

**Horwitz v 1025 Fifth Avenue, Inc.**

2004 NY Slip Op 30020(U)

January 13, 2004

Supreme Court, New York County

Docket Number: 2\_30011/5319

Judge: Diane A. Lebedeff

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDOFF  
Justice

PART 8

Michael S. Horwitz  
- v -  
1025 Fifth Avenue Inc

INDEX NO. 11539/00  
MOTION DATE 1/5/04  
MOTION SEQ. NO. 012  
MOTION CAL. NO. 1

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for PI

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits IN LIMINE

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	<u>2</u>
Replying Affidavits	<u>A-1, A-L, A-3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ABOVE AND IT IS SO ORDERED.

SCANNED  
JAN 20 2004

NOTICE: THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 13 2004

DLH  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: I.A.S. PART 8

-----X

MICHAEL S. HORWITZ AND SHERRI R. WEISER-  
HORWITZ.

Plaintiffs

-against-

Index No. 115319/00  
Mot. Seq. No. 012

1025 FIFTH AVENUE, INC.,

Defendant.

-----X

**DIANE A. LEBEDEFF, J.:**

Plaintiffs Michael Horwitz and Sherri Weiser-Horwitz move for an order restraining the defendant-landlord 1025 Fifth Avenue, Inc. (the "Co-op"), from taking further action in relation to a ten-day demand for past due rent and additional charges. The Co-op cross moves to discontinue its claim for use and occupancy.

The cross motion is granted, except to the extent that any sums claimed to be due are allocable to the Co-op's legal fees in this proceeding. From an inspection of the ten day demand (motion, exhibit A), it does not appear from the face of the demand that any such sums are included and, to the extent a legal charge of 5500 for legal charges for November of 2003 has an independent basis, the Co-op is not stayed by this order.

It is appropriate that the claim for use and occupancy be discontinued at this time. The substantive dispute has been resolved and the issue of legal fees due the tenant has been set down for a hearing on January 16, 2003, in Part 8. To the extent that any legal fees to be awarded can be offset against any maintenance and other charges due, the parties

shall be free to make that calculation. The Co-op appropriately admits that this claim now lacks the underpinning of an issue bearing upon possession of the unit or a default under the proprietary lease. Given the judicial approval of the discontinuance, the prime motion is denied.

In papers independent of the motion, the parties have presented requests for rulings *in limine* prior to the conduct of the legal fees hearing. For administrative convenience, the court will address such issues in the context of this motion. The plaintiffs seek recovery of legal fees in an amount in excess of \$166,000.

The parties both address the portion of this court's decision of June 19, 2003, in which the court determined that plaintiffs were entitled to an award of legal fees but cautioned that full fees could not be awarded. The court observed:

“...any right to legal fees must be based upon consideration of the right to such fees as set forth in the lease (*J.D. Realty Associates v. Shanley*, 288 A.D.2d 27, 28 [1st Dept. 2001], ‘since the lease attorney fee provision is not directly implicated ... defendant’s counterclaim for attorneys’ fees was properly denied [see, *Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5]’; 74 N.Y. Jur.2d Landlord and Tenant § 103, *Contractual Provisions for Attorney’s Fees*, ‘The tenant will not be liable for attorney’s fees as additional rent in the absence of an express agreement to the contrary’). Here, Article II. paragraph fifteen, states as follows:

‘(Attorney’s Fees): If the Lessee shall at any time be in default, or if the Lessor shall institute an action or summary proceeding against the Lessee based upon such default, the Lessee will reimburse the lessor for the expense of attorneys’ fees and disbursements thereby incurred by the Lessor, so far as the same are reasonable in amount, and the Lessor shall have the right to collect same as additional rent.’

Clearly, there are parts of this litigation which have not implicated this provision, such as the tort claims (see *E.M.R. Management Corp. v. Halstead Harrison Associates*, 299 A.D.2d 393 [2d Dept. 2002], ‘In the absence of any clear indication that the defendant agreed to undertake the

obligation to pay the plaintiff's attorney's fee, and since there is no statute, court rule, or other legal basis for the award of an attorney's fee in this case, the plaintiff is not entitled to such an award [see *Hooper Assocs. v. AGS Computers*, 74 N.Y.2d 487 [1989]; *Orlowski v. Koroleski*, 234 A.D.2d 436 [2d Dept. 1996]']. Moreover, declaratory judgment claims usually do not fall within such lease provisions (*Archdiocese of New York v. Amedeo Hotels Ltd. Partnership*, 295 A.D.2d 161 [1st Dept. 2002], 'We ... deny plaintiff's motion for attorneys' fees, since the subject indemnification clause does not require the tenant to reimburse the landlord for counsel fees expended in an action commenced by the landlord to obtain a declaratory judgment construing the lease').

"Because the papers do not provide sufficient guidance, to the extent the issue of legal fees is addressed, the requests in relation thereto are denied at this time."

The court has not been persuaded that its view of the law was improper

The operative essential language in this lease's legal fee provision states that "[i]f the Lessee shall at any time be **in default**, ... the Lessee will reimburse the lessor for the expense of attorneys' fees and disbursements **thereby incurred** ...so far as the same are **reasonable in amount**" (emphasis added). The court has advised the parties that it will consider legal efforts relating to the default.

Plaintiffs incorrectly urge that the provision authorizes charges for legal fees irrelevant to a default. Such fees are not authorized by the Lease, and plaintiff did not prevail on its other claims. Indeed, if the full sweep of their legal efforts were compensable under this provision, it is possible that they could not recover any legal fees. This conclusion considers that although it was determined that the notices to cure and terminate were substantively and procedurally deficient and that the Co-op could not proceed upon the claim that the tenants were in default (which issue could have been presented very early in this litigation), the balance of their declaratory judgment claims for lease interpretation were not reached, their tort claims were dismissed, and they remained

responsible for use and occupancy which reached the level of over \$50,000 in arrears. On similar facts, where the court considered the full range of legal efforts, it has been found that legal fees are not due a tenant (see, denying legal fees, *Mosesson v. 288/98 West End Tenants Corp.*, 294 A.D.2d 283, 284 [1st Dept. 2002], “defendant was awarded the maintenance arrears it sought. Plaintiff was then awarded a 20% abatement and recovered on her property damage claim. However, the abatement of \$66,722.88 was far less than ‘the not less than \$1.5 million’, together with punitive damages, that plaintiff sought in the complaint. While she prevailed on her property damage claim, plaintiff’s other tort claims were all dismissed or withdrawn. Under these circumstances, ‘neither party can claim to have prevailed ...’”; *Walentas v. Johnes*, 257 A.D.2d 352, 354 [1st Dept. 1999], lv dismissed 93 N.Y.2d 958 [1999], “In view of plaintiff’s recovery of rent arrears and our dismissal of those counterclaims sounding in tort, the award of attorney’s fees to defendant cannot stand”).

Here, the particular lease provision does not give “global” litigation coverage. Accordingly, when reaching a conclusion as to the efforts compensable to a tenant by reason of the reciprocity of Real Property Law § 234, the fees awarded must be restricted to such services which are “intimately related” to matters compensable under the lease (*Senfeld v. Z.S.T.A. Holding Co., Inc.*, 235 A.D.2d 345 [1st Dept. 1997], motion lv app dismissed 91 N.Y.2d 956 [1998], lv app den 91 N.Y.2d 956 [1998]). Because an award for all legal efforts would be akin to the “anomaly of a tail wagging an elephant”, compensation must be for “the pro tanto benefit of the reciprocal counsel fee statute” by considering the tenant’s “right to ... legal expense incurred in the elimination of only that

exposure” (*Haberman v. Wassberg*, 131 A.D.2d 331, 334 [1st Dept. 1987], mo lv app den 70 N.Y.2d 614 [1987]). In relation to the default issues, the court has determined that the “ultimate outcome” was in the tenants’ favor, and it matters not whether such outcome was “on the merits” (*Elkins v. Cinera Realty*, 61 A.D.2d 828 [2d Dept. 1978]), but only that the judgment secured is “substantially favorable” to the tenants and the tenants won “substantial relief” in relation to the default issues (*Leventritt v. 520 East 86th Street, Inc.*, 266 A.D.2d 45 [1st Dept. 1999], lv app den 94 N.Y.2d 760 [2000]).

Clearly, a goodly amount of the legal work here will not permit compensation. For example, an injunctive or declaratory request for relief – to the extent such a claim seeks “merely to prevent possible future conduct which would, if it actually occurred, constitute a breach of the lease” – has been held not to “qualify as an action based on the landlord’s failure to perform a covenant under the lease” (*Salvato v. St. David’s School*, 307 A.D.2d 812, 813 [1st Dept. 2003]). In the same vein, it has been held error to determine a right to legal fees arises where tenants “merely sought a judicial declaration of their rights under the lease” (*Spinale v. 10 West 66th Street Corp.*, 193 A.D.2d 431, 432 [1st Dept. 1993], citing *Camatron Sewing Mach. v. F.M. Ring Assocs.*, 179 A.D.2d 165 [1st Dept. 1992], and *Mogulescu v. 255 W. 98th St. Owners Corp.*, 135 A.D.2d 32 [1st Dept.], app dismissed, 71 N.Y.2d 964 [1988], lv dismissed and denied, 73 N.Y.2d 868 [1989]). And, as this court observed above, the tort claims are not compensable.

Other and further pruning will also be in order. The lease provision permits compensation only for what is “thereby incurred” in relation to the default and only “so far as the same are reasonable in amount” (proprietary lease, art. 2, para. 15). Traditional

factors to be assessed include the time and labor required, the difficulty of the questions presented, the skill required to perform the services including the lawyer's experience, ability and reputation, the amount involved and benefit resulting to the client from the services (*Matter of Freeman*, 34 N.Y.2d 1 [1974]). Additionally, in weighing legal fees, a "court may consider its own knowledge and experience concerning reasonable and proper fees ... [and] may form an independent judgment from the facts and the evidence before it as to the nature and extent of the services rendered, make an appraisal of such services, and determine the reasonable value thereof" (*Jordan v. Freeman*, 40 A.D.2d 656, 657 [1st Dept. 1972]). An agreement regarding fees is not necessarily controlling (*Krooks v. Conrad*, 257 N.Y. 329, 332 [1931], "the agreement of retainer may prove ... an extremely unjust guide for ascertaining [the] worth" of an attorney's services).

Here, the court continues its view that the issues and calculations can best be addressed at a hearing in which the chronology and purpose of the various legal steps taken can be explained and, most likely, with the County Clerk's file before the court. There are two particular areas of work which require reconstruction and are objected to by defendant on the ground such work which was fruitless or caused by the error of moving counsel. The two primary examples arose when the case was before Justice Lorraine Miller, who declined to sign the first order to show cause herein (for which there is a \$900 time charge) and later struck the matter from the calendar (which defendant states gave rise to 30.10 hours of work and a charge of approximately \$9,750). Neither of these actions were taken by this justice or by reason of this justice's orders and this court will require further information to ascertain what occurred and the policies applied.

Further, much of the discovery motion practice, to the court's recollection, was not only unsuccessful but was addressed to the tort claims (commencing with notice of deposition, 8/22/00 and continuing throughout the litigation). In relation thereto, plaintiffs' counsel is directed to prepare a specialized long account of all items of work involving the tort claims. Such account could then be subject to a denial of compensation at the beginning of the hearing. Such an accounting would assist the presentation of evidence in relation to this long entire account and would follow the course of treatment accepted in a "voluminous writings" situation (see, citing Richardson, Evidence [10th ed.], § 574, *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 452 [1974], "the 'voluminous writings' exception \* \* \* \* permits the admission of summaries of voluminous records or entries where, if requested, the party against whom it is offered can have access to the original data"; *People v. Potter*, 255 A.D.2d 763, 767 [3rd Dept. 1998], "Summaries of voluminous records are admissible as long as the opposing party is provided with the original data"; *Herbert H. Post & Co. v. Sidney Bitterman, Inc.*, 219 A.D.2d 214, 228 [1st Dept. 1996], "It was also error to exclude the charts prepared by Post containing summaries of the accountants' voluminous workpapers already in evidence. \* \* \* \* The summary charts would have explained the workpapers"). It is noted that defendant states that more than 40.60 hours, or approximately \$12,000 of legal work, was involved with the pursuit of non-party subpoenas alone and was related to the tort claims.

The court directs that a similar listing be prepared of those items of work attributable to the use and occupancy issue. The court questions whether plaintiffs will be able to frame an acceptable rationale that there should be compensation for work involving

an issue on which the client, with or without the support of counsel, defied a court order that use and occupancy be paid and on which plaintiffs have never carried the day. It is noted that the research done on June 3 and 4, 2002, also appear to involve this issue, as did the bulk of the appellate practice. Defendant maintains that approximately 64.20 hours, or \$19,000 of legal work, was spent on avoiding payment of use and occupancy.

A third specialized listing of the work involving the non-judicial foreclosure issues shall also be prepared. This area may also be suited to a special ruling and such listing would be of assistance to the court.

One of the final challenges raised is the level of compensation. The court is of the view that the fact that the tenant appeared through his own law firm does not defeat the legal fees claim for a tenant is not required to demonstrate that the tenant “incurred” attorneys’ fees as a condition precedent to a tenant’s recovery under the statute (*Maplewood Mgmt. v. Best*, 143 A.D.2d 978 [2d Dept. 1988]; *Senfeld v. I.S.T.A. Holding Co. Inc., supra*). However, the defendant is not required to accept the proposition that compensation should be at a *pro se* attorney’s – or such an attorney’s firm’s – normal billing rate (*Parker 72nd Associates v. Isaacs*, 109 Misc. 2d 57 [Civ. Ct. N.Y. Co. 1980, Lebedeff, J.]). Certainly, defendant may inquire as to what payment agreement exists, whether Mr. Horwitz would actually be paid at his billing rate, whether the work displaced work of paying clients, what discount might be given to partners for legal work, and other questions appropriate to the facts.

And there will undoubtedly be cross examination to elicit information on those times when the services were above and beyond those usually “reasonably” seen in a

landlord-tenant case by an experienced attorney. Eighteen hours on drafting a summons, complaint and order to show cause is more time than typically seen (7/6 to 7/13/00), especially when it precedes research on termination of a proprietary lease (7/21/00). It will be a basis for challenge to the size of the legal fee that the law firm, of which plaintiff was a partner, might have been able to present adequate grounds for dismissal of the claim of default after a review of the Co-op's documents and records (8/02 and 8/10/00).

Based on the court's observation, defendant *is* willing – and is not required to display enthusiasm over the prospect – to pay such legal fees as are appropriate. The Co-op's position that such fees should be limited to those “reasonable” and “thereby incurred” by reason of its declaration of default, is one which it is entitled to take under the lease terms. The lease does not give the tenant a “ticket to ride” into any legal debate at the Co-op's cost. A hearing will permit the court to explore the issues with deliberation and care.

\* \* \*

Based on the foregoing, the cross motion is granted to the extent set forth above and the motion and cross motion are otherwise denied. The motion in *limine* is denied as to the requests made by both sides, except to the extent that the tenants' request for full compensation is denied at this time. The tenant's application for sanctions is denied in the exercise of the court's discretion.

This decision constitutes the order of the court.

Dated: January 13, 2004



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J.S.C.

**FILED**  
JAN 21 2004  
NEW YORK  
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