, Daniel Milstein of Greenberg Traurig

LLP, (“the Receiver”), moves by order to show cause for an order (I) authorizing the secondary appointment of Darren R. Marks, Esq. and of Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. (“Borah Goldstein”), as Receiver’s counsel and ratifying the retainer agreement dated July 26, 2017, *nunc pro tunc*, (ii) pursuant to CPLR 8004 authorizing and directing plaintiff to issue payment to Darren R. Marks, the Receiver’s Counsel, \$40,780.90 for legal services rendered and disbursements and expenses from August 2017 through April 30, 2018. In a supplemental submission, the Receiver seeks additional fees, including for the period from May 2018 to November 2018, for a total of \$74,879.18 for legal services rendered, together with expenses and disbursements. There is no opposition to the motion, except to the extent that defendant 936-938 Cliffcrest Housing Development Fund Corp. (“Cliffcrest”) argues that the fees should not be determined or paid until final accounting and termination of the Receivership, which argument is moot since the Receivership has been terminated.

Cliffcrest is a 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.¹ The Receiver was appointed by order dated March 17, 2015, 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,

¹ Peny initially agreed to forebear on the appointment of a receiver provided Cliffcrest complied with certain stipulated conditions.

the court approved the Receiver's request to retain Neuman Ferrara LLP 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. Mr. Marks of Borah Goldstein was retained as successor counsel pursuant to a retainer agreement dated July 26, 2017 ("the Retainer Agreement") between the Receiver and Borah Goldstein, which was consented to by counsel for plaintiff and for Cliffcrest. However, formal court approval was not obtained..

Attached to the the Retainer Agreement is a fee schedule which provides, *inter alia*, for payment of \$198 per hour for court appearances and other housing court legal work.² On this motion, the Receiver seeks approval of Mr. Marks and Borah Goldstein's appointment, nunc pro tunc, and authorization for payment by plaintiff to Borah Goldstein of a total of \$74,879.18 for attorneys' fees, expenses and disbursements for the period between August 2017 and October 2018.

In support of the motion, the Receiver submits the affidavit and supplemental affidavit of Mr. Marks, monthly invoices for the period, and the Retainer Agreement. In his affirmation, Mr. Marks states:

Borah Goldstein has provided exemplary service, and at a significantly

²The fee schedule also provides for, *inter alia*, for payment of \$855, for holdover proceedings, including preparation of predicate notices and petition, plus disbursements; for non-payment proceedings payment of \$93 for a 3-day demand notice, \$277 for a notice of petition and petition, both amounts include preparation and service \$325 for preparation of settlement agreement, \$93 for preparation of a cure notice per settlement agreement; \$125 for re-service of warrant including coordination with client and marshal and city marshal fees, in connection with nonpayment proceedings. It also lists fees for eviction and law office coordination on a per room basis, at a rate of \$1,784 for a studio and three rooms, \$1,940 for four rooms and \$2,311 for five rooms.

reduced rate (Mr. Marks has reduced his hourly rate by approximately 60%) out of deference to this Court and as a professional courtesy [and that] [b]ecause of [its] representation at my instruction and guidance, the [the Property's] cash flow has increased and even exceeded the expected monthly receivables, rent and maintenance arrears have been reduced, chronic non-payers have been paying their obligations at levels not previously seen, problem tenants have been evicted, and Housing Court cases have been taken to trial. Because of work undertaken by Secondary Appointee at my instruction and guidance, the [Property] been moving towards stability and profitability.

With respect to the amounts billed, Mr. Marks states that during the calendar year of 2017, the hourly rate for attorney time was \$198.00 and during 2018, it was \$202.00, and that between August 2017 and April 2018, 147.42 hours were billed for attorney and paralegal time for handling landlord tenant matters relating to the Property amounting to \$35,023.30, plus additional amounts for disbursements and expenses for a total of \$40,780.90. In his supplemental affidavit, Mr. Marks seeking fees for the period from August 2017 to October 2018 totaling \$74,879.18 based on 365.15 hours of work related to landlord tenant matters devoted to attorney and paralegal time, and for expenses and disbursements. He attaches monthly invoices supporting the additional \$34,098.28, for fees and additional disbursements and other expenses for the period. In his supplemental affidavit, Mr Marks states that “365.15 hours were billed to the Receiver for building wide related matters which included problematic litigants, missing persons, and resolving some cases without litigation. Countless hours were spent on landlord tenant matters but not billed in order to ensure the bills were reasonable.”

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

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). Applying these standards for assessing the reasonableness of Borah Goldstein's attorneys' fees, and in the absence of opposition as to the amount of the fees, the court finds that they are reasonable based on the reduced hourly rate, the amount of time spent, and the benefits achieved.

Under CPLR 8004(b),³ 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. Here, plaintiff moved for the appointment of the Receiver, and as the receivership is being terminated, and plaintiff does not oppose the motion, plaintiff shall pay Borah Goldstein's attorneys' fees as directed below.

In view of the above, it is

ORDERED that the court authorizes the secondary appointment of Darren R. Marks, Esq.

³CPLR 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....

and the law firm of Borah Goldstein, Altschuler, Nahins & Goidel, P.C. as the substitute Secondary Appointment as Receiver's Counsel is granted, *nunc pro tunc*; and it is further

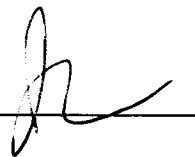
ORDERED that Secondary Appointee shall immediately file form USC872; and it is further

ORDERED that the Retainer Agreement, which has been approved by the parties is approved by this Court *nunc pro tunc*; and it is further.

ORDERED that the court approves and authorizes the payment of \$74,879.18 services rendered by Borah Goldstein concerning the Property for the period between August 1, 2017 to October 31, 2018; and it is further

ORDERED that plaintiff shall pay this amount to Borah Goldstein within ten days of service upon it of a copy of this order with notice of entry, and proof of filing of the form USC872 as directed above.

DATED: April 18 2019



J.S.C.

HON. JOAN A. MADDEN
J.S.C