Supreme Court of the State of New York
Appellate Division, First Judicial Department

Moulton, J.P., Kennedy, Rodriguez, Michael, Chan, JJ.

6246 ANTHONY GORDON,
Plaintiff-Appellant,

Index No. 103951/12
Case No. 2024-00310

MARTINA GORDON,
Plaintiff,

-against-

476 BROADWAY REALTY CORP.,
Defendant-Respondent,

BOARD OF MANAGERS OF 476 BROADWAY CONDOMINIUM,
Defendant.

_____

[And A Third-Party Acton]

Lasser Law Group, PLLC, New York (Ian J. Brandt of counsel), for appellant.

Gallet Dryer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about December 13, 2023, which, to the extent appealed from as limited by the briefs, denied the motion of plaintiff Anthony Gordon (plaintiff) to modify or reject the report and recommendation of Judicial Hearing Officer (JHO) Alan C. Marin, dated March 15, 2022, and granted the motion of defendant 476 Broadway Realty Corp. (the Co-op) to confirm the report and recommendation as to the award of attorneys' fees, unanimously modified, on the law, to deny the Co-op's motion, grant plaintiff's motion to the extent

of disaffirming that portion of the report and recommendation that awarded attorneys' fees to the Co-op and modifying the report and recommendation to award plaintiff $100,751 on his claim for abatement, plus interest at the statutory rate from October 6, 2012, and otherwise affirmed, without costs.

In 1998, plaintiffs purchased shares appurtenant to a residential unit of 476 Broadway in Manhattan and entered into a proprietary lease with the Co-op. Prior to moving into the apartment, plaintiffs performed gut renovations to remediate various identified issues. Despite the renovations, plaintiffs experienced significant leaking from 2006 through 2017. The Co-op, for its part, undertook a waterproofing project on the exterior of the building. Plaintiffs ultimately refused to pay maintenance and assessments related to the waterproofing project, contending that the work failed to remedy the ongoing leaks.

According to the Co-op, plaintiffs engaged in objectionable conduct related to their occupancy in the building, including refusing apartment access for water spray testing during most of 2012. Consequently, in September 2012, the Co-op's shareholders held a meeting and voted in favor of terminating plaintiffs' lease, and this action ensued. Among other claims, plaintiffs sought a declaration that the Co-op's notice terminating their lease was null and void; an abatement of rent, maintenance, assessment and/or use and occupancy; and damages for breach of the proprietary lease. The Co-op answered and asserted, as relevant here, a holdover counterclaim seeking immediate possession. The court awarded possession to the Co-op in 2014 (*see Gordon v 476 Broadway Realty Corp.*, 129 AD3d 547 [1st Dept 2015]). In the order currently appealed from, Supreme Court confirmed the JHO's report and recommendation which, among

other things, awarded plaintiffs a 45.6% abatement from October 2006 until December 2017.

The parties' disputes concerning prevailing party attorneys' fees and the nature of plaintiffs' eighth cause of action have been preserved for appellate review. The final order appealed "disposed of all factual and legal issues raised in the case" (*Hurd v Lis*, 126 AD2d 163, 166 [3d Dept 1987], *lv dismissed* 70 NY2d 872 [1987]). That order, in turn, brings up for review the court's July 18, 2018 order, which deemed the Co-op to be the prevailing party and sua sponte deemed the eighth cause of action to be one for breach of the warranty of habitability (*see Matter of Quinn, Emanuel, Urquhart & Sullivan, LLP v AVRA Surgical Robotics, Inc.,* 233 AD3d 497, 497 [1st Dept 2024]).

Supreme Court should have disaffirmed that portion of the report and recommendation that awarded attorneys' fees to the Co-op. To begin, the July 18, 2018 order prematurely deemed the Co-op to be the prevailing party, as significant relief remained for adjudication. Now, on the merits, there is no prevailing party. "[T]o prevail, the party seeking attorneys' fees must be successful on the central relief sought" (*49 E. Owners Corp. v 825 Broadway Realty, LLC,* 224 AD3d 493, 493 [1st Dept 2024] [internal quotation marks omitted]). Here, there was no single central issue. Rather, there were two main issues: whether plaintiffs could stay in their home and whether they were entitled to damages, or an abatement on their maintenance, due to the leaks in their apartment. Although the Co-op obtained summary judgment on its possession counterclaim, it did so under the deferential standard applied to business judgment (*see Gordon*, 129 AD3d at 548, citing *40 W. 67th St. v Pullman*, 100 NY2d 147, 155-156 [2003]). Even accepting the Co-op's award of possession as substantial relief on one of the main issues, under the circumstances plaintiffs' abatement of almost 50% for more

than a decade precludes prevailing party attorneys' fees (*see 49 E. Owners Corp.*, 224 AD3d at 493 ["Where the outcome of litigation is mixed and the relief awarded is not substantially favorable to either party, neither party can claim to be the prevailing party"]; *Pelli v Connors,* 7 AD3d 464, 464 [1st Dept 2004]).

The Co-op's cited authority does not counsel to the contrary. In *Peachy v Rosenzweig* (215 AD2d 301 [1st Dept 1995]), for example, the petitioner landlord was held to be the prevailing party because it succeeded in obtaining the central relief in the action it commenced. Although the respondent tenant was entitled to a $4,825.21 abatement setoff, this represented approximately 22% of the sum awarded under the landlord's possessory judgment, and only 8% compared to the total amount the landlord recovered (*see id.* at 301-302; *see also Excelsior 57th Corp. v Winters*, 227 AD2d 146 [1st Dept 1996] [the petitioner landlord was the prevailing party despite rent abatement for 4½ of the 54 months at issue]). Here, the Co-op sought possession by counterclaim, and the issue was resolved relatively early in the litigation. Moreover, the Co-op's only monetary award was premised on prevailing party attorneys' fees (*cf. Peachy*, 215 AD2d at 302).

Supreme Court did not err in the 2018 order when, for the purpose of issuing its reference to the JHO for a determination as to credit and offsets to which plaintiffs were entitled, it sua sponte grouped the eighth cause of action with plaintiffs' fifth, sixth, and seventh causes of action. Contrary to plaintiff's argument, the court did not lack jurisdiction to grant relief that the Co-op did not request in its moving papers. As plaintiff acknowledges, the Co-op moved for summary judgment and such a motion empowers a court to search the record (*see Chateau D'If Corp. v City of New York,* 219 AD2d 205, 210 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]), and Supreme Court had

ample basis to conclude that the eighth cause of action was duplicative of the other causes of action asserted by plaintiffs. Notably, this case does not fall into that narrow category of "borderland situations . . . where a legal duty independent of contractual obligations may be imposed by law as incident to the parties' relationship" (*Duane Reade v SL Green Operating Partnership, LP,* 30 AD3d 189, 190 [1st Dept 2006] [internal quotation marks and brackets omitted], quoting *Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]).

Turning to the JHO's abatement award, plaintiff's contention that the JHO should have awarded plaintiffs a 100% abatement instead of a 45.6% abatement is unavailing. The record clearly supports the JHO's substantial partial abatement award, and the JHO was in the best position to determine the issues presented (*see Sichel v Polak,* 36 AD3d 416, 416 [1st Dept 2007]; *Nager v Panadis,* 238 AD2d 135, 136 [1st Dept 1997]; *Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705, 705-706 [1st Dept 1985]).

Plaintiff's various challenges to the JHO's hearing rulings do not warrant reversal. Regarding the mold report, even if the JHO should have admitted reports about mold in plaintiffs' apartment, any such error was harmless under the circumstances (*see Matter of Hassine,* 222 AD3d 522, 524 [1st Dept 2023]). Indeed, plaintiff's testimony and exhibits addressed the mold condition in the apartment. Likewise, to the extent the JHO erred in declining to hear testimony from plaintiffs' subpoenaed or proposed expert witnesses, any such error was harmless (*see id.*). Although plaintiff intended for these witnesses to testify about water leaks and damage, both he and his architect extensively covered these topics during the hearing.

Because the award of attorneys' fees to the Co-op should be vacated, the $100,751 abatement is no longer a mere offset to the award to the Co-op. Thus, plaintiff is entitled to an award of $100,751, with statutory interest (CPLR 5001[a]; *see Delulio v 320-57 Corp.,* 99 AD2d 253, 254 [1st Dept 1984]; *Solow v Wellner,* 86 NY2d 582, 589-590 [1995]). To avoid further delay in this old case, interest should be computed from "the date of commencement of the damage action" (*Delulio,* 99 AD2d at 255).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 28, 2026

Susanna Molina Rojas
Clerk of the Court