Wells Fargo Bank, N.A. v Brown
2019 NY Slip Op 33365(U)
October 28, 2019
Supreme Court, Suffolk County
Docket Number: 0011380/2010
Judge: James Hudson
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Supreme Court of the County of Suffolk
State of New York - Part XL
Memorandum Decision after Hearing

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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WELLS FARGO BANK, N.A., AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2007-6 ASSET-BACKED CERTIFICATES, SERIES 2007-6,

Plaintiff,

-against-

MARIA BROWN, SWINTON BROWN, BEVERLY BROWN, BETTY BROWN,

Defendants.

x----------x

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The case at bar is a mortgage foreclosure proceeding concerning 17 Santam Court, Bayshore, Suffolk County, New York, (the "Property"). A brief recitation of the facts is as follows:

Mr. Swinton Brown ("Defendant") represents himself *pro se* on the matter. (Transcript,12/19/18, page 3). Defendant's home was subject to foreclosure by Wells Fargo Bank, N.A. ("Wells Fargo") due to an inability to maintain consistent and proper payments on the Property. Mr. Steven Schlesinger, Esq. ("Referee") was appointed by the Court to

act as the Referee on this foreclosure. (Transcript, 12/19/18, page 11). The Referee was directed to compute the amount due and owing under the mortgage and execute the sale of the Property. (Transcript, 12/19/18, page 11). During the course of discharging his duties as the Referee, Mr. Schlesinger was sued multiple times by Mr. Brown, both in State and Federal Court. (See, Transcript, 12/19/18). As a result of such litigation, the Referee was required to defend himself (successfully) in these other forums, thus incurring Attorney's fees and filing fees, in addition to expenses accrued from the mortgage foreclosure action itself. In the Court's Decision of November 16th, 2018, Mr. Schlesinger's motion for an Award of Referee's Fees and for Reimbursement of Legal Fees was granted to the extent that the matter was set down for an evidentiary hearing. The Court duly heard the testimony of Mr. Schlesinger whom we found to be in all respects, a credible witness.

The question of the Court now comes to how much compensation the Referee should be entitled to regarding such fees relating to the mortgage foreclosure and the defense of the aforementioned litigation proceedings. Mr. Schlesinger bases his arguments on equity, stating that the statutory limitation of Referee's fees should not apply, as the Court has the discretion to award the payment of reasonable expenses, pursuant to CPLR 4321(1). The issue at bar is to determine what is considered "reasonable."

CPLR 4321(1) states "[a]n order or a stipulation for a reference shall determine the basis and method of computing the referee's fees and provide for their payment. The court may make an appropriate order for the payment of the reasonable expenses of the referee."

To determine whether an attorney's fees and filing fees are reasonable, there are seven factors which need to be considered, including: (1) complexity of the matter; (2) time and

labor required; (3) attorney's experience and reputation; (4) amount in controversy; (5) normally charged attorney's fees for similar work; (6) results of the attorney's actions; and (7) attorney's responsibility (***Diaz v. Audi of America, Inc.***, 57 A.D.3d 828, 830, 873 N.Y.S.2d 308, 311 [2d Dep't 2008]). While a court has its discretion to determine what constitutes a "reasonable fee," the court must adhere to procedural and substantive rules for calculating such fees (***L.I. Head Start Child Development Servs., Inc. v. Economic Opportunity Com'n of Nassau Cty., Inc.***, 865 F. Supp. 2d 284, 291 [E.D.N.Y. 2012], *aff'd*, 710 F.3d 57 [2d Cir. 2013], and amended, 956 F. Supp. 2d 402 [E.D.N.Y. 2013] (judgment amended under Fed.R.Civ.P. 60 (a) "to correct a clerical mistake or mistake arising from oversight or omission."]) "Both the Second Circuit and the Supreme Court have held that the Lodestar-the product of a reasonable hourly rate and the reasonable number of hours required-creates a "presumptively reasonable fee." ***(Id.)***. *Citing* ***Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany***, 493 F.3d 110 [2d Cir.2007] *amended on other grounds*, 522 F.3d 182, 183 [2d Cir. 2008]). Furthermore, in addition to the Lodestar, the Court must adhere to the "forum rule." (***Id.***). The "forum rule" states that, to determine a reasonable hourly rate, the Court must use the 'prevailing [hourly rate] in the community.'" ***(Id.).***

Any conduct of a Referee that is outside the scope of the order of reference is considered beyond the Referee's power (*see* ***Central Mortg. Co. v. Acevedo***, 34 Misc.3d 213, 219, 934 N.Y.S.2d 285, 290 (Supreme, Kings Co. 2011).

(***In re Estate of Levine***, 82 A.D.3d 524, 526, 918 N.Y.S.2d 445, 447 [1st Dep't 2011]; ***Yenom Corp. v. 155 Wooster St. Inc.***, 33 A.D.3d 67, 818 N.Y.S.2d 210 [1st Dep't 2006]). Frivolous conduct can include, but is not limited to, raising meritless arguments, using the appeals process to delay or prolong litigation, using the appeals process to harass or bring

about malicious injury to another, or where the party or attorney proves false any material, factual statements. (***Id.***), *citing* NY Comp. Codes R. & Regs. tit. 22, § 130-1.1[c]).

