Franklin v Equity Residential

2025 NY Slip Op 34975(U)

December 16, 2025

Supreme Court, New York County

Docket Number: Index No. 651360/2016

Judge: Leslie A. Stroth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12M**

Justice

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JOHN FRANKLIN,

Plaintiff,

- v -

EQUITY RESIDENTIAL, ERP OPERATING LIMITED PARTNERSHIP, LP, EQR -71 BROADWAY, LLC (F/K/A EQR-71 BROADWAY A, LLC), EQR-71 BROADWAY B, LLC,EQR-71 BROADWAY C, LLC,EQR-71 BROADWAY D, LLC,EQR-71 BROADWAY E, LLC,EQR-71 BROADWAY F, LLC

Defendant.

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INDEX NO. 651360/2016

MOTION DATE 02/19/2025

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170

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

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from Defendants' receipt of tax benefits under the Real Property Tax Law § 421-g program and the alleged collection of rent overcharges from tenants at 71 Broadway in Manhattan. Following motion practice and settlement negotiations, the Court approved a class action settlement resolving liability and damages. The settlement left unresolved the amount of reasonable attorneys' fees owed to Class Counsel.

By order of reference, the Court appointed a Special Referee to hear and report on the issue of the *computation* of attorneys' fees. The Referee conducted a two-day evidentiary hearing in December 2024 and thereafter issued a report recommending a fee award based primarily on

the lodestar method[1] and excluding certain evidence proffered by Plaintiff, including a March 16, 2021 email from Defendants' counsel addressing the amount of rent overcharge damages paid and available to the class.

Plaintiff moves, in Motion Sequence 005, pursuant to CPLR 4403 to reject the Report and Recommendation of Special Referee Joseph Burke dated January 24, 2025 and entered January 31, 2025 (NYSCEF Doc. No. 129). Defendants oppose and cross-move to confirm the Report in full. Plaintiff timely moved to reject the Report, and Defendants cross-moved to confirm it.

LEGAL STANDARD

Pursuant to CPLR 4403, a court may confirm or reject a referee's report, in whole or in part. It is the function of a referee to determine the issues presented, resolve conflicting testimony, and make credibility determinations. Generally, courts will not disturb a referee's factual findings so long as they are substantiated by the record. The recommendations of a special referee are entitled to great weight because, as the trier of fact, the referee has the opportunity to see and hear the witnesses and to observe their demeanor (see *Poster v Poster*, 4 AD3d 145, 145 [1st Dept 2004]).

However, a referee's recommendations are not binding on questions of law, nor may a referee decide issues beyond the scope of the reference. (*MT/Z & Z Co., Inc. v Zimmering & Zinn, Inc.*, 260 AD2d 168, 169 [1st Dept 1999]). Where a referee applies an incorrect legal standard, excludes admissible evidence as a matter of law, or employs an erroneous analytical framework, the Court must reject or modify the report accordingly (see CPLR 4403).

[1] The lodestar method is calculated by finding "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Healey v. Leavitt*, 485 F.3d 63, 71 [2d Cir. 2007] *citing Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 [1983].

DISCUSSION

Although the Referee's factual findings regarding the work performed by Class Counsel are entitled to deference, the selection of the proper methodology for determining attorneys' fees is a legal question for the Court.

Courts addressing attorneys' fees in class actions routinely apply the percentage-of-recovery method as the primary measure, with the lodestar calculation serving only as a cross-check. "In testing the reasonableness of the negotiated fee, the Court first looks to the percentage of the recovery approach. As noted by the Court in *Willson,* federal courts around the country, including federal district courts in New York, are turning away from the lodestar/multiplier approach and are returning to the percentage of the recovery approach." (*Michels v Phoenix Home Life Mut. Ins.*, 95/5318, 1997 WL 1161145, at *31 [Sup Ct Jan. 7, 1997]). This approach aligns counsel's incentives with the interests of the class and avoids the distortions inherent in a purely time-based analysis (see *Masters v Wilhelmina Model Agency, Inc.*, 473 F3d 423, 432 [2d Cir 2007]; *In re HSBC Bank U.S.A., N.A., Checking Account Overdraft Litig.*, 49 Misc 3d 1211(A) [NY Sup 2015].

Here, the record demonstrates that Class Counsel's efforts made approximately $1.97 million in rent overcharge damages available to the class. In analogous class actions arising from the same statutory framework, courts have approved fee awards in the range of 25% to 27.5% of the recovery. Under these circumstances, the Court finds that the percentage-of-recovery method must serve as the primary framework. Accordingly, the Referee's use of the lodestar as the governing methodology cannot be confirmed. Moreover, "[t]he court prefers the percentage of recovery method to determine an award of attorneys' fees in a class action. The lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives

attorneys an incentive to raise their fees by billing more hours..Nevertheless, the lodestar method can serve as a cross-check on the reasonableness of fees a court awards under a percentage of recovery approach." (*Cox v Microsoft Corp.*, 26 Misc 3d 1220(A) [Sup Ct 2007]) (internal citations omitted).

Therefore, while the lodestar is not the primary measure, it remains relevant as a cross-check on the reasonableness of a percentage-based fee. Any such lodestar analysis, however, must employ "the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*Saul v Cahan*, 50 Misc 3d 1228(A) [NY Sup 2016]).

In applying these factors, the Court first considers the time and labor required and the complexity of the issues presented. The record reflects that this litigation spanned nearly a decade, involved novel and unsettled questions concerning the scope of the RPTL § 421-g program, required class certification, motion practice addressing threshold liability, and protracted settlement negotiations culminating in court approval. Class Counsel undertook this representation on a fully contingent basis and advanced the litigation through periods of significant legal uncertainty, including intervening appellate authority bearing directly on the merits. These circumstances support a lodestar that reflects the demands of complex, high-risk class litigation rather than routine landlord-tenant matters.

