

**Town House Stock LLC v Coby Hous. Corp.**

2007 NY Slip Op 32235(U)

July 20, 2007

Supreme Court, New York County

Docket Number: 0602514/2006

Judge: Helen E. Freedman

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

PRESENT: Friedman  
Justice

PART 39 EFM

Town House Stock LLC, et. al.

INDEX NO. 602514/06

- v -

Colby Housing Corp., et. al.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 006

MOTION CAL. NO. \_\_\_\_\_

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memo of law

**FILED**

JUL 20 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/20/07

HTB  
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 PART 39

-----x  
TOWN HOUSE STOCK LLC, MEADOW MANOR STOCK  
LLC, STEVENSON TOWERS STOCK LLC, COLUMBUS  
MANOR STOCK LLC, WESTWOOD HOUSE STOCK LLC,  
HIGHBRIDGE HOUSE STOCK LLC, TOWN HOUSE BI  
L.P., MEADOW MANOR BI L.P., STEVENSON TOWERS BI  
L.P., COLUMBUS MANOR BI L.P., WESTWOOD HOUSE  
BI L.P., HIGHBRIDGE HOUSE BI L.P. and STELLAR  
BISCAYNE LP,

Plaintiffs,

Index No. 602514/06

- against -

COBY HOUSING CORP., THE JONATHAN COMPANY-  
TW, THE JONATHAN COMPANY-MM, THE JONATHAN  
COMPANY-ST, THE JONATHAN COMPANY-CM, THE  
JONATHAN COMPANY-WH, HIGHBRIDGE HOUSE  
COMPANY, T.H.W. HOUSING CO., INC., MEADOW  
MANOR, INC., STEVENSON TOWERS HOUSING CO.,  
INC., COLUMBUS MANOR INC., WESTWOOD HOUSE,  
INC., HIGHBRIDGE HOUSE, INC., HIGHBRIDGE  
HOUSING ASSOCIATES, AFFORDABLE HOUSING LLC,  
PORTOFINO BISCAYNE LLC, LESLIE M. WESTREICH  
and SS SONTAG QI LLC.,

Defendants.

**FILED**  
JUL 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----x  
**Helen E. Freedman, J.:**

In this action, defendants seek an award of reasonable attorneys' fees pursuant to a "prevailing parties" provision in a real estate contract. Plaintiffs oppose, contending that defendants' request is untimely and that the plaintiffs were the prevailing parties because plaintiffs won the central claim in this dispute, and they obtained substantial relief for that claim. For the reasons stated below, defendants' motion is denied.

This case concerns the enforcement of real estate contracts to purchase and sell properties in New York and Florida. Under the "Portofino Agreement," plaintiffs agreed to sell defendants

“Portofino,” a Florida apartment complex. Under the “Option Agreement,” defendants agreed to sell plaintiffs six Mitchell-Lama buildings in New York. A “Supplemental Agreement” connected the deals. On April 3, 2006, the parties executed an agreement entitled “Agreement Amending Option Agreement, Portofino Agreement and Supplemental Agreement,” (the “Settlement Agreement”), which amended certain provisions of the Option and Portofino Agreements and declared the Supplemental Agreement null and void. Under the Settlement Agreement, the purchase price for Portofino remained \$95 million, but the purchase price for the New York properties increased from \$120 million to \$130 million.

Both the Portofino and Option Contracts contained “prevailing parties” attorneys’ fees provisions that the Settlement Agreement did not amend.

Section 33.3 of the Option Contract states:

In the event of any litigation between the parties arising out of the subject matter of this Agreement, including without limitation, any dispute or action premised upon a claimed breach of the terms, conditions or covenants of this Agreement, the prevailing party in such action will be entitled to recover all reasonable attorney’s fees, court costs and disbursements that are incurred by it, from the other party.

Section 6.21 of the Portofino Agreement states:

in the event of any litigation between the parties under this Agreement, the prevailing party (i.e., the party to which the judgment or decisions shall be more favorable on all significant issues) shall be entitled to reasonable attorneys’ fees and court costs at both the trial and appellate levels.

The Settlement Agreement provided that Portofino and the first group of New York properties would close simultaneously, and it contained a time of the essence clause. The parties exercised their contractual right to adjourn the closing date to June 29, 2006. On June 29<sup>th</sup>, the parties closed on five of the six New York properties, and thus plaintiffs paid an allocated portion

of the \$130 million purchase price. The parties agreed to close on the sixth property after defendants could legally tender the deed pursuant to the Division of Housing and Community Renewal (“DHCR”) regulations for the privatization of Mitchell-Lama buildings. However, defendants refused to close the \$95 million Portofino deal, prompting litigation in New York and Florida. The parties accused each other of breaching the Portofino Agreement. Both parties invoked the provision in the Portofino Agreement that awarded the non-breaching party the \$4.5 million deposit that was held in an escrow account, and each party claimed it was the non-breaching party entitled to the deposit.

*History of New York and Florida Proceedings:*

On June 23, 2006, the defendants that were the purchasers under the Portofino Agreement filed a lawsuit, *Portofino Biscayne, LLC v. Stellar Biscayne, L.P.*, Case No. 06-12284-CA-06, in the 11<sup>th</sup> Judicial Circuit Court of Miami-Dade County, Florida for return of the \$4.5 million deposit. The Florida Complaint alleged the purchasers were entitled to return of their deposit because of various external defects.

On July 17, 2006, plaintiffs commenced this New York action claiming that defendants breached the Portofino Agreement by refusing to close, despite the time of the essence provision, entitling them to the \$4.5 million deposit. The Complaint also alleged that plaintiffs would not have agreed to pay an additional \$10 million for the New York properties had they known that the defendants never intended to close on Portofino. That allegation supported its fraudulent inducement and breach of the covenant of good faith and fair dealing claims that sought recovery of \$10 million. Plaintiffs also sought an injunction preventing defendants from litigating in Florida and attorneys’ fees pursuant to Section 6.21 of the Portofino Agreement.

In a decision entered on September 11, 2006, this Court denied an application to stay this action in favor of the Florida action because it had been extensively involved in the prior litigation that had culminated in the Settlement Agreement. The Appellate Division affirmed the stay denial in *Town House Stock LLC v. Coby Housing Corp.*, 36 A.D.3d 509 (1<sup>st</sup> Dept. 2007) based on “this action’s connection to the New York litigation.” That decision also dismissed plaintiffs’ fraudulent inducement claim because it was not sufficiently distinct from the \$4.5 million claim. On November 11, 2006, the Florida court stayed the Florida action in favor of this New York action.

In a decision dated March 12, 2007, this Court granted plaintiffs’ motion for partial summary judgment on the cause of action seeking a declaratory judgment. That decision found that the defendants breached the Portofino Agreement, and it awarded plaintiffs the \$4.5 million deposit and attorneys’ fees pursuant to Section 6.21 of the Portofino Agreement. The attorneys’ fee issue was severed and referred to a Special Referee.

In a decision dated March 16, 2007, this Court dismissed plaintiffs’ remaining cause of action for breach of the covenant of good faith and fair dealing because it duplicated the \$4.5 million claim. Plaintiffs conceded that its cause of action seeking to enjoin defendants from commencing additional proceedings was moot because the Florida action was already stayed.

*“Prevailing Party”:*

Defendants contend that they are the “prevailing parties” with respect to claims arising from the Option Agreement since defendants succeeded in their motion to dismiss the fraudulent inducement and breach of the covenant of good faith and fair dealing claims. Plaintiffs contend that only one party can be the “prevailing party in the action” and since plaintiffs succeeded on the central issue in this dispute, the recovery of the \$4.5 million deposit, they are the “prevailing parties” in this

action.

The party seeking contractual attorneys' fees must request that relief before entry of judgment. *Golden v. Multigas Distributors, Ltd., et al.*, 256 A.D.2d 215, 216 (1<sup>st</sup> Dept. 1998). Defendants brought this motion after entry of the March 16, 2007 decision dismissing plaintiffs' breach of the covenant of good faith and fair dealing claim. Defendants never requested attorneys' fees pursuant to the Option Contract in connection with the previous motions in this action, and defendants' general request for attorneys' fees in the final "Wherefore" clause of its September 19, 2007 Answer did not refer to the real estate contracts.

Additionally, Section 33.3 of the Option Contract awards attorneys' fees to the "prevailing party in such action," not the prevailing party on a particular motion. To determine whether a party has prevailed for the purpose of awarding contractual attorneys' fees, it is necessary to consider the "true scope" of the dispute litigated. The "prevailing party" must prevail on the central claim advanced and receive substantial relief for that claim. *Sykes v. RFD Third Ave. I Associates, LLC*, 39 A.D.3d 279 (1<sup>st</sup> Dept. 2007). However, the "prevailing party" need not succeed on every claim. *Board of Managers of 55 Walker Street Condominium v. Walker Street, LLC*, 6 A.D.3d 279 (1<sup>st</sup> Dept. 2004).

The claim for the \$4.5 million deposit dominated the litigation in both Florida and New York. Plaintiffs were awarded the deposit, interest, and attorneys' fees pursuant to the Portofino Agreement, and defendants have not been awarded monetary relief in this action. In *Blaylock & Partners LP v. 609 Fifth Avenue Partners LLC*, 29 A.D.3d 476 (1<sup>st</sup> Dept. 2006), the Court denied "prevailing party" status to the party that "did not receive substantial relief as a result of the Supreme Court's disposition of the motion and cross motion." Here, defendants succeeded in their dismissal

motions, but they were not awarded any monetary relief. Thus, it is the plaintiffs that are the “prevailing parties” in this case because they prevailed on the central claim in this action and were awarded substantial relief in connection with that claim.

Accordingly, it is

ORDERED that defendants’ motion is denied.

DATED: July 20, 2007

ENTER:

  
\_\_\_\_\_  
Helen E. Freedman, J.S.C.

FILED  
JUL 20 2007  
NEW YORK  
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