In ***In re Estate of Levine***, *supra*, the Appellant, (a *pro se* Attorney), consistently brought meritless actions against Appellees. The Court noted that Appellant "failed to prepare an appropriate appendix, and in response to a motion questioning the sufficiency of the appendix suggested that the proceeding never existed and thus there was no record on appeal for him to provide." (***Id.*** at 526). Additionally, the Appellant frequently brought actions on appeal which raised meritless jurisdictional issues which were not supported by the procedural history of the matter. The Court held that such conduct was frivolous and malicious, and only brought to further delay litigation and harass the appellees. (***Id.*** at 527).

The case of ***Yenom Corp. v. 155 Wooster Street, Inc***. *supra,* concerned a prospective purchaser of stocks who commenced action against the Corporation for breach of an oral agreement and filed a notice of pendency. (***Id*** at 69). The Court held that the statute of frauds precluded any breach of the oral agreement and as such, the notice of pendency was cancelled. (***Id.***). Moreover, the Court sought to issue sanctions against the Appellant for bringing frivolous claims. (***Id.*** at 70). The Court determined that appropriate sanctions would be in the form of reimbursement of Attorney's fees for defending such baseless litigation. (***Id.*** at 74).

In ***L.I. Head Start Child Development Servs., Inc. v. Economic Opportunity Commission of Nassau Cty., Inc***., *supra*, the Plaintiff commenced action for Breach of Fiduciary Duties by Defendants. (***Id.*** at 285). The Court found for the Plaintiffs and awarded reasonable Attorney's fees as part of the damages. (***Id.***). The Court had asked Plaintiffs to outline an invoice of all hours worked on the matter and the corresponding

hourly rate per each Attorney and employee. (***Id.*** at 293). Hourly rates were determined based on experience and position within the firm. ***(Id.)***. The Court used the Lodestar formula and the forum rule to determine the reasonable amount of attorney's fees to be awarded. (***Id.*** at 297).

In ***Diaz v. Audi of America, Inc.***, *supra*, an automobile purchaser commenced an action against Audi of America for breach of warranty and violation of the "Lemon Law." (***Id.*** at 829). After successfully proving her causes of action, the Purchaser was awarded damages, including Attorney's fees (***Id.***). On appeal, Plaintiff contended that the amount of Attorney's fees was inadequate. (***Id.***). In rejecting this contention, the Court determined that the matter "did not involve any novel or complex issues, but rather the application of general principles of disclosure to the facts of the dispute." (***Id.*** at 831). Based on these factors, the Court determined a reasonable estimation of attorney's fees. ***(Id.).***

In the case before us, it is determined that Mr. Schlesinger's request for Attorney's fees for Referee's services is in excess of what the Statute allows. His strenuous efforts, however, while within the ambit of his designated powers, were clearly beyond the more prosaic duties contemplated by CPLR 8003.

In the matter *sub judice*, the Referee was forced to defend himself in three actions: two Federal actions and one State action. (Transcript, page 24). These lawsuits were frivolous. The baseless nature of the prior litigation against the Referee has been manifested in the filing injunction imposed on Defendant by Justice Reilly. Additionally, based on the analysis of ***In re Estate of Levine*** **and** ***Yenom Corp.***, *supra,* Defendant, Mr. Swinton's conduct can only be seen as frivolous, thus warranting the awarding of Attorney's fees to Mr. Schlesinger.

As in the case of ***L.I. Head Start Child Development Servs., Inc.***, *supra*, the Referee herein has produced evidence in the form of a spreadsheet detailing both his expended hours and reasonable wages. Upon direct examination of the Referee, he noted that his firm bases his hourly rates upon experience, background, and training. (Transcript,12/19/18, page 26). Furthermore, the Referee contends that his rates are "much less" than that of the prevailing rate for New York City firms. (Transcript, Dated 12/19/18, page 26). By using the Lodestar formula outlined in ***L.I. Head Start Child Development Servs., Inc.***, *supra,* this Court has been able to determine the amount of reasonable Attorney's fees of Mr. Schlesinger by reference to his comprehensive billing records (Exhibit 9).

To further analyze the appropriate approximation of Attorney's fees, the Court also applies the seven (7) factors outlined in ***Diaz v. Audi of America, Inc.*** *supra*. In that case, the Court weighted the Attorney's experience, skills, and knowledge against the difficulty of the matter. (***Id.*** at 831). The record at the hearing in this case revealed that the Referee has been practicing law for forty-two (42) years and is the managing partner of his firm. (Transcript, 12/19/18, page 10). Such factors must be taken into consideration by the Court.

It has long been established that frivolous lawsuits typically warrant the awarding of Attorney's fees as damages to the innocent party as compensation for having to defend themselves over such a matter (***Lawrence Ripak Co. Inc. v Gdanski***, 143 Ad3d 862 [2nd Dept 2016] 39 N.Y.S.3d 223).

