

Grayson v Fruchter

2020 NY Slip Op 32999(U)

September 11, 2020

Supreme Court, New York County

Docket Number: 603272/2006

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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ROBERT GRAYSON, LILLIAN GRAYSON, PAUL GRAYSON,	INDEX NO.	<u>603272/2006</u>
Plaintiffs,	MOTION DATE	<u>N/A</u>
- v -	MOTION SEQ. NO.	<u>012</u>
STEPHEN FRUCHTER, PHILLIP FRUCHTER, MONTAUK RUG & CARPET CORP, 111 WEST 24TH STREET LP, MARA GRAYSON, DAVID ROSENBERG (RECEIVER),		
Defendants.		

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GRAYSON, LILLIAN, GRAYSON, BILLI,	INDEX NO.	<u>102120/2008</u>
Plaintiffs,	MOTION DATE	<u>N/A</u>
- v -	MOTION SEQ. NO.	<u>007</u>
FRUCHTER, STEPHEN, FRUCHTER, PHILLIP, GRAYSON, MARA, GRAYSON, PAUL, MONTAUK RUG & CARPET CORP., 111 WEST 24TH STREET LP, DAVID ROSENBERG ESQ. RECEIVER FOR MONTAUK AND THE PROPERTY		
Defendants.		

DECISION AND ORDER

These two related actions concern the operation and control of defendants Montauk Rug and Carpet Corporation and 111 West 24th Street LP. By orders dated October 7, 2011 (NYSCEF Doc. No. 99), this court (Fried, J.) appointed David Rosenberg as temporary receiver of both entities.¹ The only remaining issues in these actions concern the amount of compensation due to Mr. Rosenberg and his firm Marcus Rosenberg & Diamond LLP (MRD).

¹ Unless specifically stated, the NYSCEF document numbers in this decision and order refer to the docket for the 2006 action (Index No. 603272/2006). All documents cited were also filed in the 2008 action (Index No. 102120/2008.) (See October 7, 2011 Orders [NYSCEF Doc Nos. 29-30]; August 14, 2018 Decision and Order [NYSCEF Doc. No. 113]; Notice of Motion [NYSCEF Doc. No. 165]; Affidavit of David Rosenberg in Support of Motion [NYSCEF Doc. No. 166]; Affirmation of Laurie Sayevich Horz in Opposition [NYSCEF Doc. No. 167]; Affirmation of Steven A. Weg in Opposition [NYSCEF Doc No. 170].)

By decision and order dated August 14, 2018 (NYSCEF Doc. No. 241), those remaining issues were referred to a Special Referee to hear and report with recommendations.² On these motions, Mr. Rosenberg seeks an order “recalling, reconsidering and revising” the court’s order of reference. (Notice of Motion [NYSCEF Doc. No. 297].) Mr. Rosenberg contends that this court, rather than the Special Referee, should determine the outstanding issues, and that the court should do so on the existing record in order to expedite payment to Mr. Rosenberg and MDR. (Affidavit of David Rosenberg in Support of Motion [Rosenberg Aff.], ¶¶ 1, 17-20 [NYSCEF Doc. No. 298].)

The court holds that there is no basis for withdrawal of the order of reference or reconsideration of its prior determinations that disputed issues of fact preclude resolution of the outstanding issues on the current record. As the opposition correctly argues, the motions do not meet the standard for leave to renew or reargue pursuant to CPLR 2221 (d)-(f), and there is no other procedural basis for the motions under the CPLR. (Affirmation of Steven A. Weg in Opposition, ¶ 2 [NYSCEF Doc No. 301]; Affirmation of Laurie Sayevich Horz in Opposition, ¶ 4 [NYSCEF Doc. No. 306].) In addition, Mr. Rosenberg failed to timely appeal the order of reference. (See In re Kalik, 117 AD3d 590, 590 [1st Dept 2014], lv dismissed and denied 24 NY3d 1199 [2015]; accord Vento v City of New York, 25 AD3d 329, 330 [1st Dept 2006].) Irrespective of any procedural defect or waiver, however, the motions are without merit.

As this court previously determined:

“While Mr. Rosenberg undeniably performed valuable services to Montauk and Associates over a period of nearly four years, there are disputes of fact as to the extent of the services he performed, the sufficiency of the documentation of those services, and whether certain services within the scope of the receiver’s

² More specifically, the following issues were referred to a Special Referee: (i) the amount of commissions payable to Mr. Rosenberg as temporary receiver; (ii) the amount of reasonable attorney’s fees, costs, and disbursements payable to MRD; and (iii) whether interest should be awarded on the commissions, fees, costs, and disbursements, and, if so, the date from which interest should be awarded. (8/14/18 Order, at 5.)

responsibilities were performed by MRD . . . These issues cannot be determined on the record before the court.”

(8/14/18 Order, at 4-5; see also id., at 3; 8/8/18 Transcript.) The court adheres to its prior determinations that disputed issues of fact preclude resolution of the outstanding issues on the current record. In addition, these issues are the proper subject of an order of reference to hear and report. CPLR 4212 provides that “on its own initiative, the court may submit any issue of fact required to be decided by the court . . . in matters of account to a referee to report.” It is well established that issues concerning the reasonableness and amount of fees, as are the subject of the order of reference at issue here, are within the scope of CPLR 4212. (See, e.g. In re Liquidation of Union Indem. Ins. Co. of New York v Spira, 67 AD3d 469, 470 [1st Dept 2009], lv dismissed 14 NY 3d 859 [reference to special referee properly made where referral sought to have special referee determine the reasonableness of interest and attorney’s fees]; Vento, 25 AD3d at 330.) The authority cited by Mr. Rosenberg fails to establish otherwise. Nor does the cited authority hold that a reference to establish the amount of commissions is improper. (Rosenberg Aff., ¶¶ 16-21.)

The court does not countenance the delays of defendants in compensating Mr. Rosenberg for the valuable services he performed as temporary receiver in maintaining the businesses. The court is also not unsympathetic to the financial impact of the COVID-19 pandemic on MDR. (Rosenberg Aff., ¶¶ 11, 33.) Nevertheless, the court must have a fully developed record in support of the claimed commissions and fees, given their magnitude. Moreover, there is no reason to believe that the reference will result in a resolution of the matter that would be less expeditious than resolution by the court. The court will, however, request that the Special Referee take all feasible steps to expedite the process under the circumstances.

It is accordingly ORDERED that the motions of David Rosenberg for the court to recall, reconsider, and revise the decision and order dated August 14, 2018 (Index No. 603272/2006, NYSCEF Doc. No. 241; Index No. 102120/2008, NYSCEF Doc. No. 113) are denied; and it is further

ORDERED that the Special Referee assigned to the reference directed by the order dated August 14, 2018, shall conduct the reference on an expedited basis to the extent feasible under the circumstances.

Dated: New York, New York
September 11, 2020


MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

APPLICATION:

CHECK IF APPROPRIATE: