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SHORT FORM ORDER

INDEX NO. 01-05336

Supreme Court of the State of New York
IAS Part XL - County of Suffolk

PRESENT:

HON. JAMES HUDSON

In the Matter of the Application of

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WARREN McDOWELL, Individually and as 50% shareholder of LONE HILL PROPERTIES, INC. for the Dissolution of LONE HILL PROPERTIES, INC.,

Plaintiff,

-against-

JUDITH STEIN, Individually and as Temporary Receiver of LONE HILL PROPERTIES, INC., and DAVID NEUFELD, the Co-Executors of the Estate of KENNETH F. STEIN, JR.,

Defendant.

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ORIG. RETURN DATE:1/11/09
FINAL SUBMIT DATE: 5/30/10
MOTION SEQ. NOS: 26 & 27

PLTF'S ATTORNEY:
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Upon the following papers marked Exhibits 1-5 read on this motion to Confirm/Reject Referee Report Pursuant to CPLR §4403; Notice of Motion and supporting papers Exhibits 1-5 ; Notice of Cross-Motion and supporting papers Exhibits A-J; reply Affirmation/Affidavit in opposition and supporting papers Exhibit 7; Other; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

It is ***ORDERED*** that the plaintiffs' motion to modify the referee's report (CPLR 4403) is granted to the extent provided herein. Defendants' cross-motion is granted to the extent that the Court declines to award attorney's fees in this matter.

The matter *sub judice* arose from a dispute over the ownership of the corporation known as Lone Hill Properties Inc. This question was resolved in the Court's decision of January 4th, 2007 (Judgment entered February 23, 2007) and the Count appointed a referee, Janet Geasa Esq. to hear and report as to the amounts due to plaintiffs in light of

their prevailing on the merits of their claims. Between September 8th 2008 and January 29th, 2009 the referee heard evidence and issued her report on November 23, 2009. Both parties have moved and cross-moved for modification.

In light of the recent decision of the Appellate Division (modifying the February 23, 2007 judgment of this Court) which directed the plaintiffs' cause of action sounding in fraud be dismissed, the plaintiffs' request for damages concerning same must be denied (*Stein v. McDowell*, ___A.D3d__, [2nd Dept. June 29th, 2010] 2010 WL 2605794).

Plaintiffs' contend, *inter alia*, that the referee made several errors in her report which warrant modification. Specifically, the plaintiffs request prejudgment interest at the statutory rate (CPLR 5004) for items 7 (b)(ii), 7(c)(I), 7(c)(ii) and 7(d) based upon refusing to account and otherwise acting in bad faith. Plaintiffs also wish for modification of that portion of the report which rejected their claim of $60,014.00 in rental income. In support of their contentions, Plaintiffs refer the court to the holdings in *Johnson v. Hartshorne* 7 Sickels 173, 52 N.Y. 173 [1873]; *Meinhard v. Salmon*, 249 N.Y.458 [1928]; *Brunetti v. Musallam*, 11 A.D.3d 280 [1st Dept.2004] 783 N.Y.S.2d 347; *Fender v. Prescott* 101 A.D.2d 418 [1st Dept.1984] 476 N.Y.S.2d 128, aff'd 64 N.Y.2d 1077, 489 N.Y.S.2d 880 [1985] and ; In *re Estate of Shulsky*, 34 A.D.2d 545 [2nd Dept.1970] 309 N.Y.S.2d 84 appeal dismissed 27 N.Y.2d 743, 314 N.Y.S.2 993 [1970]. On the issue of punitive damages, the plaintiffs rely on the holdings in State *Farm Mutual Automobile Ins. Co. V. Campbell*, 538 U.S. 408 [2003] 123 S.Ct 1513, *BMW of North America v. Gore*, 517 U.S. 559 [1996] 116 S.Ct.1589; *Ansonia Associates LLP v. Public Service Mutual Insurance Co.* 257 A.D.2d 84 [1st Dept.1999] 692 N.Y.S.2d 5 [1st Dept.1999]; and *Sawtelle v. Wadell & Reed, Inc*. 304 A.D.2d 103 [1st Det.2003] 754 N.Y.S.2d 264.

The defense counters that the plaintiffs' requests are not supported by the referee's report or record upon which it is based. Moreover, defendants cross-move for modification in regard to six items: (1) To direct the proposed judgement issued in connection with item #1 of said report be made payable by Lone Hill Properties exclusively (2) That the award concerning the "Sweetheart Lease" be reduced to zero (3) that the award with respect to the proceeds of Lone Hill Assets be reduced to zero (4) that the award concerning the proceeds of an accounted loan be reduced from $57,764.00 to zero (5) that the award of $42,694.00 representing damages for violation of the preliminary injunction be reduced to zero and finally (6) that the defendant Mr. McDowell be awarded an offset of damages in the amount of $83,767.95, representing unreimbursed expenses of Mr. McDowell on behalf of Lone Hill Properties Inc. In support of their contentions, Defense counsel cites to *City of Buffalo v. J.W. Clement Company*, 28 N.Y. 2d 241 [1971] 321 N.Y.S.2d 345; *Eastbrook Caribe AVV v. Fresh Delmonte Produce Inc*. 11 A.D.3d 296 [1st Dept.2004] 783 N.Y.S.2d 533 and *Baldasano v. Bank of New York*, 174 A.D.2d 457 [1st Dept.1991] 571 N.Y.S.2d 242. Although defense counsel could not

possibly put forth her contentions with more erudition, her client, Mr. McDowell's, actions during his stewardship of the subject corporation allow a limited argument in interpreting his behavior. It leads the Court to remind counsel that the maxim "*adaequatio intellectus nostri cum re*" ** should always govern the presentation of the defense.