Relying upon both Mr. Schlesinger's testimony and the uncontroverted documentary evidence, this Court finds that the following has been proven by a fair preponderance of the credible evidence: The Referee's Exhibit 9 consists of twenty-one (21) pages of billing records of the firm Jaspan Schlesinger. The managing partner's hourly rate is $625.00

dollars per hour. A junior partner's rate is indicated at $495.00 an hour. Associates bill at between $275.00 and $475.00 an hour. Paralegal rates vary from $235.00 to $300.00 an hour. The aforementioned cost for legal services are reasonable for the forum and the type of work expended in a case of this sort. Referring to Exhibit 9, the records dated 9/22/2015 indicate a total of 117 hours. The portions of Exhibit 9 that describe the legal services performed between 9/22/15 and 10/31/15 show a further 15.5 hours. The records for 2/25/16 manifest a further 3.05 hours. The billing records dated December 18th, 2018 indicate 166.66 hours expended between 2/22/16 and 12/18/18. Applying the hours expended against the hour rates of the various professionals employed at the Referee's law firm, the total amount of legal fees incurred amounts to $137,281.05 plus $2,449.51 in disbursements for a total of $139,340.56. (Transcript page 26). This sum is fair and reasonable under the circumstances. There is, however, a statutory impediment to such an award which overrides the general principles enunciated in the case law discussed above.

The Plaintiff argues that the Referee cannot receive an enhanced fee because it was not authorized in the Order of Reference, citing to CPLR 8003 and ***Matter of Charles F.***, 242 AD2d 297, 660 N.Y.S.2d 594 [2nd Dept.1997]. The Court therein held: "...since the record does not contain any agreement concerning the Referee's compensation which was made prior to the Referee's performance of his duties, the Referee's fee must be limited to the statutory per diem fee of $50 (see, CPLR 8003 [a]; ***Majewski v Majewski***, 221 AD2d 420; ***Neuman v Syosset Hosp. Anesthesia Group***, 112 AD2d 1029)." (***Id.*** at 298).

In the case of ***NYCTL 1998-2 Tr. v. Kahan***, 9 Misc. 3d 1119(A), 862 N.Y.S.2d 809 (Sup. Ct. Kings Co. 2005), Justice Demarest described, with great eloquence, the public policy dangers in allowing Referees to remain under compensated. Despite these concerns, however, she ultimately held that CPLR 8003 constrained the Court to find that it was impermissible to award "... payment in excess of $50.00 per day...without written agreement

or prior court authorization." (***Id.***). This rule cannot be circumvented by authorizing enhanced compensation *nunc pro tunc*. (***Id.***). As noted in ***Scher v. Apt***, 100 A.D.2d 582, 583, 473 N.Y.S.2d 521 (2nd Dept. 1984) "...the statutory *per diem* rate should apply under ordinary circumstances unless a different rate has been fixed at some preliminary point in the proceeding." (***Id.*** at 583).

In the case before us, a fair reading of the Order of Reference appointing Mr. Schlesinger confirms the lack of authorization for a fee in excess of the $50.00 *per diem* provided in CPLR 8003.

In answer to the paucity of remuneration for Referees in foreclosure actions, we note that the legislature has raised the *per diem* fee to $350.00. This increased compensation, however, did not go into effect until December 21st, 2018 and there is no indication in the Statute itself or the Session Notes for the new $350.00 fee to be applied retroactively (*see* 2017 New York Assembly Bill No. 5837, New York Two Hundred Fortieth Legislative Session Notes).

Returning to the question of Mr. Schlesinger's Reference fee, the computation method must be discussed.

The $50.00.00 compensation can be awarded, not just for the date of sale, but "... for each day spent in the business of the reference..." (CPLR 8003[a]). We agree with the ***Kahan*** Court that this applies to each day that Mr. Schlesinger devoted himself to perform "some aspect" of his "duties as Referee to sell" (***NYCTL 1998-2 Tr. v. Kahan***, *supra*). This Court finds that appearing in Federal and State Court to defend his actions as a Referee clearly come within the scope of duties for which he is eligible to be compensated.

The documents submitted in connection with this hearing (as well as the hearing before the prior Court) demonstrate that the Referee executed his duties on seventy-seven (77) days between October 25th, 2012 and February 4th, 2016. Seventy-nine days of Referee's work is reflected in the records covering February 4th, 2016 through December 19th, 2018 for a total of one hundred and fifty-six (156) days. Applying the $50.00 *per diem* rate against the days listed above provides a total of $7,800.00. The documented disbursements of $2,449.51 are expenses separate and distinct from the fees addressed in CPLR 8003 and can also be awarded.

The Court is mindful that this sum is but a fraction of the amount requested by Mr. Schlesinger and what the Court found to be a reasonable reflection of his considerable legal services in this case. The operative Statute, however, is absolute and so learned Counsel must be consoled with the truth found in the words of the immortal poet Katherine Philips: "So honour is its own reward and end."

Accordingly, the Court will order the Plaintiff to remit the sum of $10,249.51 to the Referee as compensation for his services and disbursements. The Plaintiff will have leave to submit an amended Judgment of Foreclosure and Sale providing recoupment of this sum from the Defendants.

Settle Order and Judgment.

DATED: OCTOBER 28th , 2019
RIVERHEAD, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court