

Thermwell Prods., Inc. v Nitto Denko Am., Inc.

2012 NY Slip Op 33027(U)

December 13, 2012

Supreme Court, New York County

Docket Number: 112195/11

Judge: Sherry Klein Heitler

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HEITLER
Justice

PART 30

Index Number : 112195/2011
THERMWELL PRODUCTS, INC.
vs.
NITTO DENKO AMERICA, INC.
SEQUENCE NUMBER : 005
CONFIRM/REJECT REFEREE REPORT

INDEX NO. 112195/11
MOTION DATE _____
MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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

is decided in accordance with the
memorandum decision dated 12-13-12

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12-13-12


_____, J.S.C.
HON. SHERRY KLEIN HEITLER

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
THERMWELL PRODUCTS, INC.,

Plaintiff,

- against -

NITTO DENKO AMERICA, INC.,
NITTO DENKO AUTOMOTIVE, INC.,
PERMACEL KANSAS CITY, INC.,
MARTIN MARIETTA MATERIALS, INC.,
LOCKHEED MARTIN CORPORATION,

Defendants.

----- X
SHERRY KLEIN HEITLER, J.:

Index No. 112195/11
Motion Seq. No. 005

DECISION AND ORDER

Defendants Martin Marietta Materials, Inc. (“Martin Marietta”), the Lockheed Martin Corporation (“Lockheed”), Nitto Denko America, Inc., Nitto Denko Automotive, Inc., and Permacel Kansas City, Inc. (collectively “Nitto Denko”) (hereinafter, “Defendants”), move pursuant to CPLR 4403 to confirm the report of Special Referee Ira Gammerman, dated May 22, 2012 (“Report”), in which he recommends payment of Defendants’ reasonable attorneys’ fees and costs owed to them by plaintiff Thermwell Products, Inc. (“Thermwell”) resulting from the dismissal of this action.

BACKGROUND

This indemnification action is related to claims brought by Roberta and Stuart Friedman in this court bearing Index No. 190263/09, in which Mrs. Friedman alleged that she was exposed to asbestos from a product called “Frost King Rope Caulk.” Thermwell, which distributed this product, filed a third-party indemnification action (Index No. 590306/11) against the Defendants,

alleging they manufactured and/or owned the trademark for such product.

By decision and order dated October 17, 2011, this court dismissed Thermwell's third-party complaint with leave to refile in the event that Thermwell suffered some pecuniary loss. On October 26, 2011, Thermwell initiated this plenary action, which asserted claims against the Defendants that were substantively the same as the claims asserted by Thermwell in the earlier dismissed third-party indemnification action. The Defendants then moved to dismiss. They also moved for attorneys' fees on the ground that Thermwell had not satisfied the condition precedent set forth by this court prior to commencing its plenary action. The motion to dismiss was granted by order dated April 5, 2012. The issue of costs and fees on the motions was referred to a Special Referee to hear and report.

In the Defendants' joint pre-hearing memorandum, Martin Marietta, Nitto Denko, and Lockheed claimed to have incurred \$21,463.08, \$9,923.44, and \$5635.90, respectively, in legal fees. They argued that: (1) they expended a reasonable amount of time in seeking dismissal of this action; (2) the legal fees and hourly rates charged were their respective counsels' usual rates; and (3) they acted with skill and experience in achieving a successful outcome for their clients.

The parties appeared before Special Referee Gammerman on May 22, 2012. After the submission of testimonial and documentary evidence, Referee Gammerman recommended that Martin Marietta, Nitto Denko, and Lockheed be awarded attorneys' fees in the amounts of \$10,000, \$7,000, and \$5,600, respectively. Lockheed now moves to confirm the Report in its entirety. Thermwell opposes the motion, arguing that the Defendants have not shown that their costs and fees were reasonable and that they submitted invoices for costs and fees beyond those permitted by this court's April 5, 2012 order.

DISCUSSION

This court may confirm or reject the Report, in whole or in part, or “may make new findings with or without taking additional testimony.” CPLR § 4403; *see also* 22 NYCRR 202.44. The Report should be confirmed if the findings are “substantially supported by the record, and the Referee has clearly defined the issues and has resolved matters of credibility.” *Thomas v Thomas*, 21 AD3d 949 (2nd Dept 2005); *appeal denied*, 6 NY3d 704 (2006).

A “determination of a reasonable attorney’s fee is generally left to the discretion of the [trial] court, which is usually in the best position” to consider the factors integral to such a determination. *Utica Mut. Ins. Co. v Magwood Enters., Inc.*, 15 AD3d 471, 472 (2nd Dept 2005); *see also Ebrahimian v Long Island R.R.*, 269 AD2d 488, 489 (2nd Dept 2000). These include the “difficulty of the issues and the skill required to resolve them; the lawyers’ experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved.” *Morgan & Finnegan v Howe Chem. Co.*, 210 AD2d 62, 63 (1st Dept 1994). No single factor is dispositive. These issues are “controlled by the circumstances and equities of each particular case.” *Ebrahimian, supra*, at 489.

In this case, I find that Referee Gammerman’s recommendation is substantially supported by the record. Contrary to Thermwell’s contentions, Referee Gammerman plainly accounted for Thermwell’s concerns regarding the prevailing rates in asbestos litigation and that some of the requested fees were not at issue in light of prior motion practice between the parties. Upon full review of the evidence, I decline Thermwell’s contention that the recommended fees were based

upon submitted invoices for costs and fees beyond those permitted by my April 5, 2012 order.

Accordingly, it is hereby

ORDERED that, pursuant to CPLR 4403, the recommendation by Special Referee Gammerman as set forth in the transcript of his Report, dated May 5, 2012, is confirmed in its entirety; and it is further

ORDERED and ADJUDGED that Martin Marietta Materials, Inc. is granted fees in the sum of \$10,000 from plaintiff Thermwell Products, Inc., payable by Thermwell Products, Inc. to Martin Marietta Materials Inc. within 20 days of service of a copy of this order with notice of entry, failing which, without further order, Martin Marietta Materials, Inc. may enter a judgment in the amount of \$10,000 in its favor against Thermwell Products, Inc. with interest thereon at the legal rate from the date of service of a copy of this order with notice of entry, and upon presentation hereof together with an affidavit of non-payment the Clerk is directed to enter judgment accordingly; and it is further

ORDERED and ADJUDGED that Nitto Denko America, Inc. and its constituent companies are granted fees in the sum of \$7,000 from plaintiff Thermwell Products, Inc., payable by Thermwell Products, Inc. to Nitto Denko America, Inc. within 20 days of service of a copy of this order with notice of entry, failing which, without further order, Nitto Denko America, Inc. may enter a judgment in the amount of \$7,000 in its favor against Thermwell Products, Inc. with interest thereon at the legal rate from the date of service of a copy of this order with notice of entry, and upon presentation hereof together with an affidavit of non-payment the Clerk is directed to enter judgment accordingly; and it is further

ORDERED and ADJUDGED that the Lockheed Martin Corporation is granted fees in the

sum of \$5,600 from plaintiff Thermwell Products, Inc., payable by Thermwell Products, Inc. to the Lockheed Martin Corporation within 20 days of service of a copy of this order with notice of entry, failing which, without further order, the Lockheed Martin Corporation may enter a judgment in the amount of \$5,600 in its favor against Thermwell Products, Inc. with interest thereon at the legal rate from the date of service of a copy of this order with notice of entry, and upon presentation hereof together with an affidavit of non-payment the Clerk is directed to enter judgment accordingly.

This constitutes the decision and judgment of the court

ENTER:

DATED: 12-13-12



**SHERRY KLEIN HEITLER
J.S.C.**