

Garza v 508 W. 112th St., Inc.

2009 NY Slip Op 31265(U)

June 8, 2009

Supreme Court, New York County

Docket Number: 101238/06

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 101238/2006

GARZA, ELEIZABETH

VS.

508 WEST 112TH STREET

SEQUENCE NUMBER : 002

COUNSEL FEES, EXPENSES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 09 2009

COUNTY CLERK'S OFFICE

NEW YORK

Dated: June 8, 2009

HON. JUDITH J. GISCHE S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

Supreme Court of the State of New York
County of New York: Trial Term 10

-----X

Elizabeth Garza and James McBride,

Plaintiffs,

Decision/Order

-against-

Index # 101238/06
Sequence # 002

508 West 112th Street, Inc. and
Nunz Realty, LLC,

PRESENT
Hon. Judith J. Gische

Defendants.

-----X

Pursuant to CPLR 2219(A) the following numbered papers were considered by the Court on this motion:

PAPERS

Notice of motion, DEF affirm., exhibits.....	1
JB affirm. in opp., exhibits.....	2
DEF reply affirm., exhibit.....	3

FILED
 JUN 09 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Upon the foregoing papers the courts' decision and order is as follows:

Plaintiffs make a post trial motion for the recovery of their legal fees from defendants. Defendants oppose the motion. Plaintiffs ("tenants") and defendants ("owner") are respectively the rent stabilized tenants and (present and former) owners of apartment 9B located at 508 West 112th Street in Manhattan ("apartment"). In connection with the parties' dispute concerning the use of a roof/terrace wrapping around the apartment, the court issued a decision after trial dated December 1, 2008. The tenants prevailed on their first cause of action for a declaration that the roof/terrace was/is part of their tenancy under their leases and the Rent Stabilization Law and Code. They did not prevail on their second cause of action for adverse possession or their

third cause of action for a permanent injunction preventing the owner from having access to the roof/terrace without their prior permission. The owners did not prevail on their counterclaim for a declaration that the tenants' use of the roof/terrace is subject to a revokable license.

The tenants claim that they are the prevailing parties in the underlying action and that they are entitled to recover their attorney fees pursuant to the terms of the lease and the reciprocal operation of RPL § 234. Alternatively, they argue that they are entitled to legal fees under the doctrine of judicial estoppel. Owners contest that tenants are entitled to legal fees.

Discussion

In the first instance the Court rejects the owner's argument that the motion for attorneys fees is premature due to the pending appeal of the courts' trial decision. The issue of attorneys fees is ancillary to the underlying trial. It needs to be determined for a full adjudication of all issues at the trial level. No stay is in effect pending appeal. Accordingly, the issue of legal fees can and should be addressed by the Court at this time.

The court also, at the outset, rejects the owner's position that the tenants were not the prevailing parties at trial. The gravamen of the parties' dispute concerned the tenants' continued personal use of the roof/terrace. On this issue the prevailed. A party does not have to prevail on all of its causes of action to be considered the prevailing party for purposes of a legal fee award. Nestor v. McDowell, 81 NY2d 410 (1993).

The two remaining issues are whether an award of legal fees is warranted under

the lease or pursuant to the application for the doctrine of judicial estoppel.

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). In the case of residential leases, RPL § 234 provides that when, in any action or summary proceeding, an owner is permitted to recover legal fees from the tenant based upon the failure to perform any covenant or agreement of the lease, there is also an implied reciprocal obligation by the owner to pay the tenant's legal fees, if the tenant otherwise prevails in the dispute. While this reciprocal right will apply to actions commenced by the tenant against a landlord, either directly or by way of counterclaim, its scope is still limited to the rights afforded the landlord by the terms of the underlying lease. Gottlieb v. Such, 293 AD2d 267 (1st dept. 2002).

The applicable provision of the parties' lease in this case states as follows:

"If this lease is canceled, or Landlord takes back the Apartment, the following takes place:

Any rent received by landlord for the re-renting shall be used first to pay Landlord's expenses and second any amounts Tenant owes under the Lease. Landlord's expenses include... reasonable attorneys fees."

