

Carter v Carter

2009 NY Slip Op 33293(U)

November 9, 2009

Supreme Court, Richmond County

Docket Number: 08491/94

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 08491/94
Motion No.:015**

**ANTHONY J. CARTER, D.D.S, Individually and as a
shareholder of ROBERT W. CARTER, D.D.S. and
ANTHONY J. CARTER, D.D.S., P.C.,**

Petitioners,

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**ROBERT W. CARTER D.D.S., Individually and as a
shareholder of ROBERT W. CARTER, D.D.S, and
ANTHONY J. CARTER, D.D.S., P.C.**

Respondents,

The following items were considered in the review of this motion to reargue.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The petitioner Anthony J. Carter moves for an order granting reargument of this court's decision and order dated July 30, 2009, and upon reargument reversing its decision and order awarding Robert W. Carter the payment of \$19,758.00 for interest payments made to Anthony J. Carter from April 6, 2001 through March 10, 2003. The petitioner's motion is denied in its entirety.

This case has a long and somewhat confusing procedural history. For the purposes of clarifying this court's decision and order dated July 30, 2009 this court will give a brief recitation.

Anthony and Robert Carter are two brothers that previously operated a dental professional corporation, wherein they were the only shareholders. Anthony Carter commenced this

proceeding to dissolve the professional corporation. At some point prior to April 6, 2001 this matter was transferred by the Supreme Court to James A. Dollard, Esq. to act as a referee for the purpose of dissolving the professional corporation.

On April 6, 2001, James A. Dollard, Esq. submitted a judgement to be entered in the matter awarding a sum of \$114,383.09 to Anthony J. Carter. Subsequent to the submission of this judgment, the respondent Robert W. Carter appealed James A. Dollard, Esq.'s judgement to the Appellate Division, Second Department. On June 24, 2002 the Appellate Division, Second Department issued an order holding Robert W. Carter's appeal in abeyance. Upon consideration of the appeal, the Appellate Division, Second Department found that the referee failed ". . . to set forth the findings of fact and conclusions of law that formed the basis of his award . . ." and ordered that ". . . the appeal is held in abeyance in the interim. . ." to allow the Supreme Court, through James A. Dollard, Esq. acting as referee ". . . to file its report containing the findings of fact and conclusions of law with all convenient speed."

In accordance with the order of the Appellate Division, Second Department, James A. Dollard, Esq. submitted findings of fact on March 10, 2003. Subsequently, Anthony J. Carter filed a notice of cross appeal from the March 10, 2003 findings of fact. Both Anthony J. Carter and Robert W. Carter made motions before the Appellate Division, Second Department for leave to file supplemental briefs in connection with Robert W. Carter's appeal from the April 6, 2001 judgment. Additionally, Robert W. Carter moved to dismiss the cross-appeal filed by Anthony J. Carter on the ground that it was untimely taken.

By decision and order dated May 28, 2003 the Appellate Division, Second Department, found that the 1) referee issued its finding of facts; 2) by its own motion dismissed Anthony J. Carter's cross-appeal from the referee's finding of fact; and 3) granted the parties motions to submit supplemental briefs annexing the referee's findings of fact as an exhibit. With respect to Robert W. Carter's argument that Anthony J. Carter's cross-appeal was untimely filed the court denied the motion as "academic." In dismissing Anthony J. Carter's cross-appeal the court held

that “. . . no appeal lies from findings of fact.”¹

In support to his motion to reargue, Anthony J. Carter submits copies of the motion and cross motion before the Appellate Division, Second Department that gave rise to its May 28, 2003 decision and order dismissing his cross-appeal from the referee’s findings of fact. At that time Anthony J. Carter did not argue as to when the referee’s judgement was entered. His motion merely pointed out the factual errors contained in the referee’s findings of fact that resulted in the alleged undervaluation of the professional corporation.

On December 29, 2003 the Appellate Division, Second Department rendered its decision on the appeal first taken by Robert W. Carter subsequent to James A. Dollard, Esq.’s April 6, 2001 judgment. In its decision the Appellate Division, Second Department recognized that the referee’s failure to set forth findings of fact and conclusions of law that formed the basis of his award caused the appeal to be held in abeyance.² The Appellate Division, Second Department affirmed the referee’s judgment and noted that Anthony J. Carter failed to appeal the judgment.³

In affirming the referee’s award the Appellate Division, Second Department found that the referee’s valuation was not supported in the record. The court found that the referee utilized a “multiplier” of .5 even though the record indicated that the petitioner and respondent’s experts provided multipliers in the range of .8 and 1.0. In affirming the referee’s award, the court reasoned that the utilization of a multiplier within the range in the record would only increase the award owed by the respondent appellant.⁴

The Appellate Division, Second Department rendered its determination regarding the

¹ *In re Carter*, May 28, 2003 ,[2d Dept 2003 }

² *In re Carter*, 2 AD3d 865, [2d Dept 2003].

³ *Id.*

⁴ *Id.*

sufficiency of the referee's award only after the referee submitted his findings of fact. Furthermore, the court held that a party may not appeal findings of fact only. It did not make any finding with respect to the date of entry of the referee's award.

By decision and order dated July 30, 2009 this court granted reargument of its February 5, 2009 decision and order which denied Robert W. Carter's motion for a reduction of interest on the subject judgment.

This court found that the judgment of James A. Dollard, Esq., acting as referee originally submitted to be entered on April 6, 2001 was defective. This finding was based on the fact that the April 6, 2001 judgment was not in compliance with CPLR § 4319 because it failed to include a statement of the facts on which he based his judgement. This court further found that post-judgement interest did not begin to accrue until March 10, 2003, when the referee submitted his findings of fact, which would allow the Appellate Division, Second Department to properly evaluate Robert W. Carter's appeal.

Conclusion

Motions pursuant to CPLR § 2221 are addressed to the sound discretion of the court. In this case, it is the determination of the court that it did not overlook or misapprehend the facts or law in rendering its decision dated July 30, 2009. Therefore, this court affirms the legal reasoning set forth in its prior decision and order. As such, the petitioner's motion to reargue is denied in its entirety.

Accordingly after allowing the reargument of the petitioner and having reconsidered this court's decision and order of July 30, 2009, it is hereby:

ORDERED, that the decision and order of this court dated July 30, 2009 is reconfirmed and still stands.

ENTER,

DATED: November 10, 2009

Joseph J. Maltese
Justice of the Supreme Court