

**SUPREME COURT, STATE OF NEW YORK
NASSAU COUNTY**

Present: **HONORABLE EDWARD G. McCABE**
Justice

THE VILLAGE OF FREEPORT,
Plaintiff,

**DECISION AFTER
HEARING**

Index No.002035/04
Motion Seq. No. 1

-against -

SPORTSMAN'S PROPERTIES, INC., BARRY RICHTER,
SUZANNE RICHTER, MEDCOR HOLDING CO., NORTH
SHORE UNIVERSITY HOSPITAL MANHASSET,
G.J. DIBENEDETO, M.D. RETIREMENT TRUST,
BRIDGET KNIGHT AS EXECUTOR OF THE ESTATE
OF EUGENE R. HURLEY, JR., NASSAU COUNTY,
Defendants.

VILLAGE OF FREEPORT,
Plaintiff,

-against-

Index No .002036/04

CHENONCEAUX PROPERTIES CORP., SUZANNE RICHTER,
et al Defendants.

Motion Seq. No. 1

VILLAGE OF FREEPORT,

Plaintiff,

Index No. 002038/04

-against-

Motion Seq. No. 1

SUZANNE RICHTER, PETER A. PEKICH, et al , Defendants.

_____x

On February 10, 2005, this Court heard three motions related to attorneys' fees in tax lien foreclosure proceedings initiated by the Incorporated Village of Freeport (hereinafter referred to as "IVF") by the law firm of Berkman, Henoch, Peterson and Peddy, (hereinafter referred to as "BHPP"). Pursuant to the Judgments of Foreclosure and Sale, dated September 14, 2004 in Index No. 2036/04 and September 27, 2004 in Index No. 2038/04, this Court previously awarded attorney fees to "BHPP". The Defendant, Suzanne Richter, now challenges the Court's awards of reasonable attorneys fees in these two matters and Defendants, Suzanne Richter, Barry Richter and Sportsman's Properties, Inc. object to the amount of attorneys fees requested in Index No. 2035/04, as excessive. The Court finds that the Defendant has the burden of proof in establishing a sufficient basis to set aside the two attorney's fees previously awarded in Index Nos. 2036/04 and 2038/04, in order to overcome the presumption of regularity afforded to the Court's prior orders. The challenge to the application for counsel fees in Index No. 2035/04, which has not yet been decided, will be discussed separately.

The Defendant Richter called as her witness, Marc Wohlgemuth and ,while the Defendant's attorney did not ask that he be considered a hostile witness, the Court permitted the Defendant's counsel to cross examine his own witness.

Marc Wohlgemuth testified as to his background as an attorney, stating that he worked for another firm prior to his employment with "BHPP", that he was the associate attorney in charge of these two foreclosure actions, and that he prepared the attorney's affirmation in support of "BHPP's" application for attorneys fees, which listed both his time and the time of the two paralegals. The witness testified that uncontested tax lien foreclosures are not subject to a computerized, electronic or other manual system of accounting for time and stated only the

contested foreclosure litigation is subjected to keeping actual time records. He also testified that "BHPP" employs two paralegals who work on these foreclosure matters and that Janice Ciaccio and MariJo Sparling were assigned to the subject files. He further testified that his billing rate at "BHPP" was \$165.00 per hour and that their paralegals' services are billed at \$90.00 per hour.

As to the time factor, the witness testified that a system of standardized time allotments for specific tasks was developed over a period of time by the partner in charge of foreclosures, Lisa M. Confusione, Esq.. Ms. Confusione also signed the Summonses and Complaints in these matters. He testified that the number of hours billed for these files were close approximations for the time he spent on each task, although he had no other record to support this conclusion. He admitted that "BHPP" had an agreement with "TVF" which provided for a fee of \$1,600.00 for each uncontested tax lien foreclosure. A copy of that agreement was provided to the Court and marked into evidence.

Neither paralegal was called to testify as to the work they did, or observed others do, on any of the files.

The Defendant's counsel urges the Court to find that the three tax lien foreclosure proceedings are the same type of action and that "BHPP" is billing three times for the same services. However, on the first two motions where the Defendant has the burden of proof, there was no showing that any services were done simultaneously, so as to demonstrate that "BHPP" had in fact padded its billings in requesting a fee. The fees of \$165.00 per hour for the associate's time and \$90.00 per hour for a paralegal were never disputed, nor were the disbursements.

At the end of the Defendant's case, the Court denied both motions and adhered to its prior decision and awards of reasonable attorney's fees set forth in the Judgments of Foreclosure and Sale referenced herein.

In the tax lien foreclosure proceeding filed under Index Number 2035/04, "BHPP" has the burden of proof to demonstrate the reasonableness of its fees. This matter was assigned to the Honorable Thomas P. Phelan. Despite the fact that the Defendants defaulted and do not oppose the relief requested by the Plaintiff "IVF", the order of foreclosure was not signed and the matter was referred to the Calendar Control Part, by order dated December 22, 2004, for purposes of scheduling a hearing on the issue of attorney's fees, based upon an application for the same, supported by an affirmation of counsel for Defendants, Barry and Suzanne Richter and Sportsman's Properties, Inc.. The Calendar Control Part then referred the attorney's fee issue to this Court for purposes of scheduling the hearing, together with the hearings on attorneys fees previously awarded in the other two tax lien foreclosure cases, since the hearings involve the same issue and some of the same parties. For Index No. 2035/04, the Court rules that the burden of proof in establishing the reasonableness of the fee requested by "BHPP" rests upon them. The Defendants contend that there are three tax lien foreclosures being handled simultaneously and that the fees of "BHPP" are excessive in light of this fact.

However, as indicated above, the Defendants failed to challenge the fees of the associate or paralegals as being excessive. The only issue remaining is the number of hours billed.

On the matter covered by Index No. 2035/04, Lisa Confusione was called to testify. She is the partner in charge of foreclosures. She testified that she devised the system of time spent

for various work done on foreclosure files over the eleven years she has managed this department at the firm. She further testified that she reviewed the affirmation of Marc Wohlgemuth, whom she supervises, as it relates to the time spent in performing the function by the two paralegals Marissa McCoy and Janice Ciaccio and that she believed them to be fair, reasonable and within the parameters established under the system used by "BHPP".

On cross examination, the witness conceded that the time estimates were approximations based on her experience, but stated they all were within the range of an acceptable time for each task. No evidence was adduced that individual tasks were performed simultaneously, either from the two witnesses called to testify i.e., that two of the index numbers were in consecutive order and one separated by one number and, therefore, obviously purchased at the same time. Rather, the cross examination digressed into an examination of the provisions of a separate agreement that "BHPP" had entered into with "IVF". The agreement establishes a fee schedule for legal services provided in handling uncontested foreclosures and contested foreclosures. The uncontested foreclosures are billed at a flat \$1,600.00 fee and the contested foreclosures are billed at a rate of \$175.00 to \$200.00 per hour. "BHPP" therefore kept actual time records for contested matters, but not for uncontested matters. The agreement calls for the fees to be paid on each judicial tax lien foreclosure. Based upon the terms of the private agreement between "IVF" and "BHPP", the Defendants' attorney urges the Court to limit the attorney's fee award in this case to \$1,600.00. Ms. Confusione testified that the contractual fee schedule was a minimum fee guaranteed by the "IVF" in the event no fee was collectible or the Court set a fee below \$1,600.00, but went on to explain that there is no basis to preclude "BHPP" from seeking a

higher fee from the Court when said fee is being billed for legal services that were actually performed and the amount charged is considered reasonable for said services. The Defendants' counsel stated that in a recent foreclosure action in Queens County, a Judge had set a fee of \$750.00, which he suggested should be the appropriate fee awarded in this case.

Section 5-65 (c) of the Nassau County Administrative Code authorizes reasonable counsel fees to be fixed by the Court in tax lien foreclosure actions. Section 1200.11 [DR 2-106] of the N.Y.S. Rules of Court sets forth the following factors for determining a reasonable attorney fee: the time and labor required, the fees customarily charged in the locality, the amount involved and the results obtained, the nature and length of the professional relationship with the client, and the experience, reputation and ability of the lawyer. An award of attorney's fees is to be determined by the Court on a quantum meruit basis. See, *Avco Financial Services Trust vs. Gary G. Bentley, et al.*, 116 Misc. 3d, 455 N.Y.S. 2d 62; *McGrath vs. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 788 N.Y.S.2d 281 (2004).

In this matter, the Defendants only challenge the time factor involved based upon their claim that the proceedings were brought simultaneously and involve real estate tax lien foreclosures.

The record reflects that each proceeding involved a separate tax lien, some Defendants were the same, but some were different. There were three separate lots involved. Each tax lien foreclosure proceeding must be researched and prepared individually and the attorney would naturally be liable for any malfeasance on each file.

The Defendants failed to demonstrate, through cross examination or through their own witnesses, that tasks were performed simultaneously, thereby creating a situation of double or triple billing. The only evidence presented was that while the matters are similar, they were handled by the paralegals and the associate as three separate cases requiring three separate title searches, investigation and preparation of documents. The Court cannot indulge in conjecture that these matters were not handled separately, as the Defendants suggest. Therefore, pursuant to the affirmation of Marc Wohlgemuth, Esq., dated November 30, 2004, I hereby award Plaintiff reasonable attorney fees in the amount of \$2808.00 for the legal services and paralegal services rendered to date. "BHPP" may make a supplemental application for fees for legal services to be rendered in the future, as referred to in paragraph 12 (g) of the affirmation, but such application must be supported by contemporaneous time records and, in the event a hearing is necessary, testimony by the parties to make such record.

This comprises the decision and order of the Court on the issue of attorneys' fees in the above-referenced matters.

Village of Freeport v Sportsman's Properties et al
Index No. 002035/2004

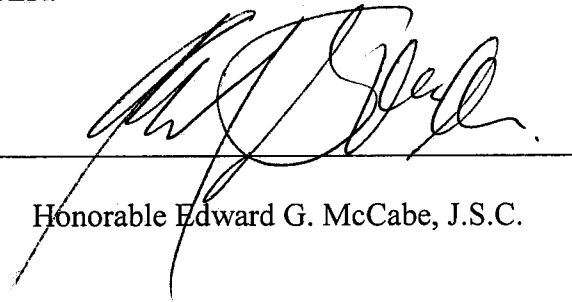
8.

The remaining branches of the underlying motion with respect to Index No. 2035/04, are respectfully referred back to the Supreme Court Justice assigned to the action, the Honorable Thomas P. Phelan, for his consideration in the foreclosure.

Dated: March 31, 2005

ENTER:

Mineola, NY



Honorable Edward G. McCabe, J.S.C.

ENTERED

APR 06 2005

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**