

Key Growth Inv. LP v Fawer
2019 NY Slip Op 33484(U)
November 25, 2019
Supreme Court, New York County
Docket Number: 157291/2017
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 157291/2017

KEY GROWTH INVEST LP,

MOTION DATE 11/01/2019

Plaintiff,

MOTION SEQ. NO. 005

- v -

MARK FAWER and MELISSA FAWER,

**DECISION + ORDER ON
MOTION**

Defendants.

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NYSCEF Doc Nos. 88-112, 114-123 and 125 were read on this motion to confirm a report of a referee in part.

Motion by Plaintiff pursuant to CPLR 4403 to confirm in part the September 23, 2019 report and recommendation of a referee to report is granted to the extent that the report is confirmed in full, with leave to renew.

BACKGROUND

On March 6, 2019, this Court referred the instant matter to a referee to hear and report on the issue of installment payments to be made to Plaintiff creditor toward the satisfaction of an August 15, 2017 judgment based upon Defendants' December 1, 2016 confession of same.

On April 24, 2019, the parties appeared before the judicial hearing officer, the Hon. Alice Schlesinger, J.H.O., for the first time. Notably, the parties discussed that part of this Court's March 6, 2019 order that directed that Defendants be deposed on or before April 19, 2019. Plaintiff indicated that this Court indicated in a conference call that a request to adjourn the deposition and hearing dates was denied. (April 24, 2019 hearing tr [tr 1] at 6.) Defendants indicated that it was their position that this Court's order gave discretion to the referee to make adjournments. (Tr 1 at 6-7.) Ultimately, the matter was adjourned to April 30 to start the hearing with testimony from Mr. Fawer, with none expected from Mrs. Fawer. The Fawers' dependents are a son who is now a senior in high school at Horace Mann and a daughter attending Emory University and who have not been asked to appear or otherwise be deposed.

On April 30, 2019, and July 11, 2019, the J.H.O. held the hearing. Initially, the J.H.O. denied Plaintiff's motion in limine to preclude certain testimony of the defendant witness Mark Fawer for failure to attend a previously ordered deposition. (April 30, 2019 hearing tr [tr 2] at 3-12; July 11, 2019 hearing tr [tr 3] at 58, lines 18-24.) The J.H.O. noted that the March 6, 2019 order had stated that Defendants' depositions were to take place on or before April 19, 2019 and that this was not done.

It is undisputed between the parties that Mr. Fawer has an annual income of \$1,200,000.00 as a partner at Greenspoon Marder LLP. (Tr 3 at 11, lines 4-17.) It is further

undisputed that Mrs. Fawer has no income. Mr. Fawer testified that his current net income is approximately \$62,000.00 per month (tr 3 at 18, lines 10–11), after taxes paid, including New York State’s maximum 10% garnishment on the Fawers’ approximately \$400,000.00 in unpaid state taxes (tr 2 at 47, lines 8–13), which amounts to approximately \$4,600.00 a month (tr 2 at 54, lines 19–24). Mr. Fawer indicated that he owes over \$3,000,000.00 in unpaid federal taxes, with nothing withheld currently but with a garnishment or other withholding in the amount of approximately \$20,000.00 expected soon, but not known to a certainty to be starting at any given time. (Tr 2 at 48, lines 1–10; tr 3 at 41, lines 6–8; at 61, lines 20–25; at 62, lines 1–10; tr 3 at 41, lines 6–8.)

Mr. Fawer indicated he pays approximately \$9,800.00 a month in common charges on his condominium home, a combination of four units, at 52 East End Avenue, New York, New York 10028. (Tr 2 at 37, lines 22–25; at 38, lines 1–2; at 59, line 11; tr 3 at 58–61.) Mr. Fawer indicated that, in 2017, the condominium was appraised for approximately \$8,000,000.00. (Tr 2 at 41, lines 17–18.)

