

**321 E. 84th St. Owners, Inc. v Ward**

2009 NY Slip Op 31524(U)

July 7, 2009

Supreme Court, New York County

Docket Number: 115363/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 115363/2008  
**321 E. 84TH OWNERS, INC.**  
 VS.  
**WARD, RALPH**  
 SEQUENCE NUMBER : 001  
 SUMMARY 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 ...

12

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

3

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

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *for summary judgment* by plaintiff is denied in accordance with the attached memorandum decision.

**FILED**  
 JUL 13 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 7/7/09

*[Signature]*  
**HON. DORIS LING-COHAN**  
 J.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 : IAS PART 36

-----x  
321 EAST 84<sup>th</sup> ST. OWNERS, INC.,

Index No. 115363/08

Plaintiff,

- against -

RALPH WARD,

Motion Seq. No.: 001

Defendant.

**FILED**  
JUL 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
HON. DORIS LING-COHAN, J.:

In this action to recover attorneys' fees, plaintiff, 321 East 84<sup>th</sup> St. Owners, Inc. (the "Coop"), moves pursuant to CPLR 3212 for summary judgment on the issue of liability on the causes of action in the complaint and summary judgment dismissing the affirmative defenses of defendant, Ralph Ward (the "Lessee").

**BACKGROUND**

Plaintiff Coop, a cooperative corporation, owns the building located at 321 East 84<sup>th</sup> Street, New York, New York (the "subject building"). Defendant Lessee is the proprietary lessee and owner of the shares of stock of the cooperative corporation relating to apartments 4F and 4R in the subject building.

In March 2007, the Lessee commenced an action, entitled *Ward v 321 East 84<sup>th</sup> St. Owners, Inc.*, Sup Ct, NY County, Index No. 104129/07 (the "underlying action"), against the Coop. The Coop sought summary judgment dismissing the Complaint in the underlying action, as well as summary judgment on its first counterclaim for attorneys' fees incurred therein. While the summary judgment motion was pending, the Court, by order entered February 27, 2008, struck the Lessee's Complaint, dismissed the underlying action, and directed the Lessee to reimburse the Coop \$1,950 in attorneys' fees, based on the Lessee's failure to

appear at a discovery conference or comply with numerous discovery orders (see Order, Not of Mot, Exh A).

Thereafter, by order entered July 2, 2008, the Court denied, as moot, the Coop's motion for summary judgment dismissing the Complaint (Order, Not of Mot, Exh B). The Court also denied, as premature, the Coop's request for summary judgment on its counterclaim for attorneys' fees, and dismissed the counterclaim "without prejudice to [the Coop's] right [to] commence a subsequent action for attorneys' fees, if warranted" (*id.*).

Thereafter, the Coop sent a billing statement, dated October 17, 2008, demanding payment from the Lessee of "additional rent" in the amount of \$33,901.72 for attorneys' fees incurred in defending the underlying action. The Lessee declined to make payment and this action ensued.

The Complaint alleges a cause of action for judgment in the amount of \$33,901.72, representing attorneys' fees incurred in the underlying action, plus interest from July 2, 2008 (first cause of action) and reasonable attorneys' fees incurred in bringing this action (second cause of action).

The Lessee answered, generally denying the allegations in the Complaint and asserting affirmative defenses, which seek dismissal of the Complaint: (1) for failure to state a claim; (2) because the claims in the underlying action were not decided on the merits; (3) because the monies sought are not in compliance with the provisions of the proprietary lease and bylaws governing the Coop; (4) based on the doctrine of unclean hands; (5) based on the doctrine of laches; (6) on the ground that this is an

alleged retaliatory action in response to the Lessee commencing a dissolution proceeding against the Coop; and (7) based on the doctrine of equitable estoppel.

The Coop now seeks summary judgment on the issue of liability on the causes of action in the Complaint, as well as summary judgment dismissing the Lessee's affirmative defenses.

#### DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

Here, the Coop essentially asserts that it is entitled to summary judgment based on the Lessee's failure to pay the \$33,901.72 listed as additional rent in the October 17, 2008 billing statement. To support its position, the Coop relies primarily on paragraph 28 of the proprietary leases, which 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 expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent

(Proprietary Leases, Not of Mot, Exhs D, E).

"It is settled that the interpretation of the provisions of a lease is governed by the same rules of construction applicable to other agreements" (*Horwitz v 1025 Fifth Ave., Inc.* 34 AD3d 248, 249 [1<sup>st</sup> Dept 2006]). Furthermore, "in those instances where the intent of the parties is clear and unambiguous from the language employed on the face of the agreement, the interpretation of the document is a matter of law solely for the court" (*id.*). Moreover, "New York public policy disfavors any award of attorneys' fees to the prevailing party in a litigation ... and a provision in an agreement allowing the recovery of attorneys' fees that are 'incidents of litigation' should be strictly construed" (*id.* [internal citations omitted]).

Here, there simply has been no finding that the Lessee is in default of the proprietary leases. The October 17, 2008 billing statement, demanding payment of \$33,901.72 as additional rent for attorneys' fees incurred in defending the underlying action, does not constitute a finding of default. The Coop's assertion that whether the Lessee is in default of the proprietary leases has no bearing on its rights to reimbursement for attorneys' fees is

contradicted by the clear and unambiguous language employed on the face of said leases. Thus, the Coop fails to demonstrate entitlement to judgment as a matter of law, and the request for summary judgment on the issue of liability of the first and second causes of action must be denied.

The branch of the motion seeking summary judgment dismissing the Lessee's affirmative defenses must also be denied since, here too, the Coop fails to offer any evidentiary proof to establish entitlement to judgment as a matter of law. The conclusory assertion that the affirmative defenses lack merit is insufficient. Furthermore, contrary to the Coop's position, the dismissal of the Complaint in the underlying action for noncompliance is not on the merits so as to preclude the proffered affirmative defenses (see *Maitland v Trojan Elec. & Mach. Co.*, 65 NY2d 614, 615-616 [1985]).

Accordingly it is

ORDERED that the motion for summary judgment is denied; it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon all parties with notice of entry.

Dated: 7/1/09

**FILED**  
JUL 13 2009  
Hon. Doris Ling-Cohan, J. S. C.  
COUNTY CLERK'S OFFICE  
NEW YORK