

14 Maiden, LLC v Stempel
2022 NY Slip Op 32562(U)
July 26, 2022
Supreme Court, New York County
Docket Number: Index No. 159587/18
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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14 MAIDEN, LLC et al.,

DECISION and ORDER
AFTER HEARING

Plaintiff(s),

INDEX No.: 159587/18
Mot. Seq.: 003

-against-

Present:
Hon. Lynn R. Kotler, J.S.C.

LEE STEMPEL,

Defendant(s).
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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
OSC, affirmation, exhibits	89-100
N/X-mot, affirmation, exhibits	101-114
N/X-mot, affirmation, exhibits	115-117
Opp to x-motions, exhibits	119-124
Reply Aff	125-126
Reply Aff	127-128
Attorney Brodie's Exhibit to x-motion	131
2/10/22 Transcript	132
2/17/22 Interim Order	133
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6/3/22 Order	160
Plaintiffs' Post-Hearing Memo	163
Receiver's Post-Hearing Memo	164

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The court's interim order dated February 17, 2022 is herein incorporated by reference. In said order, the court directed that an evidentiary hearing be held to determine the reasonableness of the commission requested by Receiver Kahn in her cross-motion for an order approving a commission of \$475,000 representing 5% of the

sale proceeds plus expenses. That hearing was subsequently held on April 27, May 2 and May 4, 2022. Receiver Kahn testified and called Michael DeCheser of Cushman Wakefield as a witness. The court then granted the parties an opportunity to submit post-hearing memoranda, which they have done. Upon the testimony and evidence adduced at the hearing, the court finds as follows.

Briefly, plaintiffs commenced this action pursuant to RPAPL § 901 *et seq.* and moved for a judicial partition by private sale of the building located at 14 Maiden Lane, New York, New York (the “building”) and the appointment of a receiver to oversee the sale and disburse the sale proceeds. Defendant *pro se* opposed that motion. In a decision/order dated December 9, 2019, the court granted plaintiffs’ motion. In an order dated March 9, 2021, the court appointed Receiver Kahn as receiver to sell the building.

CPLR § 8004[a], entitled “Commissions of receivers”, governs commissions due to a receiver. That statute provides in pertinent part as follows:

[a] Generally. A receiver, except where otherwise prescribed by statute, is entitled to such commissions, not exceeding five per cent upon the sums received and disbursed by him, as the court by which he is appointed allows, but if in any case the commissions, so computed, do not amount to one hundred dollars, the court, may allow the receiver such a sum, not exceeding one hundred dollars, as shall be commensurate with the services he rendered.

Thus, Receiver Kahn may receive a maximum commission of 5%, but the court may award a lower percentage (*see i.e. Key Bank of New York v. Anton*, 241 AD2d 482 [2d Dept 1997]). The receiver bears the burden of justifying the commission sought (*id.*; *see also De Nunez v. Bartels*, 264 AD2d 545 [1st Dept 1999]). Evidence of mismanagement or wasting of assets is grounds to deny a full commission (*see i.e. Kaufman Properties & Associates, LLC v. 2 Court Street, LLC*, 51 AD3d 1206 [3d Dept

2008] citing *Constellation Bank N.A. v. Binghamton Plaza Inc.*, 236 AD2d 698 [3d Dept 1997]). Meanwhile, extent and duration of services along with success and expediency are factors courts consider when setting a receiver's commission (*Constellation, supra* at 700; *De Nunez, supra*).

This case has languished for years and significant judicial resources have been devoted to this case: motion practice, numerous conferences, oral arguments on motions and now the hearing at issue. After years of litigation, the building was finally sold for \$9.5 Million. The sale occurred, in part, through the diligent efforts of Receiver Kahn.

