

Konsker v Cushman & Wakefield, Inc.

2018 NY Slip Op 30567(U)

March 29, 2018

Supreme Court, New York County

Docket Number: 651493/12

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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MITCHELL KONSKER, PAUL N. GLICKMAN,
MATTHEW R. ASTRACHAN, A. MITTI LIEBERSOHN,
and ALEXANDER CHUDNOFF,

Index No. 651493/12

Plaintiffs,

- against -

CUSHMAN & WAKEFIELD, INC.,

Defendant.
-----X

Hon. Andrea Masley:

Plaintiffs Mitchell Konsker, Paul N. Glickman, Matthew R. Astrachan, A. Mitti Liebersohn and Alexander Chudnoff move, pursuant to CPLR 4403, to confirm the special referee report, dated April 19, 2017 (the Report), and entry of judgment in the amount of \$150,003.44 in unpaid wages, plus prejudgment interest from January 15, 2011, \$150,003.44 in liquidated damages and \$342,684.69 in attorneys' fees.

Defendant Cushman & Wakefield cross-moves, pursuant to CPLR 4403, to modify the Report by reducing the attorneys' fees awarded to plaintiffs and for an award of reasonable attorneys' fees to defendant.

Plaintiffs are commercial real estate brokers who left defendant's employ in January 2011 after their contracts expired. In their May 2, 2012 complaint, plaintiffs sought \$4 million for breach of contract or \$8 million for unpaid wages (\$4 million) in violation of the New York Labor Law and liquidated damages (\$4 million). On February 14, 2013, Justice Oing dismissed plaintiffs' second (breach of good faith and fair dealing), fourth (accounting), and fifth (declaratory judgment) causes of action. On November 17, 2014, the parties resolved by stipulation the base commission claims in the amount of \$1,493,790 and limited attorneys' fees to those allocable to the additional commissions. Apparently, the parties also agreed to waive liquidated damages as to this amount. After three years of discovery, including eight depositions, the parties filed dueling motions for

summary judgment. By decision and order dated May 16, 2016, Justice Oing granted plaintiffs' motion for unpaid commissions for 2010, while they were employed by defendant, but denied for 2011, 2012, and 2013. He referred the issue of whether additional commissions are owed to plaintiffs and if so attendant (1) liquidated damages, prejudgment interest and attorneys' fees pursuant to Labor Law §198, or (2) if no such additional commissions are owed, defendant's reasonable attorneys' fees. Finally, at the start of the referee's hearing on April 18, 2017, five years after plaintiffs initiated this action, defendant conceded that it owes additional commissions as well as liquidated damages: \$32,160.14 to Konsker; \$30,958.90 to Liebersohn; \$26,527.05 to Chudnoff; \$31,806.99 to Glickman and \$28,550.36 to Astrachan, totaling \$150,003.44. The parties also agreed to pre-judgment interest at 9% running from January 15, 2011.

As of the date of the referee's hearing, April 18, 2017, plaintiffs' legal fees were \$752,573.16. Plaintiffs do not seek legal fees related to the portion of the action that the parties settled, bringing the bill to 502,326.15. Plaintiffs further reduced the amount sought by small billed amounts, bringing the amount sought at the referee's hearing to \$497,326.15, a 33% voluntary reduction.

The referee reduced the fee further because the amount recovered was less than the amount recovered in settlement. The referee reduced the hours charged as a result of his belief that this was a simple wage and hour case, not complex commercial litigation, further reducing the fee. As a result, the referee reported that attorneys' fees should be awarded in the amount of \$326,217.19, another 34% reduction. In addition to the \$150,003.44 stipulated to by the parties and interest at 9% since January 15, 2011, the referee also awarded liquidated damages in the amount of 100% of total unpaid wages of \$150,003.44.

Plaintiffs simply ask to confirm the referee's report. While plaintiffs understandably disagree with the referee's finding that this is a basic wage and hour case, they concede that it is supported by the record. In concluding this was a simple wage and hour case, the court notes that the referee appears to have overlooked the work entailed in defendant's motion to dismiss. See Helewitz Report at 17. Nonetheless, after waiting five years to be paid their wages, plaintiffs certainly have the right to choose to accept the fee recommended by the referee and put an end to this litigation.

Defendant insists that it is the prevailing party, and thus, entitled to legal fees. Defendant relies on one factor: that plaintiff sued for \$3.5 million, but recovered \$150,000 as liquidated damages. The referee has already incorporated this factor by making a downward adjustment of 34% to the amount of attorneys' fees requested by plaintiffs. Plaintiffs had already reduced the amount sought by 33%. Defendant wants more. Defendant objects to the binary structure of Justice Oing's order of reference: if plaintiff is entitled to additional compensation, then the referee shall compute plaintiffs' attorneys' fees and liquidated damages. Otherwise, the referee shall compute defendant's attorneys' fees. Defendant blames the order for prohibiting the referee from considering defendant's successful defense.

Defendant's motion is denied because plaintiffs prevailed. Plaintiffs earned wages and defendant failed to pay them, forcing plaintiffs to initiate this litigation. Defendant misrepresents its winning statistics. For example, defendant omits from its calculation plaintiffs' success in securing \$1.4 million in damages by settlement over two years after this action was initiated.¹ Effectively, defendant seeks to punish plaintiffs for settling for

¹Plaintiffs claimed additional commissions of nearly \$3.5 million and recovered just \$150,000. In absolute terms, C&W prevailed by a factor of over 20 to 1." Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Confirm and in

\$1.4 million without insisting on an additional \$1.4 million in liquidated damages, which may have been awarded had the parties gone to trial on that issue. Even if the court were to accept defendant's exclusion of the \$1.4 million, courts have awarded attorneys' fees exceeding the amount of damages. See *Barfield v N.Y. City Health & Hosps. Corp.*, 537 F3d 132 (2d Cir 2008) (Court awarded \$ 49,889 in attorneys' fees where compensatory and liquidated damages totaled \$1,744.50). That four of plaintiffs' five cause of action were dismissed is likewise of no moment. The reality is that parties assert multiple legal theories in complaints, sometimes the claims even conflict, and many are dismissed. As a consequence of New York's liberal pleading policies, parties also allege damages, but are not always awarded the requested amount. Indeed, it is usually less. Defendant's myopic view of counting claims dismissed and calculating awards as a percentage of damages alleged in the complaint is contrary to New York practice. Likewise, defendant does not become victorious by settling at the last minute, twice. Defendant's purposeful failure to pay employees earned wages renders defendant a wage thief and the loser. Any other conclusion would be a perversion of the record and antithetical to the purpose to New York's Labor Law and the penalties it provides to discourage such bad employer behavior.

As a procedural matter, defendant's cross motion is improper. If defendant disagreed with Justice Oing's May 16, 2016 decision to deny attorneys' fees to defendant unless plaintiffs were found not to be entitled to additional wages, its remedy was to reargue or appeal. On December 4, 2017, defendant filed a notice of withdrawal of its notice of appeal of the May 16, 2016 decision and order. Defendant's time to reargue has long expired.

Plaintiffs incurred an additional \$26,319.50 for this motion and the referee hearing.

Support of Cross-Motion to Modify. p. 1.

The court finds that plaintiffs are entitled to such reasonable attorneys' fees. See *Posner v. S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 (1st Dept 2004).

Again, the hearing and this motion would have been unnecessary, had defendant simply paid plaintiffs the wages they earned. The referee's justification for reducing the hourly rates does not apply to this motion which is not a wage and hour issue.

Accordingly, it is

ORDERED, that plaintiffs' motion is granted and the referee's report is confirmed; and it is further

ORDERED, that defendant's cross-motion is denied; and it is further

ORDERED, that plaintiffs shall have judgments as stipulated to by the parties as follows: \$32,160.14 (21%) to Konsker; \$30,958.90 (21%) to Liebersohn; \$26,527.05 (18%) to Chudnoff; \$31,806.99 (21%) to Glickman and \$28,550.36 (19%) to Astrachan, totaling \$150,003.44 with interest at 9% from January 15, 2011 until the date of this decision and thereafter at the statutory rate as calculated by the Clerk; and it is further

ORDERED, that plaintiffs shall have judgment for liquidated damages awarded by the referee as follows: \$32,160.14 (21%) to Konsker; \$30,958.90 (21%) to Liebersohn; \$26,527.05 (18%) to Chudnoff; \$31,806.99 (21%) to Glickman and \$28,550.36 (19%) to Astrachan, totaling \$150,003.44; and it is further

ORDERED, that plaintiffs shall have judgment for attorneys' fees awarded by the referee as follows: \$68,505.61 (21%) to Konsker; \$68,505.60 (21%) to Liebersohn; \$58,719.10 (18%) to Chudnoff; \$68,505.61 (21%) to Glickman and \$61,981.27(19%) to Astrachan, totaling \$326,217.19 with interest at the statutory rate from April 19, 2017 to the date of the decision and thereafter at the statutory rate as calculated by the Clerk; and it is further

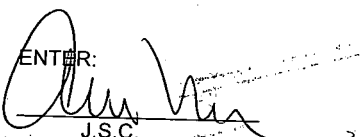
ORDERED, that plaintiffs shall have judgement for \$5,527.10 (21%) to Konsker; \$5,527.09 (21%) to Liebersohn; \$4,737.51 (18%) to Chudnoff; \$5,527.10 (21%) to Glickman and \$5,000.70 (19%) to Astrachan, totaling \$26,319.50 for this motion and the referee hearing with interest at the statutory rate from the date of this order; and it is further

ORDERED, the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendant in the sum of

- Konsker \$ _____
- Liebersohn \$ _____
- Chudnoff \$ _____
- Glickman \$ _____
- Astrachan \$ _____

including interest as indicated above and as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements in the sum of \$ _____, as taxed by the Clerk of the Court, for a total sum of \$ _____ and plaintiffs shall have execution thereon.

DATED: 3/21/18

ENTER: 
J.S.C.
HON. ANDREA MASLEY