

Sachs v Adeli

2013 NY Slip Op 31212(U)

June 7, 2013

Sup Ct, New York County

Docket Number: 603930/2003

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

-----X
RICHARD B. SACHS,

Plaintiff,

-against-

Index No.: 603930/2003
Motion Date: 11/27/12
Motion Seq. No.: 025

KATAYONE ADELI, SEAN P. BARRON
KLOTHES, LLC, KLOTHES (NY), LLC
and JOHN DOES, 1-10.

Defendants.
-----X

The following papers, numbered 1 to 3, were read on this motion to confirm, in part, and reject, in part, the special referee's report.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: X Yes No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM
DECISION.

FILED

JUN 10 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 7, 2013

Eileen Bransten
Hon. Eileen Bransten

- 1. CHECK ONE:X CASE DISPOSED NON-FINAL DISPOSITION
 - 2. CHECK AS APPROPRIATE: Motion Is: X GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK AS APPROPRIATE: Cross- Motion Is: GRANTED X DENIED GRANTED IN PART OTHER
 - 4. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X
RICHARD B. SACHS,

Plaintiff,

-against-

Index No.: 603930/2003
Motion Date: 11/27/2012
Motion Seq. No: 25

KATAYONE ADELI, SEAN P. BARRON
KLOTHES, LLC, KLOTHES (NY), LLC
and JOHN DOES, 1-10.

Defendants.

FILED
JUN 10 2013
NEW YORK
COUNTY CLERKS OFFICE

EILEEN BRANSTEN, J.

In this motion, Plaintiff Richard B. Sachs ("Sachs") moves, pursuant to CPLR 4403, to confirm in part, and reject in part, the report of Special Referee Justice Ira Gammerman entered May 30, 2012 (the "Referee's Report"). Defendant Katayone Adeli ("Adeli") cross-moves, pursuant to CPLR 4403, to confirm in part, and reject in part, the Referee's Report. For the reasons stated below, Sachs's motion is granted and Adeli's cross-motion is denied.

Background¹

Adeli is a clothing designer who, through her company Klothes (NY), LLC, entered into a factoring loan arrangement with The CIT Group (the "CIT loan"). Adeli also executed a personal guaranty of the CIT loan (the "Guaranty"). The Guaranty provided for recovery

¹ All facts in this section are undisputed unless otherwise indicated.

of “all costs and fees incurred in enforcing the debt,” and specifically included attorneys’ fees. After Adeli defaulted on the debt, Sachs, her business partner, purchased the debt from CIT and sought to enforce the Guaranty. On April 5, 2005, after several rounds of appeals, Sachs successfully obtained summary judgment on the Guaranty and sought to enforce his right to attorneys’ fees.

By decision dated April 5, 2005, Justice Karla Moskowitz referred the issue of attorneys’ fees to a special referee to hear and report. That hearing was stayed by order of Special Referee Nicholas Doyle, dated September 12, 2005, pending resolution of Adeli’s bankruptcy case. Adeli was denied discharge in bankruptcy on August 2, 2010 after unsuccessfully arguing before the Ninth Circuit Court of Appeals. Once the automatic bankruptcy stay was lifted, Sachs re-filed Justice Moskowitz’s reference to a special referee in order to conclude the matter of attorneys’ fees.

The special referee held three days of hearings on the fee issue between October 2011 and February 2012. In the Referee’s Report, the special referee recommended that the Court deny Sachs’s request for \$60,167.22 in disbursements due to a lack of support in the record. *See Referee’s Report*, p. 4. Next, the special referee recommended that the Court grant Sachs’s request for attorneys’ fees in the amount of \$838,874.00. *See Referee’s Report*, p. 6. Finally, the special referee recommended that any interest on amounts already paid to attorneys be denied due to a lack of evidence memorializing the dates of payment. However,

the special referee also stated that “when you [Sachs] apply to Judge Bransten, if you want to recompute interest . . . if there are checks in the record that [] came in without objection and those checks indicate payment, the date of that check . . . would be the date on which interest on that amount would be computed.” See Referee’s Report, pp. 5-6.

Sachs moves to confirm the award of attorneys’ fees, reject the denial of interest and does not contest the denial of disbursements. Adeli moves to reject the award of attorney’s fees and confirm the denial of interest and disbursements.

Discussion

CPLR 4403 permits a court to confirm or reject a referee’s report, in whole or in part. It is well settled that “where questions of fact are submitted to a referee, it is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility, and generally courts will not disturb the findings of a referee ‘to the extent that the record substantiates his findings and they may reject findings not supported by the record.’” *Campaign for Fiscal Equity, Inc. v. State*, 29 A.D.3d 175, 196 (1st Dep’t 2006), *aff’d as modified*, 8 N.Y.3d 14 (2006) (quoting *Kardanis v. Velis*, 90 A.D.2d 727, 727 (1st Dep’t 1982)).

The Court has reviewed the Referee’s Report and the papers submitted by the parties, and finds that the Referee’s Report should be confirmed, with one exception. The Court

finds that, given the testimony and evidence submitted regarding invoices and checks, and the parties' stipulation that all attorney invoices submitted to Sachs were paid, interest should be awarded. *See* Plaintiff's Post Fee Hearing Ex. 7, p. 2.

A. *Attorney's Fees*

Adeli argues, principally, that Sachs's efforts to "collect" on the Guaranty after securing the judgment are not compensable under the clause that provides for attorneys' fees incurred "enforcing" the guaranty. *See* Defendant Adeli's Memorandum of Law in Support of Cross-Motion ("Def.'s Brief") pp. 8-9. The Court finds no merit to this argument because the word "enforce" means "to compel a person to pay damages for not complying with (a contract)." *Black's Law Dictionary* (9th ed. 2009). In this context, there is no meaningful difference between "collecting" on a judgment and "compel[ling] the person to pay" according to the provisions of the Guaranty.

The sole case cited by Adeli that involves a provision awarding attorneys' fees is not simply unavailing, but supports Sachs's position. *See Schaefer v. Smigel*, No. 1:08 Civ. 6439(JFK), 2009 WL 174795 (S.D.N.Y. Jan. 22, 2009). In *Schaefer*, the parties had settled previous litigation pursuant to a settlement agreement, and the defendant delivered a promissory note to the plaintiff. *Schaefer*, at *1. The defendant subsequently defaulted on the note and the plaintiff brought suit to enforce the settlement agreement. *Schaefer*, at *2.

Although the court in *Schaefer* distinguished between language in the settlement agreement awarding attorneys' fees when "collecting [a] judgment" as opposed to "obtain[ing] a judgment," it also found that the promissory note accompanying the settlement agreement contained broader language. *Schaefer*, at *3. The court ultimately awarded fees because it found that the promissory note's provision awarding "all costs of collection," included efforts to obtain a judgment. *Schaefer*, at *3. Here, the Guaranty requires Adeli to pay "all costs and fees incurred in enforcing this Guaranty." The Guaranty contains a similar provision, with a similarly broad meaning, to the promissory note in *Schaefer*.

Adeli also argues that the fees averred by two witnesses who testified through a video link should be disallowed. Adeli contends that because Sachs made no showing of undue hardship in bringing the witnesses for live testimony, their statements should be stricken from the record. However, Adeli has made no claim of prejudice due to the internet-based testimony. Further, even if it was error to allow such testimony, the error was harmless because Adeli did not challenge the testimony's veracity and the testimony is supported by documentary evidence.

Finally, Adeli argues that the fees charged were unreasonable because there were no novel issues, the bankruptcy trial lasted only one and one-half days and one attorney raised his fee after switching firms. *See* Def.'s Brief p. 11. Defendant ignores the extensive history of motions, appeals, and multiple forums in which this case was pursued. *See* Plaintiff's

Post Fee Hearing Exs. 15-18. The case was appealed all the way to both the Court of Appeals and the Ninth Circuit. *Id.* Further, Plaintiff received a 65% discount on attorney's fees after Adeli filed bankruptcy. *See* Plaintiff's Post Fee Hearing Ex. 8, pp. 48-49. Given that the attorneys were already charging at their usual hourly rates, the Court concludes that the discount makes the fees all the more reasonable.²

B. *Interest*

The Court finds sufficient evidence in the record to support an award of interest. The checks and invoices listed in the exhibits, the testimony given regarding Sachs's prompt payment, and the stipulation that the all invoices were paid, provide competent evidence on which to award interest pursuant to CPLR 5001.

Sachs seeks interest on four main components of the special referee's attorneys' fee award. First, Sachs seeks interest on \$152,495 for services rendered by Aaron Richard Golub, Esquire, P.C., starting from September 16, 2005, prior to Adeli's filing of bankruptcy. *See* Plaintiff's Fee Hearing Ex. 1. Second, Sachs seeks interest on \$46,840 for services rendered by Aaron Ricahrd Golub, Esquire, P.C., starting from September 7, 2010,

² Attorneys' fees incurred during the litigation of bankruptcy issues by a creditor's attorney, unlike those of the debtor's attorney, are recoverable pursuant to a contract, i.e. the Guaranty, enforceable under state law. *See Travelers Cas. and Sur. Co. of Am. v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 448, 453 (2007).

after Adeli's bankruptcy filing. *See* Plaintiff's Post Fee Hearing Ex. 30. Third, Sachs seeks interest on \$543,518 for services rendered by Stutman, Tresiter & Glatt, PC, starting from September 7, 2008. *See* Plaintiff's Fee Hearing Ex. 3. Finally, Sachs seeks interest on \$88,959 for services rendered by Greenberg Traurig LLP, starting from January 15, 2011. *See* Plaintiff's Fee Hearing Exs. 4, 6; Plaintiff's Post Fee Hearing Exs. 32, 33, 34, 35.

In sum, the Court confirms the special referee's recommendation that Sachs receive attorneys' fees of \$838,874 and that the disbursements be denied, but rejects the special referee's recommendation regarding interest and awards interest to Sachs.

Conclusion

For the reasons set forth above, it is hereby

ORDERED that Plaintiff Richard B. Sachs's motion to confirm the referee's report in part, and reject the referee's report in part, is granted in full; and it is further

ORDERED that Defendant Katayone Adeli's cross-motion to confirm the referee's report in part, and reject the referee's report in part, is denied; and it is further

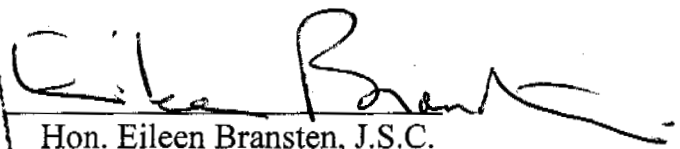
ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff Richard B. Sachs and against defendant Katayone Adeli, the sum of \$838,874.00 for attorney's fees; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff Richard B. Sachs and against defendant Katayone Adeli, in the sum, as calculated by the Clerk, equal to the statutory rate of interest on the following amounts and dates: (1) \$152,495 from September 16, 2005 until the entry of judgment; (2) \$46,840.04 from September 7, 2010 until the entry of judgment; (3) \$543,518 from September 7, 2008 until the entry of judgment; and (4) \$88,959 from January 15, 2011 until entry of judgment.

This constitutes the decision and order of the Court.

Dated: New York, New York
 June 7, 2013

ENTER:


 Hon. Eileen Bransten, J.S.C.

FILED
 JUN 10 2013
 NEW YORK
 COUNTY CLERK'S OFFICE