

<b>255 W. End Ave. Owners Corp. v Fernandez</b>
2009 NY Slip Op 33105(U)
December 17, 2009
Supreme Court, New York County
Docket Number: 113226/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**JANE S. SOLOMON**

PART 55

**PRESENT:**  
Index Number : 106258/2007

LEATHER, ROBERT CHEAU

vs  
61 WEST 8TH STREET, LLC.

Sequence Number : 002

SUMMARY JUDGMENT

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

MOTION DATE 11/2/09

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

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

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

PAPERS NUMBERED	
1-3, 4-5	
6-7	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is ~~granted~~ <sup>denied</sup> by the Annexed Memorandum Decision and order,

*NB 1/11/10 @ 2  
pre-trial conf  
set at end*

COUNTY CLERK'S OFFICE  
NEW YORK

JAN 04 2010

**FILED**

Dated: 12/17/09

*J.S.*  
\_\_\_\_\_  
**JANE S. SOLOMON** 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):

\* 2]  
SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 55

-----x  
255 WEST END AVENUE OWNERS CORP.,

Plaintiff,

Index No.: 113226/2007

-against-

DECISION and ORDER

PETER FERNANDEZ and LIBBY CRANE,

Defendants.

-----x

**JANE S. SOLOMON, J.:**

Plaintiff, 255 West End Avenue Owners Corp. (255 West),  
sues Defendants Peter Fernandez (Fernandez), the owner of the  
shares appurtenant to a Co-Op apartment located at 255 West End  
Avenue, Apartment 15B, New York, New York (the Apartment), and  
Libby Crane, Fernandez's tenant, for an injunction requiring  
access to the apartment's terrace, and for attorneys' fees.  
Subsequently, the parties entered into a stipulation regarding  
access to the terrace. 255 West moves for summary judgment on  
its claim for attorneys' fees. Defendants oppose the motion as  
frivolous and counterclaim for attorney's fees. The motion is  
granted for the foregoing reasons.

#### FACTS

The Apartment is a penthouse with an attached terrace.  
Crane maintains a garden on the terrace, including plants on  
trellises and in heavy planters. On May 29, 2007, 255 West's  
managing agent sent a letter to Crane informing her that the  
downstairs apartment, 14B, was experiencing water leaks and that

the Co-Op required access to the terrace in order to determine the cause, and to repair the leak. The letter explained that a water test would be performed, and to facilitate it, "[m]any of the plants on you[r] deck will need to be moved and/or removed" (Motion, Ex. A). Thus, a seventeen month struggle began, where Plaintiff contends that Crane refused to remove the plants, planters and trellises that blocked access to areas of the roof and parapet of the building, and, therefore, blocked the unobstructed access to the roof that was required to effectuate repairs.

Paragraph 7 of the lease states that "Lessee shall keep the terrace . . . clean and free of . . . leaves and other debris . . . . Any planting or other structures erected by the Lessee . . . may be removed or restored by the Lessor at the expense of the Lessee for the purpose of repairs, upkeep or maintenance of the building" (Motion, Ex. C, ¶7).

On July 10, 2007, Defendants were notified that by not removing the plants they were in violation of the lease, and a failure to cure the defects by August 13, 2007 would result in a default (Motion, Ex. B). By August 13, the plants were not removed and the leak in the downstairs apartment remained.

On October 2, 2007, this action commenced. The first, second and third counts seek injunctive relief requiring Defendants to remove the plants; count four seeks reimbursement

[\* 4]  
of expenses, including attorney's fees, incurred in compelling Defendants to uphold their Lease obligations.

On June 4, 2008, the parties entered into a stipulation which states, in relevant part:

"The Defendants will permit access to the Terrace . . . and will permit the Plaintiff and its agents to relocate and, to the extent necessary, remove certain plants from the Terrace so that the Co-op can perform tests to certain exterior areas of the Building. The Tests shall be performed in a reasonable manner and within a reasonable time from the date of this Stipulation." (Motion, Ex. P)

#### DISCUSSION

Plaintiff argues that Paragraph 28 of the Lease grants it the right to attorneys' fees and disbursements, because Defendants defaulted. Paragraph 28 states:

"If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense . . . in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default . . . 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" (Motion, Ex. C, ¶28).

Furthermore, 255 West argues that it was the prevailing party in this action, because the stipulation granted the relief it sought from Defendants in counts one, two and three. Defendants counter that issues of fact remain regarding whether 255 West acted in a reasonable manner. Therefore, Defendants

[\* 5]

contend that attorneys' fees should not be granted, as the scope of the law suit encompasses more than just the access to the property that the stipulation governs.

In determining which party to a litigation should be accorded the status of a prevailing party, and thereby allowing the recovery of attorneys' fees, the court must consider "the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope." (*Excelsior 57<sup>th</sup> Corp v. Winters*, 227 AD2d 147, 147 [1<sup>st</sup> dept, 1996]). "To be considered a 'prevailing party,' one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof" (*Sykes v. RFD Third Ave. I Associates, LLC*, 39 AD3d 279 [1st Dept, 2007]).

255 West's essential legal claim against Defendants was its entitlement to access to the terrace for the purpose of repairs to the building and Defendants failure to provide this access as required by the lease.

Although 255 West ultimately received the access that it was seeking by stipulation, rather than by judicial determination, it has still prevailed on the central claims it raised (see *id.*, citing *Matter of Thomasel v. Perales*, 78 NY2d 561 [1991]). Defendants mere assertion that Crane's denial of access for seventeen months was reasonable is unpersuasive and not supported by any evidence on the record. Accordingly, it

hereby is

ORDERED that the issue of attorneys' fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it further is

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it further is

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: December 17, 2009

ENTER:



J.S.C.

JANE S. SOLOMON

**FILED**  
JAN 04 2010  
NEW YORK  
COUNTY CLERK'S OFFICE