

Matter of Rennert v S.M.R. Holding Corp.

2016 NY Slip Op 31776(U)

September 23, 2016

Supreme Court, New York County

Docket Number: 601897/2009

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**In the Matter of the Petitioner of
ABRAHAM RENNERT,**

Petitioner,

-against-

S.M.R. HOLDING CORP., et al.,

Respondents.

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DECISION AND ORDER

**Index No.: 601897/2009
Motion Seq. Nos.: 006 & 007**

O. PETER SHERWOOD, J.:

In motion sequence number 006, respondents move to reject in part and confirm in part Special Referee Louis Crespo’s Report (“Report”). In motion sequence number 007, petitioner The AM & MM Rennert Family Trust (the “Trust”) moves to reject in part and confirm in part the Report.¹ Non-party Joseph F. Grassi (the former attorney to respondent SMR Holding Corp.) moves to reject the portion of the Report that recommends the amount of his charging lien.

For the following reasons, the Report is confirmed, except that the amount of non-party Mr. Grassi’s charging lien should be set at the total amount of \$58,014.

I. Background

SMR Holding Corp. (“SMR”) was a closely held corporation that held a single asset – a commercial/residential building located at 15 Eighth Avenue (the “Building”). In June 2009, Rennert sued Esther pursuant to BCL 1104-a to dissolve SMR based on alleged oppressive conduct. He alleged that Esther, SMR’s majority shareholder, was living in a duplex apartment in the Building without paying rent. Rennert’s order to show cause commencing this proceeding sought to surcharge Esther for her rent-free living arrangement. In November 2009, SMR signed a 20-year lease with Esther for the apartment for \$750 per month and no rent increases. By order entered January 26, 2011 (the “Dissolution Order”) the Court (Yates, J.) granted the petition, pursuant to BCL 1104-a(2). In June 2011, after Justice Yates dissolved SMR and without consulting Rennert or the Court, Esther leased the Building’s commercial space to Igor Unisex,

¹ The original petitioner Abraham Rennert was substituted out for the Trust.

Inc. (“Igor”). In June 2013, the Building was sold for \$3,500,000. The net sale proceeds are being held in escrow.

In an order dated April 27, 2015, this Court ordered Referee Crespo to conduct an accounting of respondent SMR, including the Trust’s claim for a surcharge. The Trust owns one-third of the shares in SMR. The Trust initially sought a \$510,836.02 surcharge consisting primarily of the following five items:

- (i) Fair rental value of Esther’s residential space from June 2003 to October 2012 at 15 Eighth Avenue (the “Building”) minus any rent Esther paid;
- (ii) One-third difference between \$4,070,000 and the \$3,500,000 – the latter number being the contract price at which the Building actually sold;
- (iii) One-third of the difference between the fair market rent at which the commercial space could have been rented and the actual rent paid;
- (iv) One-third of the \$181,826.56 in legal fees in this proceeding that the Estate and Esther paid; and
- (v) One-third of the interest and penalties from belated tax payments.

The Report denied (i) through (iii) in their entirety, but awarded \$37,000 representing the value of the Building had the ground floor commercial space been vacant when the Building sold (for \$3,500,000). As to item (v), the Report surcharged the Estate for interest of \$511.10 and penalties of \$1,633.25 – to which the Trust is entitled to a one-third surcharge. As to item (iv), the Report awarded the Trust a one-third surcharge on the sum of \$163,964.24 (\$54,108.20). The Report also recommended surcharging respondents one-third of travel expense totaling \$778.50. Finally, the Report recommended that the Court approve the award of reasonable fees and expenses to Mr. Grassi in the sum of \$77,464 and \$349.17 and that such fees and expenses are chargeable to the respondents pursuant to their respective share interest in SMR, with statutory interest from November 1, 2013 to date of payment.

II. Arguments

It is well-established that the report of a referee shall be confirmed whenever the findings contained therein are substantially supported by the record (*Poster v Poster*, 4 AD3d 145 [1st Dept 2004] [courts will not disturb findings of a referee so long as determination is substantiated by record]; *DiIorio v Gibson & Cushman of New York, Inc.*, 204 AD2d 167 [1st Dept 1994]). Here, Referee Crespo is especially informed about this case. Respondents even note that “in his

comprehensive and detailed 60 page Report . . . [Referee Crespo] became involved with this case in 2012” (Opp. [Motion Sequence No. 007] NYSCEF Doc. No. 168 at 1-2).

Initially, for the many reasons stated in the Report, Referee Crespo’s recommendation that the Trust is entitled to surcharges, as a general matter, is confirmed (*see e.g.*, Report at p. 39). The Referee noted that “the Court’s determination [that respondents looted, wasted, and diverted assets belonging to SMR] is akin to willful or reckless dissipation or transfer of assets upon which a surcharge will rest” pursuant to BCL 1104-a(d). Respondents never perfected their appeal to the dissolution order.

a. Charging Lien

Contrary to the report, respondents and Mr. Grassi now agree that the Court should set the value of Mr. Grassi’s charging lien in the total amount of \$58,173 (\$58,014 in fees and \$159.90 in expenses) (*see* Grassi Aff., NYSCEF Doc. No. 144, ¶ 6 [“In fact, there is an arithmetic mistake in the Referee’s calculation of the total amount he recommended. The arithmetically total correct amounts are \$58,014 in fees and \$159.90 in expenses.”]); Respondents’ Reply Memo., NYSCEF Doc. No. 175 at 10). Therefore, the Court adopts the Report except to fix the total amount of Mr. Grassi’s charging lien for fees to \$58,014.00 have agreed to the correct amount.

b. Travel Reimbursement

Referee Crespo recommended that the Court surcharge respondents for \$778.50 in travel expenses for Martin Zucker’s (son of Esther Zucker) flight to New York to attend the closing of the Building’s sale. Respondents argue that this corporate expense was incurred while “winding down” the business and that Referee Crespo confused the trip by Mr. Zucker with a prior trip to assist the commercial tenant which was paid for by Mr. Zucker. However, the Referee expressly sustained the objection to this expense because Mr. Zucker’s travel to the Building occurred after the dissolution of SMR (Report, Conclusions of Law ¶¶ 40-41). Respondents presented no evidence that it was necessary for Mr. Zucker to personally attend the closing and that it could not have taken place by way of a power of attorney. Respondents’ argument is rejected.

c. Tax Interest and Penalties

Respondents argue that the interest of \$511.10 and penalties of \$1,633.25 surcharges are inappropriate because these were incurred because the funds were not available. Extra time was required to obtain a court order to permit the title company to release the payment to the IRS.

However, as noted by petitioner, the sale of the Building took place in June 2013 and the payments were due by September 2013. Respondents waited until April 2015 to obtain from this court an order to pay the IRS (Schwartz Aff., Ex. E [April 2, 2015 Order]). Therefore, the Report's finding is substantially supported by the record.

d. Commercial Lease

The Report recommends that "the respondents are subject to the further surcharge of \$37,000 for the difference in the market value of the property sold in June 2013. Petitioner argues, *inter alia*, that the leasing of the ground floor premises in the Building at a below market rate reduced the sale price of the Building and the Trust is entitled to a surcharge against respondents of \$190,000.00 (one-third of \$570,000, which petitioner argues is the difference between the \$4,070,000 fair market value and the \$3,500,000 sales price). Petitioner argues that the Report erred in awarding \$37,000 for the difference of the value of the Building as if vacant (\$3,537,000 and the sales price of \$3,500,000). Petitioner also argues that the Trust is entitled to a surcharge of \$41,641.67 because of Esther's leasing of the commercial premises for a below-market rate.

Respondents argue, *inter alia*, that Referee Crespo failed to consider the \$90,000 in rent revenue that the commercial lease produced. Respondents argue that SMR was never properly dissolved pursuant to BCL 1110. Respondents reasonably believed that they were authorized to execute the commercial lease. Respondents request \$63,000 representing the net value of the commercial lease.

Here, notwithstanding the parties' respective arguments seeking different amounts, the Report's recommendation of a \$37,000 surcharge is substantially supported and therefore confirmed by this Court (*see e.g.*, Report, Conclusions or Law, ¶¶ 42-51).

e. Legal Fees

Petitioner argues that the report's list of more than 25 separate payments from SMR to its attorney's (Report ¶¶ 48-49) total \$183,965.79 (\$175,965.79 to attorney Grassi and \$8,000 to attorney Konopka and not the lesser amount of \$155,964.24 and \$8,000 in the Report). Petitioner argues that this Court should confirm that portion of the Report concluding that SMR's legal expenses are not proper expenses allocated to SMR, but the amount of the surcharge should be one-third of \$183,965.79. Petitioner also argues that the Report denied a surcharge of \$750

imposed by the court on respondents' counsel. Petitioner argues that, in effect, the fine imposed on respondents' counsel's contemptuous conduct forced petitioner to pay \$250.

Here, petitioner's argument that the Report miscalculated the legal fee payments must be rejected. Petitioner does not posit a legal or factual rebuttal to Referee Crespo's finding that "the Accounting only reveals \$155,964.24 was paid with SMR funds to Mr. Grassi" (Report at p. 59, fn. 37 [Referee Crespo even references that he considered a miscalculation argument from petitioner's post-trial memorandum of law]). Petitioner does not even identify the alleged payments that Referee Crespo allegedly failed to include in his arithmetic. Petitioner also does not provide factual or legal support to rebut Referee Crespo's finding that the \$750 was a corporate expense.

f. Use and Occupancy

Petitioner also asserts that the Court should reject the portion of the Report that did not award petitioner \$216,966.67 (one-third of \$650,900.01 for the rental value of Esther's rent free use of her apartment in the Building according to petitioner's expert). Pages 45 through 50 of the Report provide detailed analysis and substantial support from the record for the finding that petitioner is not entitled to a "use and occupancy" surcharge (Report, Conclusions of Law, ¶¶ 52-83). For the reasons stated in the Report, which are substantially supported by the Record, petitioner's argument is rejected.

g. Pre-Judgment Interest

Finally, petitioner argues that it is entitled to pre-judgment interest on the surcharges (which the Report does not specifically address). Notably, the Report provides for statutory interest as to the charging lien (Report at p. 60). In this context, awarding pre-judgment interest is within the Court's discretion. Because Referee Crespo awarded interest with respect to the charging lien, he specifically used his discretion in not awarding pre-judgment interest with regard to the surcharges.

The Court has considered the parties' remaining arguments and finds them to be without merit.

Accordingly, it is hereby

ORDERED that the Motion to Confirm the Report of Special Referee Louis Crespo is **GRANTED**, except that the total amount of Mr. Grassi's charging lien shall be set at \$58,173; and it is further

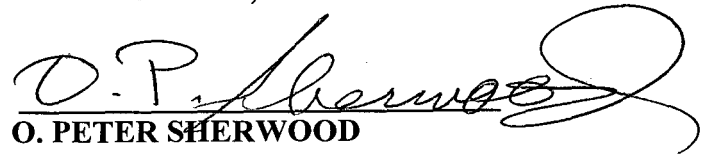
ORDERED that petitioner is directed to settle order on five (5) days notice.

This constitutes the decision and order of the court.

DATED: September 24, 2016

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E N T E R,



O. PETER SHERWOOD
J.S.C.