

City Lumber, Inc. v Central Parking System of New York

2006 NY Slip Op 30122(U)

December 21, 2006

Supreme Court, New York County

Docket Number: 0060197/2006

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

City Lumber Inc.

INDEX NO. 601974/06

- v -

MOTION DATE _____

MOTION SEQ. NO. 1

Central Parking System

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that these motions are denied in accompanying decision & order denying motion + granting cross motion in part

FILED

JAN 03 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/21/06

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X

CITY LUMBER, INC.,

Plaintiff,

-against-

INDEX NO. 601974/06

CENTRAL PARKING SYSTEM OF
NEW YORK, INC.,

DECISION AND ORDER

Defendant.

Motion Seq. No.: 001

-----X

Hon. Jane Solomon, J.:

In this action, plaintiff City Lumber, Inc. (plaintiff, or City, or subtenant) seeks to recover in excess of \$40,000 in attorney's fees from defendant Central Parking System of New York, Inc. (defendant, or Central, or over-tenant) pursuant to an indemnification clause contained in a written sublease agreement dated December 15, 2005 (the sublease). Central now moves to dismiss the complaint, for an award of attorney's fees in its favor, and for the imposition of sanctions against City.

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Background

Initially, City moved by Order to Show Cause (OSC) for an order enjoining Central from taking any action to terminate the sublease pursuant to a notice of default dated May 23, 2006 (default notice), and staying the time period for City to cure the default set forth in that notice (Yellowstone Injunction).

This court signed the OSC and granted the requested interim relief, pending a hearing on the OSC. Subsequent to the parties' appearance in court, City tendered to Central the amount sought in the default notice. City then withdrew both of its causes of action and the branches of the OSC relating to the *Yellowstone* Injunction and now presents a single cause of action - a breach of contract claim based on Central's purported failure to honor the indemnification clause of the sublease and reimburse City for its attorney's fees. City has since served Central with an amended complaint containing that single cause of action. Though Central asserts that City should not have served the amended complaint absent leave of this court, it acknowledges that the cause of action seeking attorney's fees remains viable, if only by virtue of the original complaint.

Central came into possession of the commercial building located at 550 West 37th Street, New York County (the building) pursuant to a written agreement dated May 26, 1999 (the lease), between non-party landlords Ralph and Frank Chiaia d/b/a Classic Sanitation Co. (collectively, landlord) and Central's predecessor in interest, non-party Fourth Apple Parking Corp., which lease was thereafter assigned to Central. Pursuant to the sublease, Central leased the building to City.

By notice of petition and petition dated April 3, 2006, the landlord commenced a non-payment proceeding in the Commercial

Landlord and Tenant Part (Part 52) of the Civil Court of the City of New York, New York County (the Civil Court Proceeding). The petition alleged that respondent-tenant Central had defaulted in the payment of its rental obligations to the landlord in the amount of \$50,583.06 (representing rent and additional rent due and owing for the period February, March and April 2006). In that proceeding, City was named as a respondent-undertenant and appeared via counsel.

When Central tendered the rent that was then due and owing to the landlord, the Civil Court Proceeding was settled pursuant to the terms of a written stipulation dated May 10, 2006 (the stipulation), and the proceeding was discontinued.¹

City contends that as a result of Central's failure to pay the rent due the landlord and the ensuing Civil Court Proceeding, City's tenancy was imperiled, its quiet enjoyment of the building was disturbed, and City was forced to incur attorney's fees to safeguard its tenancy.

Upon learning that Central had failed to pay the rent to the landlord, City asserts that rather than pay its April and

¹The stipulation was without prejudice to a pending action in the Supreme Court, New York County, based on Central's claim that it made certain overpayments to the landlord and without prejudice to the landlord's right to amend its answer in that action to assert a claim for attorney's fees and late charges. The stipulation also provided that, "[t]he Respondent-Undertenant [City] has raised herein certain claims against Respondent-Tenant [Central] arising from this action and the dispute between the Respondent-Tenant and the Petitioner-Landlord. Said claims are discontinued without prejudice." Stipulation, ¶ 7.

May, 2006 monthly rent to Central, it deposited that sum in its attorney's escrow account "in anticipation of the need to cure Central Parking's default in its rental payments to the [l]andlord." In addition, City asserts that, on June 1, 2006, rather than pay the full June 2006 rent due, it deposited part of that month's rent into its attorney's escrow account in order to segregate those funds that it believed it was due as a result of the attorney's fees that it has incurred.

City bases its demand for its attorney's fees on the terms of the sublease, which contains, in relevant part, the following provision:

Overtenant agrees, to indemnify, defend and hold harmless Undertenant from any and against any and all claims, losses, expenses, liabilities or damages arising out of the actions or omissions of Overtenant, its contractors, agents invitees, and licensees, with respect to the Premises or any other space leased by Overtenant from Landlord in the building in which the Premises are located.

(the indemnification clause), Sublease, ¶ 36.

Discussion

A party to an action may only recover attorney's fees when such an award is authorized by agreement between the parties (e.g., a lease), by statute (e.g., RPL § 234),² or by court rule. *Matter of A. G. Ship Maint. Corp. v*

²Where a landlord has a right to obtain attorney's fees pursuant to a lease agreement for a residential dwelling, the tenant is given an implied reciprocal right to recover such fees. RPL § 234. In a commercial setting, there is no entitlement to attorney's fees

Lezak, 69 NY2d 1, 5 (1986), citing *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 (1979) and *City of Buffalo v J. W. Clement Co.*, 28 NY2d 241, 262-63 (1971). This general rule that attorneys' fees are incidents of litigation and that absent specific agreement, statute, or court rule, each side must bear its own legal expenses, is premised on "the high priority accorded free access to the courts and a desire to avoid placing barriers in the way of those desiring judicial redress of wrongs. . . ." *Matter of A. G. Ship Maint. Corp. v Lezak*, 69 NY2d at 5.

"[A] promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is so contrary to the well-understood rule that parties are responsible for their own attorney's fees, that a court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise." *Hooper Assocs. Ltd. v AGS Computers, Inc.*, 74 NY2d 487 (1989).

In *Waverly Mews Corp. v Waverly Stores Assocs.* (294 AD2d 130, 131 [1st Dept 2002]), the lease in effect between the parties contained a clause providing that "the landlord is entitled to all costs and expenses incurred in the event of defendant's default of obligations under the lease[,]" and there

pursuant to RPL §234. See *Ubo Realty Corp. v Fulton*, NYLJ, September 8, 1993, at 21, col 1 (App Term, 1st Dept 1993).

was an explicit finding by the court that the defendant had, in fact, defaulted under the obligations of the lease.

Nevertheless, despite the expansive language used in the lease that entitled the landlord to "all costs and expenses," the Appellate Division, First Department, upheld the IAS court's denial of the landlord's application for attorney's fees as "*the lease provision relied upon does not expressly provide for the recovery of legal fees [emphasis added],*" *Waverly Mews Corp. v Waverly Stores Assocs.*, 294 AD2d at 131 citing *Matter of A. G. Ship Maint. Corp. v Lezak*, 69 NY2d at 5.

Similarly, in this action, although the sublease contains a broad indemnification clause wherein Central agreed to "indemnify, defend and hold harmless [City] from any and against any and all claims, losses, expenses, liabilities or damages arising out of [Central's] actions or omissions[,]" this indemnification clause fails to unambiguously provide for attorney's fees. *Waverly Mews Corp. v Waverly Stores Assocs.*, 294 AD2d 130, *supra*. As the language of the indemnification clause fails to make it "unmistakably clear" that the parties intended the clause to apply to claims for attorneys' fees, the indemnification clause cannot serve as the basis on which City may successfully recover attorney's fees. *Hooper Assocs. Ltd. v AGS Computers, Inc.*, 74 NY2d 487 *supra*.

A review of the lease discloses that the clause

requiring the overtenant to indemnify the landlord, which is the clause that defendant bases its attorney's fees claim on, contains "unmistakably clear" language requiring the overtenant to reimburse the landlord for attorney's fees. City was, or should have, been aware of this provision since pursuant to the terms of the sublease, the provisions of the lease were incorporated into the sublease. Accordingly, City was clearly on notice that the language employed in the indemnification clause of the sublease did not necessarily provide a sufficient basis by which City could recover attorney's fees from Central. City was free to negotiate for the inclusion of an "unmistakably clear" attorney's fees provision in the sublease when the parties entered into that agreement. City's failure to include such language in the sublease at that time cannot be remedied at this late juncture by expanding the reach of the indemnification clause.

