

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

2005 NY Slip Op 30013(U)

February 8, 2005

Supreme Court, New York County

Docket Number: 1\_30011/5319

Judge: Diane A. Lebedeff

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

PRESENT: Hon. DIANE A. LEBEDEFF  
*Justice*

PART 8

Horwitz, Michael S.

INDEX NO. 115319/00

MOTION DATE 11/8/04

MOTION SEQ. NO. 013

MOTION CAL. NO. 7

- v -

1025 Fifth Avenue, Inc.)

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

PAPERS NUMBERED

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

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

Replying Affidavits \_\_\_\_\_

} 1-5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED:

J.S.C.

Dated: FEB 08 2005

*Dr*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Do Not Post  Reference

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. 013

1025 FIFTH AVENUE, INC.,

Defendant.

-----X

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

The motion for legal fees, an issue which has been the subject of numerous decisions in this case, is granted to the extent that legal fees are approved to the extent indicated below.

The court determines the movant co-operative is permitted to request an award for legal fees at this procedural point, after the conclusion of an appeal (*see AD 1619 Co. v. VB Management, Inc.*, 175 Misc.2d 1021 [A.T. 1st Dept. 1998], *aff'd as modified*, 259 A.D.2d 382 [1st Dept. 1999], *lv app disp'd* 93 N.Y.2d 1030 [1999], Appellate Division held party could properly interpose a claim for fees after judgment and conclusion of appeal). Further, while the tenants benefit from the fact that an insurer provided legal services on certain portions of the case and compensation is not sought for such services, it is determined that the co-operative's law firm may properly seek compensation for its legal work.

In relation to entitlement to fees, 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). It appears that the Appellate Division, First Department, decision of May 27, 2004, determined that the co-operative was entitled to adopt its policy regarding terrace awnings and that the tenants were in default in relation to that policy. Additionally, as the parties will well recall, there was an additional default in the failure to pay maintenance and/or assessment(s). Further, the co-operative prevailed on what appears to be their second counterclaim for an immediate declaration of default and order for immediate removal, such that its request is not barred by the rules which hold a request for future relief may not be compensable (*see Salvato v. St. David's School*, 307 A.D.2d 812, 813 [1st Dept. 2003], request for declaration or injunction "to prevent possible future conduct which would, if it actually occurred, constitute a breach of the lease" not compensable; *Spinale v. 10 West 66th Street Corp.*, 193 A.D.2d 431, 432 [1st Dept. 1993], mere "judicial declaration of their rights under the lease" not compensable, and 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]).

Additionally, the court must be satisfied that the judgment is "substantially favorable" or grants "substantial relief" to the party seeking fees (*Leventritt v. 520 East 86th Street, Inc.*, 266 A.D.2d 45 [1st Dept. 1999], *lv app den* 94 N.Y.2d 760 [2000]).

Notwithstanding that the eviction claim was dismissed and those issues do not appear to have been revisited upon the appeal, the co-operative prevailed on the central issue that it had an immediate right to removal of the disputed awning.

Being satisfied that the movant has shown entitlement to legal fees as a general matter, the court now turns to issues of computation. 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). Of course, the fees awarded must be restricted to such services which are “intimately related” to matters compensable under the lease (*Senfeld v. I.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]). On the matter of valuation, 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).

Almost exclusively, the items covered by the movant's billing appear to relate to these two broad areas of default and the normal incidental work related to involvement in this litigation and keeping a client abreast of the litigation. The amounts appear to be reasonable in general and appropriately billed. The court will exclude certain items from an award as follows:

- 1. Work Not Described:** There is no description of the legal work done on the invoices of: (1) April 30, 2000; (2) May 31, 2000; (3) June 30, 2000; (4) July 31, 2000; (5) December 31, 2000; and (6) March 31, 2001. The amounts covered by these bills are denied without prejudice to renewal upon a full description.
- 2. Non-Judicial Foreclosure:** The non-judicial foreclosure was fatally flawed for reasons previously stated and is determined not to be compensable (invoice of September 30, 2000, and October 31, 2000, and work on November 30, 2000).
- 3. Disbursements:** Other than disbursement charges permitted under law, the claim for disbursements as itemized on the bills is denied without prejudice except as to those bills which are fully compensable under the terms of this decision. At this time, the court is unable to review the allocation of disbursements to this matter.

All other items claimed to be compensable are found to be proper by the court, including those on the invoice of September 30, 2004. To the extent relief is denied, movant is granted leave to renew upon proper papers.

The court has considered the belated fax submission of the defendants in reaching the above result.

Settle judgment, supported by an affidavit of computation. The judgment may include interest and lawful disbursements, as well as any costs incurred.

Dated: February 8, 2005



J.S.C.