

**Kowal v Jack from Brooklyn Inc.**

2017 NY Slip Op 32037(U)

September 27, 2017

Supreme Court, New York County

Docket Number: 156412/2015

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

-----X  
JAIME KOWAL, RYAN TOMKINSON,

Plaintiffs,

- v -

JACK FROM BROOKLYN INCORPORATED,  
A/K/A JACK FROM BROOKLYN, INC., A/K/A  
JACK FROM BROOKLYN INCORPORATED,  
ERECH SWANSTON A/K/A JACKIE SUMMERS,  
A/K/A JACK SUMMERS,

Defendants  
-----X

Index No.  
156412/2015

Decision and  
Order

Mot. Seq. 6

HON. EILEEN A. RAKOWER, J.S.C.

Presently before the court is plaintiffs' motion for an order pursuant to CPLR §4403 to accept the report of Judge Gammerman dated May 16, 2017 and filed July 27, 2017 ("Report"), and enter an order awarding plaintiffs attorneys' fees in the amount of \$45,342.74. Plaintiffs claim that the parties agreed to this on the record in open court before Judge Gammerman. Defendants oppose.

By way of background, plaintiffs Jaime Kowal and Ryan Tomkinson (collectively, "plaintiffs") commenced this action on June 25, 2015 seeking repayment of two identical loans that they made to the defendants. Each loan was for \$40,000.00. Each loan contained a provision that states, "Costs of Collection. Maker agrees to pay to Holder and reimburse Holder for reasonable costs and expenses, including attorney's fees and court costs, if any, incurred by Holder in connection with the enforcement or collection hereof."

By Notice of Motion filed on August 31, 2015, plaintiffs moved for default judgment against the defendants, jointly and severally, in the amount of \$127,354.08, plus interest, reasonable attorneys' fees and costs. By Order dated

January 20, 2017 and filed on January 21, 2017, the Court granted plaintiffs' application for default judgment in the amount of \$127,354.08 and referred the issue of the amount of reasonable attorneys' fees and costs due to plaintiffs to a Referee to hear and report with recommendations. On March 21, 2017, the clerk entered judgment against the defendants.

On March 24, 2017, defendant Erech Swanston ("Swanston"), appearing pro se, filed an order to show cause seeking to vacate the default judgment entered by the court. The motion had a return date of May 9, 2017. On March 24, 2017, Swanston, appearing pro se, and plaintiffs' counsel appeared before Special Referee Jeremy R. Feinberg. Mr. Feinberg adjourned the hearing to determine reasonable attorneys' fees until May 16, 2017. On May 9, 2017, Michael Kenny, Esq., on behalf of defendants, and Justine T. Rousseau, Esq., on behalf of plaintiffs, appeared before Justice Rakower for the Order to Show Cause. Justice Rakower denied the Order to Show Cause, and held, "There is no stay. The referee must move forward." On May 15, 2017, Mr. Kenny, on behalf of defendants, filed a second order to vacate the default judgment which included a request to adjourn the May 16, 2017 hearing scheduled before the Special Referee. On May 16, 2017, Justice Ostrager scheduled the order to show cause to be heard on May 23, 2017 before Justice Rakower. Defendants' request to adjourn the hearing to determine attorneys' fees was denied. Defendants' order to show cause was subsequently withdrawn by defendants on June 8, 2017 in accordance with Mr. Kenny's correspondence dated June 6, 2017.

Mr. Kenny and Ms. Rousseau appeared at the scheduled hearing on May 16, 2017 on behalf of their respective clients. Mr. Kenny appeared on behalf of defendants. Ms. Rousseau appeared on behalf of plaintiffs. As reflected in the transcript, the following exchanges were made at the scheduled hearing:

Judge Gammerman: Well, how much are you seeking in attorneys fees, counsel?

Ms. Rousseau: It is \$46,342.74.

Judge Gammerman: Okay. And you dispute the reasonableness of that amount?

Mr. Kenny: I do not, your Honor.

(Transcript at 3:4-9).

Judge Gammerman: I don't need it. If you consent to the reasonableness I can recommend it to Judge Rakower.

Mr. Kenny: I understand.

(Transcript at 3:19-22)

Judge Gammerman: Well, do you agree? Let's put it this way. This may be an academic exercise. But, if you agree that the fee is reasonable I can make that recommendation. And then depending upon what Judge Rakower does with respect to the motion now to vacate the default, that will either be part of the judgment or it won't be part of the judgment.

Mr. Kenny: I think we are both on the same page. We don't dispute the reasonableness of Ms. Rousseau's fees.

(Transcript at 5:8-16)

Judge Gammerman: How much is the fee that you're seeking?

Ms. Rousseau: \$45,342.74.

Judge Gammerman: Okay. That is my report to Judge Rakower. That is the reasonable amount.

(Transcript at 5:22-26)

In their current motion, plaintiffs contend that Judge Gammerman's recommendation that they be awarded \$45,342.74 should be confirmed. Plaintiffs claim that at the hearing, the parties, through their counsel, agreed that this was a reasonable amount of attorneys' fees.

Defendants oppose, and submit the attorney affirmation of Mr. Kenny on their behalf. Defendants argue that "[t]he Court should deny the motion because it is undisputed that Ms. Rousseau expended only \$22,000 worth of attorney time in representing plaintiffs in this case (see Exhibits A and B hereto)." Defendants argue, "Ms. Rousseau cannot enforce her 1/3 contingency fee arrangement against defendants because the attorney's fee provisions that Ms. Rousseau asserts as the

basis for the award - contained in the two \$40,000 promissory notes executed by defendant Jack From Brooklyn, Inc. - cannot be reasonably read as permitting defendants to enter into a contingency fee arrangement that increases the amount of the debt at issue here by 30%." Defendants further argue, "Ms. Rousseau has done nothing in her present application to attempt to establish that her request for an award of \$45,342.74 - which exceeds the total cost of one of the two promissory notes at issue here - is reasonable based on the number of hours that she expended."

As for his appearance before Judge Gammerman, Mr. Kenny states in his affidavit, "As the transcript of the May 16th hearing more accurately reflects (see Rousseau Aff., Ex. 1 (NYSCEF Doc. No. 100), I never stipulated to anything on that day. Instead, out of courtesy to Ms. Rousseau, based on ongoing settlement discussions between our clients that have now failed, and because of a pending motion to vacate the default entered against my clients that those settlement discussions later induced defendants to withdraw, I merely told Judge Gammerman that defendants were 'not disputing' the reasonableness of her fee at that time." Mr. Kenny further states, "In refraining from disputing the fee amount, however, I never imagined that Ms. Rousseau would move this Court for an order holding my clients fully responsible for her contingency arrangement with her own clients. At no time during or before the hearing did Ms. Rousseau indicate that she would ever do so."

Pursuant to CPLR § 4403, the Court has the power to confirm or reject "in whole or in part ... the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing" if necessary. A referee's report should be confirmed where the report "clearly defined and addressed the issues raised, resolved matters of credibility, and made findings substantiated by the record." (*Gass v. Gass*, 42 AD3d 393 [1st Dept. 2007]).

Here, the loans provided by plaintiffs to defendants each contains a provision that states, "Costs of Collection. Maker agrees to pay to Holder and reimburse Holder for reasonable costs and expenses, including attorney's fees and court costs, if any, incurred by Holder in connection with the enforcement or collection hereof."

A reasonable attorney's fee is commonly understood to be a fee which represents the reasonable value of the services rendered. *Diaz v Audi of America, Inc.*, 57 AD3d 828 [2d Dept 2008]. In general, factors to be considered include (1) the time and labor required, the difficulty of the questions involved, and the skill

required to handle the problems presented; (2) the lawyer's experience, ability and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved. *In re Sucheron*, 95 AD3d 892 [2d Dept 2012]. "As a general rule, the reasonable hourly rate [for an attorney] should be based on the customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented." *Id.* At 526-27. It is the burden of the applicant to establish the prevailing hourly rate for the work performed. *See Gutierrez v Direct Marketing Credit Services, Inc.*, 267 AD2d 427 (2d Dept 1999).

"It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." (*U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597 [2004]). "When an obligation to reimburse another party for litigation expenses arises pursuant to a contract between the parties, the terms of the contract 'must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.'" (*Edelman v. Emigrant Bank Fine Art Finance, LLC*, 2011 WL 11071779, at \*9 [N.Y.Sup. May 23, 2011]) (citing *Hooper Assocs. Ltd. v AGS Computers, Inc.*, 74 N.Y.2d 487, 491 [1989]). *See Merch. Cash & Capital LLC v. Nguyen*, 14 CIV. 3496 NRB, 2014 WL 5374453, at \*1 [S.D.N.Y. Oct. 14, 2014]) ("The provision for attorney's fees here cannot reasonably be read as permitting the creditor to enter into a contingency fee arrangement that increases the amount of the debt by thirty percent. If the parties had intended to use such a percentage rate, they should have so specified in the contract").

Here, under the parties' loan agreements, defendants are obligated to plaintiffs "for reasonable costs and expenses, including attorney's fees and court costs, if any, incurred by Holder in connection with the enforcement or collection hereof." The provision does not provide that defendants would be obligated to satisfy a contingency fee arrangement that separately exists between plaintiffs and their attorneys. Since plaintiffs did not present and Judge Gammerman did not consider any of the factors enumerated above, the amount of reasonable attorneys' fees is again referred to a Special Referee to hear and report with recommendations.

Based upon the foregoing, it is hereby

ORDERED that plaintiffs' request to confirm the Report and Recommendation issued by the Honorable Ira Gammerman, J.H.O., and dated May 16, 2017 is denied; and it is further

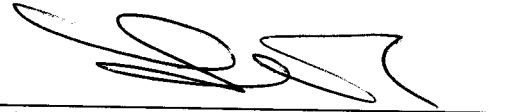
ORDERED that a new inquest is directed; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendant, of the date of the hearing.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 27, 2017



Eileen A. Rakower, J.S.C.