Accordingly, that branch of Central's motion that seeks to dismiss City's complaint is granted, and the complaint is hereby dismissed.

Central's Application for Attorney's Fees

Central seeks to recover for attorney's fees expended in the defense of this action based on the terms of the lease which, pursuant to the terms of the sublease, are incorporated into the agreement between Central and City. The lease, in

pertinent part, allows the landlord to recover from the tenant for any "expenditures or . . . obligations for the payment of money, including but not limited to reasonable attorney's fees [incurred by the landlord in] instituting prosecuting or defending any actions or proceedings . . . arising from any default by the tenant, including a default in the payment of rent" (attorney's fees clause). lease, at ¶ 19.

Significantly, the language employed in the attorney's fees clause allows for the recovery of fees *only* in actions arising from a default by the tenant.

When there is an agreement, i.e., a lease, that allows a party to recover attorney's fees resulting from litigation between them, a party may generally recover attorney's fees only if that party prevails with respect to the central relief sought. *Solow v Wellner*, 205 AD2d 339 (1st Dept 1994) *affd* 86 NY2d 582 (1995). In *Excelsior 57th Corp. v Winters* (227 AD2d 146, [1st Dept 1996]), the Appellate Division, First Department, answered the question of when a party should be accorded "prevailing party" status:

We have previously stated that such a determination of [which party should be accorded the status of "prevailing party" to recover attorneys' fees] requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope

In this action, City sought a Yellowstone Injunction

to preserve its tenancy, and also sought to recover for its attorney's fees pursuant to the indemnification clause. However, the gravamen of the dispute litigated herein was clearly City's attempt to recover for its attorney's fees. City's failure to pay the rent due Central, even after the Civil Court Proceeding was settled and City's tenancy was no longer at risk because of that proceeding, was clearly part and parcel of its attempt to recover for its attorney's fees. City's failure to pay rent and the resulting default notice was clearly engendered by City's attempt, albeit misguided, to recover said fees.

The interpretation of a provision in an agreement allowing the recovery of attorneys' fees should be strictly construed. See *Horwitz v 1025 5th Avenue, Inc.*, __ AD3d __, 2006 WL 3230786, 2006 NY Slip Op 08050 (1st Dept 2006) (attorney's fees clause allowing for recovery of attorney's fees in actions arising out of lessee's default could not support award of fees absent a finding that lessee was in default); *J. D. Realty Assocs. v Shanley*, 288 AD2d 27 (1st Dept 2001) ("this is not, strictly speaking, a dispute over whether the terms of a lease have been violated. It is, rather, one concerned with ascertaining by judicial declaration the meaning of certain provisions of the parties' stipulation of settlement. Accordingly, . . . the lease attorney fee provision is not directly implicated . . .").

In "strictly construing" the attorney's fees provision of the lease, the true scope of the central issue in dispute herein, viz., City's putative entitlement to attorney's fees under the sublease, and the attendant facts and circumstances hereto, it is clear that Central may not recover for its attorney's fees incurred herein. Even though City cannot recover for its attorney's fees pursuant to the indemnification clause and City's complaint is dismissed, because the true scope of this action does not arise from City's default under the terms of the lease and/or sublease, Central may not recover its attorney's fees under a provision that predicates recovery on such a default.

Sanctions

Lastly, given the totality of the facts and circumstances herein, Central's application for the imposition of sanctions is denied. See *Volkell v Volkell*, 112 AD2d 293, 294-295 (2nd Dept 1985) (sanctions only warranted in those rare cases where the bounds of zealous advocacy are transcended or baseless activity is undertaken to harass or impose an onerous burden).

Accordingly, it hereby is

ORDERED that the branch of defendant's motion that seeks dismissal of plaintiff's complaint is granted and plaintiff's complaint is dismissed; and it is further

ORDERED that those branches of defendant's motion that seek an award of attorney's fees in its favor and the imposition of sanctions against plaintiff are denied.

Dated: December 21, 2006

ENTER:



J.S.C.

JANE S. SOLOMON

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