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| Altair 18 Condominium v 42 W. 18th St. Realty Corp. |
| 2021 NY Slip Op 31695(U) |
| May 20, 2021 |
| Supreme Court, New York County |
| Docket Number: 155810/2016 |
| Judge: Barbara Jaffe |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

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INDEX NO. 155810/2016

ALTAIR 18 CONDOMINIUM,
Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

42 WEST 18TH STREET REALTY CORP.,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 85, 91-105 were read on this motion for _____ attorney fees.

Defendant seeks an award of attorney fees incurred pursuant to CPLR 6514(c). Plaintiff partly opposes.

I. PERTINENT BACKGROUND

By summons and complaint dated July 13, 2016, plaintiff commenced this action seeking a declaration pursuant to RPAPL § 1501, *et seq.*, that it is the sole “legal equitable” owner of an easement giving it a right of way across defendant’s lot and an order permanently enjoining defendant from engaging in conduct or acting in any manner to interfere unlawfully with its right to the peaceful and quiet use and enjoyment of the easement. (NYSCEF 1). It thereupon filed a notice of pendency. (NYSCEF 9).

By decision and order dated January 6, 2020, plaintiff’s motion for an order extending the notice of pendency was denied, defendant’s cross motion for summary judgment was granted, and the notice of pendency was cancelled. In addition, pursuant to CPLR 6514(c), defendant was granted costs and expenses occasioned by the filing and cancellation of the notice of pendency,

including reasonable attorney fees incurred in defending the action on its merits. (NYSCEF 92).

The decision was affirmed on appeal. (NYSCEF 93).

II. CONTENTIONS

A. Defendant (NYSCEF 91-102)

Defendant seeks an award of \$302,548.87, composed of \$294,142.92 in fees and \$8,405.95 in disbursements incurred in defending this action. In support, it submits copies of the invoices sent by defense counsel to defendant for legal services and disbursements through February 28, 2021 (NYSCEF 96), and a spreadsheet reflecting services rendered to defend the action (NYSCEF 97). It maintains that it excludes work that does not directly relate to this action, and includes fees incurred in litigating the appeal and the instant fee application. The amount sought is reasonable, defendant asserts, given the time, effort, and skill required to litigate this action, the difficulty of the questions presented, and counsel's experience, reputation, and standing. It further maintains that its hourly rates for attorneys and non-attorneys are reasonable, especially when compared to those charged by plaintiff's counsel in other matters.

B. Plaintiff (NYSCEF 103-104)

In opposition, plaintiff contends that defendant's award should not exceed \$97,867.93, reflecting \$90,366.50 in fees and \$7,501.43 in disbursements, arguing that defendant fails to demonstrate that its hourly rates are reasonable absent evidence of prevailing rates charged in the community by similar firms in similar matters and that its billing rates for dissimilar matters are not probative. Likewise, it argues, defendant should not be awarded fees for non-attorney timekeepers, as defendant provides no evidence of whether those rates are reasonable when compared with those of comparably sized firms. Nor should defendant be awarded fees for attorneys who did not appear as counsel in the action and those that performed redundant and

duplicative work, plaintiff argues. Moreover, the job positions, backgrounds, and experience of those non-attorneys and non-appearing attorneys are not disclosed.

Fees and disbursements incurred before it filed the notice of pendency and those incurred after it was cancelled, including those incurred in litigating the appeal, are not recoverable, plaintiff claims, because even if it prevailed on appeal, the protections afforded by the notice of pendency had been lost, nor are fees incurred in preparing the instant fee application recoverable.

Plaintiff observes that defendant includes work unrelated to this action, and maintains that fees incurred in participating in court-ordered mediation should be excluded as defendant participated in the mediation in bad faith and with no intention of resolving the dispute.

As defendant's invoices include block billing and vague, redundant, excessive, inefficient, and unnecessary, plaintiff seeks a 50 percent reduction of the total requested fees, specifically taking issue with 65.3 hours expended in litigating its motion to dismiss, 24.4 hours for preparing for plaintiff's deposition, 4.6 hours for preparing for a third-party deposition, and 105.9 hours expended on legal briefing.

C. Reply (NYSCEF 105)

In reply, defendant acknowledges a calculation error in its original fee request, and now seeks an award of \$286,460.71, reflecting the exclusion of unrelated work. It asserts that its hourly rates are reasonable and compare favorably with those awarded in other cited cases. The ore-litigation fees, for work that direct benefited the defense of this action, are recoverable as are those incurred on appeal, as the notice of pendency could have been reinstated after a successful appeal. Defendant asserts that fees are recoverable for work performed by all attorneys, even if they did not formally appear in this action, and it denies that the work performed by the non-appearing attorneys was unnecessary or redundant. It denies having acted in bad faith at the

court-ordered mediation, and observes that parties are not required to settle, as long as they appear. Moreover, as the mediation was confidential, defendant argues that any inquiry into the level of its participation is precluded. It reasserts its entitlement to fees incurred in litigating the instant fee application, and objects to a 50 percent reduction, as its work was necessary and not redundant. Defendant disputes plaintiff's proffered examples of alleged unnecessary billing, arguing that the hours expended were reasonable and appropriate for the work performed.