The plain language of the effective statute confer upon us the power to "confirm or reject, in whole or in part…the report of a referee" (CPLR 4403). The Court's *auctoritas*, however, is moderated by authority which states that "It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record..."(*Nager v. Panadis* 238 A.D.2d 135,136, 655 N.Y.S.2d 946 [1st Dept.1997])

As noted by Mr. Justice Cooper in his eloquent decision *Jan S. v. Leonard S.* 26 Misc.3d 243, 884 N.Y.S.2d 848, [Supreme NY Co.2009] "Courts of New York generally 'will look with favor upon a Referee's report, inasmuch as the Referee, as a trier of fact, is considered to be in the best position to determine the issues presented.' At 249-250 citing *Namer v. 152-54-56 W. 15th St. Realty Corp.*, 108 A.D.2d 705, 706, 485 N.Y.S.2d 1013 (1st Dept. 1985), quoting *Matter of Holy Spirit Assn. for Unification of World Christianity v. Tax Commn. of the City of New York*, 81 A.D.2d 64, 438 N.Y.S.2d 521 (1st Dept. 1981).

We can only thank and commend the referee, Ms. Janet Geasa Esq. For the clarity of her report and attention to detail. She has "...clearly defined the issues and resolved matters of credibility" (*Nager v. Panadis, supra* at 136). The slight departure from her recommendation is no reflection on her sterling abilities. Indeed, with the limited exception noted herein, the Court adopts Ms. Geasa's report and incorporates it into this decision by reference.

In support of his request for compound interest, Plaintiffs' counsel relies upon the holding in *Johnson v. Hartshorne*, 7 Sickels 173, 52 N.Y. 173 [1873]. The Court thanks Mr. Ross for citing to a decision of Chief Judge Sanford Church, a great jurist who deserves to be remembered. In addition to the sagacity of his opinions, he was renowned for his steadfast attention to the duties of his office, despite declining health. In response to a warning concerning same he answered "There is the public business to be done, and we must do it as long as we can."* The Court declaims on the subject of judicial history in order to respectfully remind defense counsel that the decision in *Johnson v. Hartshorne* is not to be referred to as a "rogue case", coming as it does, from the pen of such an illustrious author. We do find, however, that the matter at hand is distinguishable from the facts presented in *Johnson* and therefore decline to apply it's reasoning. As noted in Plaintiffs' reply, however, there is no serious dispute as to plaintiffs' entitlement to statutory interest for all amounts awarded (CPLR 5004) and the Court finds that it shall be computed as of February 23, 2007 with the exception of earlier dates of interest

computation set forth in the referee's report (e.g. $36,742.00 for excess contributions as of December 31st, 2000; $14,750.00 for the "Sweetheart Lease" as of May 1st 1999).

The Court is in agreement with defense counsel that attorney's fees would be inappropriate at this juncture. As a general rule, attorney's fees are considered incidents of litigation and are not recoverable in the absence of statute, a contractual agreement or manifest bad faith (*Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943 [1973]; *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129-130, 94 S.Ct. 2157 [1974]; *Hartford Casualty Insurance Company v. Vengroff Williams & Assoc.*, 306 A.D.2d 435 [2nd Dept.2003] 761 N.Y.S.2d 30). As acknowledged by the defense, in our decision after trial the Court found that the defendant Mr. McDowell, had engaged in egregious behavior which warranted the imposition of attorney's fees against him. It cannot be said that his behavior before the referee rises to the same level. Accordingly, the Court cannot award same.

As noted above, the arguments of Mr. Ross and Ms. Blair, though presented with a laudable eloquence that honors this Court, fail to persuade us to depart from the recommendations of the Referee. The sole exception (in addition to awarding statutory interest) concerns the rental income for the subject property.

The Referee points out in her report that the defendant Mr. McDowell's submissions (Defendant's exhibits A and B) do not satisfy the Court's direction to provide an accounting. The referee further greeted with "suspicion" the defendant Mr. McDowell's testimony regarding cash receipts for rents and his lack of recall (Referee's report page 7). We concur with this finding but it brings us to a different result. The defendant, Mr. McDowell, was the custodian of the records of the subject corporation while the property was leased. Since his actions have prevented the plaintiffs from having more substantive evidence of rental income, we find that they are entitled to an inference in their favor (*Barlow v. Werner Co.* 295 A.D.2d 381, 743 N.Y.S.2d 731 [2nd Dept.2002]). As such the Court will accept the plaintiffs' figure of $60,014.00 as rental income imputed for the dates in question.

The remaining contentions of both plaintiffs and defendants have been argued with great vigor. For the reasons set forth in the referee's report, however, we find them ultimately to be without merit.

Therefore, the motion and cross-motion for modification of the referee's report are granted to solely to the extent provided herein. The report is otherwise confirmed as written. The parties are directed to settle judgement within thirty days from service of a copy of this decision with notice of entry.

*(The Historical Society of the Courts of the State of New York, biography of Chief Judge Sanford Elias Church)

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** conform our minds to the facts

This constitutes the decision and order of the Court.

Dated: Riverhead, New York
July 26, 2010

James Hudson
A.J.S.C.

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