Moskowitz v Sheridan
2005 NY Slip Op 30577(U)
April 14, 2005
Supreme Court, New York County
Docket Number: 100198/04
Judge: Jane S. Solomon

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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HERBERT MOSKOWITZ d/b/a MANHATTAN REALTY CO.,

Plaintiff,

-against-

MARTIN SHERIDAN,

Defendant.

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INDEX NO. 100198/04

DECISION, JUDGMENT AND ORDER

JANE S. SOLOMON, J.

Plaintiff Herbert Moskowitz d/b/a Manhattan Realty Co. ("Moskowitz") is the owner of a five-story building in Manhattan, which was originally used for commercial purposes. In 1976, he leased the building's second floor to defendant Martin Sheridan ("Sheridan") as a residential loft apartment; Sheridan has continuously occupied it since that date. The building was subject to the terms of New York's Loft Law, Article 7-C of the Multiple Dwelling Law ("MDL"), which provides for the conversion of all residential loft apartments into rent-stabilized units.

Moskowitz undertook the necessary renovations to convert the lofts into rent-stabilized units, and, subsequently, registered the building as an "Interim Multiple Dwelling." In February 2002, the Department of Buildings approved the renovations, and issued a certificate of occupancy. On June 3, 2002, the New York City Loft Board issued an Order directing Moskowitz to register Sheridan's apartment with the New York

State Division of Housing and Community Renewal, pursuant to the Rent Stabilization Law, and tender Sheridan a rent-stabilized lease.

In December 2002, Moskowitz mailed Sheridan a proposed lease on a standard form, and Sheridan rejected it. In short, they disagreed over (1) whether Sheridan should be entitled to sell the improvements he made to his loft to any prospective tenant and (2) the lease language regarding subletting and assignments. The parties attempted to negotiate a settlement, but could not do so.

Moskowitz brought suit seeking an order of ejectment and a declaration "that the lease proffered to the defendant is valid and correct lease [sic] and the plaintiff is not required to alter any terms to accommodate defendant [sic] special desires." On March 17, 2004, Sheridan answered, asserting affirmative defenses that: (1) Moskowitz failed to serve predicate notices as required by Real Property Law ("RPL") § 232-a; (2) the proposed lease failed to satisfy the terms of the Loft Board Order and the MDL; (3) Moskowitz failed to allege the necessary elements of both of his causes of action; and (4) the proposed lease impermissibly sought to coerce Sheridan to waive his jury trial right.

By Order dated December 6, 2004, I denied Moskowitz's motion for summary judgment and granted Sheridan's cross-motion

for summary judgment. In doing so, I adjudged and declared that the proposed lease did not comply with the Loft Board's Order and ordered Moskowitz to reissue Sheridan a rent-stabilized lease and rider, which contain subletting and assignment provisions that comply with the Loft Board's Order and acknowledge Sheridan's rights pursuant to MDL § 286 (6) to "sell any improvements to the unit made or purchased by him to an incoming tenant."

Moskowitz now moves for reargument and reconsideration of the December 6, 2004 Order, arguing that its language regarding improvements is too broad. Sheridan opposes the motion and cross-moves for attorney's fees.

Moskowitz contends that the language I ordered to be included in the new lease is incomplete, such that it could be misconstrued as to suggest that Sheridan has an unfettered right to sell his interest in his rent-stabilized lease to a prospective tenant. He argues that the language should property indicate that Sheridan has a qualified right to the sale of his improvements, limited by the law regarding fixtures, and suggests that the appropriate language should read: "the tenant may dispose of the fixtures installed or paid for by him pursuant to the Loft Law and the Loft Board's rules and regulations."

With regard to the sale of fixtures, MDL § 286 (6) provides: "[A] residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit

made or purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvement to the owner for an amount equal to their fair market value. ... The loft board shall establish rules and regulations regarding such sale of improvements...".

As my December 6, 2004 Order failed to properly declare Sheridan's right to the sale of the fixtures he installed, reargument is granted, and upon reconsideration, that portion of the December 6, 2004 Order declaring the parties' rights is vacated.

Sheridan argues that Moskowitz's efforts to reargue this motion amount to a request of the Court to overturn the Loft Board's June 3, 2002 Order. How this is so is unclear from Sheridan's papers, but as best as I can interpret it, he appears to argue that by limiting his rights to the sale of fixtures based upon the MDL and rules and regulations promulgated by the Loft Board, I would be contravening the Loft Board's Order requiring Moskowitz to issue him a rent-stabilized lease. Such a position is without merit. Though neither party submits a copy of the Loft Board Order, it is unlikely that the Loft Board ordered Moskowitz to issue a lease giving Sheridan rights beyond those granted under the law.

As to attorney's fees, the cross-motion is granted. Real Property Law ("RPL") § 234 states:

> "Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorney's fees and/or expenses incurred as a result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorney's fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in any action or summary proceeding commenced by the landlord against the tenant."

Section 234 was designed to provide tenants with a reciprocal statutory right to the recovery of attorney's fees where a landlord has a contractual right to such fees based upon the terms of the parties' lease. Haberman v. Wassberg, 131 A.D.2d 331, 334-35 (1st Dep't 1987). The threshold question is then whether Moskowitz could have recovered attorney's fees if he prevailed in having Sheridan ejected.

The parties agree that since Sheridan did not sign the new lease, the terms of the 1976 lease control with regard to attorney's fees. See Barrow Realty Corp. v. Village Brewery Rest., 272 A.D. 262 (1st Dep't 1947). Paragraph 19 (Fees and Expenses) of that lease reads:

> "If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, then, unless otherwise provided elsewhere in this

> lease, Landlord may immediately or at any time thereafter and without notice perform the same for the account of Tenant, and if Landlord makes any expenditures or incurs any obligations for the payment of money in connection therewith including, but not limited to, attorney's fees in instituting, prosecuting or defending any action or proceeding such sums paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Landlord within five (5) days of rendition of any bill or statement to Tenant therefor."

Moskowitz relies upon Kips Bay Towers Assocs. v. Yuceoglu, 134 A.D.2d 164 (1st Dep't 1987) for the proposition that attorney's fees are not proper here. In that case, the First Department denied a prevailing tenant legal fees based upon the terms of his lease, which included language providing for attorney's fees similar to that in Sheridan's 1976 lease. The Kips Bay court did not quote the exact language of the lease it interpreted, but it appears that it was the same boilerplate language applicable here, as the provision there was also found at paragraph 19 and the court described it as permitting "the landlord to incur an expense 'for the account of Tenant' by performing an act that should be performed by the tenants under the lease, in which event the expense so incurred, including, but not limited to, attorney's fees, is to be deemed additional rent and paid on the first day of the calendar month following the incurring of such expense." Id. at 165-66. In dicta, the court stated that the applicable lease provision "seems to apply in situations where, for instance, a landlord incurs an expense

because a tenant causes damage to the premises and, in violation of the lease, fails to make repairs." Id. at 166.

On its face, Kips Bay appears to be controlling, but it is distinguishable. There the landlord brought a declaratory judgment action to determine whether it was required to extend a rent-stabilized tenant a renewal lease, such that no provision of the lease was at issue. Yet, the tenor of Moskowitz's argument is correct--some cases appear to hold that attorney's fees are not recoverable where the proceeding involved is not a traditional landlord-tenant dispute based upon the breach of a specific lease provision. See, e.g., East 55th St. Joint Venture v. Lichtman, 126 Misc.2d 1049, 1051 (App. Term, 1st Dept. date); 5700-5800-5900 Arlington Ave. Assocs. v. Medina, 136 Misc.2d 943 (Civ. Ct., Bronx Cty. 1987). However, the conclusion he draws is improper.

After the Kips Bay decision was issued, the First Department decided Cier Industries Co. v. Hessen, 136 A.D.2d 145 (1988). That case appears to have implicitly overruled any applicable rule established by Kips Bay. The court reinstated the Civil Court's award of attorney's fees to a landlord stemming from a holdover proceeding brought against the tenant of a rent-stabilized apartment, based upon the tenant's failure to occupy the apartment as her primary residence as required by the rent stabilization laws. The Cier Industries court relied not solely

upon the boilerplate lease language regarding attorney's fees, but more explicitly upon the terms of the lease that required the tenant to "surrender the premises upon the expiration of her lease." Id. at 147. In doing so, it found that the tenant had breached a covenant of her lease by failing to surrender the premises, entitling the landlord to recover under the attorney's fees provision.

Sheridan's 1976 lease contains similar language at Paragraph 21: "Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to the Landlord the demised premises.... Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease." Had Moskowitz prevailed on his ejectment cause of action, he would have been entitled to attorney's fees under Cier Industries. As such, RPL § 234 requires that Sheridan reciprocally be entitled to attorney's fees, if he prevails.

Moskowitz contends that Sheridan was not the prevailing party here because he only "prevailed" on the issue of the appropriate fixtures language in the new lease, and Moskowitz had already agreed to include that language in the new lease prior to my December 6, 2004 Order. He misconstrues the controlling law. A determination of whether Sheridan is the prevailing party requires not a limited review of the individual arguments each

party made and the court's determination of them, but a consideration of the true scope of the dispute, followed by a comparison of what was achieved within that scope. Excelsior 57th Corp. v. Winters, 227 A.D.2d 146 (1st Dep't 1996). At issue here was the propriety of Sheridan's rejection of the proffered lease--in other words, whether he was entitled to remain in the apartment. Had I determined that the proposed lease complied with the terms of the Loft Board's Order, Moskowitz could have prevailed on the ejectment claim. Under these circumstances, it is clear that Sheridan was the "prevailing party" as required under RPL § 234, entitling him to attorney's fees. See 119 Fifth Avenue Corp. v. Berkhout, 134 Misc.2d 963 (Civ. Crt., N.Y. Cty. 1987) (awarding attorney's fees to a loft tenant prevailing in an ejectment action).

Accordingly, it is hereby

ORDERED that Moskowitz's motion for reargument and reconsideration is granted, and upon reconsideration, the declaration of December 6, 2004 is vacated and replaced with the following:

> "ADJUDGED AND DECLARED that the proposed lease and rider, which previously were issued by plaintiff Herbert Moskowitz d/b/a Manhattan Realty Company to defendant Martin Sheridan, violate the terms of the Loft Board's June 3, 2002 Order, and Moskowitz must now

reissue a rent-stabilized lease and rider to Sheridan, the subletting and assignment provisions whereof must expressly comply with the terms of the above-mentioned Loft Board Order, and shall acknowledge said defendant's right, pursuant to Multiple Dwelling Law § 286 (6) "to sell any improvements to the unit made or purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvements to the owner for an amount equal to their fair market value," and otherwise limited by the Multiple Dwelling Law or any rule or regulation promulgated by the Loft Board with regard to the sale of fixtures";

And it further is

ORDERED that Sheridan's cross-motion for attorney's fees is granted, and the issue of how much Moskowitz owes Sheridan for reasonable attorney's fees is referred to a Special Referee to hear and report with recommendations; and it further is

ORDERED that the Sheridan's cross-motion shall be held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403; and it further is

ORDERED that a copy of this order with notice of entry shall by served by hand within 45 days on the Judicial Support

Office (Room 311) to arrange a date for the reference to a Special Referee, failing which the cross-motion for attorney's fees will be denied.

Dated: April 14, 2005

ENTER:

J.S.C

JANE S. SOLOMON

Norman Cousins
Clerk

FILED
APR 21 2005
COUNTY CLERK'S OFFICE
NEW YORK