

JHAC LLC v Advance Entertainment, LLC
2022 NY Slip Op 30251(U)
January 19, 2022
Supreme Court, New York County
Docket Number: Index No. 654948/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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JHAC LLC,	INDEX NO.	<u>654948/2018</u>
Plaintiff,	MOTION DATE	<u>04/05/2021</u>
- v -	MOTION SEQ. NO.	<u>012</u>
ADVANCE ENTERTAINMENT, LLC, JOSEPH MELI, RESET PARTNERS, LLC, MOSTLY DUNE HOLDINGS, LLC, and JASON LIEBMAN,	DECISION + ORDER ON MOTION	
Defendants.		

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 373, 374, 375, 376, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 414, 415

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

In motion sequence number 012, nonparty Kevin Law moves to confirm the Sixth Report of Daniel J. Leffell, the Court-appointed Special Master, and to adopt the Referee's recommendations in the Sixth Report, compelling payment from the plaintiffs as set forth in that report.

Leffell (Special Master) was appointed by order dated December 16, 2020 to supervise discovery and assist the parties with settlement. (NYSCEF 340, Order.) On February 19, 2021, Law's counsel made an application to the Special Master requesting reimbursement of \$33,953.55¹ in expenses Law incurred in responding to plaintiffs' subpoenas pursuant to CPLR 3111 and 3122(d). (NYSCEF Doc. No. [NYSCEF] 376, Fee Request Letter.) Law asserted that plaintiffs' subpoenas contained 80 requests, albeit some duplicative, resulting in the production of 554 pages of documents. Law

¹ This amount is comprised of \$31,575 in attorney fees and \$2,378.55 in vendor expenses. (NYSCEF 375, Sixth Report.)

also asserted that plaintiffs' aggressive conduct resulted in unnecessary communications, and in turn, more corresponding expenses. (*Id.*) On February 26, 2021, plaintiffs made a cross application to the Special Master to compel Law to submit a sworn statement detailing the circumstances of the alleged destruction of responsive documents and communications. (NYSCEF 375, Sixth Report; NYSCEF 688, Plaintiffs' Cross Application Letter [filed in Index No. 650633/2017].)

On March 19, 2021, the parties appeared before the Special Master to hear and report on these applications.² (NYSCEF 375, Sixth Report.) On April 1, 2021, the Special Master issued the Sixth Report, granting Law's application to the extent that he be reimbursed \$23,928.30, denying a request for future expenses as premature, and denied plaintiffs' cross application. (*Id.*)

"Where, as here, the order of reference was to hear and report, the court required to decide the issue may confirm or reject, in whole or in part, the report of the Referee, may make new findings with or without taking additional testimony or may order a new trial or hearing." (*Interlink Metals v Kazdan*, 222 AD2d 55, 59 [1st Dept 1996] [citations omitted].) "[T]he report of a [r]eferee should be confirmed if the findings therein are supported by the record." (*Oropallo v Bank of Am. Home Loans, LP*, 162 AD3d 1420, 1422 [3d Dept 2018] [internal quotation marks and citations omitted].)

CPLR 3122(d) provides that "[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery." Plaintiffs argue that the expenses, even as reduced, are disproportionate to the discovery produced, equating to approximately \$42.20 a page. However, plaintiffs provide no support showing that a

² There was not unanimous consent for the Special Master to hear and determine. (NYSCEF 375, Sixth Report.)

cost per page review is required or should be considered. Reasonableness should be evaluated by reviewing the expense for the tasks performed related to the nonparty production, not a general cost per page review.

Here, the Special Master did a detailed review of the expenses in question and reported to the court whether those expenses were reasonable. The Special Master addressed each category of tasks challenged by the plaintiffs and analyze the applicable law.

Responsiveness and Privilege Review

The Special Master determined that Law was entitled to the cost of a detailed responsiveness and privilege review. The Special Master did not find the case law cited by plaintiffs persuasive. The court agrees with the Special Master's finding. In *Peters v Peters*, 2016 NY Slip Op 31254[U], *4 (Sup Ct, NY County 2016), the court declined to award attorney's fees with respect to time spent determining which documents to withhold on the basis of privilege or relevancy but awarded attorneys' fees "for gathering and reviewing documents for production." The court relied on *Finkelman v Klaus*, which stated "[w]hile some costs are recoverable by a non-party responding to Subpoenas Duces Tecum, the responding party does bear the costs associated with withholding documents from production due to relevancy or privilege." (17 Misc 3d 1138[A], 1138A, 2007 NY Slip Op 52331[U], *5 [Sup Ct, Nassau County 2007], citing *AYW Networks, Inc. v Teleport Commcns. Group, Inc.*, SFO June 13, 2005, Index No. 4586/1999, Supreme Court Nassau County [Warshawsky, J.].) However, the *Finkelman* court, looking to the federal courts for guidance, then goes on to quote Robert Haig's Commercial Litigation in New York State Courts which states "[w]hile unanimity is lacking, federal courts have held that, in addition to the actual copying costs, the

reasonable cost of labor expended to gather and review documents for production, including attorney's fees, are covered under Rule 45" (*id.* at *6.) and directed plaintiff to pay the costs incurred for production.

The court agrees with the Special Master that it is unclear whether time spent reviewing documents for production could be broken down into review for privilege and relevancy versus other purposes of the review as the *Peters* court ordered. Further, the Finkelman court also is not clear in this distinction, if it is even possible.

Protective Order and Questionnaire

Law seeks \$1,400 in fees for the review of a protective order and drafting and reviewing of a questionnaire created to aid Law in gathering production. The Special Master found that Law was entitled to be reimbursed for these tasks. Specifically, the Special Master determined that these tasks did not fall under the "wholly" unrelated to document production category discussed in *Sands Harbor Marina Corp. v Wells Fargo Ins. Serv.*, 2018 WL 1701944 [EDNY 2018].) In *Sands Harbor*, the EDNY found tasks of attempting to research privilege issues to resist the subpoena and researching cost-shifting and 'fees-for-fees' law to be wholly unrelated. (*Id.* at *7.) While the court believes the questionnaire was perhaps unnecessary, the finding by the Special Master that these tasks were not wholly unrelated is supported by the record.

Document Production Review

The Special Master also concluded that reimbursement of \$4,500 for reviewing the document production is reasonable and in line with Rule 11-c of the Commercial Division of the Supreme Court, Appendix A, Guidelines for Discovery of Electronically Stored Information (ESI) from Nonparties, V., A & B, which "specifically allows for the allocation of such fees and costs 'in accordance with Rules 3111 and 3122(d) of the

CPLR.” (*Walt Disney Co. v Peerenboom*, 2019 NY Slip Op 30181[U], *13 [Sup Ct, NY County 2019] [citation omitted].)

The Special Master distinguished the case relied on by plaintiff, *US Bank Nat. Assn. v PHL Variables Inc., Co.*, 2012 WL 5395249, at *4 (SDNY Nov. 5, 2012), as only addressing a privilege review and distinguishing the case US Bank relied on in turn, *Zubulake v. UBS Warburg LLC*, 216 FRD 289, 290 (SDNY 2003), which held that “the producing party has the exclusive ability to control the cost of reviewing the documents” in an cost-shifting analysis involving parties to the action and not a subpoenaed nonparty. Again, the record supports the Special Master’s finding.

Attorney-Attorney Communications

Plaintiffs objected to reimbursement for communications between Law’s two attorneys, Cohen and Recher, as well as for communications between Law’s attorneys and plaintiffs’ counsel. Again, the Special Master correctly distinguished the case law relied on by plaintiffs in that the cases cited involved the denial of fees between the requesting party’s adversary and the nonparty’s counsel. The court agrees that it would be unreasonable to hold the requesting party responsible for fees generated by communications between the nonparty and opposing counsel. On the other hand, it is reasonable to reimburse a nonparty for communications involving the subpoena between its counsel internally as well as between the nonparty’s counsel and the requesting party.

Objections and Privilege Log

The finding that Law is entitled to reimbursement for the privilege log is supported by the record. As the Special Master correctly points out, CPLR 3122(b) requires that a nonparty either produce all documents and waive any privilege or

withhold documents on privilege grounds and produce a privilege log. It would not be reasonable to require a nonparty to produce a privilege log at its expense or waive the privilege. The same can be said for objections to the subpoena which are required pursuant to CPLR 3122(a) if a nonparty wishes to not waive any privilege.

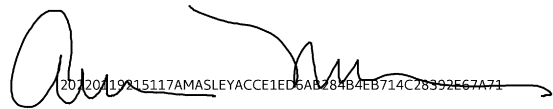
Junior Attorney Rate

Plaintiffs asserted that many of the tasks performed should have been completed by a junior attorney or paralegal. Law countered that his attorneys are solo practitioners. The Special Master correctly pointed out that while Law is entitled to counsel of his choice, plaintiffs should not bear the cost of that decision. The Special Master concluded that one hour of Cohen's time and 32.25 hours of Recher's time should be reimbursed at a reasonable rate for a mid-level law firm associate, which he set at \$253 an hour. The Special Master's finding is supported by the record.

Accordingly, it is

ORDERED that the Law's motion is granted, and the Sixth Report of the Court-appointed Special Master is confirmed; and it is further

ORDERED that plaintiff is directed to reimburse Law \$7,976.10 (1/3 of \$23,928.30) within 30 days of this decision and order.



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1/19/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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