

Soriano v EAN Holdings LLC

2023 NY Slip Op 31305(U)

April 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 524896/2017

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13 day of April 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
DOMINICK SORIANO and ELIONORA SORIANO,

Index No: 524896/2017

Plaintiffs,

DECISION & ORDER

-against-

EAN HOLDINGS LLC, ELRAC LLC d/b/a
ENTERPRISE RENT A CAR and DAVID GOODE,

Defendants.
-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendants' motion.

<u>Papers</u>	<u>NYSCEF Nos.</u>
Notice of Motion and Affidavits/Affirmations Annexed.....	82-91
Notice of Cross Motion and Affidavits/Affirmations Annexed.....	92-94
Affirmation in Opposition Papers.....	93-94; 96
Reply to Opposition Papers.....	97

Upon the foregoing papers, Plaintiff's outgoing counsel, Louis Grandelli, P.C. ("Grandelli"), moves (MS #4) for an Order directing Plaintiff's incoming counsel The Barnes Firm ("Barnes") to pay its share of the attorney's fees in the underlying action as set forth in Special Referee Miriam P. Sunshine's report dated September 23, 2021 ("referee's report"), plus a 9% statutory interest on the sum; Barnes moves (MS#5) for an Order pursuant to CPLR § 2201 staying Grandelli from proceeding to enforce the referee's report pending the determination of Barnes' appeal.

Motions # 4 and # 5

The underlying action is for personal injuries sustained by Plaintiff, Dominick Soriano (“Plaintiff”) arising from a two-vehicle collision that occurred on August 18, 2017 on the westbound Belt Parkway near the 103rd Street exit, in Brooklyn, New York. It is undisputed that following the accident, Plaintiff initially retained Grandelli and that Grandelli received an offer of \$435,000.00. Moreover, it is also undisputed that after Plaintiff decided to switch attorneys and retain Barnes, Barnes obtained an offer of \$750,000.00, which the Plaintiff accepted. Subsequently, Barnes moved (MS#3) for an Order awarding Barnes 95% of the attorneys fees and setting this matter for a hearing to determine the proportionate share of attorneys’ fees between Plaintiff’s former and current counsel. The Court referred the issue of attorney fees and costs to a referee to hear and report¹. Special Referee Miriam Sunshine (“Referee Sunshine”) conducted a hearing on August 12, 2021, and thereafter issued a report on September 23, 2023. Based on the documents and presentations, at the hearing, the referee recommended that Grandelli be awarded 60% of the net contingency fee and Barnes be awarded 40% of the net contingency fee.

In support of its motion, Grandelli submitted, *inter alia*, copies of the referee’s report, Grandelli’s letter correspondence to Barnes, dated October 8, 2021 and email correspondences between attorneys at Grandelli and Barnes, dated October 12, 2021. Grandelli argued that it attempted to ascertain a check in the amount of \$145,000 from Barnes in accordance with the referee’s report to no avail as Barnes contended that the filing of a Notice of Appeal stays its obligation to pay the sum due. In opposing Barnes’ contentions, Grandelli further argued that there are no grounds to stay enforcement of the referee’s report regarding the division of attorneys fees as Barnes failed to post an undertaking pursuant to CPLR § 5519.

In opposition to Grandelli’s motion, Barnes submitted a copy of the transcript from the hearing held on August 12, 2021 before Referee Sunshine. Barnes argued that because Grandelli largely handled the preliminary work, while Barnes handled the bulk of discovery and negotiations instrumental, expending almost double the amount of hours² to bring the underlying

¹ JHO/Special Referee Order dated June 16, 2021

² Pursuant to the referee’s report Grandelli expended approximately 20 hours on the case and Barnes expended approximately 35 hours on the case.

matter to a successful resolution, there was no basis to support the Referee Sunshine's determination that Grandelli is entitled to 60% of the fee.

In support of its cross motion, Barnes's only argument that the court should stay all further proceedings by Grandelli seeking to enforce its charging lien is in the interest of justice since there is a high likelihood that it will be successful on appeal.

The factors used to determine the reasonableness of legal fees include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (*Matter of Askin*, 113 AD3d 72, 83 [2d Dept. 2012]; see *Matter of Barich*, 91 AD 3d 769, 770 [2d Dept. 2012]). An award of a reasonable attorney's fee is within the sound discretion of the Supreme Court (*Boruch v Rommi Realty, LLC*, 212 AD3d 590, 592 [2d Dept. 2023]; *Wodecki v Vinogradov*, 125 AD3d 645, 645 [2d Dept. 2015]).

A referee derives authority from an order of reference by the court (see CPLR §§ 4311, 4317; *Alleyne v Grant*, 124 AD3d 569, 569 [2d Dept. 2015]). Generally, the recommendations and report of a referee will not be disturbed when they are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility (see *Hudson v Smith*, 127 AD3d 816, 816 [2d Dept. 2015]; *IG Second Generation Partners, L.P. v Kaygreen Realty Co.*, 114 AD3d 641, 642 [2d Dept. 2014]; *Spodek v Feibusch*, 55 AD3d 903, 903 [2d Dept. 2008]). A referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor (*Matter of Piller v Schwimmer*, 135 AD3d, 766,769 [2d Dept. 2015]; see *Last Time Beverage Corp. v F & V Distrib. Co., LLC*, 98 AD3d 947, 950-951 [2d Dept. 2015]).

A notice of appeal does not automatically stay enforcement of an order, since a stay is a statutory privilege which may only be granted if certain statutory requirements are complied with. CPLR § 5519 governs the stay of enforcement of orders that are the subject of an appeal. Pursuant to CPLR § 5519(a)(2) "[s]ervice upon the adverse party of a notice of appeal. . . stays all proceedings to enforce the judgment or order appealed from pending the appeal . . . where the judgment or order directs the payment of a sum of money, and an undertaking in that sum is

given" (*see* CPLR § 5519[a][2]). In addition, CPLR § 2201 provides that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just" (*see* CPLR § 2201). Thus, a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications and potential waste of judicial resources" (*Matter of Hersh*, 198 AD3d 773, 775 [2d Dept. 2021], quoting *Matter of Tenebaum*, 81 AD3d 738, 739 [2d Dept. 2011]).

The Court notes that although Barnes timely appealed from Referee Sunshine's determination, it neglected to obtain a CPLR § 5519 stay pending the appeal by failing to post an undertaking. The Court is not convinced that Barnes will be prejudiced or irreparably harmed without a stay. Thus, in exercising its discretion, the Court denies Barnes' request for a stay pending the determination of the appeal.

Accordingly, it is hereby

ORDERED, that Grandelli's motion (MS #4) for an Order directing Barnes to pay its share of the attorney's fees in the underlying action as set forth in Special Referee Miriam P. Sunshine's report dated September 23, 2021, plus a 9% statutory interest on the sum, is granted; and it is further

ORDERED, that Grandelli is entitled to judgment in the amount of \$145,000.00 plus 9% statutory interest from September 24, 2021; and it is further

ORDERED, that Barnes' cross motion (MS#5) for an Order pursuant to CPLR § 2201 staying Grandelli from proceeding to enforce the referee's report pending the determination of Barnes' appeal is denied.

Issues not addressed are either moot or without merit.

This constitutes the Decision and Order of the Court.

ENTER



HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice