

**A&F Hamilton Heights Cluster, Inc. v Urban Green
Mgt., Inc.**

2020 NY Slip Op 30493(U)

January 28, 2020

Supreme Court, New York County

Docket Number: 653038/2014

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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**A&F HAMILTON HEIGHTS CLUSTER, INC.,
derivatively on behalf of HAMILTON HEIGHTS
CLUSTER ASSOCIATES, L.P., and JAMES FENDT,
derivatively on behalf of A&F HAMILTON HEIGHTS
CLUSTER, INC., PLEASANT AVENUE ASSOCIATES,
L.P., FAM PLEASANT AVENUE LLC, AFF-PSA
BRONX 9-D, INC. and TAF ALEXANDER AVE. INC**

Plaintiffs,

-against-

**URBAN GREEN MANAGEMENT, INC. and
ERIC ANDERSON,**

Defendants,

-and-

**HAMILTON HEIGHTS CLUSTER ASSOCIATES, L.P.,
A&F HAMILTON HEIGHTS CLUSTER, INC.,
PLEASANT AVENUE ASSOCIATES, L.P., FAM
PLEASANT AVENUE LLC, AFF-PSA BRONX 9-D,
INC., and TAF ALEXANDER AVE., INC.,**

Nominal Defendants.

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O. PETER SHERWOOD, J.:

In a Decision and Order dated November 6, 2019 (Doc. No. 1317), this court denied the Receiver’s motions for commissions based on his failure to provide evidence of disbursements made during the period for which he sought commissions. A receiver’s commissions are to be calculated “upon the sums received and disbursed by him” (CPLR 8004[a]), whichever is lower (see *New York Sate Mortgage Loan Enforcement Admin. Corp. v Milbank Site One Homes, Inc.*, 151 AD3d 424, 425 [1st Dept 1989]). The court also noted that commissions are not recoverable from proceeds of mortgage debt incurred during the receivership (see *JDM Long Island, LLC v U.S. Bank Nat’l Ass’n*, 2014 U.S. Dist LEXIS 163320 *17 [EDNY November 21, 2014]). Such proceeds arise from the extension of a loan as to which there is a corresponding repayment obligation. It is merely a conversion of equity into debt and is not “sums received” under CPLR

8004(a). The court invited the Receiver to re-submit his request consistent with governing legal precedent.

In Motion Sequence Number 034 (relating to commissions for the period January 1, 2018 to November 31, 2018) and Motion Sequence Number 035 (concerning the period January 1, 2019 to termination of the receivership effective July 15, 2019) the Receiver again failed to set forth disbursements and included proceeds of a 2018 refinancing of a mortgage in the calculation of his commissions (*see* Docs No. 1328 and 1331). Nevertheless, exhibits annexed to the Receiver's affidavits in support of the motions contain both receipts and expenditures information for most of the periods at issue (*see* Docs. No. 1329 and 1332). The Receiver requests that his commissions be calculated based on five percent (5%) of rents received and proceeds of the 2018 refinancing. The Receiver's commissions shall be calculated based on the lesser of rents and profits found to have been collected and disbursements found to have been made (*see id.*, at 425). Proceeds of the refinancing will not be considered as part of the commissions calculation.¹

In Motion Sequence Number 034, relating to commissions for services performed in 2018, the Receiver seeks an award of \$214,298.03, which is 5% of the sum of \$1,035,960.61 in rents collected, and \$3,250,000 in proceeds of a mortgage refinancing (Soumas Aff'd ¶¶ 41-45, Doc. No. 1328). The cash flow report for 2018 shows rents collected and expenditures made of \$1,035,960.61 and \$1,002,433.46, respectively (Doc. No. 1329).

In motion sequence number 035, the Receiver requests an award of \$30,310.24 representing five percent (5%) of rents collected in 2019 up until the date of his termination (Soumas Aff'd ¶ 42, Doc. No. 1331). The cash flow report for the period January 1, 2019 to July 14, 2019 shows rents collected and expenditures made of \$606,204.90 and \$455,559.88 respectively (Doc. No. 1332). These sums are not disputed.

The Partnership argues that there is no right to a 5% commission and that a 5% commission is not warranted here given the receiver's alleged "repeated intentional violations of this court's orders, gross mismanagement of the Partnership buildings and obstructionism" (Opp. 4, Doc. No. 1359). It adds that the Receiver has the burden to justify his accounts and he has failed to do so here (*id.*). Moreover, the Receiver is required to render services in order to earn his commissions

¹ In the November 16, 2019 Decision and Order, the court allowed that although "the proceeds of the refinancing is [not] a proper 'sum received,' he may offer evidence to show an entitlement to fees as compensation for services provided in connection therewith" (Doc. No. 1317 at 2). No such evidence has been submitted. Accordingly, no fees shall be awarded for such services.

