

**Tishman Constr. Corp. v United Hispanic Constr.
Workers, Inc.**

2017 NY Slip Op 30119(U)

January 23, 2017

Supreme Court, New York County

Docket Number: 150585/2011

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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TISHMAN CONSTRUCTION CORP., AN AECOM
COMPANY, and SL GREEN REALTY CORP.,

DECISION AND
ORDER

Plaintiffs,

Index No.
150585/2011

-against-

UNITED HISPANIC CONSTRUCTION WORKERS,
INC.,

Defendant.

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HON. ANIL C. SINGH, J.:

Plaintiffs move: 1) pursuant to CPLR 4403 to confirm the special referee's report and recommendation of an award of reasonable attorneys' fees and costs in favor of plaintiffs and against United Hispanic Construction Workers, Inc., and David Rodriguez in the amount of \$216,146.41; and 2) for entry of judgment. Defendant United Hispanic Construction Workers, Inc. ("United Hispanic") and its president David Rodriguez oppose the motion and cross-move to deny the report in its entirety, or, in the alternative, confirm the report in part and deny it in part.

This action arose from public protests and picketing by members of United Hispanic in front of the office building located at 100 Park Avenue in Manhattan.

The building is owned and operated by plaintiff SL Green Realty Corp. The protests and picketing were aimed at plaintiff Tishman Construction Corp., which has an office in the building.

United Hispanic began the protests and picketing in 2011.

On December 9, 2011, plaintiffs moved by order to show cause to enjoin offending activities. Plaintiffs alleged that members of United Hispanic gathered in front of the building and engaged in abusive demonstration tactics, including engaging in noisemaking activities through the use of shouting, screaming, yelling, blowing whistles, yelling into the building, yelling into bullhorns, making harassing and derogatory comments to passersby, and blocking ingress and egress.

On May 22, 2012, the parties executed a so-ordered stipulation permitting United Hispanic to protest subject to certain restrictions on the time, place and manner of any future protests.

When protests and picketing resumed on June 3, 2015, plaintiffs filed an order to show cause, asserting that the actions of United Hispanic and David Rodriguez violated the so-ordered stipulation.

Following a five-day contempt hearing in June and July of 2015, the Court issued a 33-page memorandum opinion, finding that plaintiff established by clear and convincing evidence that: 1) United Hispanic and David Rodriguez disobeyed

the court's lawful mandate; 2) the actions of both United Hispanic and David Rodriguez defeated, impaired, impeded, or prejudiced the rights of plaintiffs; and 3) both United Hispanic and David Rodriguez engaged in a systematic and continuous pattern of violating the order while engaging in protest. Accordingly, the Court issued an order dated January 26, 2016, adjudging United Hispanic and Rodriguez in contempt of court for willful failure to obey the order regulating the protests and picketing. The Court imposed a fine in the amount of \$1,000 against United Hispanic, and a separate fine in the amount of \$500 against David Rodriguez.

In addition, the Court ordered United Hispanic and Rodriguez to pay for all of plaintiffs' attorneys' fees, costs, expenses and disbursements associated with this action. The portion of the action seeking attorneys' fees and costs was severed and referred to a special referee to hear and determine.

On October 14, 2015, United Hispanic and Rodriguez moved for reargument. The Court denied the motion in a memorandum opinion dated November 13, 2015, writing:

Movants argue that the alleged contempt arises out of a labor dispute, so the Court had no authority to punish defendant and Rodriguez except after a jury trial pursuant to Judiciary Law 753-a.

The record reflects that defendant and Rodriguez failed to assert at

any time during the hearing or at oral argument that defendant was entitled to a jury trial under Judiciary Law 753-a. Accordingly, the Court cannot consider such an argument now on reargument. Nor did defendant establish at the contempt hearing that this case arises from a labor dispute within the meaning of Judiciary Law section 753-a(2)(a).

Discussion

The matter was assigned to Special Referee Jeremy R. Feinberg to determine the amount of reasonable attorneys' fees and costs. The referee issued a 28-page report dated August 22, 2016.

CPLR 4403 provides that this Court has the authority to confirm, in whole or in part, the report of a special referee.

A referee's report is not binding, but is intended "merely to inform the conscience of the court" (Matter of Gehr v. Board of Education of City of Yonkers, 304 N.Y. 436, 440 [1952] (internal quotation marks and citation omitted)). However, "[i]t is well settled that a special referee's findings of fact and credibility will generally not be disturbed where substantially supported by the record" (RC 27th Avenue Realty Corporation v. New York City Housing Authority, 305 A.D.2d 135, 135 [1st Dep't 2003; see also Namer v. 152-54-56 W. 15th St Realty Corp., 108 A.D.2d 705, 706 [1st Dept., 1985]; Spodek v. Feibusch, 55 A.D.3d 903, 903 [2d Dept., 2008]; Sichel v. Polak, 36 A.D.3d 416 [1st Dept.,

2007]; Kardanis v. Velis, 90 A.D.2d 727 [1st Dept., 1982]). As the referee is in the best position to weigh the evidence and make credibility determinations, the court properly defers to the findings of the referee in confirming the report (Anderson ex rel. Anderson, Weinroth & Co., L.P. v. Weinroth, 48 A.D.3d 121, 133 [1st Dept., 2007]).

To a large extent, United Hispanic's cross-motion is an effort to relitigate issues that were previously decided against United Hispanic and Rodriguez.

United Hispanic and Rodriguez contend that the award of attorneys' fees violates the protestor's First Amendment rights. However, in a prior opinion, we explicitly acknowledged that the protestors have a constitutional right to engage in lawful protest. The Court found that the protestors were in contempt not because they exercised their First Amendment rights, but because they failed to adhere to the order regulating the protests.

David Rodriguez contends that: 1) the Court has no authority to award attorneys' fees or any other damages against him individually; and 2) the record is devoid of evidence that Rodriguez violated any order in his individual capacity or directly committed any contemptuous act. However, in a prior memorandum opinion, the Court found specifically that Rodriguez is the president of United Hispanic; he ratified United Hispanic's violation of the Court's order; and the

president of a corporation may be punished for contempt of court (Schreiber v. Schomacker Piano Forte Mfg. Co., 152 A.D. 817 [1st Dept., 1912]).

Next, United Hispanic contends that the Court should refuse to award any damages until the damages issue is resolved by a jury. However, in a prior memorandum opinion, the Court specifically found that United Hispanic and Rodriguez failed to assert at any time during the hearing or at oral argument that they were entitled to a jury trial under Judiciary Law 753-a and, accordingly, the Court could not consider such an argument on reargument.

United Hispanic contends that the protest meets the definition of a labor dispute under Judiciary Law 753-a. However, in a prior memorandum opinion, we held specifically that United Hispanic failed to establish at the contempt hearing that the case arises from a labor dispute within the meaning of Judiciary Law 753-a.

United Hispanic contends that the Court should not award any attorneys' fees or costs as plaintiffs failed to mitigate their fees by incurring fees for protest activity the Court held was not contemptuous, such as litigating protest sound levels.

United Hispanic's contention is meritless, for it ignores the clear language in the Court's memorandum opinion and the contempt order awarding all

attorneys' fees and costs incurred.

United Hispanic and Rodriguez contend that the Court should reject the Special Referee's report and recommendation for a multitude of reasons. They contend that: 1) the recommendation is egregiously disproportionate to the contempt at issue; 2) plaintiffs' counsel were unable to parse from their records time spent proving the acts the Court found to be contemptuous; 3) the referee found that United Hispanic and Rodriguez are responsible for \$26,358.98 in fees, despite the undisputed testimony that plaintiffs' counsel did not charge plaintiffs for these fees but provided plaintiffs with a "one-time" discount of \$26,358.98; 4) the referee found that plaintiffs' counsel were guilty of the practice of block billing; 5) plaintiffs' counsel's time records contain a disproportionate number of senior attorney hours and billing for multiple lawyers present at hearings; 6) plaintiffs did not prove damages resulting from United Hispanic's or Rodriguez's protest activities and any fee award would be tantamount to an excessive punitive damage award; 7) the Court found that David Rodriguez was not responsible for most of the contemptuous conduct and the referee failed to limit his fee calculation regarding Rodriguez to hours for those activities the Court found Rodriguez violated the 9/25/15 order; 8) plaintiffs had limited success in proving Rodriguez was responsible or caused protesters to violate the orders; 9) the referee

disregarded the Court's instruction not to include any attorneys' fees and costs incurred after the Court referred the matter of fees and costs to the referee; 10) the Court should refuse to award fees for any hours spent requesting injunctive relief where, as here, the Court held there was not criminal contempt; 11) plaintiffs failed to mitigate their fees by incurring fees for protest activity the Court held was not contemptuous, such as litigating protest sound levels; 12) plaintiffs incurred excessive attorneys' hours attempting to prove 135 alleged violations of the Court's 2012 order, most of which were found not to violate any court mandate; 13) plaintiffs' results were limited to only proving four discrete violations, only two of which pertain to Rodriguez; 14) the violations resulted in no actual injury to plaintiffs, and United Hispanic has already paid the statutory fines for the violations; 15) plaintiffs' fee application is a hodgepodge of attorney hours and costs unrelated to the four discrete violations; 16) plaintiffs attempted to bill defendant for attorneys' fees that were not actually paid by plaintiffs; 17) plaintiffs had limited success in proving actual damages, criminal contempt, or entitlement to injunctive relief; 18) plaintiffs failed to provide sufficiently detailed documentation to enable the Court to determine which attorney hours were spent proving the four discrete 2012 order violations; 19) the court should reject all block billed hours; 20) plaintiffs' assignment and billing for six attorneys was

“overlawyering”; 21) the overall hours spent on the litigation were excessive; 22) contemporaneous time records were not presented in the fee hearing; 23) an award of attorneys’ fees is not appropriate as plaintiffs failed to prove any actual loss or injury; 24) the Court should not award sound expert invoices, for plaintiffs did not prove any violation and the Court found United Hispanic did not violate the 2012 order relating to sound levels; 25) the Court should not award transcript fees because the fee hearing and transcript fees would have been abbreviated and possibly eliminated if plaintiffs had submitted in their fee application only those hours directly related to the four proven 2012 order violations; and 26) the Court should reject the report and recommendation regarding the security costs as that was not part of the Court’s reference.

After careful consideration, the Court finds that the contentions have no merit. Calculating the amount of reasonable attorneys’ fees is an inexact science. Nevertheless, the Special Referee carried out the assigned task to the best of his ability, providing the Court with a detailed, well-reasoned report and recommendation. The record reflects that the referee considered and weighed all of the evidence and testimony, taking into account the arguments presented by the parties. Ultimately, the referee found that plaintiffs were successful on the whole as they were able to obtain relief from the protest activity in the form of penalties

and this attorneys' fee award.

Accordingly, it is

ORDERED that plaintiffs' motion is granted, and the report and recommendation of the referee is confirmed; and it is further

ORDERED that the cross-motion to reject the report and recommendation is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiffs Tishman Construction Corp., and SL Green Realty Corp., and against defendant United Hispanic Construction Workers, Inc., and David Rodriguez in the sum of \$216,146.41, with interest from the date of this order at the statutory rate, as calculated by the Clerk.

Date: January 23, 2017
New York, New York



Anil C. Singh