In Bunny Realty v. Miller (180 AD2d 460 [1st dept. 1992]) the Appellate Division of this department interpreted an identical lease provision to be broad enough to support an award of legal fees for any reason, including breach of a lease. The only limitation on the landlord was that the ultimate result had to be the re-taking of possession or the re-renting of the apartment. The court stated:

“...[T]his clause is sufficiently broad to allow the landlord to procure counsel fees for any reason, including breach of lease, so long as the ultimate result would be to take possession or re-rent the apartment.”

Under lease provisions similar to this one, even where a landlord is successful in proving a breach of lease, no legal fees are recoverable unless a corresponding judgment of possession is also obtained. See: Nestor v. McDowell, *supra*; 490 Owners Corp. v. Israel, 189 Misc2d 34 (NY Sup. Ct. AT 2nd dept. 2001). Thus, in this case the tenants' reciprocal rights to legal fees must emanate from a dispute that would have otherwise triggered the landlord's right to seek possession of the apartment. The court holds that the parties' dispute in this case does not involve any rights to continued occupancy of the apartment.

The parties' dispute revolved around the right to use a terrace/roof. At no time was the plaintiffs' tenancy of the apartment in jeopardy or at issue. The landlord never took steps to terminate the tenants' occupancy of the apartment. There were no predicate notices sent. There were no letters sent indicating that the owners would be taking any action to terminate the tenancy. The dispute was one that concerned whether the roof/terrace was a required service under the lease(s) and rent stabilization laws. The tenants' declaratory judgment action was not precipitated by any fear that their tenancy was going to be terminated if they did not act. As tenants concede, it was precipitated by what they perceived as “repeated unannounced intrusions by the new owners and its agents” onto the roof terrace. [Frazer reply affirm. 3/12/09 ¶6]. The tenants did not prevail in proving that the owner's access of the roof/terrace violated the lease or any of their rights warranting relief.

The landlord asserted their rights in this dispute by seeking declaratory judgment

that it could discontinue the tenant's use of the roof/terrace without otherwise violating the lease. It never sought ejectment or possession of the apartment. The owner would not have been entitled to legal fees in this action had it been the one that prevailed.

The court does not believe that the parties dispute, although within the ambit of the lease, was one that implicated a right to possession of the underlying apartment. Nestor v. McDowell, *supra*. Consequently, it does not trigger the reciprocal right or the tenants to recover legal fees in this action.

Tenants alternatively assert that they are entitled to legal fees because the owner asserted a counterclaim for legal fees in this action. They argue that under the doctrine of judicial estoppel, the owner is now precluded from claiming that no legal fees are due the tenant in this action. Judicial estoppel precludes a party from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding. Nestor v. Britt, 270 Ad2d 192 (1st dept. 2001). It applies, however, only where there has been a prior determination in favor of the party now seeking to assume an inconsistent position. Baje Realty Corp. v. Cutler, 32 AD3d 307 (1st dept. 2006); Maas v. Cornell University, 235 AD2d 1 (1st dept. 1999) *affd.* 94 NY2d 87 (1999).

At bar the doctrine of judicial estoppel does not apply on the issue of legal fees. Although the owner asserted a counterclaim for legal fees, it has not prosecuted that claim and *a fortiori* has not had determination in its favor based upon such counterclaim. The cases cited by tenants are inapposite. In Stern v. Niikura (9 Misc3d 130[a][NY Sup AT 1st dept. 2005]) the court estopped the landlord from denying the

existence of a lease that it relied upon in a prior phase of the litigation. It does not expressly address the issue of a prior determination and the decision's silence on this issue cannot be construed that there was no prior determination, especially when the legal principle relied upon is to the contrary. In Evans v. Schneider (2 Misc3d 139[A][NY Sup AT 1st dept.2004] the court denied legal fees where a tenant was attempting to invoke a lease that it had successfully argued was invalid in another phase of the proceeding. At bar, the owners are not denying the existence of the lease or the lease language concerning legal fees in that lease. They have not obtained any prior ruling in this or any other case with these parties that is inconsistent with their current position on this motion concerning legal fees.

Accordingly, the motion for legal fees is denied. Any requested relief not expressly addressed herein is denied. This constitutes the decision and order of the Court.

Dated: New York, New York
June 8, 2009

SO ORDERED:



J.G. J.S.C.