The Court next considers counsel's experience, ability, and reputation, as well as the customary fee charged for similar services. Class Counsel has substantial experience litigating

complex commercial and class matters, including rent overcharge claims arising from specialized statutory schemes. Generally, reasonable hourly rates are those in "'the district in which the court sits' for 'similar services by lawyers of reasonably comparable skill, experience, and reputation.'" (*Marshall v Deutsche Post DHL, 2015 Wage & Hour Cas* 2d (BNA) 191336 [EDNY Sept. 21, 2015] *quoting Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 232 [2d Cir.2006]).

Importantly, prevailing market evidence in the record demonstrates that Defendants' own counsel performed comparable work in this litigation and billed at rates exceeding $1,300 per hour in 2019 and more than $1,700 per hour by 2024. In assessing reasonable fees for a lodestar cross-check, Courts may use evidence of opposing counsel's fees as a benchmark for a reasonable fee. (*Hart v BHH, LLC, 15CV4804,* 2020 WL 5645984, at *10 [SDNY Sept. 22, 2020]).

The Referee nonetheless adopted a $500 hourly rate for Class Counsel while expressly declining to determine or account for defense counsel's rates. Where, as here, uncontroverted evidence establishes that defense counsel commanded significantly higher rates for similar work, the adoption of a materially lower rate for Class Counsel without a reasoned explanation grounded in market evidence cannot be sustained.

The Court also considers the contingent nature of the representation and the results obtained. Class Counsel assumed the risk of nonpayment and succeeded in making approximately $1.97 million in rent overcharge damages available to the class. Here, a corrected lodestar calculated using prevailing market rates would yield a multiplier well within the range routinely approved in complex class actions, thereby confirming the reasonableness of a percentage-based fee.

Accordingly, because the lodestar method adopted by the Referee was not grounded in prevailing market evidence, failed to account for the complexity, risk, and results of the litigation, and did not properly consider comparator rates reflected in the record, it cannot serve as a reliable cross-check. On re-referral, the lodestar must be recalculated using a corrected hourly rate reflective of prevailing market comparators, and then applied solely as a cross-check on the percentage-of-recovery fee.

The Referee excluded a March 16, 2021 email from Defendants' counsel pursuant to CPLR 4547. That ruling was erroneous as a matter of law.

CPLR 4547 bars evidence of offers to compromise when offered to prove liability or damages. It does not bar the admission of factual admissions, even when made in the context of settlement discussions (see *PRG Brokerage Inc. v Aramarine Brokerage, Inc.*, 107 AD3d 559, 560 [1st Dept 2013]. The email at issue did not propose consideration to resolve the fee dispute; rather, it quantified rent overcharge damages paid and remaining available to class members.

Accordingly, the email constitutes a factual admission and must be considered in determining the recovery generated by Class Counsel.

Plaintiff further seeks an award of fees incurred in litigating the amount of attorneys' fees ("fees on fees") pursuant to Real Property Law § 234. The Court declines to award such relief.

Although Real Property Law § 234 renders reciprocal a lease provision permitting the recovery of attorneys' fees by a landlord, the statute does not mandate an award of fees-on-fees in every case. Rather, the determination remains subject to the Court's discretion and the procedural posture of the dispute. Here, the issue referred to the Special Referee was limited to the computation of attorneys' fees arising from the settlement, not the adjudication of a separate entitlement to additional fees incurred in post-settlement fee litigation.

Moreover, the Court notes that the fee dispute arose not from Defendants' enforcement of lease provisions against the class, but from a disagreement over the appropriate methodology and amount of a class counsel fee award following settlement approval. Under these circumstances, an award of fees-on-fees would unduly expand the scope of the settlement's fee provisions and is not warranted (see *David Z. Inc. v Timur on Fifth Ave., Inc.*, 7 AD3d 257 [1st Dept 2004]; *IG Second Generation Partners, L.P. v Kaygreen Realty Co.*, 114 AD3d 641, 643 [2d Dept 2014].

Because the Referee applied an incorrect legal framework, excluded admissible evidence, and relied on a lodestar method unsupported by prevailing market rates, the Court declines to confirm the Report in full.

The recalculation of attorneys' fees applying the percentage-of-recovery method as the primary measure, utilizing a corrected lodestar as a cross-check, admitting the March 2021 factual admission, and including fees-on-fees is, however, a factual exercise appropriately addressed by the Special Referee. The matter is therefore re-referred for further proceedings consistent with this Decision and Order.

The court has considered the remaining arguments of the parties and finds such unavailing. Accordingly; it is hereby

ORDERED that Plaintiff's motion pursuant to CPLR 4403 is granted to the extent that the Special Referee's Report is rejected insofar as it applied the lodestar method as the primary measure of attorneys' fees; and it is further

ORDERED, that the percentage-of-recovery method shall be applied as the primary measure, with a corrected lodestar method used solely as a cross-check; and it is further

ORDERED, that the March 16, 2021 email is admitted as a factual admission relevant to determining the recovery made available to the class; and it is further

ORDERED, that Plaintiff's application for fees-on-fees pursuant to Real Property Law § 234 is denied; and it is further

ORDERED, that Defendants' cross-motion to confirm the Special Referee's Report in full is denied; and it is further

ORDERED, that the matter is re-referred to Special Referee Joseph Burke to recalculate the attorneys' fee award consistent with this Decision and Order.

12/16/2025
DATE

LESLIE A. STROTH, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[X]	REFERENCE