

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X INDEX NO. 160136/2017

THE BOARD OF MANAGERS OF THE LUX CONDOMINIUM

11/07/2018,

Petitioner,

MOTION DATE 11/07/2018

- v -

MOTION SEQ. NO. 002 003

CORE MANAGEMENT NY, LLC,

DECISION, ORDER, and JUDGMENT

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 10, 11, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for

MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for

SANCTIONS

This is a proceeding to compel the respondent, the former managing agent of Lux Condominium (the Condominium), to immediately produce to the petitioner all of the Condominium's books, records, information, and other items in the respondent's possession, custody, or control (SEQ 002). By so-ordered stipulation dated May 9, 2018, the respondent agreed to produce, return, and turn over to the petitioner by May 25, 2018, the items listed in an attached Schedule A, which comprised all items sought in the petition, with minor modifications. By interim order dated May 30, 2018, the court noted that the respondent produced documents to the petitioner at 11:00 p.m. on May 25, 2018, that the petitioner picked up 17 boxes of documents from the respondent on May 29, 2018, and that as a consequence of the foregoing the petitioner had not yet had an opportunity to review the documents. Accordingly, the court directed the petitioner to review the production and notify the respondent of any missing documents by July 25, 2018, and the petition was adjourned until August 3, 2018. By interim order dated August 10, 2018, upon learning that there remained uncured deficiencies in the respondent's document production, the court directed the respondent to produce to the petitioner, by August 24, 2018, (1) a flash drive of the QuickBooks native file for all of the Condominium's books and records maintained on the QuickBooks platform; (2) ADP native file access for the Condominium's files only; and (3) all email communications between Nick Spaho and Fation Spaho with any service providers to the Condominium on any email account between October 2016 through October 2017. The respondent failed to comply with the court's order. Instead, on August 24, 2018, the deadline for the production, the respondent filed an appeal of the court's August 10, 2018, interim order.

On August 27, 2018, the petitioner filed a motion to punish the respondent for its failure to comply with the court's order, by awarding the petitioner actual expenses and reasonable attorneys' fees incurred in connection with this proceeding pursuant to 22 NYCRR 130-1.1(a), (c)(1), and (c)(2) (SEQ 003). The respondent opposes the motion. However, its unauthorized sur-reply shall not be considered.

In its petition, the Board of Managers of the Lux Condominium seeks to obtain access to the Condominium's own records, information, and other items allegedly being held in the exclusive possession of the Condominium's former managing agent, the respondent. The petitioner avers that the respondent has refused to turn over the Condominium's records, and has even refused to provide the Condominium with basic information maintained solely by the respondent, including the names of certain vendors/service providers, payroll rates for the building's employees, and keys to portions of the Condominium building and its equipment. While the respondent avers in its verified answer to the petition, dated December 11, 2017, that it is "willing and able to cooperate" with the petitioner and to turn over the items sought by the petitioner, its conduct following the commencement of this proceeding, as described above, casts doubt upon this intention. As the respondent has failed to raise any valid objection to producing the items sought by the petitioner in this proceeding, the petition is granted to the extent provided herein.

22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against . . . a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c). "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of . . . the party." Id. Upon applying this standard, the court concludes that the respondent, in refusing to comply with the terms of its own stipulation and with court orders enforcing that stipulation, has engaged in frivolous conduct and is thus subject to the provisions of 22 NYCRR 130-1.1.

In determining the appropriate amount of an award, a court must consider the retributive and deterrent purposes of sanctions, the presence or absence of any evidence as to the actual expense to the petitioner, and the respondent's apparent lack of regret or concern for the consequences of its litigation conduct. See generally Jones v Camar Realty Corp., 167 AD2d

285 (1st Dept. 1990). Under the circumstances here, an award of actual expenses reasonably incurred and reasonable attorney's fees is appropriate.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that the respondent is directed to produce to the petitioner all information, documents, and other items listed in Schedule A, annexed to the so-ordered stipulation dated May 9, 2018, to the extent not already provided, within 20 days of receipt of this order with notice of entry; and it is further,

ORDERED that the petitioner's motion for an award of costs or sanctions against the respondent is granted to the extent that it is awarded costs in the form of reimbursement for actual expenses reasonably incurred in connection with this proceeding and reasonable attorney's fees; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: (1) the appropriate amount of attorneys' fees and actual expenses to be awarded; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above, and it is further

ORDERED that the parties shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the petitioner shall serve a proposed accounting within 24 days from the date of this order and the respondent shall serve objections to the proposed accounting within 20 days from service of petitioner's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first

fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the Decision, Order and Judgment of the court.

4/10/2019
DATE

Nancy M. Bannon
NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
SEQ 002	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
SEQ 003	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> OTHER
				<input type="checkbox"/> OTHER
				<input type="checkbox"/> REFERENCE