SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** IAS MOTION 37EFM

Justice

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JOSE CRUZ, MAHMOUD ELDWARDANY, DEBORAH FINSTON, JOHN TOMASZEWSKI, DONALD WEST,

Petitioner,

for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

- v -

SEWARD PARK HOUSING CORPORATION, DAVID PASS, CLINTON GRAND PARKING L.L.C., ICON PARKING SYSTEMS, L.L.C.,

Respondent.

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INDEX NO. 155244/2016

MOTION DATE 5/1/18

MOTION SEQ. NO. 005

DECISION AND ORDER

Arthur F. Engoron, J.S.C.

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 5, were used on respondents' motion, and petitioner's cross-motion, to confirm in part and reject in part a special referee's report on attorney's fees:

	Papers Numbered:
Notice of Motion - Affirmation - Affidavit - Exhibits	1
Affirmation in Opposition - Affidavit	2
Reply Affirmation	3
Petitioner' Reply Letter (June 28, 2018)	4
Respondents' Reply Letter (July 2, 2018)	5

Brief Background

Respondent Seward Park Housing Corporation ("Seward Park") owns a well-known housing complex on the storied Lower East Side of Manhattan. Petitioners are cooperators who, before the events here in issue, had long-term, relatively inexpensive licenses to park their cars in Seward Park's garage. On January 27, 2016 Seward Park's Board of Directors voted to switch from a "park-and-lock" system to a "valet parking" system and to have respondent Clinton Grand Parking L.L.C. ("Clinton Grand"), a subsidiary of respondent Icon Parking Systems, L.L.C., operate it. The next day, Seward Park notified the cooperators of the vote. Almost immediately, certain cooperators/licensees publicly and vociferously objected. On March 2, 2016 Seward Park's Board voted to approve a proposed contract with Clinton Grand ("the Contract"). The objections continued.

On or about June 22, 2016 petitioners filed the instant CPLR Article 78 Petition, seeking to annul the Board's decisions on various grounds, including that the Board failed to provide proper advance notice of the votes; that the Board exceeded its authority; and that the Contract is illegal. On or about July 21, 2016 respondents moved to dismiss the petition, primarily on the grounds that the petition was untimely and that the Business Judgment Rule insulated the Board's actions. On or about September 1, 2016 petitioners cross-moved for sanctions for frivolous litigation and various alleged bad acts. On or about September 19, 2016 respondents replied to the opposition to their motion and opposed the cross-motion. In a Decision and Order dated July 19, 2017 this Court dismissed the

petition on the ground of untimeliness, while also addressing the Business Judgment Rule and other issues, and sent respondents' request for attorney's fees, for which petitioners' proprietary leases provided, to a referee to hear and report.

Respondents' attorneys, Greenberg Traurig, LLP ("GT"), requested $254,000 in attorney's fees for all work, including pre-hearing letter briefs and preparing for the hearing, up to, but not including, the one-day hearing before Special Referee Louis Crespo on September 20, 2017. Referee Crespo issued a 23-page report, dated December 22, 2017, recommending that respondents be awarded $161,000, having reduced the amount requested due to alleged double billing, block billing, lack of complexity, failure to use more associate (as opposed to partner) time, and other miscellaneous grounds. On or about January 22, 2018 respondents moved to affirm in part and reject in part the recommendations. Respondents agreed with the recommendations that GT's hourly rates were reasonable and that the GT attorneys performed the work that they claimed, etc., but disagreed with the Referee's recommendation about double and block billing and the other grounds for reducing the fee award. Furthermore, pursuant to the co-op's by-laws, Seward Park was entitled to "fees on fees," and GT requested (as indicated in a July 3, 2018 e-mail to the Court) an additional $166,396 for (1) the fee hearing itself and post-hearing submissions ($39,124) and (2) to analyze the Referee's Report and move to confirm/reject it ($127,272).

On or about March 31, 2018 petitioners cross-moved to affirm in part and reject in part the Referee's recommendations. In their mirror-image cross-motion, petitioners argued that this litigation raised neither novel nor difficult questions; that the reductions for block and double billing were correct; but that the award should be further reduced by $40,000 because GT's hourly rates were excessive and GT used partners, rather than associates, for the bulk of the work. In their reply papers, for which respondents have requested an additional $37,827, respondents parried petitioners' cross-motion and further supported their motion. In total, respondents are requesting $464,164 ($254,000 + $39,124 + $127,272 + $37,827 + $5,941 in disbursements).

Case Law

A classic formulation of the factors that determine the reasonableness of a fee request was delivered by Chief Judge Breitel in Matter of Freeman, 34 NY2d 1 (1974):

> Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved. Significant in the inclusion is the factor of the amount involved.

Id. at 9 (citations omitted).

One Perspective

That a law firm is asking for the staggering sum of $464,164 to have prevailed upon a court to dismiss as untimely a relatively straightforward CPLR Article 78 Petition commenced by several middle-class tenants responsible for attorney's fees is shocking and disturbing, highway robbery without the six-gun. Society cannot devote such huge resources to such a simple court proceeding (which, after all, accomplished nothing) and survive, much less prosper. Such an outrageous figure sounds like a typographical error or an April Fool's joke; if it is not, it merits "fee shaming," public humiliation, and possible sanctions. For such egregious overreaching, a court could, and maybe should, award nothing. After all, these days, that same $464,164 (incidentally, significantly more than twice the $208,000 annual salary of a New York State Supreme Court Justice; 223% to be exact) could buy you a one-bedroom co-op apartment on the Upper East Side of Manhattan, at First Avenue and 72nd Street, a stone's throw from the new Second Avenue Subway Line, with a 24-hour doorperson, live-in resident manager, concierge, laundry room, and on-site parking garage (a particularly nice amenity!). If you are

bargain-hunting, $400,000 could buy you a one-bedroom co-op apartment in Bay Ridge, Brooklyn, near the old "R" Subway Line, with a live-in super, washer-dryer, high ceilings, and almost 1,000 square feet. If you are tired of apartment living, but still want a short commute, $450,000 could buy you, free and clear (no mortgage, same as the apartments), your very own private house in suburban Elmont, Nassau County, just over the Queens border, with more than 1,200 square feet of indoor space, four bedrooms, three baths, a finished basement, updated kitchen, and a "great" backyard (emphasis in the original). The point being that we are not talking mere Monopoly money here!

Another Perspective

GT's papers are long, and they are beautiful: well-organized, well-written, and well-reasoned. They are predictable, but in the best sense of that term; GT argued just what you would expect, just what it had to, and just how it had to. They were lengthy of necessity, because petitioners' original attorney (who was not on the fee request) made life difficult for respondents, with unfounded accusations of improprieties, the request for sanctions, and matters that, if not strictly relevant, no lawyer worth his or her salt would ignore. Fish gotta swim, birds gotta fly, and lawyers gotta litigate. Arguments made in moving papers could also be found in reply papers, ad nauseum, etc., but that is how lawyers usually argue, and sometimes win, cases. In short, GT did what lawyers do, submitted excellent papers, and prevailed.

Discussion and Disposition

This Court, for the most part, grants respondents' motion to confirm in part and reject in part the Referee's report. In particular, the Court confirms the Referee's findings that GT's hourly rates, some of which topped $1,000 per hour, were reasonable (high, but arguably reasonable), and that its attorneys performed the work they claimed, etc. The Court rejects the findings (1) that the amount awarded should be reduced because of double billing, as, for all that appears, the attorneys were collaborating, not duplicating; (2) that the block billing was improper, because determining what work GT did, and that the work was on this case, was easy enough; and (3) that GT should have used more associate time, because experienced partners charge more but work quicker.

However, the Court takes issue with the time spent on respondents' cross-motion to dismiss, other than the time spent on the Statute of Limitations argument. CPLR 7804(f) provides that a "respondent may raise an objection in point of law by setting it forth in ... a motion to dismiss the petition, made ... within the time allowed for [an] answer." Such a motion should be limited. "On a pre-answer motion pursuant to CPLR 7804(f) ... [n]o additional facts alleged in support of the motion may be considered. Since those branches of the [respondent's] motions which were to dismiss the petitions did not seek dismissal based upon an objection in point of law, but instead sought relief on the merits, the Supreme Court properly, in effect, denied those branches of the motions." 1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Village of Garden City, 62 AD3d 1004, 1006 (2d Dept 2009). To similar effect is the following: "The courts frown on the making of a motion by a respondent on the presumably narrow ground of a single defense while at the same time including on the motion all the evidence the respondent has on the merits and asking that it be allowed to serve an answer if the motion is denied. It amounts to the respondent's attempt to get two bites at the apple." David D. Siegel and Patrick M. Connors, New York Practice § 567, at 1089 (6th ed. 2018). Here, respondents' Statute of Limitations defense was based on a point of law (and succeeded). However, its Business Judgment Rule defense was more of a factual defense on the merits. Certainly, in their papers, respondents argued vociferously that the petition was untimely. Respondents would have achieved the same result -- dismissal with prejudice -- had this been their only argument; there was no need to make a double-barreled motion. Of course, had the limitations defense failed, respondents could have served an answer asserting the Business Judgment Rule defense and any others it chose.

Such simplicity would have worked its way all down the line: in analyzing petitioner's opposition papers; in drafting reply papers; in preparing for oral argument; in in-court time; and even in the fee application. For example, respondents' underlying moving brief devotes 10 pages to their Business Judgment Rule defense; their reply brief adds another seven pages. Had respondents' defense been limited to untimeliness, the savings would have been considerable.

Taking the broadest possible perspective, this Court is troubled, almost haunted, by the idea of awarding almost half a million dollars to attorneys who simply prevailed upon a court to dismiss an untimely proceeding, and not in the context of industrial or technological behemoths battling each other for market supremacy, but in the context of a handful of middle-class cooperators upset with a Board of Directors' decision (and who presumably paid their own two sets of attorneys).

Cultural change may be in the offing. By requesting astronomical fees, attorneys are in danger of killing the goose that laid the golden egg.

> Litigation tends to be lengthy and expensive. * * * Courts, attorneys and litigants can all take steps to prevent civil cases from becoming pricey boondoggles. * * * [Attorney's fees should be] at a cost that [is] proportionate to the nature of disputes. * * * The City Bar is . . . asking attorneys to eschew litigation tactics like asserting defenses ... that could ... burden the parties.

Andrew Denney, *NYC Bar Association Urges New Approaches to Streamline Civil Litigation*, New York Law Journal, June 27, 2018 at 1 and 2. Fees are zooming out of control, and Courts should not be complacent; rather, we should be on the front line, not the sideline, leading the charge to keep them reasonable (keeping in mind the considerable costs of running a law practice). To focus solely on GT's rates and hours would be to miss the forest for the trees.

As petitioners point out, the Second Circuit has memorably stated that a litigation loser "should not have to pay for a limousine when a sedan could have done the job." Simmons v New York City Transit Auth., 575 F3d 170, 177 (2d Cir. 2009). This case should have been litigated, and would have been dismissed, solely on Statute of Limitations grounds. Even if that had not succeeded, respondents would have prevailed on their business judgment rule defense; the limitations argument was not life-or-death; gold-plated lawyering was not needed. GT probably needed two partners to do everything it did as well as it did. But another approach could have achieved the same result: the partner in charge could have walked out into the hallway, grabbed the first mid-level litigation associate that walked by, and said, "Our client is being sued; it's untimely; get it dismissed." Such an approach would, the Court finds, have resulted in fees, including disbursements, of not more than $175,000 (which may not seem like an awful lot of money, but could buy you a 55-foot yacht, equipped with multiple staterooms; a salon/galley/dining area; a washer-dryer; and stall showers). To this Court, that's reasonable.

Conclusion

Motion and cross-motion granted in part, denied in part. The referee's report is hereby affirmed in part and rejected in part, as indicated herein; respondents, jointly and severally, are entitled to a fee of $175,000, including disbursements, against petitioners Jose Cruz, Deborah Finston, John Tomaszewski and Donald West (petitioner Mahmoud Elwardany having settled out), jointly and severally, with interest from the date of entry of judgment; and the clerk shall enter judgment accordingly.

7/6/2018
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE