

Bavers v Shepherd

2019 NY Slip Op 32255(U)

July 29, 2019

Supreme Court, New York County

Docket Number: 653002/2017

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

RUTH BAVERS AND DANIEL SAMUEL KATAN, AS CO-TRUSTEES OF THE AKI KATAN IRREVOCABLE TRUST, DANIEL KATAN, AKI KATAN,

Plaintiff,

INDEX NO. 653002/2017

MOTION DATE 05/13/2019,
05/13/2019

MOTION SEQ. NO. 003 004

- v -

ALLYSON SHEPHERD, ARI ZUBLI, ISAAC ZUBLI, THE ISAAC ZUBLI FAMILY TRUST, NYC FIVE STAR SERVICE CORP., JAVITS CENTER PARKING CORP., NEW YORK CUSTOM ADVERTISING CORP, GUARDIAN BROKERAGE, INC., JET WARE CORP., JESDER MANAGEMENT LLC, DOES 1-10

Defendant.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 119, 120, 121, 122, 123, 124, 125, 126, 127, 130, 136, 147, 148, 149

were read on this motion to/for ATTORNEY - FEES.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 118, 131, 132, 133, 134, 135, 150

were read on this motion to/for STAY.

Motion sequences 003 and 004 are consolidated for disposition. The plaintiffs' motion (Mtn. Seq. 003) for an assessment of attorney's fees and costs, which was ordered on October 24, 2018 by New York State Supreme Court Justice Charles Ramos when he found the defendants' motion to dismiss to be "frivolous," is granted to the extent that this issue is referred to a Special Referee to determine the reasonable attorney's fees of the plaintiffs' in opposing the motion as ordered

by Justice Ramos. The defendants' motion (Mtn. Seq. 004) to stay the enforcement of sanctions is denied.¹

The Relevant Facts and Circumstances

This action concerns the parties' dispute over their ownership of two real estate holding companies. During oral argument of the defendants' motion (Mtn. Seq. 002) to dismiss, on October 24, 2018, Justice Ramos denied the motion and imposed sanctions on the defendants:

The court: There are voluminous documents here. There's no removal of two of the directors. They weren't removed. And certainly at this point I can't rule that I could dismiss the complaint saying that they were removed. There's no removal here. How could I possibly even consider your motion? ...

The court: Talk about a frivolous motion ...

The court: Do you have a case that holds that corporate formalities and trust formalities can be dispensed with? Do you know what transactional attorneys get for doing things like this? This is not a joke. This is serious business. This is our profession ...

The court: We're into the details. People rely on us to do these kinds of things, properly. You remove two directors without even telling them, with no mention in this – in this agreement that they're removing directors? It doesn't – you may – you may prevail at trial, I don't know how this case is going to turn out, but you're certainly not going to prevail on this motion.

And you think that bringing this action was frivolous and sanctionable? Guess what: ***You're paying attorney's fees for these attorneys to be here to oppose this motion. This is sanctionable*** ...

The court: Good. Then the motion is denied. Sanctions are granted. ***Reasonable attorney's fees to the plaintiffs for opposing this motion*** [emphasis added] (hereinafter, the **Award**) (NYSCEF Doc. No. 123, at 15:9-14, 15:17, 16:4-8, 16:10-20, 17:8-10).

¹ Due to a clerical error, Mtn. Seq. 004 was previously granted as unopposed. Pursuant to a So-Ordered Stipulation and Order (NYSCEF Doc. No. 133), Mtn. Seq. 004 was restored to the calendar.

The defendants' have appealed the motion to dismiss and the Award (the **Appeal**). The Appeal was scheduled to be perfected by July 17, 2019.

The plaintiffs now move for an assessment of reasonable attorney's fees and costs. The defendants also move to stay enforcement of the Award pending the resolution of the Appeal.

Discussion

I. Motion Sequence 003 (Assessment of Attorney's Fees and Costs)

The plaintiffs argue that they are entitled to an award of \$71,949 in attorney's fees and \$1,624.16 of expenses because these amounts are (i) reasonable under the circumstances, and (ii) constitute "costs" under 22 NYCRR § 130 and are therefore not subject to a cap of \$10,000. The defendants argue that the plaintiffs should be awarded no more than \$10,000 in attorney's fees and costs, to be paid to the Lawyers Fund for Client Protection and/or the Commissioner for Taxation and Finance. The Uniform Rules of the Chief Administrative Judge provide that:

Section 130-1.1 Costs; sanctions.

(a) *The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and **reasonable attorney's fees, resulting from frivolous conduct as defined in this Part.*** In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part [emphasis added] (22 NYCRR §§ 130-1.1a, 130-1.2).

The record is clear that Justice Ramos awarded reasonable attorney's fees for the cost of plaintiffs to oppose the motion to dismiss. This was stated twice on the record at oral argument and it constitutes the law of the case. Under these circumstances, the \$10,000 cap on financial

sanctions does not apply. The record is also clear that Justice Ramos awarded reasonable attorney's fees to the plaintiffs directly. Although the defendants argue that there is a proper procedure to follow before a sanctions award is made, this Court is not the appropriate forum to resolve that issue; that issue falls within the purview of the First Department on the Appeal. At oral argument on the instant motions, to the extent that the defendants argued that only Justice Ramos could award reasonable attorney's fees, the Court offered and plaintiffs' counsel indicated that they would consent to having the case referred to Justice Ramos, who now serves as a JHO to assess reasonable attorney's fees. Tellingly, the defendants refused to consent to such referral. Thus, in accordance with Justice Ramos' October 24, 2018 order, the plaintiffs are entitled to receive reasonable attorney's fees for opposing the motion to dismiss. Accordingly, the plaintiffs' motion for an assessment of attorney's fees and costs is granted to the extent that this issue is referred to a Special Referee to hear and determine the plaintiffs' reasonable attorney's fees in opposing the defendants' motion to dismiss in accordance with Justice Ramos' October 24, 2018 order.

II. Motion Sequence 004 (Stay of Sanctions Pending Appeal)

The defendants argue that a stay is appropriate because it will not delay this action and would promote judicial efficiency in the event that the sanctions award is reversed on appeal. The plaintiffs argue that a stay should not be issued because the Appeal lacks merit, a stay would undermine judicial interests, and denying the stay would not prejudice the defendants. The Court agrees with the plaintiffs. The defendants' motion for a stay is denied.

Accordingly, it is

ORDERED that the plaintiffs' motion for an award of legal fees (Mtn. Seq. 003) is granted to the extent that the issue of the amount of plaintiff's reasonable attorney's fees in opposing the defendant's motion to dismiss is referred to a special referee to hear and determine such amount; and it is further

ORDERED that the defendants' motion for a stay (Mtn. Seq. 004) is denied; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and determine the issue of reasonable attorney's fees and costs payable to the plaintiffs per the Justice Ramos' October 24, 2018 and this decision and order, which issue is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for the plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

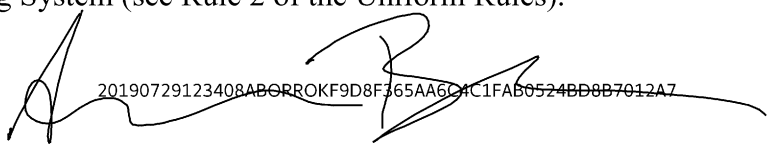
ORDERED that, unless otherwise directed by the Special Referee, on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the hearing on the issue specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

7/29/2019

DATE



ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: