

**Siegler v 875 Tenant Corp.**

2010 NY Slip Op 31645(U)

June 28, 2010

Supreme Court, New York County

Docket Number: 106712/07

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number: 106249/2009

SIEGLER, JODY CUKIER

vs  
875 TENANT CORP.

Sequence Number : 002

SUMMARY JUDGMENT

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

MOTION DATE 1/19/10

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

1-4  
5-9  
10-11

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

**FILED**  
JUL 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/28/10

JANE S. SOLOMON  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 55

-----X  
JUDY CUKIER SIEGLER and SCOTT SIEGLER,

Plaintiffs,

DECISION AND ORDER

-against-

875 TENANT CORP.,

Index No. 106712/07

Defendant.

-----X  
JANE S. SOLOMON, J.:

Plaintiffs Jody Cukier Siegler and Scott Siegler (the Sieglers) move for summary judgment in this action by them, as owners of a cooperative apartment, against the building owner, defendant 875 Tenant Corp. (875 Tenant). 875 Tenant cross-moves for summary judgment in its favor. The motions are decided as follows.

The Sieglers purchased the shares appurtenant to the leaseholds of two apartments in a residential cooperative apartment building located at 875 Fifth Avenue in Manhattan. They purchased the shares allocable to apartment 9G in 2004, and the shares allocable to apartment 9H in 2006. They did a substantial renovation of apartment 9G before purchasing 9H, and then sought to combine the two apartments into a single unit. The Sieglers submitted their plans for combining the units to the board of directors of 875 Tenant, and after making inquiries, 875 Tenant approved the project subject to an alteration agreement dated July 10, 2008 (Alteration Agreement, Notice of Motion, Ex.

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[\* 5]  
C).

In the Alteration Agreement, 875 Tenant consented to the Sieglers' renovation work as proposed in architectural drawings they submitted, subject to specific conditions set forth in thirty-four paragraphs. As relevant, the Sieglers agreed to give ten days notice before work would begin; to complete the work within one hundred twenty days of commencement; that 75% of all floor areas other than foyers, baths or kitchens be covered with carpeting or other "sound-abating material"; that 875 Tenant could suspend all work and prevent workers from entering the apartment if the Sieglers' did not comply with the Alteration Agreement; and that the Sieglers released 875 Tenant and the managing agent from all liability for loss or property damage in any way connected with the work.

The Sieglers commenced demolition and plumbing work on July 14, 2008. On July 17, 875 Tenant informed them that the project was no longer approved, and demanded that they immediately stop work on the apartment. 875 Tenant directed that workers coming to the Siegler residence be turned away. The Sieglers were not told why approval was withdrawn.

They subsequently learned that a principal reason for 875 Tenant's change of heart was that the Sieglers' downstairs neighbor, the newly installed co-op president, Stefan Reyniak, had his own renovation plans that were not consistent with the

[\* 4]

Sieglers'. For example, Reyniak's plans called for moving his bedroom under the Sieglers' existing living room, and Reyniak wanted to reduce the noise level from above by requiring the Sieglers to install new, sound-proofed flooring.

In the weeks following 875 Tenant's withdrawal of its approval, the Sieglers and 875 Tenants negotiated changes to the scope of work. The Sieglers hired an attorney in July 2008 to negotiate with 875 Tenant, and when this did not result in permission to resume work, they hired new attorneys to negotiate and to prepare for litigation, if needed. On September 3, 2008, an e-mail message was exchanged between counsel for the Sieglers and 875 Tenant (the E-Mail Agreement), whereby the Sieglers' agreed to revise their renovation plans and 875 Tenant agreed to permit work to resume. Left unresolved, however, was 875 Tenant's demands for additional "sound attenuation", either by the installation of carpeting, or installation of a layer of soundproofing material under portions of the Sieglers' parquet floors.

Work resumed, as did negotiations over sound abatement. 875 Tenant agreed to pay half the cost of sound abatement, but they were unable to agree on the amount. The parties also disputed the manner in which a bathroom, which was part of the previously approved plan, was to be installed due to concerns over the potential for leaks. Negotiations broke down, and on

[\* 5]

March 6, 2009, 875 Tenant issued a second demand that work stop pending execution of another alteration agreement.

The Sieglers commenced this action on May 4, 2009, seeking an injunction preventing 875 Tenant from blocking completion of work on the apartment, and seeking a money judgment for the increased cost of the renovation project and for reasonable attorney's fees and disbursements. They also contend that the stop work orders left the apartment in an uninhabitable condition, so they were denied use of the apartment in violation of the warranty of habitability (Real Property Law § 226-b), and they were denied the quiet enjoyment of the premises in violation of Article 1, section 8 of the Proprietary Lease (Notice of Motion, Ex. B). They also claim that they are entitled to attorney's fees under the terms of the Proprietary Lease (*id.*, Article 2, section 14). Defendants answered with counterclaims for breach of contract due to the Sieglers' alleged non-compliance with the E-Mail Agreement; declaratory judgment that 875 Tenant has the right to install the sound-proofed flooring; and for reasonable attorney's fees under the Proprietary Lease.

The Sieglers moved for a preliminary injunction. On June 1, 2009, the court issued an interim order directing that work proceed except with respect to the floors in question (Notice of Motion, Ex. EE). On June 12, the motion was resolved by the parties' agreement made on the record (Notice of Motion,

[\* 6]

Ex. FF). Since then, the parties have resolved all issues with respect to the work (Stipulation and Order of Partial Settlement, Notice of Cross-motion, Ex. 37 [the document is not fully executed or so-ordered], and see, Reply Aff. Of Eric B. Levine, Esq., paragraph 12 [Ex. 37 is their stipulation of settlement, but it preserves the parties' rights to recover money damages]). Still unresolved are the monetary issues, including the question of attorney's fees. That is the subject of this motion.

#### DISCUSSION

The Sieglers contend that they twice obtained 875 Tenant's written consent to perform alterations, and that the Proprietary Lease gives them the right to make alterations with 875 Tenant's written consent (Proprietary Lease, Article 2, section 8). They argue that 875 Tenant breached these agreements when the stop work orders were issued, and that they are entitled to recover damages as a result. They seek to recover maintenance fees they paid for the months that the apartment was uninhabitable because of the stop work orders, and some additional architectural fees incurred. But the greater part of the Sieglers' alleged damages are attorney's fees. Article 2, section 14 of the Proprietary Lease provides that the Lessor, i.e., 875 Tenant, is entitled to the reimbursement of reasonable attorney's fees and disbursements in the event that the Lessee defaults on the lease. Real Property Law § 234 creates the

converse entitlement to reimbursement in the lessee's favor when it is the successful party.

875 Tenant argues that, in the Alteration Agreement, the Sieglers released it from liability that is in any way connected to the work (Alteration Agreement, paragraph 29). The release specifically refers to damages arising from interruption or suspension of the work, regardless of the reason for such interruption or suspension. Accordingly, the claims directly flowing from the stop work orders, i.e., the maintenance and the architectural fees, are dismissed based on the release in the Alteration Agreement.

875 Tenant further contends that the Sieglers cannot recover attorneys fees because they are not the prevailing parties, as the dispute was resolved pursuant to a settlement agreement, and under the terms of the settlement agreement, the Sieglers agreed to install floor coverings in their residence, which is in compliance with 875 Tenant's primary demand.<sup>1</sup>

The Sieglers correctly argue that the Proprietary Lease does not entitle a party to reimbursement of attorneys fees based on which is the prevailing party; rather reimbursement of attorneys fees can be obtained where the other party breached the

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<sup>1</sup> It would appear that both parties achieved their primary demands in the settlement agreement, as the Sieglers were permitted to complete the renovation substantially as they desired, in large part because of the court's contribution to the carpeting issue.

lease. Here, although 875 Tenant alleges that the Sieglers breached the Proprietary Lease by failing to adhere to house rules on floor coverings and sound abatement, as well as rules regarding installation of bathroom, the fact remains that the work was undertaken with 875 Tenant's approval, and therefore it was not in violation of the lease. 875 Tenant also did not breach an agreement by stopping work, as this remedy was specifically contemplated in the Alteration Agreement, and the reasons were related to the legitimate enforcement of house rules, even if it appears that a significant motivation in that enforcement was to benefit the neighbor below.

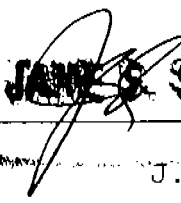
Finally, 875 Tenant maintains that it properly exercised its right to stop the Sieglers' work under the business judgment rule (see, *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]). Even if this were the case, it would not entitle 875 Tenant to reimbursement of attorneys fees because the Proprietary Lease only permits reimbursement in the event of a default, and there was none.

The parties' other contentions have been considered, and are not availing. Accordingly, it hereby is

ORDERED that the motion and cross-motion are granted to the extent that plaintiffs' claims and defendant's counterclaims for money damages, including reasonable attorneys fees and disbursements, are dismissed, and the clerk is directed to enter judgment accordingly, without costs and disbursements, and the motions otherwise are denied.

Dated: June 28, 2010

ENTER:

  
**JANE S. SOLOMON**  
\_\_\_\_\_  
J.S.C.

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