

<b>Terrastone Ellwood L.P. v Gateway Ventures, LLC</b>
2012 NY Slip Op 33850(U)
November 28, 2012
Supreme Court, New York County
Docket Number: 108892/10
Judge: Carol E. Huff
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32

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TERRASTONE ELLWOOD L.P., : Index no. 108892/10

Plaintiff, :

- against - :

GATEWAY VENTURES, LLC; NEW YORK :  
DEPARTMENT OF TAXATION AND FINANCE; :  
NEW YORK CITY, DEPARTMENT OF :  
TRANSPORTATION, PARKING VIOLATIONS :  
BUREAU; THE CITY OF NEW YORK (Environmental :  
Control Board); THE CITY OF NEW YORK :  
(Department of Housing Preservation and Development); :  
et. al., :

Defendants. :

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**FILED**  
NOV 29 2012  
COUNTY CLERKS OFFICE  
NEW YORK

CAROL E. HUFF, J.:

In this mortgage foreclosure action with respect to property located at 1 Sherman Avenue and 97-105 Ellwood Street, New York, New York (the "Property"), the Property's first receiver Carol Lilienfeld moves for an order approving her final account; authorizing and ratifying payment of outstanding bills to the court-appointed attorney, managing agent and others; approving payment of commissions to the receiver; and authorizing that the bond be discharged.

Lilienfeld was appointed receiver by order of this Court dated August 9, 2010. She was discharged, at her request, by order dated July 13, 2012, and a successor receiver was appointed to replace her.

Lilienfeld also seeks commissions of \$79,000 (of which \$18,000 has already been paid) representing five percent the \$1,581,882.39 she collected during her receivership. She also seeks

an order providing for payment to the court-appointed law firm Borah, Goldstein, Altschuler, Nahins & Goidel ("Borah Goldstein") totaling \$19,204.60; to the court-appointed managing agent The Beson Group totaling \$13,215.92; to contractor Petroleum Tank Cleaners totaling \$4,431.88; and to SJ Fuel Company totaling \$4,770.45.

Plaintiff strongly opposes payment of full commissions to Lilienfeld. Plaintiff attorney states that the first receiver's

neglect of serious issues at the Property, including her failure to perform necessary and emergency repairs, and refusal to cooperate with [plaintiff] contributed to the significant deterioration in condition of the Property during her receivership. As a result, during Lilienfeld's receivership, the Property was placed into New York City's Alternative Enforcement Program, resulting in various violations owed to the New York City Department of Taxation and Finance which liens have, and will continue to substantially and unreasonably decrease the value of the property.

Jason S. Leibowitz 8/22/12 Aff. at 2.

Lilienfeld disputes these assertions and details the difficulties she faced in her receivership as well as plaintiff's alleged lack of cooperation. She submits the affidavit of a building manager in support of her position.

A receiver may be compensated with commissions "not exceeding five percent . . . as the court by which he is appointed allows. . . ." CPLR 8004(a). The receiver "is not entitled to the 5% statutory maximum as of right as the . . . court clearly has the discretion to award a lower percentage." Coronet Capital Co. v Spodek, 202 AD2d 20, 27 (1<sup>st</sup> Dept 1994).

Because there are numerous issues of fact presented that cannot be determined on the papers submitted, the matter is hereby referred to a Judicial Hearing Officer or Referee to hear and report on the issue of whether and in what amount the fees requested by the first receiver should be discounted to an amount reasonable in relation to the services rendered and the results

achieved.

With respect to the payments to the court-appointed attorneys and managing agent and to others, the motion is granted. Although plaintiff states generally that the motion should be denied in its entirety, it does not offer specific objections to these payments. Plaintiff also does not specifically object to the final account presented by the first receiver or to the discharge of the bond, and these aspects of the motion are granted as well.

Accordingly, it is

ORDERED that those parts of the motion seeking approval of the final account and discharge of the bond are granted, and with respect to them Lilienfeld is directed to settle order with notice; and it is further

ORDERED that that part of the motion seeking payment to Borah Goldstein, The Beson Group, Petroleum Tank Cleaners and SJ Fuel Company is granted, and with respect to it Lilienfeld is directed to settle order with notice; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of whether and in what amount the fees requested by the first receiver should be discounted to an amount reasonable in relation to the services rendered and the results achieved; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the

calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of the Part (which are posted on the website of this Court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above, and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion, and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section

202.44 of the Uniform Rules for the Trial Courts, and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

Dated: NOV 28 2012

  
**CAROLE E. HUFF**  
J.S.C.

**FILED**  
NOV 29 2012  
COUNTY CLERKS OFFICE  
NEW YORK