

**Silverstein v Westminster House Owners, Inc.**

2008 NY Slip Op 32170(U)

July 31, 2008

Supreme Court, New York County

Docket Number: 0601706/2007

Judge: Walter B. Tolub

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

WALTER B. TOLUB

PRESENT: \_\_\_\_\_

PART 10

Index Number : 601706/2007  
SILVERSTEIN, KEITH D.  
vs.  
WESTMINSTER HOUSE OWNERS, INC.  
SEQUENCE NUMBER : 002  
MONEY JUDGMENT

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

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 this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

AUG 01 2008

COUNTY CLERKS OFFICE  
NEW YORK

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

Dated: 7/31/08

[Signature]  
WALTER B. TOLUB (S.C.)

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
KEITH D. SILVERSTEIN

Plaintiff,

-against-

WESTMINISTER HOUSE OWNERS, INC.,  
ELLIOT SCHRAGER, DAVID KAUFMAN,  
JUDY KLEINBERGER, NANCY PRESTON,  
PETER GUSS, MITCHELL BRODER and MARK TODDES

Defendants.  
-----x

Index No. 601706/07  
Mtn Seq. 002

**FILED**  
AUG 01 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

WALTER B. TOLUB, J.:

This is a motion by the Plaintiff for attorneys' fees and expenses incurred as a consequence of the dismissal of Defendant's counterclaim.

Facts

This action was commenced by the Plaintiff, a former shareholder of Defendant, who claimed that the Defendant breached a proprietary lease and its fiduciary duty by failing to approve the transfer of Plaintiff's shares and lease. Defendant interposed a counterclaim for attorneys' fees pursuant to paragraph 28 of the lease. Paragraph 28 states:

If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expenses thereof to the Lessor, including

reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor on demand as additional rent.

(Plaintiff's Ex. C, ¶28).

Plaintiff then filed a motion to dismiss Defendant's counterclaim. In opposition, Defendant cross-moved for summary judgment to dismiss the Complaint. This court denied Plaintiff's motion to dismiss the counterclaim and granted Defendant's summary judgment motion and dismissed the Complaint.

(Plaintiff's Ex. F, Decision dated November 30, 2007).

On April 1, 2008, the Appellate Division, First Department, affirmed so much of the November 30, 2007 Order which granted Defendant's summary judgment motion dismissing the Complaint and modified so much of the order which denied Plaintiff's motion to dismiss Defendant's counterclaim. The appellate Division determined that:

As there was no allegation that plaintiff was in default of the lease, the cooperative corporation was not entitled to recover attorneys' fees pursuant to Paragraph 28 of the lease, and its counterclaim seeking such relief should have been dismissed.

(Plaintiff's Ex. G)

Plaintiff now brings this motion seeking an award of attorneys' fees arguing that Real Property Law §234 has been triggered and that he is entitled to attorneys' fees as a matter of law.

### Discussion

Real Property Law §234 states in pertinent part that:

Whenever a lease of residential property shall provide that the landlord may recover attorneys' fees and/or expenses incurred as a result of the **failure of a tenant to perform any covenant or agreement contained in such a lease**. . .there shall be implied in such a lease a covenant by the landlord to pay the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant . . . in the successful defense of any action . . . commenced by the landlord against the tenant arising out of the lease.

(*Emphasis added* RPL §234).

Real Property Law §234 was designed to give prevailing tenants a right to recover attorneys' fees where a landlord had a contractual right to such fees (Jocar Realty Co. v. Galas, 176 Misc. 534 [Civ. NY CO. 1998]). While the landlord's right to attorneys' fees must arise from the language of the lease, the tenant's right to such fees is statutory (Id.). The statute was intended to level the playing field between landlords and residential tenants (245 Realty Associates v. Sussis, 243 AD2d 29 [1<sup>st</sup> Dept 1998]).

Plaintiff argues that in obtaining the dismissal of Defendant's counterclaim, he was successful in defending against an "action" within the contemplation of RPL §234.

Under RPL §234, a landlord's liability for legal fees is not automatic when a tenant prevails on any action (*emphasis added* East 55<sup>th</sup> Street Joint Venture v. Litchman, 122 Misc.2d 81 [Civ.

NY CO [1983] citing Eaton v. New York City Conciliation & Appeals Bd., 56 NY2d 340 [1982]). RPL §234 does not require an award of attorneys' fees in every case, rather, the determination is left to the discretion of the trial court, taking into account the underlying facts and circumstances involved (Eaton v. New York City Conciliation & Appeals Bd., 56 NY2d 340 [1982]).

Once the underlying facts and circumstances are taken into account, the prevailing party may recover attorneys' fees (Board of Managers of 55 Walker Street Condominium v. Walker Street, LLC, 6 AD3d 279 [1<sup>st</sup> Dept 2004]). A determination of which party is the prevailing party requires an initial consideration of the true scope of the dispute litigated, followed by an analysis of what was achieved within that scope (Board of Managers of 55 Walker Street Condominium v. Walker Street, LLC, 6 AD3d 279 [1<sup>st</sup> Dept 2004] citing Solow v. Wellner, 205 AD2d 339 *aff'd* 86 NY2d 582]).

In the instant matter, there can be no doubt that Plaintiff was not the prevailing party on the central claims advanced in the action as a whole, his entire Complaint was dismissed and the dismissal was affirmed in its entirety by the Appellate Division.

Moreover, RPL §234 allows the tenant to recover attorneys' fees in cases where it *successfully defends against the landlord's claim it breached the leased*. Here, the Plaintiff was never forced to defend against the claim that it breached the

lease. If a landlord pursues an action against a tenant for breach of the lease and prevails, then the landlord is entitled to fees based on the contractual agreement between the parties. The converse is that if the tenant successfully defends a claim that it breached the lease then the tenant is awarded attorneys' fees pursuant RPL §234. The only thing that Plaintiff had to defend against was Defendant's claim for attorneys' fees on an action that was ultimately dismissed. Given the posture of this case, Plaintiff may not recover attorneys' fees pursuant to RPL §234.

Accordingly, it is

ORDERED that Plaintiff's motion for attorneys' fees is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/31/08

*W*  
 \_\_\_\_\_  
 HONORABLE WALTER B. TOLUB, J.S.C.

**FILED**  
 AUG 01 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK