

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32054
H/kmb

_____AD3d_____

Argued - March 22, 2011

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
CHERYL E. CHAMBERS, JJ.

2010-02486

DECISION & ORDER

J. Leonard Spodek, also known as Leonard Spodek,
et al., respondents, v Charles Neiss, etc., et al.,
appellants, et al., defendants.

(Index No. 32644/96)

Katlowitz & Associates, New York, N.Y. (Elan E. Weinreb and Moshe Y. Katlowitz
of counsel), for appellants.

Jaspan Schlesinger LLP, Garden City, N.Y. (Laurel R. Kretzing and Daniel E.
Shapiro of counsel), for respondents.

In an action, inter alia, to recover damages for breach of contract, the defendants Charles Neiss, Fay Neiss, also known as Fay Podrabinek, Devorah Rubin, Michael Rubin, Jacob Neiss, Brenda Garcia, Neiss Management Corp., Berta Management Corp., Brenda Management Corp., 80 Clarkson Realty Corp., Premium 600 Realty Corp., Robinson 1601 Realty Corp., 789 St. Marks Realty Corp., North 751 Realty Corp., 751 St. Marks, LLC, 985 Ocean Avenue, LLC, and the Neiss Family Trust appeal from a judgment of the Supreme Court, Nassau County (Lally, J.), entered February 19, 2010, which, upon an order of the same court (Cardello III, R.), dated January 11, 2009, directing them to pay attorney's and expert fees to the plaintiffs in the principal sum of \$109,104.37 pursuant to a so-ordered stipulation of the parties dated January 9, 2009, is in favor of the plaintiffs and against them.

ORDERED that the judgment is affirmed, with costs.

“Under the general rule, attorney’s fees are incidents of litigation and a prevailing

party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491; see *Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379; *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597). Indeed, “New York public policy disfavors any award of attorneys’ fees [and experts’ fees] to the prevailing party in a litigation” (*Horwitz v 1025 Fifth Ave., Inc.*, 34 AD3d 248, 249). Thus, a contractual provision assuming an obligation to indemnify a party for attorneys’ and experts’ fees “must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assoc. v AGS Computers*, 74 NY2d at 491; see *Adesso Café Bar & Grill, Inc. v Burton*, 74 AD3d 1253, 1254).

Here, while we disagree with the Referee’s determination that paragraph 4 of the so-ordered stipulation of the parties dated January 9, 2009, bearing the title “Expert and Legal Fees,” is ambiguous, we nevertheless affirm because that paragraph, when viewed in the context of “the language and purpose of the entire agreement and the surrounding facts and circumstances” (*Hooper Assoc. v AGS Computers*, 74 NY2d at 492), constitutes an unequivocal and enforceable agreement by the defendants to indemnify the plaintiffs for their reasonable attorneys’ fees and experts’ fees incurred in connection with their litigation of an underlying contempt motion (see *Centennial Contrs. Enters. v East N.Y. Renovation Corp.*, 79 AD3d 690, 693; *RAD Ventures Corp. v Artukmac*, 31 AD3d 412, 414). Indeed, the intention to pay such fees “is unmistakably clear from the language of the [agreement]” (*Hooper Assoc. v AGS Computers*, 74 NY2d at 492), and it would be difficult, if not impossible, to ascertain any other rational purpose for the provision given the agreement as a whole (see *Breed, Abbott & Morgan v Hulko*, 74 NY2d 686, 687).

The defendants’ remaining contentions are without merit or need not be considered in light of the foregoing.

MASTRO, J.P., FLORIO, BELEN and CHAMBERS, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court