

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 8

In the Matter of the Application of

STEPHEN ROSNER, holder of 50% of all
the membership interests in A&S WINDOW
PRODUCTS, LLC, f/k/a CUSTOM
METALCRAFTERS & ERECTORS, LLC, for
the judicial dissolution of A&S WINDOW
PRODUCTS, LLC, f/k/a CUSTOM
METALCRAFTERS & ERECTORS, LLC,

Petitioner,

INDEX NO.: 022427/2008
MOTION DATE: 06/15/2010
MOTION SEQUENCE: 006

-against-

ANTHONY CARNIVAL, ROBERT CARNIVAL,
JESSE CARNIVAL and JOSHUA CARNIVAL,

Respondents.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Receiver's Account for June 1, 2009 through May 31, 2010 & Schedules Annexed	2

Paul F. Millus, Esq. was appointed as the Receiver in the above-captioned action pursuant to an Order of this Court dated December 29, 2008.

The Order provided, *inter alia*, that "all expenses of the Receiver, shall be a charge against the profits and income of the corporation, or, if none, the amount shall be fixed by the Court and become the responsibility of the members of the LLC." Mr. Millus has submitted his

account from June 1, 2009 through May 31, 2010, and requests payment thereon. CPLR 8004(a).

The Receiver made a prior request for payment for the period January 1, 2009 through May 31, 2009. That request was granted in an Order of this Court dated June 30, 2009. There have been no interim applications since the request of June, 2009.

Over the last year, the Receiver has diligently shepherded the wrapping up of the open contract for window installation (the Haller contract). Due to funds owed subcontractors by A&S Window and their threat to cut off delivery of product, Haller only agreed to payment on its contract with A&S if funds went directly to suppliers.

The Receiver consented to this methodology, with the agreement of Rosner, one of A&S Window's owners, so that the project could be completed in an efficient and professional manner and the balance of payments due A&S Window would be received. Mr. Millus points out:

However, as a result I was unable to seek payment of my commissions since there were no funds there to do so and continue to allow this practice which resulted in the payment of suppliers and service providers to the project which would eventually result in the completion of the Project which was our primary and paramount concern.

Mr. Millus continues:

Mr. Rosner and I were in contact during the period of time from June of last year until present on so many occasions that it is truly impossible to count. Each day we would either speak or communicate via email concerning matter affecting the suppliers who we had to keep at bay in order to prevent additional lawsuits from being filed, resolving or attempted to resolve lawsuits that had been filed thus far and satisfying Haller's need for more and more work to be completed in order to meet, or attempt to meet, his expectations regarding the LLC's performance at 350 West Broadway.

....

Indeed, throughout the course of the period from June 1 through May 31, 2010 I count over 1,000 emails with Mr. Rosner alone in connection with this matter and literally hundreds to and from Dave Haller concerning the status of the ongoing project.

....

I would travel to Mr. Haller's office with Mr. Rosner and discuss with David

Haller what needed to be done in order to continue the flow of money, at least to the third-party providers who were working on the project and to keep money flowing to those providers who were complaining about lack of funding so that they could complete their work. These meetings were generally contentious at best but I did my level best to try to mediate the differences that both parties had concerning the status of the ongoing project.

Mr. Millus also handled two outstanding litigations that had been filed against A&S Window due to the lack of funds with which to hire outside counsel.

The Receiver has constantly acted as referee between Rosner and Carnival (the other owner of A&S Window). Carnival passed away in late 2009 or early 2010. No representative of the estate has yet to be appointed.

On the legal front, the Receiver has also confronted the State of New York and its claim of Use taxes against the LLC for the years 2007 – 2008. This claim had risen to over \$400,000.00 with penalties. The State levied a tax compliance levy on the LLC of \$444,315.69, and a copy has been served on Haller.

What this means, of course, is that all monies due to the LLC from the Haller project will go to the State of New York. This leaves no available funds for third-party suppliers nor the Receiver.

Fees Due the Receiver

Upon a review of the Receiver's account for June 1, 2009 through May 31, 2010, the Receiver received \$800,731.27. He disbursed \$808,231.49 (detailed spreadsheet attached to motion. This does not include funds that were paid directly from Haller to suppliers of A&S Window (estimated at \$120,000.00).

Based upon the above, the Receiver would be entitled to \$40,036.56 (commission rate of 5%) plus expenses of \$1,211.44. Mr. Millus has also calculated the time worked on this assignment at 207.6 hours (detailed billing records attached to motion). If the Court was to award the Receiver at an hourly rate of \$300.00 per hour, an amount far less than his normal rate, he would be due \$62,280.00.

In light of the LLC's financial condition, one which will not improve with time due to the outstanding tax lien, the Receiver would have the absolute right to request to be relieved of his

appointment. This, however, would be detrimental to the winding up of the affairs of the LLC and the completion of the outstanding project.

Pursuant to CPLR § 8004(b), the party who requested a Receiver may be responsible for the Receiver's commissions if the entity that would normally be looked to for payment no longer could make such payment. With this in mind, the Receiver, Rosner, and Rosner's counsel, have met and conferred on how Mr. Millus could remain on as Receiver and be compensated, despite the financial condition of the LLC.

They have entered into a stipulation, which they have presented to the Court, which will establish an escrow account to be funded by Mr. Rosner, over a period of three months, totaling \$40,000.00, and that the Receiver will accept said sum in full and in lieu of any amount that would be awarded by the Court and which all parties agree the LLC will be unable to pay.

In consideration of the Receiver's detailed submissions, his actions on behalf of the LLC with Haller and its layers of controversy, as well as the legal action facing the LLC, and the State Use tax claim, the Court finds that Mr. Millus is entitled to commissions, at minimum, in the sum of \$40,000.00; and it is **SO ORDERED**.

By separate Stipulation and Order, the Court approves of the method arrived at between the petitioner, Stephen Rosner, and the Receiver, Paul F. Millus, Esq., for the payment of the Court's award of commissions to the Receiver.

It is **SO ORDERED**.

Dated: July 26, 2010


J.S.C.

ENTERED

AUG 05 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**