(see *Independent Properties Co. v Mast Property Investors, Inc.*, 539 NY2d 121, 122 [3rd Dept 1989]). Where receivership duties have been performed by persons other than the receiver, his commissions should be reduced (see *Central Hanover Bank & Trust Co. v Williams*, 280 NYS 2d 314 [1st Dept 1935]). The Partnership argues that the Receiver delegated virtually all of the day-to-day tasks to a property management company and consequently his commissions should be reduced (*id.* at 7). The Partnership asks that the court exercise its discretion and further reduce the commissions given that the funds received in the form of residential rents come from public sources, in part (*id.*). Finally, the Partnership requests that the final award be adjusted and a surcharge imposed to take into account alleged prior overpayments (*id.*, at 8), specifically commissions in the amount of \$216,048.10 (see Doc. No. 815), which Justice Singh granted in a Decision and Order dated April 25, 2017. The sums on which that award was made included proceeds of a 2016 refinancing. The motion before Justice Singh was unopposed and this court will not disturb it.

As evidence of “gross mismanagement,” the Partnership cites, among other things, a large number of building code violations and utility company shutoff notices issued against receivership properties during the Receiver’s tenure in office (see Goldberg Aff’m ¶¶ 27-32, Doc. No. 1342). It is undisputed that the buildings in the receivership are in need of major repairs. Although the Partnership presented proof of many violations and shutoff notices issued during the receivership period, such proof does not inform whether the receiver was guilty of “gross mismanagement because no pre-receivership period data presented to show the receiver’s management of the properties was significantly worse than that of the Partnership. The receiver’s commission shall not be reduced based on the allegation of “gross mismanagement” (see *id.*, at ¶¶ 27-32).

As the Partnership asserts, there is substantial evidence in the record of repeated violations of the court’s orders and obstruction in the main action. Some of that conduct and their adverse impacts are discussed in a Decision and Order dated September 25, 2019 and need not be repeated here (see Doc. No. 1289). Suffice it to say, the Receiver’s obstructionist conduct following the court’s Decision and Order dated November 2, 2018 granting summary judgment in favor of the Partnership, significantly delayed return of control of the properties to the Partnership, added unnecessarily to the Partnership’s costs and resulted in more sums collected into and disbursed from the accounts managed by the Receiver. But for such conduct, control of the properties would

have been returned to the Partnership (and costs thereby avoided) no later than the middle of February 2019 (*see id.*, at 3). Commissions shall be calculated with reference to this date. The Receiver did not submit income and expense data for January and February in the motion (*see* Doc. No. 1331). Thus, the court cannot determine directly the amounts collected and disbursed in those months but can make a reasonable estimate as set forth here. The period January 1, 2019 to February 15, 2019 constitutes 23% of the period to July 15, 2019 (1.5 ÷ 6.5 months). Based on the delay in return of the properties alone, the Receiver's commissions for 2019 should be reduced to 23% of 5%. The Partnership asks the court to reduce the commissions, but the court declines the invitation. Accordingly, a reduction of the commissions to 1.15% of disbursements is warranted for the period January 1, 2019 to July 14, 2019. Commissions of 5% of disbursements for the period January 1, 2018 to December 31, 2018 shall be awarded as most of the obstructionist activity occurred after November 2, 2018.

The amounts of the award are as follows:

1/1/18-12/31/18:	\$50,121.65
1/1/19-07/14/19:	<u>\$ 5,238.93</u>
	\$55,360.58

The Receiver also requests that the property manager Michael Besen be awarded a management fee in an amount equal to six percent (6%) of the rental income collected by the Receiver. He calculates that amount as \$62,157.63 for 2018 and \$36,372.29 for the period January 1, 2019 to July 14, 2019.

The Receiver provides no evidence in support of the amounts requested and Mr. Besen did not appear. Further, the property manager ignored court ordered directives aimed at facilitating a return of management responsibility for the properties to the Partnership. For these reasons, specifically a failure of proof and violation of court directives, no amount shall be awarded to the property manager. Even if Besen had presented evidence in support of its fees request, the court would still deny fees for 2019 based upon his failures to provide proper services to the tenants and his repeated refusal to obey court directives.

The court has considered the parties' other arguments and finds them unavailing.

All funds being held by the Receiver on account of the Partnership less \$55,360.58 in commissions authorized herein shall be disbursed to the Partnership. The Partnership shall be responsible for any fees awarded by the court for services provided by Cullen.

Counsel for the Partnership shall settle order on three days' notice to the Receiver.

This constitutes the decision and order of the court.

DATED: January 28, 2020

ENTER,



O. PETER SHERWOOD J.S.C.