Mr. Fawer further testified that his first mortgage on the condominium was for about \$3,750,000, which, with principal and unpaid and accruing interest, remains outstanding at approximately that amount, and that he also has a second mortgage. (Tr 2 at 39, lines 3–6; at 40, lines 9–10.) Mr. Fawer stated that monthly amounts due are \$25,000.00 on the first mortgage and \$9,000.00 on the second mortgage, and that no monthly payments have been made in the past year and perhaps none within the past two years on the \$34,000.00 total amount due per month on both mortgages. (Tr 2 at 13, lines 11–23; at 50, lines 18–25; at 51, lines 3–7; tr 3 at 10, lines 18–25; at 12, lines 3–5.) When Plaintiff’s counsel asked, “[w]hat are you doing with those \$25,000 per month in lieu of paying your mortgage?” Defendants’ counsel objected, and the J.H.O. sustained the objection, stating that “[i]t is predicated on certain facts which are not necessarily in evidence, so I will sustain it, certainly, as to form.” (Tr 3 at 12, lines 6–12.)

Testifying further as to Defendants’ expenses, Mr. Fawer testified that he pays about \$3,500.00 a month for various insurance. (Tr 2 at 42, lines 5–8.) Mr. Fawer further testified that he pays the following expenses monthly: his children’s tuition/room and board etc. at \$9,600.00 a month; food at \$4,000.00 a month; clothes at \$3,000.00 a month; entertainment at \$2,000.00 a month; telephone and Internet at \$1,500.00 a month; medical at \$1,000.00 a month, and transportation at \$500.00 a month. (Tr 2 at 51–58.) Mr. Fawer referred to these amounts throughout his testimony as “estimates.” (*See e.g.*, tr 2 at 56, line 11; at 58, line 14.) Mr. Fawer further indicated that his net take home pay goes toward a variety of necessary expenses and specifically cited to the common charges of \$9,800.00 and the insurance payments of \$3,500.00 as to dollar amounts presently being paid monthly. (Tr 3 at 55, 58–61.) Defendants also leased a Mercedes at \$1,100.00 a month, which lease was ending in October, requiring \$300.00 a month in additional insurance plus a garage at an additional \$500.00 a month. (Tr 2 at 20, lines 4–22.) Mr. Fawer then testified that he owed California approximately \$40,000.00 in unpaid state taxes and has been paying installments of \$1,100.00 per month to pay that down. (Tr 3 at 60, lines 22–25.) Mr. Fawer also testified to paying about \$1,000.00 in dues or charitable contributions to his synagogue annually.

As to the prior payment of \$30,000.00 at \$7,500.00 a month pursuant to a stipulation between Plaintiff and Defendants, Mr. Fawer indicated that further payments could not be made to Plaintiff after the New York State garnishment, which began around January 2019. (Tr 3 at 21, lines 9–17.) As to the expected federal deductions toward the approximately \$3,000,000.00 due, the J.H.O. stated that including \$20,000.00 in Mr. Fawer’s monthly expenses presently was “completely speculative” and indicated to the parties not to “calculate payments that are not now being made.” (Tr 3 at 61, lines 20–25; at 61, lines 1–10.)

Mr. Fawer indicated that his son had been awarded a tuition reduction of \$15,000.00 for the upcoming 2019–2020 school year and that his daughter was ineligible for scholarships. (Tr 3 at 66, lines 7–12.)

Mr. Fawer testified that, other than his 401 (k) and that belonging to Mrs. Fawer, Defendants have no investments, savings accounts or the like, and no sources of income other than the salary of Mr. Fawer of \$1,200,000.00 annually plus any discretionary compensation to be determined in or about December 2019. Mr. Fawer testified that Defendants’ two checking accounts had balances of \$900.00 and \$4,000.00 as of April 30, 2019. (Tr 2 at 29, lines 8–21.)

On September 23, 2019, the J.H.O. issued her report. The hearing officer recommended Defendants begin paying \$10,000.00 a month in installment payments. The hearing officer based this amount on her belief that Defendants had the ability to resume the \$7,500.00 payments to Plaintiff as had been agreed upon in the stipulation, “particularly now that they are not paying mortgage charges.” (J.H.O. report at 4.) The J.H.O. further cited to savings from the tuition deduction and the end of the Mercedes lease. (*Id.*)

Plaintiff now moves pursuant to CPLR 4403 to confirm the report of the judicial hearing officer in part to the extent of confirming that the installment payment amount be fixed at \$25,000.00 a month, the amount requested in the initial application of Plaintiff. Plaintiff further moves pursuant to CPLR 3126 for discovery sanctions against Defendants. Defendants oppose and request that the installment payment amount be fixed at \$0.

