American Bank Note Corp. v Daniele
2014 NY Slip Op 30033(U)
January 7, 2014
Supreme Court, New York County
Docket Number: 115446/05
Judge: Richard F. Braun

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN J.S.C. **Justice** **PART** 23

Index Number : 115446/2005
AMERICAN BANK NOTE, et al.
vs.
DANIELE, HERNAN DANIEL, et al
SEQUENCE NUMBER : 013
CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____
MOTION DATE 9/12/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3 **, were read on this motion to/for** Confirm report of Special Referee; cross motion to modify report

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits _____ **No(s).** 1
Notice of cross motion.
Answering Affidavits — Exhibits _____ **No(s).** 2
Replying Affidavits _____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is denied and the cross motion is granted to the extent of modifying the Special Referee's Report, and remanding the matter to him for a further assessment and calculation of damages to which defendants are entitled.

This constitutes the decision and order of this Court. See separate Opinion.

FILED
JAN 09 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: New York, New York, December 20, 2013 ENTER: _____, **J.S.C.**

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: IAS PART 23

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AMERICAN BANK NOTE CORPORATION, ABN SOUTH AMERICA, INC. and TRANSTEX SA,

Index No. 115446/05

OPINION

Plaintiffs,

-against-

HERNAN DANIEL DANIELE and DIANA VIRGINIA FERNANDEZ ROSAS,

Defendants.

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RICHARD F. BRAUN, J.:

Plaintiffs move to confirm the February 4, 2013 referee's report, pursuant to CPLR 4403. Defendants cross-move to modify the referee's report, pursuant to CPLR 4403, and to remand the matter for further assessment and calculation of damages.

By April 2, 2012 stipulation, the following issues were referred to a referee to hear and report: (1) whether plaintiffs should be liable for costs, damages, and reasonable attorneys' fees sustained by reason of the attachment that was promulgated by this court in this action; and (2) if plaintiffs are liable, the sum of damages, including reasonable attorneys' fees. The referee reported that plaintiffs are liable for wrongful attachment, which is not challenged by plaintiffs. A hearing was held by the referee at which testimony was taken regarding fees and expenses. On February 4, 2013, the referee's extensive report and recommendation was issued. It concluded and recommended that defendants be awarded attorneys' fees and costs with interest.

A Special Referee's report and recommendations are to be confirmed if his or her findings are supported by the record (*Sichel v Polak*, 36 AD3d 416 [1st Dept 2007]). In *Poster v Poster* (4 AD3d 145 [1st Dept 2004]), the Court held:

> It is the function of a referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility. Generally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record. The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor (citation omitted). To the extent that the referee clearly defined the issues, resolved matters of credibility and made findings that were substantially supported by the record, the court properly credited those findings; to the extent that the referee's findings were not substantiated by the record, they were properly rejected (citation omitted).

"[CPLR 6212] subdivision (e) makes [an] attaching plaintiff liable for all costs and damages 'if it is finally decided that the plaintiff was not entitled to an attachment of *the defendant's property*' (emphasis supplied), an issue on which plaintiff has the burden of proof (*see* CPLR 6223, subd [b])." (*Ford Motor Credit Co. v Hickey Ford Sales*, 62 NY2d 291, 301-302 [1984]). In *Bank of N.Y. v Norilsk Nickel* (14 AD3d 140, 149 [1st Dept 2004]) the Court stated: "Rule 6212 (e) requires the court to award damages, including attorneys' fees, without a showing of fault, for wrongful attachment. Rule 6212 (e) was added 'to make the attaching plaintiff strictly liable for all damages occasioned by a wrongful attachment.'"

The first area raised by defendants was fees on fees. The American Rule as to recovery of attorneys' fees is that they are only recoverable pursuant to a contract between the parties, a statute, or court rule (*Baker v Health Mgt. Sys.*, 98 NY2d 80, 88 [2002]). In that case, the Court refused to award attorneys' fees incurred in the making of an indemnification motion made pursuant to Business Corporation Law §§ 722 (a) and 724. The Court noted that the statute did not explicitly provide for "fees on fees". The Court looked at the wording of Business Corporation Law § 722 (a), which includes the language "attorneys' fees actually and necessarily incurred as a result of such action or proceeding...." The language in CPLR 6212 (e) is similar: "sustained by reason of the

attachment". CPLR 6212 (e) must be interpreted in favor of plaintiffs, in light of the American Rule and the Court of Appeals holding.

Another area of contention related to attorney's fees on the two appeals in this action, including as to jurisdictional discovery issues. Plaintiffs note that the referee refused to award defendants fees in connection with the appeals on the ground they were unrelated to the attachment, and thus were not "sustained by reason of the attachment" as required by CPLR 6212 (e). The referee erred in not awarding attorney's fees to defendants for the time expended regarding the two appeals.

Plaintiffs contend that the referee refused to award attorney's fees for defendants' failure to succeed on their opposition to plaintiffs' taking jurisdictional discovery because it is not reasonable to compensate defendants for their failures in the Supreme Court and at the Appellate Division. Defendants argue that their interim failure to succeed is not a valid basis for denying fees, particularly where defendants were ultimately successful in the action. As defendants show, damages were proximately connected to the discovery issues in light of the attachment, and thus there was no basis to deny fees on that aspect of the litigation (*cf. Thropp v Erb*, 255 NY 75, 79-80, 80-81 [1931] [the Court determined: "The levy in the attachment action was the cause which induced the defendant in that action to appear and defend on the merits, though no summons was served upon him. Since it was the inducing cause of that appearance and defense, the expenses properly incurred in the defense constitute 'damages sustained by reason of the attachment' within the intent and meaning of the undertaking."]).

With respect to the second appeal, the referee noted that the appeal was not related to the attachment because the funds had been released by the time of that appeal. Plaintiffs conclude that, because the second appeal could have no effect on the previously attached fund, the attorney's fees

were not incurred "by reason of the attachment" (CPLR 6212 [e]). However, as defendants contend, had defendants not been successful in the second appeal, the attachment order could have been reinstated, and may have resulted in the loss of defendants' right to recover attachment damages, pursuant to CPLR 6212 (e). Thus, defendants are entitled to their attorney's fees on that appeal too (*see Israel Commodity Co. v Banco Do Brasil, S.A.*, 50 Misc 2d 362, 372-375 [Sup Ct, NY County 1966]; *cf. Tyng v American Sur. Co.*, 174 NY 166, 168-169 [1903] [where the order granting the defendant's motion to vacate the attachment was reversed on appeal, and the defendant succeeded in getting the complaint dismissed at trial, the defendant was awarded the amount of the plaintiff's undertaking as damages for defendant's counsel fees that she had to pay due to the attachment]).

Defendants also challenge the failure of the referee to award to defendants fees for the associate of defendants' lead attorney and his Argentine co-counsel. The referee denied fees for defendants' attorney's New York associate and Argentine co-counsel. Defendants note that plaintiffs had two attorneys at the hearing and at practically every conference. Plaintiffs argue that the hearing was not a full blown trial that necessitated a second seat. Defendants have shown that the fees for the New York associate should have been included in that such a use by counsel at a hearing was needed and is commonplace. With respect to the Buenos Aires attorney, the referee found that there was a failure of proof in that the fees were not "credibly documented". Plaintiffs argue that defendants' use of Argentine co-counsel was unnecessary and duplicative because the same work was being done by defendants' New York counsel. Defendants argue that New York and foreign counsel were needed for this complex action. The referee's recommendation should not be modified as to the Argentine co-counsel.

The next area of contention is the contingency fee adjustment to the base lodestar amount.

In *McGrath v Toys "R" Us, Inc.* (3 NY3d 421, 429-430, n 1), the Court noted the factors to be considered in relation to the "lodestar" method, which is employed to determine reasonable attorney's fee awards:

> The factors are: '(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' (citation omitted).

As noted by the Court in *Matter of City of New York* (52 AD3d 387 388 [1st Dept 2008]): "The court was not bound by claimant's retainer agreement with counsel, which provided for attorney fees to be calculated as a percentage of the interest portion of the award, as well as the principal; it was required only to assess reasonable attorney fees (citation omitted)." The referee did take the lodestar method into account, and the court will not modify his report in that regard.

With respect to the interest award, the referee followed the determination made in *1199 Hous. Corp. v Jimco Restoration Corp.* (77 AD3d 502, 503 [1st Dept 2010]), where the Court held that "prejudgment interest on the attorneys' fee claim was properly awarded from the date of the underlying judgment on plaintiff's breach of contract claim and not from the date of the instant judgment." As noted in *Subin v United States Fid. & Guar. Co.* (12 AD2d 49, 53 [1st Dept 1960]), "a proper element of damage ... under the warrants of attachment was the legal rate of interest...." However, defendants believe that, as an oversight, the referee failed to provide for pre-judgment interest on the damages portion of the award – items I and II. Plaintiffs argue that the referee did award pre-judgment interest on items I and II. The referee awarded 9% prejudgment interest on the

sum of the attached funds, from the date when the funds were restrained, November 4, 2005, to the date released, October 9, 2009, minus a credit of interest earned while the funds were held by the sheriff. Plaintiffs comment that the referee was generous in including the nine month time period of the temporary restraining order, which is not an attachment. The attachment was not granted until August 29, 2006. In *Provisional Protective Comm. v Williams* (121 AD2d 271 [1st Dept 1986]), the Court determined: "It is well settled that statutes providing for the extraordinary remedy of attachment are strictly construed in favor of the party whose property is sought to be attached. (citation omitted.) The temporary restraining order contained in the order to show cause in the present case was only a security device ... pending disposition of the motion for an order of attachment. Under these circumstances, the attorney's fees sought by defendants are not within the ambit of damages recoverable under CPLR 6212." (*id.* at 273.) However, plaintiffs do not request a modification on this basis. Plaintiffs perceive defendants' request as one for prejudgment interest on the prejudgment interest awarded, owed as of October 9, 2009, but not paid, as seeking interest on interest, which would be an impermissible windfall (*see Kassis v Teachers' Ins. & Annuity Assn.*, 13 AD3d 165 [1st Dept 2004]). There is no error evident in the interest that was awarded in relation to the property of which defendants were deprived and thus with respect to the damages assessed.

Accordingly, by separate December 20, 2013 decision and order, plaintiffs' motion was denied. Defendants' cross motion was granted to the extent of modifying the Special Referee's report, and remanding this matter to him for a further assessment and calculation of damages to which defendants are entitled, in accordance with this opinion.

Dated: New York, New York
January 7, 2014

Richard F. Braun
RICHARD F. BRAUN, J.S.C.