III. ANALYSIS

A. Scope of fee award

Pursuant to CPLR 6514(c), upon the cancelling of a notice of pendency, the plaintiff may be directed to pay "any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." The provision has been interpreted to include all fees "which flow from the wrongful filing and cancellation of such notice" (*No. 1 Funding Ctr., Inc. v H & G Operating Corp.*, 48 AD3d 908, 911 [3d Dept 2008]). Thus, fees incurred before plaintiff filed the notice of pendency are not recoverable (*see Josefsson v Keller*, 141 AD2d 700, 701 [2d Dept 1988] [awarding fees, costs, and expenses "occasioned by the filing of a *lis pendens* by the plaintiff"]). However, as a cancelled notice of pendency can be reinstated on appeal (*see e.g. Sorenson v Bridge Cap. Corp.*, 30 AD3d 1144, 1144 [1st Dept 2006] [reinstating a cancelled notice of pendency]), the expenses defendant incurred in litigating the appeal and defending the cancellation of the notice of pendency are recoverable.

In New York, expenses incurred in litigating a fee application are not recoverable, absent an explicit grant of authority by statute or agreement. (*Sage Realty Corp. v Proskauer Rose LLP*, 288 AD2d 14, 15 [1st Dept 2001], *lv denied* 97 NY2d 608 [2002]). Where, as here, there is no agreement between the parties, and CPLR 6514(c) does not expressly allow for "fees on fees,"

defendant may not recover fees in litigating the instant fee application. (*See e.g. Baker v Health Mgmt. Sys., Inc.*, 98 NY2d 80, 87 [2002] [fees on fees not permitted under Business Corporation Law § 722[a], despite language permitting recovery of fees “incurred as a result of such action or proceeding”]; *546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 121 [1st Dept 2012] [fees on fees not recoverable under Limited Liability Company Law § 420 absent express authority]; *The Jeffrey Deskovic Foundation for Justice v New York City Police Dept.*, 2021 WL 1334174, *1 [Sup Ct, NY County 2021, Jaffe, J.] [fees on fees not recoverable under Public Officers Law § 89[4][c][ii] absent express authority]).

Neither party cites authority reflecting whether fees are recoverable for those incurred during mediation, but as the parties were mandated to appear for mediation by court order, with the threat of sanctions if either party failed to comply with the rules of the alternative dispute resolution program, the fees incurred in attending mediation during the pendency of this action are recoverable. Whether a settlement was reached or defendant was earnest in seeking to resolve the action is immaterial, as attendance at the mediation was mandatory and plaintiff offers no evidence of bad faith.

B. Hourly rates

When determining the reasonableness of fees, the court is to consider “the difficulty of the issues and the skill required to resolve them; the lawyers’ experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved.” (*Morgan & Finnegan v Howe Chem. Co.*, 210 AD2d 62, 63 [1st Dept 1994]). The determination of reasonableness is within the court’s discretion, and the movant bears the burden of establishing that the

reasonableness of the hours expended and rates charged. (*Lancer Indem. Co. v JKH Realty Grp., LLC*, 127 AD3d 1035, 1036 [2d Dept 2015]). However, “trial courts need not, and indeed should not, become green-eyeshade accountants” when determining the proper amount of fees. (*Fox v Vice*, 563 US 826, 838 [2011]).

Plaintiff cites no authority for its contention that non-appearing attorneys’ work is not recoverable. Nor is there a requirement that a movant establish the experience and background for each and every individual timekeeper, especially those engaged in clerical and paralegal work. Defendant submits evidence of the background and experience of the main attorneys that worked on the matter, and the rates for the attorney timekeepers are reasonable and commensurate with their experience. Likewise, defendant’s non-attorney timekeepers’ rates are reasonable and compare favorably to rates permitted in other fee awards. Moreover, the issues central to the litigation were not simple, required multiple motions, and an appeal, and thus, the rates charged are appropriate.

C. Reductions

A review of defendant’s invoices reflect that the entries are sufficiently detailed to determine what work was completed; the entries do not constitute block billing. (*Cf RMP Cap. Corp. v Victory Jet, LLC*, 139 AD3d 836, 840 [2d Dept 2016] [reducing fee award where billing entries vague and nonspecific]). Moreover, defendant’s invoices do not facially reflect unnecessary or duplicative work.

After deducting \$7,986.28 in fees and disbursements incurred before the filing of the notice of pendency and \$18,286.27 in fees and disbursements incurred in preparing and litigating the instant fee application from the \$286,460.71 requested, defendant is entitled to \$260,188.16.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s counsel is hereby awarded \$260,188.16 for attorney fees and disbursements as reasonably incurred in the prosecution of this action; it is further

ORDERED, that the payment shall be delivered to counsel for defendant and written proof of such payment shall be provided to the Clerk of Part 12 within 30 days after service of copy of this order with notice of entry; and it is further

ORDERED, that proof of payment shall be provided to the Clerk of the Part and service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at www.nycourts.gov/suptctmanh).

5/20/2021

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: