ITAL Assoc. v Axon
2016 NY Slip Op 32410(U)
December 9, 2016
Supreme Court, New York County
Docket Number: 650163/2014
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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ITAL ASSOCIATES, ANTHONY LEPORE, LOUISE LEPORE, GABRIELLE LEPORE and ELENORE LEPORE, individually and on behalf of HARRISON STREET DEVELOPMENT ASSOCIATES a/k/a 18 HARRISON DEVELOPMENT ASSOCIATES, a New York limited partnership,

Plaintiffs,

-against-

THOMAS AXON, 18 HARRISON STREET CORP., HARRISON STREET REALTY CORP., RMTS LLC, and AXON ASSOCIATES, INC.,

Defendants,

-and-

LORAINE BUETTI, STEPHEN J. LOVELL, and JAYNE SPIELMAN,

Additional Defendants.

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DECISION AND ORDER

Index No.: 650163/2014
Mot. Seq. No.: 005

O. PETER SHERWOOD, J.:

In motion sequence number 005, plaintiffs' counsel Samuel Goldman & Associates ("SGA") moves for an award of $1,225,771.91 in attorney's fees plus $43,264.41 in expenses out of the purported "$3,502,205.47 common fund" payout SGA claims it recovered on behalf of eight of nine limited partners in the Harrison Street Partnership ("Partnership"). Alternatively, SGA seeks payment for the value of SGA's services and a *pro rata* share of expenses on *quantum meruit*/unjust enrichment theories against three limited partners, Stephen Lovell ("Lovell"), The Spielman Group ("Spielman") (together "Lovell/Spielman") and Lorraine Buetti ("Buetti") (collectively, "Additional Defendants"), who, SGA argues, obtained the benefit of SGA's services without paying for them.[1]

[1] SGA asserts that under *quantum meruit*/unjust enrichment, it is entitled to $334,301.44 in attorney's fees plus $11,799.38 in expenses against Lovell and Buetti each, as well as $222,867.62 in attorney's fees plus $7,866.24 in expenses against Spielman, for an aggregate fee of $891,470.50 and $31,465.00 in expenses.

Lovell/Spielman (represented by Jeffrey N. Levy, Esq.) oppose the motion, along with Buetti (represented by Steven D. Feinstein, Esq.) arguing, *inter alia*, that in May 2016 Justice Coin rejected similar arguments in a related matter and that there was zero risk to SGA when it decided to take on this case because the defendants had already agreed to sell the subject property before SGA filed the complaint. They argue that the lawsuit has been a pretext to allow SGA to make a claim for attorney's fees.

I. Background

a. The Action

The Partnership's sole asset was a fully occupied commercial property located at 18 Harrison Street in a Manhattan neighborhood commonly referred to as Tribecca ("18 Harrison Street Property"). The Partnership acquired the property in 1985 for $500,000 (*see* NYSCEF Doc. No. 24, ¶ 7). Defendant 18 Harrison Street Corp. ("18 Corp.") was the general partner. It is owned and controlled by defendant Thomas Axon ("Axon").

In October 2013, Goldman drafted a termination letter to Axon and requested books and records (Buetti Aff., ¶ 9). The letter was drafted for Lovell's signature but Lovell did not sign it. The letter was sent on October 31, 2013 by ITAL Associates. On November 5, 2013, more than two months before SGA filed this lawsuit, Axon agreed to sell both the 18 Harrison Property and commercial property located at 185 Franklin Street in the same neighborhood ("185 Franklin Property"), which is the subject of another action discussed below (Italiano Aff., ¶ 17).

On January 17, 2014, SGA brought this action, naming Buetti, Lovell and Spielman as "Additional Defendants." The complaint asserts eight (8) causes of action, two of which are derivative claims, on behalf of the Partnership. The two derivative claims sought an accounting of money allegedly taken by Axon and a declaratory judgment nullifying certain transactions undertaken by Axon, including an allegedly fraudulent million dollar mortgage the Partnership issued to Axon. On March 7, 2014 Lovell/Spielman filed their answer in which they admitted all material allegations in the complaint, joined plaintiffs as to all eight causes of action, and added a crossclaim against the defendants seeking appointment of a receiver (NYSCEF Doc. No. 17). Thereafter, plaintiffs and defendant conducted limited discovery and plaintiffs continued to challenge alleged "looting" of the Partnership by the general partner (*see* NYSCEF Doc. No. 65). At the same

time, 18 Corp. considered a number offers that did not get past the due diligence period[2] (affirmation of Samuel Goldman ¶¶ 25, 29-30). On February 3, 2015, the Partnership entered into a Contract of Sale of the Harrison Street Property, with a closing scheduled for April 3, 2015 (*id.* ¶ 29). The closing was delayed as the limited partners negotiated their claims against Axon.