DISCUSSION

“Generally, New York courts will look with favor upon a Referee’s report inasmuch as the Referee, as a trier of fact, is considered to be in the best position to determine the issues presented.” (*Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705, 706 [1st Dept. 1985].) Here, the Court having reviewed the transcripts and the report of the referee, along with the papers submitted, will confirm the award of the J.H.O. for the reasons stated in her report and under the *Namer* standard.

While Plaintiff argues strenuously that it is entitled to the full \$25,000.00 monthly installment amount it initially sought, the Court is guided by the *Kaufman* test described in its March 6, 2019 decision and order, which is “what the judgment debtor can reasonably afford to pay, taking into consideration his needs, those of his dependents, and *other inroads on his income from other obligations.*” (*Kaufman v Kaufman*, 29 AD2d 922, 922 [1st Dept 1968] [emphasis added].) Here, Defendants do not dispute that they owe at least \$400,000.00 in unpaid

mortgage payments. Further, although Defendants' objection was sustained as to where the \$25,000.00 listed by Mr. Fawer as a monthly expense has been going if not to the bank, the fact remains that Defendants have not provided an actual accounting of their net monthly income less expenses, as most of the "expenses" cited are in fact either estimates, expected future liabilities, or amounts that are due but are not being paid, all of which the J.H.O. suggested should not be used to calculate payments. Although it appears to the Court that Defendants have failed to show that they do not have at least \$25,000.00 a month available now to pay to Plaintiffs, the Court in accounting for the "other inroads" on that income such as the known \$3,000,000.00 of federal tax liability and perhaps nearly \$4,000,000.00 on the first mortgage alone, will defer to the J.H.O. as to what Defendants can reasonably afford to pay.

Nevertheless, the Court did direct a deposition of Defendants to be held on or before April 19, 2019, and there is significant discovery which might yet be had from Defendants. On the record before the Court presently, the Court will fix installment payments to begin forthwith, but the Court will further direct as to the branch of the motion made pursuant to CPLR 3126 that both Mr. and Mrs. Fawer each appear for a deposition by Plaintiff on or before a date certain, not to be adjourned without the approval of this Court, and in any event to be adjourned only in the case of a real emergency. The Court will also direct Plaintiff to serve discovery demands on Defendants by a date certain and for Defendants to respond to the demands by a date certain that will not be adjourned for any reason. Any application made in the papers by Plaintiff for the appointment of a receiver or for monetary sanctions is denied without prejudice.

CONCLUSION

Accordingly, it is

ORDERED that the motion is granted to the extent that it is

ORDERED that the report of the judicial hearing officer, the Hon. Alice Schlesinger, J.H.O., dated September 23, 2019, is confirmed in full, with leave to renew; and it is further

ORDERED that Defendants shall make payment to Plaintiff of \$10,000.00 a month by money order delivered to counsel for Plaintiff on the first business day of each month, beginning December 2, 2019, until the August 15, 2017 judgment is satisfied in full; and it is further

ORDERED that the branch of the motion pursuant to CPLR 3126 is granted to the extent that Plaintiff shall serve discovery demands on Defendants on or before December 5, 2019, and Defendants shall respond on or before December 24, 2019, and defendant Mark Fawer shall appear for a deposition on or before January 6, 2020, which shall continue day by day until completion, and defendant Melissa Fawer shall appear for a deposition on or before January 8, 2020, which shall continue day by day until completion; and it is further

ORDERED that discovery deadlines may not be adjourned without Court approval, and only in the event of a real emergency, pursuant to the procedures outlined in Rules of the Part; and it is further

ORDERED that both parties shall serve a copy of this order with notice of entry on the other within 10 days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that the parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821 on Tuesday, January 14, 2020, for a status conference.

The foregoing constitutes the decision and order of the Court.

11/25/2019
DATE

CHECK ONE: CASE DISPOSED DENIED

APPLICATION: GRANTED SETTLE ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

Robert D. Kalish
HON. ROBERT D. KALISH
J.S.C.

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE