

Matter of Conley v New York City Loft Bds.

2009 NY Slip Op 30904(U)

April 10, 2009

Supreme Court, New York County

Docket Number: 113897/02

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shafer Justice

PART 8

Index Number : 113897/2002

CONLEY, STEPHEN M.

vs

NEW YORK CITY LOFT

Sequence Number : 003

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

notion 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 and cross-motion are decided in accord with the annexed memorandum.

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER
J.S.C.

Dated: 4/10/09

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 — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

In the matter of the application of
STEPHEN M. CONLEY,
Petitioner,

INDEX NO. 113897/02

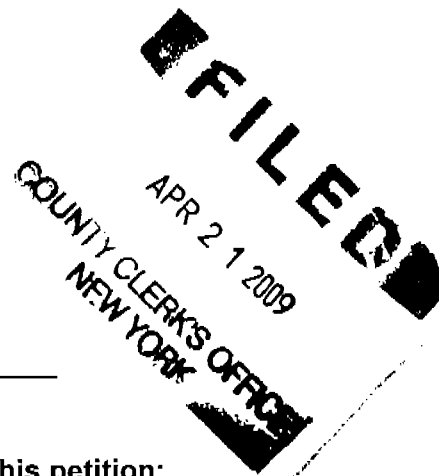
MOTION SEQ. NO. 001

For a Determination Pursuant to Article 78 of
the Civil Practice Law and Rules,

-against-

NEW YORK CITY LOFT BOARDS and
EPDI ASSOCIATES,

Respondents.



The following papers, numbered 1 to 7, were read on this petition:

	<u>PAPERS NUMBERED</u>
Notice of Motion – Affirmation – Exhibits	1,2
Notice of Cross-Motion – Affirmation – Exhibits	3,4
Affirmation in Reply and in Opposition	5
Affirmation in Reply and in Support	6
Affirmation in Response	7

Cross-Motion: Yes No

Upon the foregoing papers, the motion and cross motion are decided
as follows:

Introduction

This proceeding, the culmination of 25 years of litigation between a loft tenant and his landlord, seeks the return of an undertaking and attorneys' fees. The landlord cross-moves for discovery in the event the request for attorneys' fees is granted.

Background

Petitioner is the protected tenant of record of a registered residential loft apartment located in a building complex owned by respondent, EPDI Associates, pursuant to a lease agreement beginning in 1979. There has been litigation between the parties since 1985, initiated by the landlord, which resulted in an order of eviction against the tenant based upon abandonment. Tenant has successfully reversed that determination and brings two claims for relief.

Tenant's first request is unopposed. In 2004, the Appellate Division ordered the tenant, pursuant to CPLR 2606, to deposit \$10,000 with the County Clerk as security for the landlord's costs, since tenant lived out of state. The action has been fully litigated with tenant the prevailing party, absolved from any possible liability for costs. Tenant requests the undertaking, together with all applicable interest, be returned to tenant's counsel.

Tenant's second request, for reimbursement of the costs of this litigation, including reasonable attorneys' fees is opposed. Tenant asserts he is entitled to attorneys' fees pursuant to reciprocal covenant mandated by Real Property Law § 234 which imposes a

duty upon landlords to reimburse tenants' attorneys' fees

[w]henever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease.

The lease at bar does not contain such a clause. Tenant argues that the landlord's claims for attorneys' fees in its pleadings constitute a judicial admission and landlord is estopped from defending itself on the ground that there is no such clause.

In the alternative, tenant argues he is entitled to recover attorneys' fees because the conduct of the landlord was fraudulent and malicious. Tenant alleges the landlord fraudulently "concocted" the claim of abandonment, constructively evicted him, and failed to provide him with notice of the abandonment proceedings.

Landlord asserts, and tenant does not deny, that, at the time it initiated its abandonment application against the tenant and four other tenants, it had not seen or heard from the tenant in more than seven years and he had not paid rent in more than six years. Landlord asserts it was unaware of tenant's constructive eviction claims since he never initiated any action for harassment or to restore services.

Discussion

For over two hundred years, the prevailing common law rule in the United States of America (known appropriately as the "American Rule") is that attorneys' fees are not to be awarded unless expressly authorized by statute, court order or written agreement between the parties. (*A G Ship Maintenance Corp v Lezak*, 69 N.Y.2d 1 [1986]; *Summit*

Valley Indus, v United Bhd Of Carpenters & Joiners, 456 U.S. 717 (1982); *Arcambel v. Wiseman*, 3 U.S. 306 (1796). Since public policy requires that all persons should freely resort to the courts for redress of wrongs, the law protects them when they act in good faith and upon reasonable grounds in commencing either a civil or criminal prosecution. (*United Pickle Co, Inc. v Omanoff*, 63 A.D.2d 892 [1st Dept 1978])

This Court finds that none of the exceptions to the American Rule are found here. Real Property Law § 234, designed to provide a reciprocity of rights, is irrelevant to a situation where, as here, there is no right to reciprocate. No Court has provided the relief sought by the tenant – a grant of attorneys’ fees to a tenant under Real Property Law § 234 where the lease contained no provision for attorneys’ fees to be granted to the landlord. In fact, it has been explicitly rejected.

In the absence of a lease agreement providing for landlord's recovery of fees, the reciprocity provisions of Real Property Law § 234 are not triggered. Landlord's prayer for relief in the holdover notice of petition, seeking, *inter alia*, “rent and use and occupancy ... and legal fees,” does not have the force of a judicial admission which would concede the existence of a fees provision. Unlike *East Egg Assocs v Diraffaele* (158 Misc 2d 364, *affd* 160 Misc 2d 667) the petition herein did not allege the existence of a rental agreement in which tenant agreed to pay reasonable attorneys' fees incurred by the landlord (*Partnership 92 West, LP v Woods*, 186 Misc.2d 445 [NY Cty 2000])

Nor does this Court find that tenant has established that landlord’s course of conduct was “entirely motivated by a disinterested malevolence.” (*United Pickle Co v Omanoff*, 63 AD2d 892 [1st Dept 1978])

Tenant does not dispute that he vacated the premises and failed to pay rent for six

years. Moreover, the landlord initiated its action against five units, not simply the tenant and the proceedings were protracted and complex, filling in over 1100 pages of transcripts. Although the hearing officer ultimately found a constructive eviction, he described the interrupted water service as a

philosophical question about the chicken and egg, it is hard to know which came first – whether, as [tenant] claims, the water was shut off and he then stopped paying to heat the unit or that he stopped properly heating the unit, which led the pipes to freeze and burst and caused [landlord] to shut off the water in response.[Weiner Aff, Ex M]

Under these circumstances, it cannot be said that the landlord's behavior was motivated by fraud and malevolence sufficient to warrant the grant of attorneys' fees.

Respondent's cross motion for discovery is denied as moot.

We have considered the other arguments raised by the parties and find them to be without merit.

Accordingly, it is hereby

ORDERED that petitioner's request for attorney's fees is denied; and it is further

ORDERED that respondent's cross motion is denied as moot; and it is further

ORDERED that petitioner's request, pursuant to CPLR 2006, directing the

Director of Finance of the City of New York and/or the New York County Clerk to return the undertaking deposited by Warshaw Burstein Cohen Schlesinger & Kuh, LLP, as attorneys for Petitioner Stephen Conley, in the amount of \$10,000, together with any and all applicable interest is granted; and it is further

ORDERED, that counsel for petitioner shall serve a copy of this order with notice of entry upon the Clerk of the Court who is directed to release the undertaking deposited by Warshaw Burstein Cohen Schlesinger & Kuh, LLP, as attorneys for Petitioner Stephen Conley, in the amount of \$10,000, together with any and all applicable interest.

This reflects the decision and order of this Court.

Dated: 4/10/09

MARILYN SHAFER
J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

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