At the hearing, the court finds that Receiver Kahn demonstrated that she applied her substantial experience, knowledge, and capabilities to achieve the results obtained in this proceeding. Receiver Kahn testified in the narrative for two days about the work she performed as receiver and was cross-examined by plaintiffs' counsel. Voluminous documents were submitted to the court evidencing her extensive communications made in order to fulfill her duties, as well as her time records. There is no dispute that Receiver Kahn faced obstacles at inception in terms of obtaining necessary insurance and disputes with plaintiffs' counsel about the Receiver's authority to market and sell the property. For example, plaintiffs' counsel took the position that Receiver Kahn should set a minimum price for the building. As Receiver Kahn correctly pointed out, she did not have the authority to do so. Nor would this court give her such authority. Plaintiffs brought this application to sell the property and the court was not going to permit this case to languish even further while plaintiffs held out for the best offer they could possibly obtain, with no end in sight. The court plainly explained this to plaintiffs' counsel

before Receiver Kahn was appointed at a conference on March 9, 2021. So it is surprising to the court that plaintiffs' counsel faulted Receiver Kahn for not setting a minimum price for the building.

Receiver Kahn has further established that she performed her duties in an excellent manner while marketing the building and that her primary concern was how to get the best price for the parties while protecting them. Before she obtained a broker, Receiver Kahn negotiated with Cushman Wakefield regarding the broker's commission. Receiver Kahn rejected Cushman Wakefield's first proposed fee structure and got Cushman Wakefield to reduce its commission to 3.5% if they were the sole broker and 4.5% if they co-brokered the sale. Receiver Kahn called Michael DeCheser of Cushman Wakefield who corroborated Receiver Kahn's testimony about these negotiations as well as Receiver Kahn's actions during the course of the marketing and sale of the building. That plaintiffs objected to the proposed fee structure and urged Receiver Kahn to get Cushman Wakefield to agree to a 3% commission does nothing to undercut the receiver's position. Rather, this fact demonstrates that Receiver Kahn was receptive to and did in fact work with the parties at all steps in this proceeding.

Finally, Receiver Kahn demonstrated that she performed admirably in the events leading up to and including the sale of the building. The ultimate purchaser came in at the last minute, a new contract of sale was drafted, said purchaser was sophisticated and demanding and the Receiver handled major title exceptions and other closing issues, including preserving the parties' ability to do tax-saving 1031 exchanges. Indeed, it was Receiver Kahn who proposed every order in this case, to which neither plaintiffs nor defendant had any written opposition to. The Receiver has more than met

her burden to demonstrate her entitlement to the full 5% statutory commission.

When Receiver Kahn originally cross-moved for her commission, plaintiff's counsel attacked her "qualifications, background, expertise and how she performed her duties in a discourteous and unprofessional manner" (interim order dated February 17, 2022 p. 6). This was bold, as the court noted at both oral argument on the motion and in the interim order. Indeed, after plaintiffs' motion for summary judgment was granted and they were directed to settle an order (decision/order dated December 9, 2019), the proposed order lacked the necessary language that was customary in an order appointing a receiver. This order should have been routine but was apparently not for plaintiff's counsel. Then, plaintiffs did nothing for over a year until the court calendared the action for a conference on March 9, 2021 (see order dated March 1, 2021). Less than a year after she was appointed, the property was sold. The contrast between the course of this litigation before and after Receiver Kahn's appointment is stark.

At the hearing, plaintiff's counsel took a different tack from the arguments raised in opposition to the receiver's cross-motion. Now, plaintiffs argue that Receiver Kahn is entitled to compensation at an hourly rate or some other reduction because a full 5% commission would result in a windfall. Contrary to the parties' contention, a receivership is not compensated on an hourly rate as a matter of course.

There is no dispute that Receiver Kahn is entitled to some amount as compensation for her role in this case. Plaintiffs posit a minimum of \$83,870.02 for the 161.4 hours Receiver Kahn spent at her usual hourly rate of \$515 an hour. However, hourly compensation does not compensate Receiver Kahn for the real risks and responsibilities she undertook as a receiver in this case. Plaintiff's counsel offers that

the court should deduct from Receiver Kahn's compensation the amount paid to Cushman Wakefield, the broker which marketed the property and received a 3% fee of \$285,000 as well as the sum of \$30,000 paid to Attorney Jordan Brodie for legal fees, leaving \$128,485.46 for Receiver Kahn as 5% of the funds deposited into the receiver's account. The court disagrees. Neither Cushman Wakefield nor Attorney Brodie performed a receiver's duties. In addition to commissions, a "receiver is also entitled to be reimbursed for [allowable] expenses [which] include . . . the expenses of any necessary . . . legal or other services" (2 Weinstein, Korn & Miller CPLR Manual § 33.05 (2021); see *316 Second Ave. NH v. 316 Second Ave. LLC*, 2014 NY Slip Op 31342[U] (Sup Ct NY Co 2014); *JDM Long Is., LLC v U.S. Bank N.A.*, 2014 WL 6632644, 2014 US Dist LEXIS 163320 [EDNY Nov. 21, 2014]; see also *Tit. Guar. & Trust Co. v Adlake Corp.*, 161 Misc 27, 28 [Sup Ct, Queens County 1936]). Thus, the court's prior authorization of reimbursement for Cushman Wakefield's 3% broker's fee and Attorney Brodie's legal fees should not be taken from Receiver Kahn's compensation in this matter.

The most compelling argument raised by plaintiffs is that a 5% fee would result in a windfall and that Receiver Kahn's fee must be limited to "the fair value of the services rendered" citing 22 NYCRR 36, §36.4(c)(4). As an aside, plaintiffs also cite the New York Rules of Professional Conduct Rule 1.5(a) and NYSBA Ethical Opinion 1202 (as to fixed fees) (Oct. 2, 2020), but this rule and ethics opinion are not on point as they relate attorneys fees generally, not compensation for a court appointee.

Receiver Kahn's fee is set pursuant to the provision which governs her appointment, Part 36. The court is mindful that her fee must therefore necessarily be

limited to the fair value of the services rendered. As the court already stated, Receiver Kahn is entitled to more than a payout at her usual hourly rate because as Receiver, she carried significant exposure and liability in this role. Receiver Kahn contrasts 22 NYCRR §36.4(c)(4), asserting that she “has found no case that cited this section to reduce -- or even measure -- the Receiver’s commission”. However, Part 36 governs appointments by the court, and thus, her fee cannot exceed the fair value of the services rendered.

While Receiver Kahn did not specifically testify about her liability as receiver of the building, there can be no dispute that she took on a very real liability in this role. Moreover, the court appointed Receiver Kahn and put its trust in her as a qualified Part 46 appointee to fulfill her responsibilities to the best of her ability. This trust cannot simply be compensated on an hourly rate.

Thus, the court finds that 5% of the full amount of monies deposited into the receiver’s account, to wit, \$8,851,734.13, is a sum that will compensate Receiver Kahn for the fair value of the services she rendered. The percentage is taken from an amount less than the sum requested by Receiver Kahn in this application, but as Receiver Kahn stated in her affirmation in limited opposition to plaintiffs’ motion for partial disbursement dated January 28, 2022, only \$8,616,871.71 was wired by the purchaser into the receiver’s account plus the balance of the contract deposit of \$234,862.42. A receiver is entitled to a commission “upon the sums received and disbursed by [them]” (CPLR § 8004[a]). The court finds that Receiver Kahn is entitled to a 5% commission based upon the extraordinary work she has performed, the incredible result achieved in terms of the final sale price and the fact that she was able to bring this litigation to its conclusion in

such a relatively short period of time, factoring in the self-represented defendant and the issues he presented.

As for Receiver Kahn's request for an opportunity to submit invoices in support of her request for reimbursement of her expenses, the court will grant Receiver Kahn such an opportunity by way of settling an order on notice supported by an affirmation and proper documentation such as the invoices.

Accordingly, it is hereby **ORDERED** that after a hearing, the court finds that Receiver Kahn is entitled to a 5% fee on the total sum of monies deposited into her receiver's account, \$8,851,734.13; and it is further

ORDERED that the court grants Receiver Kahn an opportunity to request reimbursement of her expenses by settling an order on notice supported by an affirmation and proper documentation such as the invoices within 90 days from the date of this order.

This constitutes the decision and order of the court.

Dated: New York, New York
July 26, 2022

So Ordered:



Hon. Lynn R. Kotler, J.S.C.