On July 27, 2015 the Purchaser commenced a lawsuit against the 18 Harrison Street Property seeking specific performance of the Contract of Sale (*Eighteen Harrison Management LLC v 18 Harrison Street Development Associates, LP*, Index No. 157640/2015) ("Related Action"). That case was transferred to this court on October 9, 2015 as it related to this action, although this court had been managing the matter informally prior to that time. On July 30, 2015, SGA filed a proposed order to show cause in this action that sought to allow the sale to close and to escrow all of the funds from the sale (affirmation of Jay A. Gayoso, exhibit 4). A similar order to show cause was filed on August 3, 2015. Both motions were withdrawn (NYSCEF Doc. No. 49).

b. The Parties

For this action, in July and November of 2013, SGA signed retainer agreements[3] with two families (Italiano and Lepore) who made up five of the limited partners of the Partnership. These families are not affiliated with either the Partnership's general partner, defendant 18 Harrison Street Corp., or its principal, defendant Axon.[4] In aggregate, plaintiffs owned 14.85% of the Partnership, 18 Harrison Street Corp. owned 1% and other Axon companies owned limited partnership interests aggregating to 44.55%. The remaining three limited partners – Lovel, Spielman and Buetti owned 14.85%, 9.90% and 14.85% of the Partnership, respectively, aggregating 39.60%. They too are not affiliated with the Axon defendants.

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[2] Buetti never responded to the complaint but on October 12, 2015 Steven Feinstein put in an appearance on her behalf in which he also acknowledged receipt of the summons and complaint (*see* NYSCEF Doc. No. 64). Despite her default, the court permitted Buetti to participate in the proceedings, including settlement negotiations.

[3] Under the retainer, SGA receives 30% of any recovery if collection or settlement occurs within 75 days of the filing of the Complaint, 35% if it occurs between 75 days after filing of the Complaint and 90 days before trial and 40% if it occurs afterwards (affirmation of Samuel Goldman, exhibit A [Plaintiffs' Legal Services Contingent Fee Agreement]).

[4] SGA's individual plaintiff clients are Ital Associates ("Ital"), Anthony Lepore, Louise Lepore, Gabrielle Lepore, and Elenore Lepore.

c. The 185 Franklin Case

SGA previously pursued another case against Axon and a different limited partnership where Italiano and Lepore were limited partners and Axon controlled the general partner (*Ital v Axon*, Index No. 153449/2014 [Sup Ct New York County] [Coin, J.] ["185 Franklin Case"]). Lovell and Spielman were not limited partners in that partnership, although Lovell's mother-in-law was. After settling the 185 Franklin Case, SGA made a fee application against the limited partners who did not sign its contingency agreement. In that application, SGA made substantially similar arguments to those being made on this motion. In a Decision and Order dated May 6, 2016, Justice Ellen M. Coin denied the fee application (affirmation of Jeffrey N. Levy, exhibit 1), holding, *inter alia*, that New York Partnership Law § 115-a (5) is not applicable to recoveries by individual partners, that SGA had a conflict of interest, that there was no common fund, that there was no agreement to pay fees or be bound by the retainer agreement, and that there was no unjust enrichment. Notably, SGA was paid $1.7 million in fees by the 26 clients that had signed contingency fee retainers.

d. SGA's Interactions with the Additional Defendants

Buetti first became involved with SGA in July 2013 (aff. of Loraine Buetti ¶ 9) when her son, Jarret Buetti, began to investigate her options with respect to the Franklin Street and Harrison Street partnerships (*id.* ¶ 5). Buetti had a 2.75% ownership interest in the Franklin Street Partnership compared to a 14.85% interest in the Harrison Street Partnership (*id.* ¶ 3). In 2013, Jayne Italiano of Ital Associates, a limited partner in both the Franklin Street and Harrison Street partnerships, told Buetti that her friend, Samuel Goldstein, was trying to get all of the 28 non-Axon affiliated limited partners in the Franklin Street Partnership to sign a contingency retainer with SGA (*id.* ¶ 6). On July 10, 2013, Buetti signed (*id.* ¶ 9). She claims Goldman pressured her to sign a separate retainer agreement in connection with the Harrison Street Partnership, after Axon had already taken steps to sell the properties (*id.* ¶¶ 13-16). Buetti alleges that Goldman told her that whether she signed an agreement with him or not, SGA was entitled to 30 to 45 percent of the money Buetti would receive from a sale of the 18 Harrison Street Property (*id.*). She told Goldman that she would not under any circumstances allow him to represent her in the Harrison Street Partnership matter (*id.* ¶ 16).

In fall 2013, SGA contacted Lovell and Spielman and requested that they sign the SGA contingency retainer. Initially, Lovell and Spielman retained Mark Mermel, Esq. to review the

retainer and advise them. SGA claims this resulted in SGA sending a revised retainer on December 11, 2013 setting forth hourly rates (affirmation of Samuel Goldman ¶ 44). In February 2014, after being served the complaint, Lovell and Spielman hired the Tashlik Goldwyn Crandell Levy LLP ("Tashlik") to represent them.

e. The Settlement

On November 18, 2015, this case was settled in principle at a conference before this Court. Pursuant to the settlement, the eight (8) non-Axon related limited partners are to receive $4.5 million. A settlement agreement was not submitted to the court and approved until March 28, 2016 due to a dispute between SGA and Tashlik over handling of SGA's claim for an award of attorney fees from the payout to Lovell, Spielman and Buetti. In the end, the court directed that $600,000 allocable to Lovell, Spielman and Buetti be placed in escrow pending the court's determination of SGA's fee application (affirmation of Jeffrey N. Levy ¶ 51) and that the remainder of the settlement funds be released promptly. As a result of the settlement, $955,828.77 was allocated to each of Buetti and Lovell and $637,219.18 went to Spielman.

f. SGA Efforts in this Litigation

SGA and the Additional Defendants offer starkly different characterizations of SGA's efforts in this action. Buetti alleges that SGA submitted two Orders to Show Cause, which it later withdrew, but made no effort to get a judicial determination of whether any of the allegations in its complaint were valid. SGA took no depositions and did no further discovery. Lovell/Spielman say that after filing the complaint, SGA did nothing more than await sale of the building to collect its fee. The record before the Court reveals that SGA did much more (*see, e.g.*, NYSCEF Doc. No. 65).

SGA states it expended 1,528.1 hours for a total of $768,744.46 of attorney time and spent $43,264.41 in expenses but submitted no time records. Buetti replies that this number of hours is incredible as there were no depositions, complicated motion practice, nor a trial. She emphasizes that the amount of hours claimed approximates what a single attorney bills working almost full time for a year. On April 27, 2016, Buetti's attorney scheduled a meeting at SGA's office to review SGA's filed (affirmation of Jay A. Gayoso ¶ 4). SGA refused to turn over its time sheets or files (*id.* ¶ 3). SGA received (or will receive) over $330,000 in fees from plaintiffs.

II. Arguments

a. Plaintiffs' Arguments

SGA argues that a fee recovery is warranted under the "common fund" doctrine, which provides "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole" (*Boeing Co. v Van Gernert,* 444 US 472, 478 [1980]). "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense" (*Mills v Elec. Auto-Lite Co.*, 396 US 375, 392 [1970]). The "common fund" doctrine is characterized not by the application of rigid rules and formulas, but rather by the great flexibility with which it is applied to promote its two underlying purposes (*Seinfeld v Robinson,* 246 AD2d 291 [1st Dept 1998]). SGA argues that it created a $3,502,205.47 common fund through "a comprehensive investigatory process and negotiations, rather than protracted litigation" (affirmation of Samuel Goldman ¶ 3, NYSCEF Doc. No. 104). SGA also maintains that New York Partnership Law § 115-a (5) permits the Court to award reasonable attorney's fees if, as in the case here, there is a recovery by settlement.

As to the size of its fees request, SGA argues that fees equal to 35% of the recovery are reasonable under the percentage of the recovery method. The fee arrangement provides for a sliding scale contingency fee, which increases as the matter progresses. SGA asserts that this fee arrangement reflects the market rate because the limited partners in this case and the 185 Franklin case had attempted for years to locate a law firm that would take the cases on a contingency fee basis, which only SGA agreed to do (aff. of Lawrence Italiano ¶¶ 7-8). This fee arrangement was accepted by 26 of the 28 limited partners in the 185 Franklin case and five of the eight limited partners in this case. SGA asserts that courts routinely approve attorney's fees of 1/3 of the settlement (*see e.g., Lopez v Dinex Grp., LLC,* 2015 NY Misc LEXIS 3657 [Sup Ct Oct. 6, 2015]). Courts have also approved higher fees (*see, e.g., Hart v RCI Hospitality Holdings,* 2015 US Dist. LEXIS 126934 [SDNY Sept. 22, 2015] [approving attorney's fees and expenses equal to 36.7% of a $15 million settlement fund]).

SGA maintains that the fee requested is also reasonable when the Lodestar method is applied. The total value of the time claimed by plaintiff's counsel is $768,744.46 and the fee requested is 1.59 times this amount. SGA offers to provide the court with documentation if requested, including complete time charge records.

SGA adds that the requested fee is reasonable under other factors courts consider. SGA asserts it took significant risk when it took on the case without any guarantee of compensation, there were no prior judgments, the firm is highly experienced, the matter was highly complex and required a detailed line-by-line analysis of 15 years of Partnership financial data. SGA also argues that counsel for the Additional Defendants entered the case only after SGA had conducted its initial investigatory work.

SGA also argues that it is entitled to fees based on *quantum meruit* and unjust enrichment concepts. A party may not accept the benefits of legal work knowingly performed without paying the reasonable value of such services (*see Reingold & Tucker v Golia,* 2013 NY Slip Op 50103[U] [Sup Ct 2013]). In *Golia*, a law firm defended Golia in three cases. While the firm received retainer agreements in two cases, Golia delayed signing the third and hired new counsel instead. The court held that the firm was entitled to fees from the third case under *quantum meruit*. The Court held that to obtain fees this way, an attorney must show (1) performance of services in good faith, (2) acceptance of the services, (3) an expectation of compensation, and (4) reasonable value for the services. SGA argues that these four elements have been met.

SGA asserts that Lovell and Buetti agreed to a similar retainer in the 185 Franklin Case. Further, Buetti discussed the Harrison Partnership case with SGA for two years without signing the agreement (affirmation of Samuel Goldman ¶ 55). Lovell's mother-in-law, Mrs. Calick, was a partner in both partnerships. In August 2013, Lovell agreed to the retainer on behalf of Mrs. Calick in the 185 Franklin case, but failed to sign for himself when requested in connection with the 18 Harrison case. Lovell and Spielman retained Tashlik as their counsel in this matter after a settlement in principle had been reached. SGA asserts that Tashlik did not monitor the sales process, analyze the financial records, or retain a forensic accountant (unlike SGA). Moreover, Tashlik never acted to request appointment of a receiver as it urged be done in its crossclaim. SGA argues that

Buetti was not separately represented in this matter until October 12, 2015 and filed only limited papers in this action.

Regarding unjust enrichment, SGA asserts that the Additional Defendants obtained a benefit from it without compensation. Finally, SGA argues that the $43,264.41 in expenses were reasonably incurred and necessary. They include charges for research, photocopying, long distance telephone, fax charges, postage, and delivery expenses.

b. Additional Defendants' Oppositions

Additional Defendants argue that SGA represented only 14.85% of the Partnership and 27.3% of the non-Axon limited partnership interests. Although SGA states it represents five of the eight non-Axon Limited Partners, four of them are members of the same family and only account for a 9.90% interest. The Additional Defendants also assert that they declined SGA's representation (repeatedly) because they did not feel comfortable with SGA's abilities. Lovell and Spielman appeared by their own counsel in February 2014, shortly after being served with the Complaint. Buetti who claims she was never served with the complaint (*see* Buetti Aff. ¶ 20, NYSCEF Doc. No. 120) appeared by her own counsel in October 2014.[5]

Additional Defendants argue that having violated several of the New York Rules of Professional Conduct, no fees should be awarded SGA. Specifically, SGA violated Rule 1.7 which concerns conflicts of interest, by attempting to represent plaintiffs and the Additional Defendants at the same time. Additionally, each affected client did not give informed consent, confirmed in writing as required by Rule 1.7[b][b]. SGA also did not advise the Additional Defendants of any of the actual or potential conflicts of interest (aff. of Loraine Buetti ¶¶ 13-16; *see generally* affirmation of Samuel Goldman). SGA knew that the Harrison Street Property was going to be sold before filing the complaint and had a duty to give Additional Defendants an informed choice about what was in **their** best interests. They argue that some may have wanted cash flow instead of a sale. SGA did not regularly inform them or give them advice. Rather, the Additional Defendants retained their own counsel and paid their own significant fees. In the 185 Franklin case, SGA sued Sommella and Karol (who were limited partners in the Franklin Street Partnership), again, as "additional defendants."

[5] Buetti's counsel acknowledged receipt of the summons and complaint in his Notice of Appearance(*see* NYSCEF Doc. No. 64).

Judge Coin found that by naming Sommella and Karol as defendants, SGA created an irreconcilable conflict of interest in violation of Rules 1.7 (a) and 1.7 (b) (3). They claim that SGA contacted not to protect their best interests, but to protect its fee.

Regarding the fee request based on New York Partnership Law § 115-(a) (5), Additional Defendants point out that the statute applies to derivative claims only and that only two of the eight causes of action here are derivative (the Fifth Cause of Action for accounting and Sixth seeking to nullify an alleged fraudulent mortgage transaction). Additional Defendants argue the action was settled and characterize the derivative claims as "abandoned."

They argue that a "common fund" was not created because the payments satisfied individual claims. In any event, recovery in a common-fund case is limited to "exceptional cases" in which "dominating reasons of justice" require the allowance of counsel fees (*Kantrowitz, Goldhamer & Graifman, P.C. v New York State Elec. & Gas Corp.*, 27 AD3d 872, 875 [3d Dept 2006]). Additional Defendants emphasize that Justice Coin denied the identical "common fund" and Partnership Law arguments that SGA makes here (affirmation of Jeffrey N. Levy, exhibit 1 at 11, 14). The money received from the sale was from an asset already owned by the partners. This was not, as in a class action, a recovery of damages. Additional Defendants note that the court in *Shlomchik v Richmond 103 Equities Co.* (763 F Supp 732, 745 [SDNY 1991]) held that NY Partnership Law §115-a (5) cannot be used to recover fees from individual parties, but rather, is applicable only for a recovery of fees from the partnership itself – and here, the Partnership did not recover anything (*see id.* [the fee application "ignores the requirement of New York Partnership Law, § 115–a (5) that expenses and fees be paid *out of the award* to the partnership"]).

Additional Defendants also assert that in her denial of SGA's fee application, Justice Coin noted that "while the complaint . . . asserted both individual . . . as well as derivative claims . . . the monetary settlement satisfied only plaintiffs' individual claims" (affirmation of Jeffrey N. Levy, exhibit 1, at 10, NYSCEF Doc. No. 117). Both matters were settled by a sale of the partnership's real estate. In this action, Lovell and Spielman specifically refused representation by SGA and retained separate counsel shortly after commencement of this litigation. Buetti retained counsel much later, in October 2015. Additional Defendants distinguish the cases cited by SGA as being class actions which apply a different construct for attorney's fees awards. In a class action, Additional Defendants

would have had an opportunity to opt out of the "class." Here, they were not. Finally, SGA is being paid. It stands to receive $330,000 from its clients.[6]

Regarding the amount of fees being sought, Additional Defendants argue that SGA's request is not reasonable and that SGA's failure to provide time records is fatal. Courts require substantiation of the effort expanded where fees are being sought (*Goldberger v Integrated Resources, Inc.*, 209 F3d 43, 46 [2d Cir 2000] ["[f]ollowing an exhaustive review of counsel's billed hours"]). They maintain that SGA's affirmation that it incurred over $768,000 in time charges seems excessive for only drafting a complaint, two Orders to Show Cause that were withdrawn, participating in settlement discussions and drafting an application to approve the settlement. They contend that SGA did not submit detailed time records, but argue that SGA improperly aggregated the time spent in this case with that spent on the 185 Franklin case. They also assert that SGA delayed settlement negotiations to position the matter more favorably for this fee application.

Concerning a lodestar analysis, a reasonable hourly rate and reasonable number of hours creates a "presumptively reasonable fee" (*Millia v Metro-North Railroad Co.*, 658 F3d 154, 166-167 [2d Cir 2011]). Additional Defendants argue that the analysis fails here because SGA did not provide a breakdown of its time and did not justify its hourly rate. SGA claims, without support, that the value of its time is $768,744.46 and requests 1.59 times that amount. An enhancement, such as the one SGA requests, may be awarded only in "rare" and "exceptional" circumstances (*Millea*, 658 F3d at 167). Such circumstances are absent in this case.

In response to the *Quantum Meruit*/Unjust Enrichment basis for an award, Additional Defendants argue there was no unjust enrichment. Additional Defendants hired and paid their own counsel. SGA cannot show that the work was done at the Additional Defendants' request. Instead, SGA sought to interpose itself as the attorney despite repeated express refusals of its services. SGA cannot establish even a *quasi*-attorney-client relationship, specifically because of the ethical considerations discussed above. Again, Judge Coin denied a similar argument in the 185 Franklin

[6] *See Kantrowitz, Goldhamer & Graifman, P.C.*, 27 AD3d at 875 ("Petitioners do not dispute that they have received remuneration for their efforts pursuant to the one-third contingency fee arrangement . . . this fact alone militates against a finding that this case constitutes one in which 'overriding considerations' require the equitable allowance of more fees to petitioners") (citations omitted).

Case (affirmation of Jeffrey N. Levy, exhibit 1, at 16).

Additional Defendants also argue that SGA cannot collect expenses and forensic fee expenses either, because SGA did not have an attorney-client relationship with them. SGA has also refused to provide a copy of its accountant's bill and has not proven that those expenses were necessarily and properly undertaken.

b. Plaintiffs' Reply

In reply, SGA points out that Justice Coin's decision in the 185 Franklin Case is on appeal.[7] SGA argues that there was no "conflict." According to SGA, the Additional Defendants were necessary parties to the lawsuit and were named to give them notice of the proceedings. No claims were asserted against them and Paragraph 17 of the Complaint states that they are named as Additional Defendants solely because their interests may be affected by the outcome (NYSCEF Doc. No. 1, ¶ 17). Lovell and Spielman filed an Answer and Crossclaim which states that a receiver should be appointed to manage the proposed sale but never filed a motion for such relief. Thus, SGA argues that Tashlik agreed with SGA's strategy that there should be a sale, as evidenced by its failure to file papers suggesting an alternative course of action. Tashlik could have asserted derivative claims and sought to remove SGA as counsel for plaintiffs. It did none of that.

SGA also asserts that but for the "common fund" doctrine, the limited partners could not have obtained counsel to take their case. SGA argues, based on public policy, that the goal of incentivizing counsel to take cases such as this one would be entirely undermined if potential beneficiaries could avoid paying plaintiff's counsel by retaining their own counsel merely to shadow the litigation. SGA also cites *Koppel v Wien*, 743 F2d 129 (2d Cir 1984), which held that a separate fund need not be contemporaneously created – the "fund" is a fee sharing mechanism for those who share in a benefit by the plaintiff's action. SGA argues that the Additional Defendants could have "opted-out," as in a class action, by simply opposing the sale.

SGA argues that New York Partnership Law §115-a (5) applies even though there is no recovery on specifically derivative claims. The law should not penalize counsel if the settlement of a derivative cause of action results in awards to the plaintiffs indevidually. Cases are usually settled for omnibus amounts settling all claims. The settlement here included settlement of all the claims,

[7] The appeal from th May 6, 2016 decision has not been perfected.

including the derivative claims. SGA reiterates that the Partnership benefited by SGA obtaining access to the Partnerships' accounts and financial records and that it was SGA's analysis of those records that uncovered a multitude of improper payments and resulted in enhancement of the payouts to plaintiffs.

SGA argues that submission of detailed time sheets are not necessary here because the court is being asked to apply the percentage of the recovery method, applicable in this equitable fund context (*see e.g., Hart v RCI Hospitality Holdings*, 2015 US Dist LEXIS 126934. At *37 [SDNY Sept. 22, 2015] ["The Second Circuit has authorized District Courts to employ a percentage-of-the-fund method when awarding fees in common fund cases"]).

III. DISCUSSION

The court became engaged overseeing the settlement negotiations not long after plaintiff filed the request for judicial intervention and, as a result, is uniquely positioned to assess the facts that are relevant to this motion.

Of necessity, SGA represented the interests of all of the non-Axon affiliated limited partners against the general partner since early 2013, long before it filed this case. Through its efforts both the Franklin Street and Harrison Street properties were sold, with the limited partners receiving multiples of the initial buyout offer Axon had made to them for the Franklin Street Property before SGA became involved. Further, sale proceeds to the Partnership were not discounted by the substantial sums Axon sought to impose on it. The complaint alleges that although the Harrison Street Property has been "extremely profitable," the limited partners have received no distributions since 2000 or earlier and that "Axon has been systematically and continually looting the Partnership and misappropriating all of the Partnership's net cash flow since at least the year 2000" (NYSCEF Doc. No. 1, ¶49). In these, as in all material allegations in the complaint, Additional Defendants were fully aligned with plaintiffs (*see* NYSCEF Doc. No. 17, ¶2 as to Lovell/Spielman).[8] Like plaintiffs, Additional Defendants received no benefits from Partnership assets for fifteen years or more prior to SGA's involvement. Investigations and analyses of Partnership books and records covering many years enabled SGA to negotiate payouts to the limited partners undiluted by improper credits, including an alleged fabricated million dollar mortgage Axon sought to charge against the

[8]Having failed to file an answer, Buetti is deemed to have admitted all material allegations.

proceeds of the sale. As a result of SGA's efforts, a substantially larger pool of funds was available for distribution to the limited partners. In contrast to the demonstrated efforts of SGA, the record and the court's experience with the parties fail to reveal any significant expenditure of effort by the respective counsel of the Additional Defendants add to the value of Partnership assets.[9] Although Additional Defendants fault SGA for failing to serve their best interests and assert that the Additional Defendants may have preferred to receive cash flow instead of a sale, none of them suggested that alternative before the court but instead supported sale of the Property. Additional Defendants Buetti and Lovell received close to $1 million each and Spielman was paid over $600,000 as their respective shares of the proceeds from sale of the 18 Harrison Street Property.

SGA made a number of attempts to obtain retainers from all of the limited partners prior to filing the case. As of the time of commencement of this litigation in January 2014, SGA had retainers to represent only 14.85% of the 18 Harrison Street Partnership interests and 27.3% of the non-Axon limited partner interests. Additional Defendants Lovell, Spielman and Buetti owned 14.85%, 9.90% and 14.85% of the partnership respectively.

The Complaint named the Additional Defendants as necessary parties thereby giving them notice of pendency of the suit. Lovell and Spielman hired separate counsel in February 2014. Buetti retained her counsel in October 2014. Before hiring separate counsel, all three communicated repeatedly with SGA in connection with progress of their claims against the general partner.

Despite the substantial benefits the Additional Defendants are enjoying due primarily to the efforts of counsel for plaintiffs, the court is constrained to deny SGA's request for an award of attorney fees based on New York Partnership Law § 115-(a) (5) or the common fund theory for the reasons stated in the decision of Justice Coin except as to the additional one million dollars SGA was

[9] Counsel for Lovell and Spielman, takes credit for obtaining "an additional $100,000 for the non-Axon partners at the Court in the settlement conference when SGA was willing to fold its tent and collect its contingency fee" (Aff'm of Jeffrey Levy, ¶ 31, NYSCEF Doc. No. 123). In fact, early in the settlement discussions and before these counsel assumed an active role, the court obtained a commitment from plaintiff in the Related Action who was the prospective purchaser of the 18 Harrison Street Property to make that sum available should the Court require it in order to conclude a settlement. In any event, this enhancement of settlement funds amounts to 2.2% of the settlement amount.

able to prevent Axon from taking for himself out of proceeds of the sale. The court will make an award based on an unjust enrichment analysis.

It is undisputed that the Additional Defendants declined to hire SGA, despite their acceptance of the fruits of the firm's labors. As a result, SGA was required to name Lovell, Spielman and Buetti as necessary parties and thereby creating an apparent conflict of interest. In this case however, the Additional Defendants interests in the litigation are aligned with those of the plaintiffs as is evidenced by Lovell/Spielman's answer to the complaint and Buetti's default in which they admit all material allegations.

As Justice Coin held, New York Partnership Law § 115-(a) (5) applies only when there is a derivative recovery on behalf of the partnership and fees are paid from a common fund. Here the Partnership terminated by the terms of the Partnership Agreement in February 2014 although it continued to exist for a time as a partnership-at-will (*see* NYSCEF Doc. No. 1, ¶ 38). The settlement payments were made to satisfy individual claims but the size of those payments were higher due to recoveries to the Partnership procured through the efforts of SGA. SGA cannot recover under the terms of this provision, except to the extent noted above. As to the limited common fund available here, no payment will be made at this point because SGA has not made the required lodestar showing to support a claim for an award of reasonable attorney fees (*see Schlomchik v Richmond 103 Equities Co.*, 763 F Supp 732, 744-45 [SDNY 1991]).

As to the claim based on a *Quantum Meruit/Unjust Enrichment* theory, SGA has made out a *prima facie* case by showing that (1) it performed valuable services in good faith, (2) Additional Defendants accepted the services rendered as is reflected in the Lovell/Spielman answer to the complaint and Buetti default, (3) SGA made clear throughout that it expected to be compensated for its services, and (4) SGA claims a reasonable value for its services. Approximately 73% of the proceed paid to the limited partners went to the Additional Defendants.

In her decision in the Franklin Street case, Judge Coin rejected SGA's unjust enrichment claim because of the irreconcilable conflict of interest resulting from the naming of Sommella and Karol as additional defendants. However, it does not appear that the additional defendants had aligned themselves with plaintiffs in an answer thereby reconciling any conflict of interest that might otherwise be presumed.

In their opposition to the motion, Lovell/Spielman argue that they paid "six figures to represent their interests. They were not unjustly enriched by SGA" (affirmation of Jeffrey N. Levy ¶ 16, NYSCEF Doc. No. 123). Whether Lovell/Spielman paid other counsel for similar services has no bearing on whether they were unjustly enriched as a result of the services provided by SGA.

Lovell/Spielman also argue that the claim for fees on a quasi-contract basis should be denied for failure of SGA to provide the required documentation. The court agrees that while adequate documentation has not been provided, detailed proof of the time and effort SGA devoted to this matter may be presented before a Special Referee to whom this matter will be referred to hear and recommend on the issue of the reasonable fees that should be awarded SGA. In reviewing the evidence and making its recommendations, the Special Referee shall excise any time not related to the Harrison Street Property and may take into account the recovery of Partnership assets from Axon discussed above. Finally, SGA shall be reimbursed for reasonable expenses incurred in the prosecution of the case upon submission of proper proof before the Special Referee.

In referring the matter for trial, the court is not intending spawn a new round of litigation. Accordingly, the parties are encouraged to meet and confer in an effort to reach agreement on the issue of attorney fees. It is hereby

ORDERED that a Special Referee shall be designated to hear and report on the amount of attorney's fees and costs to be awarded and the issue is hereby submitted to the JHO/Special Referee for such purpose; 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 119 M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear beard and recomment as specified above; and it is further

ORDERED that counsel shall, within 10 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(s) specified above shall proceed from day to day until completion; and it is further

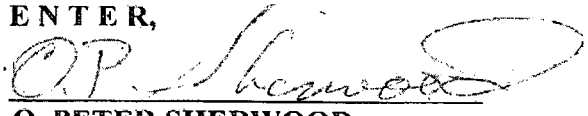
ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, within fourteen (14) days of entry, plaintiffs shall serve a copy of this order with notice of entry upon counsel for defendants and Additional Defendants.

This constitutes the decision and order of the court.

DATED: December 9, 2016

ENTER,



O. PETER SHERWOOD
J.S.C.