

Wilmington Trust, N.A. v Elmwood NYT Owner, LLC
2023 NY Slip Op 30190(U)
January 12, 2023
Supreme Court, New York County
Docket Number: Index No. 850176/2020
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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WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE HOLDERS OF CD 2016-CD2 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-CD2, WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE REGISTERED HOLDERS OF JPMDB COMMERCIAL MORTGAGE SECURITIES TRUST 2017-C5, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-C5, DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CITIGROUP COMMERCIAL MORTGAGE TRUST 2017-P7, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-P7, WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CD2017-CD3 MORTGAGE TRUST, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-CD3,

INDEX NO. 850176/2020

MOTION DATE _____

MOTION SEQ. NO. 018 019

DECISION + ORDER ON MOTION

Plaintiff,

- v -

ELMWOOD NYT OWNER, LLC, LANDINGS NYT OWNER, LLC, OAKWOOD NYT OWNER, LLC, WALLKILL NYT OWNER, LLC, BOARD OF MANAGERS 229 WEST 43RD STREET CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, GLOBAL SECURITY GROUP INC., and JOHN DOE NO. I THROUGH JOHN DOE NO. XXX,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 018) 244, 245, 246, 247, 248, 249, 250, 251

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 019) 233, 234, 235, 236, 237, 238, 239, 240, 241

were read on this motion to/for REARGUMENT/RECONSIDERATION

Upon the foregoing documents, it is

In motion seq. no. 018, counsel for the receiver, Hunton Andrews Kurth, moves for interim counsel fees and expenses for February 2022 to May 2022 totaling \$97,712.92. In motion seq. no. 019, plaintiffs move to renew and reargue its default judgment motion or, alternatively, to extend the time to serve a defendants Elmwood NYT Owner, LLC, Landings NYT Owner, LLC, Oakwood NYT Owner, LLC, and Walkkill NYT Owner, LLC. Both motions are unopposed.

Fees Motion

To determine the reasonableness of the requested fee, the court is guided by the following factors:

(1) “the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented”; (2) “the lawyer’s experience, ability, and reputation”; (3) “the amount involved and benefit resulting to the client from the services”; (4) “the customary fee charged by the Bar for similar services;” (5) “the contingency or certainty of compensation”; (6) “the results obtained”; and (7) “the responsibility involved.”

(*Matter of Freeman*, 34 NY2d 1, 9 [1974].) These factors apply in commercial cases. (Commercial Litigation in New York, 4th ed., 2015, § 53:7, Court-Awarded Attorneys’ Fees.) The court also relies on its own knowledge of hourly rates charged by private firms which practice in the Commercial Division, New York County. (See *Miele v New York State Teamster Conference Pension & Retirement Fund*, 831 F2d 407, 409 [2d Cir 1987].)

The court finds the rates charged by the attorneys in the firm (blended rate of \$675/hr) and support staff (blended rate of \$250/hr) are reasonable. During the four month period at issue, counsel and staff expended approximately 169 hours on tasks including negotiating and drafting new leases, negotiating and drafting amendments to existing leases, negotiation, drafting, and finalizing settlement with the Board of Managers of the Condominium, drafting and serving notices of default,

notices of termination, and eviction papers regarding a tenant, reviewing and providing input into Receiver's monthly reports, and preparing and filing Orders to Show Cause for approval of two lease amendments, interim counsel fees, and approval of the settlement agreement.

Based on the work that was necessary in Hunton's representation of the Receiver, the court finds that the approximately 169 hours expended by Hunton over four months is reasonable. The representation of the Receiver, as detailed above, required the negotiation and drafting of several agreements, lease amendments and motions. Nevertheless, certain reductions are necessary. For example, billing an hour drafting an affirmation of service and e-filing such on the NYSCEF docket is unwarranted and billing 1.40 hours analyzing and redacting four months of invoices for privilege is unreasonable. Thus, the court will reduce Hunton's fees by \$1,500, awarding Hunton \$96,212.92 in attorneys' fees and expenses.

Renew and Reargue

On April 6, 2022, this court held in abeyance plaintiffs' motion for a default judgment against Elmwood NYT Owner, LLC, Landings NYT Owner, LLC, Oakwood NYT Owner, LLC, Wallkill NYT Owner, LLC (collectively, Borrower Defendants), permitting plaintiff an opportunity to supplement the record. (NYSCEF 215, Decision and Order [seq. no. 013].) This court found that it was not clear whether a receptionist at the Borrower Defendants' office building person "had the authority, or apparent authority, to accept service." (*Id.* at 4.) There was also an issue as to whether the default motion was timely. (*Id.* at 5.)

Plaintiffs' motion is granted. As stated in the underlying decision and order, on January 29, 2021, Janice Mac Avoy, Esq. contacted the plaintiffs' counsel and stated

that she was retained by the Borrower Defendants. Ms. Mac Avoy allegedly requested a 30-day extension to respond to the complaint, and there was an alleged agreement to extend the Borrower Defendants' time to answer until March 1, 2021. On March 2, 2021, the Lenders' counsel reached out via email to Ms. Mac Avoy inquiring if there would be a responsive pleading; the inquiry went unanswered. Plaintiffs point out several occasions where the Borrower Defendants' purported counsel appeared before the court. As noted in the previous decision Ms. Mac Avoy is listed as counsel for the Borrower Defendants on NYSCEF for e-filing notifications, but Ms. Mac Avoy has not filed a formal notice of appearance.

On this motion, plaintiffs' counsel points to several occasions when Ms. MacAvoy or someone else at her firm appeared before the court. (NYSCEF 234, Fiander aff ¶¶ 6 [“Ms. Mac Avoy, on behalf of Borrowers, was invited to and did appear for the status conference on March 5, 2021.”], 7 [“Ms. Mac Avoy, on behalf of Borrowers, was also invited to and did appear for another conference on March 16, 2021.”], 8 [“Ms. Mac Avoy's colleague, Shira Sandler, appeared on behalf of Borrowers at another conference on May 14, 2021.”] These informal appearances, where counsel never objected to service or jurisdiction or stated that the appearance was for a limited purpose, is sufficient to show that defendants were served with the complaint in this action. (*Matter of Sessa v Bd. of Assessors of Town of N. Elba*, 46 AD3d 1163, 1164 [3d Dept 2007] “[S]ervice of process can be waived by respondent simply by appearing in the proceeding and submitting to the court's jurisdiction. A formal appearance is effected by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer, and a party can also appear informally

by substantially participating in the litigation.”] [internal quotation marks and citations omitted].)

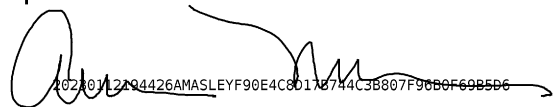
Plaintiffs also now offer emails evidencing their agreement to extend the Borrower Defendants’ time to answer to March 1, 2021. (NYSCEF 236, January 30, 2021 Email; *Annis v NY City Tr. Auth.*, 108 AD2d 643, 645 [1st Dept 1985] [“While it is undisputed that the additional proof offered on renewal was in existence at the time of the original application, until a decision was rendered, petitioners could not anticipate that Special Term would have denied the application because of the absence of corroborating proof as to petitioner’s involvement in the derailment.”].)

Accordingly, it is

ORDERED that Hunton’s request for interim fees is approved in the amount of \$96,212.92; and it is further

ORDERED that plaintiffs’ motion to renew and reargue motion seq. no. 013 (default judgment) is granted; and it is further

ORDERED that, upon renewal and reargument, the court vacates its prior order (NYSCEF 215), to the extent that it held plaintiffs’ motion in abeyance as to the borrower defendants, and grants plaintiffs’ motion for a default judgment against defendants Elmwood NYT Owner, LLC, Landings NYT Owner, LLC, Oakwood NYT Owner, LLC, and Walkkill NYT Owner, LLC in all respects.



1/12/2023

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE