

Tower Three Partners LLC v Rorke
2013 NY Slip Op 32681(U)
October 17, 2013
Sup Ct, New York County
Docket Number: 653722/12
Judge: Jeremy R. Feinberg
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JEREMY R. FEINBERG
SPECIAL REFEREE

PRESENT: _____

PART 84R

Index Number : 653722/2012
TOWER THREE PARTNERS LLC
vs
RORKE, GREGORY
Sequence Number : 002
HEAR AND DETERMINE

E-FILE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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~~

**THIS REFERENCE IS DISPOSED OF IN ACCORDANCE
WITH ACCOMPANYING R. / DETERMINATION**

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

Dated: October 17, 2013

JF
JEREMY R. FEINBERG, J.S.C.
SPECIAL REFEREE

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 84R

-----x

TOWER THREE PARTNERS LLC,

Plaintff,

Index No.: 653722/12

-against-

GREGORY RORKE AND MSP GROUP LLC,

Defendants,

-----x

JEREMY R. FEINBERG, SPECIAL REFEREE:

By Order dated May 29, 2013, the Honorable Barbara R. Kapnick sent this matter to the Special Referee Part for assignment to a referee to hear and determine the amount of reasonable attorneys' fees incurred in prosecuting this action (the "May 29, 2013 Order"). The May 29, 2013 Order had otherwise granted Plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213.

This matter was assigned to me on September 3, 2013 and the hearing was held on that same date.¹ Plaintiff was represented by Laurie E. Foster, Esq. and Shana R. Cappell, Esq., each from Morgan Lewis & Bockius LLP ("Morgan Lewis"). William B. Kerr, Esq. of Kerr LLP appeared for Defendant. Ms. Foster testified

¹ References to the transcript of the September 3, 2013 hearing will be in the form of "Tr. ___". References to the post-trial briefs submitted by the parties will be in the form of "Pl. Mem. ___" and "Def. Mem. ___" respectively.

concerning the amount and nature of legal services her firm performed. There were no witnesses for Defendant.

Plaintiff submitted two exhibits into evidence - an Affirmation of Laurie E. Foster, annexing, among other things, the promissory note upon which this action was based, the invoices for legal services that Morgan Lewis provided (Pl. Ex. 1) and a collection of detailed time entries reflecting the work performed by legal and administrative professionals at Morgan Lewis (Pl. Ex. 2).² Defendant did not submit any evidence.

The parties ordered the transcript and submitted post-hearing briefs. I directed the parties to address the issue of "fees on fees" in these submissions, and Plaintiff included up-to-date invoices reflecting all such fees on fees and remaining fees from the underlying case. As these belated materials would otherwise be *de hors* the record, the parties signed a stipulation dated October 9, 2013 allowing me to consider them.

In addition to the testimony and exhibits, I have taken judicial notice of the uncontroverted matters that are contained in the county clerk file and on the court's computerized records (*Khatibi v. Weill*, 8 AD3d 485, 485-86 [2d Dept 2004]).

² Because the time entries contained information that might be privileged, the parties agreed that Plaintiff's Exhibit 2 would be for the Referee's eyes only. Defendant received the invoice information that did not contain the specific time entries, and Foster, in her testimony, summarized the nature of the work performed in each invoice (Tr. 10-13).

BACKGROUND

The instant matter involves a breach of a promissory note, flowing from Defendant MSP Group LLC's failure to repay a multi-million dollar loan and Defendant Rorke's failure to honor a guaranty that secured the promissory note (Pl. Ex. 1 Tab A [note], Tab B [guaranty]). Pertinently, both documents required the payment of attorneys' fees in the event of enforcement of either instrument (Pl. Ex. 1 Tab A ¶ 4.5; Tab B ¶ 10).

Attempts to resolve Defendants' respective defaults were unsuccessful and the matter proceeded to litigation. Plaintiff brought a motion for summary judgment in lieu of complaint in October, 2012, which Justice Kapnick granted on January 14, 2013. That decision directed the parties to settle an order breaking down all amounts due and carving out the issue of attorneys' fees for a Special Referee to hear and determine (January 14, 2013 Decision at 2).

After joint effort of counsel, the parties submitted a proposed settlement order on April 9, 2013. Justice Kapnick, with some modifications, entered the order on May 29, 2013 which, among other things, awarded recovery from Defendants jointly and severally the sum of \$4,889,998.11 (consisting of \$3,000,000 in principal and the remainder in interest), the accrual of pre-judgment interest through entry of final judgment, and the assessment of attorneys' fees in a hearing before a Special

Referee (Pl. Ex. 1 Tab C).³

THE ATTORNEYS' FEES HEARING

Foster testified that she supervised the underlying lawsuit from inception in October 2012. She and her colleagues began work on the matter attempting to reach a forbearance agreement on the note (Tr. 5). Foster explained that a variety of lawyers and administrative professionals from her firm worked on the matter ranging from two partners, two associates, paralegals, process servers, and library staff (Tr. 8-9). She testified that these individuals were billed at the firm's usual and customary hourly rates, between \$730-\$855 for the partners, \$560-\$625 for the associates, and \$140-\$260 for the other professionals (Tr. 8).

Foster also testified as to the legal tasks that her firm undertook for Plaintiff, including advising the client about the default and possible strategies including forbearance; analysis of the promissory note and guaranty; research on Defendants for purposes of service; drafting the motion for summary judgment in

³ The May 29, 2013 Order did not specifically indicate whether this reference was to Hear and Report or Hear and Determine. As a precautionary measure, the parties entered into a written stipulation agreeing that the undersigned could Hear and Determine the issues. A subsequent communication with Justice Kapnick's law clerk (Tr. 2) and review of the January 14, 2013 Decision made clear that the reference was to Hear and Determine and that the stipulation was unnecessary.

lieu of complaint including the client's affidavit; bankruptcy advice about settling with Defendants; serving Defendants with the motion papers; addressing Defendants' default on liability; working on settling an order per the Court's direction; calculating interest to be included in the Judgment; drafting notice of entry and other related post-decision matters; complying with requests from the judgment clerk and preparation for the attorneys' fees hearing (Tr. 15-19, 22, 27-29, 31-33).

Finally, Foster described the educational background and experience of each of the lawyers who worked on the matter. She testified that she was a 1977 graduate of Columbia Law School and had over 35 years of experience as a litigator. She stated that the associates assisting her on the matter were Adriana Martinez, a 2004 graduate of Columbia Law School who worked on the case until taking maternity leave and Cappell, a 2002 graduate of Columbia Law School, who took over when Martinez left (Tr. 43-44). Foster added that Steven Navarro, co-head of Morgan Lewis' merger and acquisition group with over 30 years of experience, was the relationship attorney for the client. Foster also testified that a bankruptcy partner, Wendy Walker, with over 20 years of experience, and Daryl Pinsker, a bankruptcy associate who graduated from Cardozo Law School in 2002, also assisted with certain issues (Tr. 44-45).

Following the hearing, and as part of her post-trial

submission, Foster submitted an affirmation detailing the work performed after August 23, 2013. Foster affirmed that an additional \$20,027 in fees had accrued over the ensuing time, of which \$16,760.50 related to the fee application, and \$3,266.50 related to the primary case (Foster Supplemental Affirmation ¶ 4, Ex. A). As was the case with the invoices submitted during the hearing, Plaintiffs only provided unredacted copies of the time entries to me (*see fn. 2, supra*).

All told, Plaintiff seeks attorneys' fees in the amount of \$117,482.00 and disbursements totaling \$1,777.32 as summarized in Exhibit B to Foster's Supplemental Affirmation.⁴

DISCUSSION

Initially, I note that although Foster has an interest in the outcome of this hearing to the extent of a larger fee award for her firm, I find her testimony to be credible. In this instance, I do not believe that whatever interest she has in collecting attorneys' fees colored her testimony, which is otherwise supported by the documentary evidence in this matter.

⁴ In the course of testifying about the December 2012 invoice, Foster noted that a \$350 disbursement for a filing fee included therein was also sought as a cost to be taxed by the Judgment Clerk. Accordingly, she withdrew Plaintiff's request for that amount (Tr. 25). The summary figures take account of the subtraction of this disbursement.

To determine reasonable attorneys' fees, I must weigh the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate or what is generally referred to as the "lodestar" method. (*Hensley v Eckerhart*, 461 US 424, 430 [1982].) I am also to consider:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

(*Id.* at 430 n.3; see also *Matter of Freeman*, 34 NY2d 1 [1974]; *Bankers Fed. Sav. Bank FSB v. Off W. Broadway Dev.*, 224 AD2d 376 [1st Dept 1996].)

1. Reasonable Hourly Rates

As a starting point, I conclude that the rates charged by Morgan Lewis professionals in this case are reasonable. In particular, for large law firm attorneys in Manhattan, I conclude that it is reasonable for partners with the experience and pedigree of Foster, Navarro, and Walker to command rates of between \$730-\$855 per hour, senior associates such as Martinez and Cappell to be billed at \$560-\$625 per hour, and

administrative professionals ranging from managing clerks to librarians to be billed at \$140-\$260 per hour (Tr. 8). I further note, as additional evidence of their reasonableness, that Defendants did not object to the rates, and that Plaintiff has paid the bills that have been sent to it in full (Tr. 6).

2. Reasonable Hours Expended

As a general matter, having reviewed the invoices and the testimony concerning the tasks performed, I find that the work of plaintiff's counsel in this case was reasonable and efficient. By and large, the work was necessary, non-duplicative, and appropriate to achieve the results obtained in this commercial dispute. There is one exception. Navarro, a corporate practitioner and the relationship attorney for Plaintiff at the Morgan Lewis firm, billed a total of 11.1 hours on this matter, the majority of which was at the beginning of the case. Although some involvement by a relationship attorney, outside that attorney's area of expertise, is understandable, I conclude that Navarro should not have spent as much time as he did. Accordingly, I disallow 2.1 hours of his time (*Schoenau v. Lek*, 283 AD2d 200 [1st Dept 2001] [affirming Referee's award of fees and noting "[i]t was proper for the referee to employ his own knowledge, experience and expertise as to the time required to perform similar legal services"]).

Plaintiff's legal team, and in particular, its litigators, are guilty to some degree of engaging in the time-keeping practice of "block billing" - stringing together multiple entries under the same time charge. Block billing does not render the attorneys' fees unreasonable *per se* (*J. Remora Maintenance v. Efromovich*, 103 AD3d 501, 503 [1st Dept 2013]). In this case, I did not have difficulty discerning the nature of the work or amount of work reflected in the time entries. In one instance where block billing caused confusion during the hearing, the parties stipulated to an appropriate resolution (Tr. 39-42).

3. Other Factors

There is little question that Plaintiff's counsel obtained a great result - a multi-million dollar recovery including principal and interest through the efficient means of a motion for summary judgment in lieu of complaint (May 29, 2013 Order). On the other hand, this was, for the most part, not an overly complex case. There was no discovery in this action. The main difficulty counsel encountered was the computation of interest (Tr. 29). On balance, I conclude that these factors offset each other - neither the great result nor the relative simplicity of the case warrant an adjustment to the fees at issue, nor do any of the other factors set forth in *Hensley*.

4. Fees on Fees

Finally, I must consider whether Plaintiff is entitled to "fees on fees" for time spent preparing for the attorneys' fees hearing at issue on this matter. It is undisputed that the invoices Plaintiff submitted at the hearing reflect 3.6 hours of Cappell's time and 1.2 hours of Foster's time spent on obtaining attorney's fees (Tr. 39-42; Pl. Ex. 2). Having performed my own review of the time entries in Plaintiff's post-trial submissions, I conclude that there are an additional 7.5 hours of Foster's time, 15.3 hours of Cappell's time, and 0.2 hours of Calvaruso's time that fit this category.

In New York, "an award of fees on fees must be based on a statute or on an agreement." (546-552 W. 146th St. LLC v. Arfa, 99 AD3d 117, 123 [1st Dept 2012]; Sage v. Proskauer, 288 AD2D 14, 15 [1st Dept 2001].) Here, the attorneys' fees award is based on language found in both the promissory note and the guaranty. The promissory note states that "[t]he Borrower agrees to pay on demand all losses, costs and expenses, if any (*including reasonable counsel fees and expenses*), in connection with the preparation, negotiation and enforcement of this Note. . ." (Pl. Ex. 1 Tab A ¶ 4.5 [emphasis supplied]). The guaranty obligates Defendant Rorke "to pay reasonable attorneys' fees . . . and all other costs and expenses which may be incurred by Lender in the enforcement of this Guaranty or any claim hereunder . . ." (Pl.

Ex. 1 Tab B ¶ 10 [emphasis supplied]).

I have considered the relevant language and do not discern a basis to award fees on fees in this case - it is not "unmistakably clear" that fees on fees were contemplated in the agreements (*cf. Arfa*, 99 AD3d at 122 [citations omitted]). To the extent that *Hayes v. Ontario Plastics* (6 AD3d 1122, 1123 [4th Dept 2004]), relied upon by Plaintiff, can be read to suggest a different result, I decline to follow it, in that it conflicts with both *Arfa* and *Sage* from the First Department, which mandate the result here. Accordingly, I am constrained to disallow the fees on fees time from Plaintiff's submissions.

In sum, I disallow 2.1 hours of Navarro's time, 8.7 hours of Foster's time, 18.9 hours of Cappell's time, and 0.2 hours of Calvaruso's time.⁵ These total \$19,841.50 in deductions. As Defendant has not raised any challenges to Plaintiff's claims for disbursements, I award those in full (*RMP Capital Corp. v. Victory Jet LLC*, 2013 NY Slip Op. 51543(U) [Sup Ct, Suffolk County 2013]). As a result, I conclude that Plaintiff is entitled to \$97,640.50 in attorneys' fees and \$1,777.32 in disbursements.

⁵ Morgan Lewis's rates increased during the course of the case. I deduct Navarro's time from the rates as of December 30, 2011 (\$745) and Foster (\$855), Cappell (\$625) and Calvaruso (\$260) from the rates as of June-September 2013.

CONCLUSION


Based on the foregoing, it is hereby

ORDERED and ADJUDGED that plaintiff is entitled to \$97,640.50 in attorneys' fees and \$1,777.32 in disbursements.

The Clerk is directed to enter judgment accordingly.

The parties are directed to contact the Clerk of the Special Referee Part to make arrangements to retrieve the original exhibits submitted as evidence in this case.

Dated: October 17, 2013



JEREMY R. FEINBERG

Special Referee