

Amaglamated Dwellings, Inc. v Blutreich

2008 NY Slip Op 32909(U)

October 20, 2008

Supreme Court, New York County

Docket Number: 117239/07

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Justice

Index Number : 117239/2007

AMALGAMATED DWELLINGS, INC.,

VS.

BLUTREICH, IRA

SEQUENCE NUMBER : # 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 117239-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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 this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

OCT 24 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/20/08

WALTER B. TOLUB 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 15

-----x
AMAGLAMATED DWELLINGS, INC.,

Plaintiff,

-against-

IRA BLUTREICH and IRIS BLUTREICH,

Defendants.

-----x
WALTER B. TOLUB, J.:

Index No. 117239/07
Mtn Seq.001

FILED

OCT 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

This is Plaintiff's motion for an order granting partial summary judgment as to liability and setting the matter down for a hearing on damages.

Facts

Plaintiff is the owner and proprietary lessor of the building located at 504 Grant Street, New York, NY (the "Building").

Defendants Ira and Iris Blutreih, are the occupants of apartment G44 in the Building ("Premises"). The terms of Defendants' occupancy are governed by a proprietary lease between the Defendants and the Plaintiff ("Lease").

When the Defendants in this action failed to pay maintenance and electric charges under the lease, Plaintiff commenced an action in the Supreme court of the State of New York, County of New York entitled Amaglamated Dwellings, Inc. v. Blutreih ("Nonpayment Action"). The Nonpayment Action was removed to the

Civil Court of New York pursuant to CPLR 325(d) and received an the index number: 186 TSN 2004. A jury trial was conducted in April 2006 and Plaintiff was awarded judgment for unpaid maintenance and electric charges due from 1998 through 2006.

Thereafter, Plaintiff moved for attorneys' fees in the Nonpayment Action. By Order dated June 8, 2006, Judge Jeffrey Oing held that Plaintiff was the "prevailing party" in the Nonpayment Action (Plaintiff Ex. C). A hearing was conducted on the appropriate amount of fees due to the Plaintiff. By Order dated July 21, 2006, Judge Oing awarded Plaintiff an additional judgment of \$86,618.53 for attorneys' fees incurred by the Plaintiff (Plaintiff Ex. D).

Plaintiff had difficulty collecting the Judgement and commenced a Special Proceeding in Supreme Court. In the proceeding, the parties entered into a stipulation in which the Blutreichts agreed to pay all outstanding monies owed to Amaglamated by December 4, 2006. The Blutreichts complied with the stipulation and satisfied the Judgments. On December 12, 2006, Amaglamated confirmed that it received the amounts due. By letter dated December 12, 2006, Amaglamated wrote to the presiding Judge and stated "[t]here is nothing further that has to be done in connection with the instant application, and the Court can close its file" (Defendants' Ex. C).

Plaintiff thereafter commenced the instant action seeking

* 4]
summary judgment for the recovery of additional attorneys' fees, and for costs and disbarments incurred in enforcing the Judgments. Plaintiff argues that pursuant to the Proprietary Lease ¶6, Defendants are obligated to reimburse the Plaintiff for the expenses incurred in recovering payments for all fees, costs and expenses incurred. Plaintiff also argues that it is entitled to the costs and fees incurred in the Instant Proceeding.

Defendants argue that the Stipulation entered into between the parties was fully satisfied. Defendants assert that had they sought fees and costs, they should have provided for same in the Stipulation.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before*

Trial, [James Publishing 2006] §37:180).

"If the parties intended for an attorney's fee claim to survive the execution of a settlement agreement, the claim should expressly preserved in the agreement" (512 East 11th St. HDEC v. Als, 10 Misc.3d 142(A) [App. Term, 1st Dept 2006]; *citing* Rossmill Assoc. v. Curtis, NYLJ, February 26, 1999 at 26 col 2 [App Term, 1st Dept]). When "there is no express reservation of rights with respect to a derivative issue of attorneys' fees, it must be deemed to have been waived and subsumed in the negotiated settlement" (Rosehohl Enterprise, LLC v. Gluck, 16 Misc.3d 132(a) [App Term, 1st Dept 2007] *citing* Harmir Realty Co. v. Tesa, 2003 NY Slip Op 50015[U][2003]; JD Realty Assoc v. Shanley, 288 AD2d 27 [2002]). Here, there was no provision in the Stipulations for any fees or costs and the Defendants fully complied with the terms of the Stipulation.

Plaintiff argues that a separate claim for additional fees and costs was warranted by virtue of the terms of the Proprietary Lease, and that this action therefore does not violate the general rule against the "splitting" of a cause of action. While it is true that paragraph 7 of the Proprietary Lease permits the Lessor to recover for expenses incurred as a result of the recoupment of costs, it does not specifically state that a separate action may be commenced for same.

The Court of Appeals has held that clauses of a lease are

interdependent, that different facets of a lease may be interrelated and constitute separate parts of a whole. Here, the Proprietary Lease entails a single obligation which requires the Plaintiff to assert its entire claim in one action (O'Connell v. 1205-15 First Avenue Assoc., LLC, 28 AD3d 233 [1st Dept 2006]; 950 Fifth Corporation v. King, 42 NY2d 886 [1977]). Failure to make a claim for attorneys' fees in the initial summary proceeding results in the splitting of a cause of action, which is prohibited (Century Factors v. New Plan Realty Corp., 41 NY2d 1040 [1977]).

Here, there was no provision in the Stipulation for any fees or costs and the Defendants fully complied with the terms of the Stipulation. It follows that Plaintiff's motion for partial summary judgment as to Defendants' liability is denied and the matter is dismissed.

Accordingly, it is


ORDERED that Plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that this matter is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to dismiss the action.

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

Dated: 10/20/08



HON. WALTER B. TOLUB, J.S.C.

FILED
OCT 24 2008
COUNTY CLERK'S OFFICE
NEW YORK