

**Access.1 Communications Corp.-NY v Shelowitz**

2011 NY Slip Op 30921(U)

April 11, 2011

Supreme Court, New York County

Docket Number: 107939/2010

Judge: Saliann Scarpulla

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: SALIANN SCARPULLA  
Justice

PART 19

Access.1

INDEX NO. 107939/2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

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

- v -  
Shebowitz & Associates PLLC

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

APR 13 2011

NEW YORK  
COUNTY CLERK'S OFFICE

<sup>15</sup>  
motion and ~~cross motion~~ are decided in accordance  
with accompanying memorandum decision.

*This constitutes the decision & order of the  
Court.*

Dated: 4/11/11

Saliann Scarpulla  
SALIANN SCARPULLA, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
ACCESS.1 COMMUNICATIONS CORP.-NY,

Plaintiff,

Index Number 107939/2010  
Submission Date 11/17/2010  
Mot. Seq. No. 001  
**DECISION & ORDER**

-against-

MITCHELL C. SHELOWITZ, and  
SHELOWITZ & ASSOCIATES PLLC,

Defendants.

-----X

**Appearances: For Plaintiff :**  
Calabro & Associates, P.C.  
By Gregory G. Calabro, Esq.  
450 Seventh Avenue, Suite 1504  
New York, New York 10123  
646-688-6095

**For Defendants:**  
Pro se

Papers considered in review of this motion for summary judgment:

<b>Papers</b>	<b>Numbered</b>
Notice of Mot. and Motion with Annexed. Ex.....	<u>1</u>
Notice of Cross-mot. with Annexed Ex. by Plaintiff.....	<u>2</u>
Reply Affirm.....	<u>3</u>

---

**HON SALIANN SCARPULLA, J.:**

Plaintiff moves for summary judgment for rent due on a commercial sub-lease ("the sublease") entered into between plaintiff Access.1 Communications Corp.-NY ("Access.1") as a sublandlord and defendant Shelowitz & Associates PLLC ("Shelowitz and Associates") as a subtenant for the period from May 2008 until the termination date of August 31, 2011. Pursuant to paragraph 1.10 of the sublease, Shelowitz agreed to pay \$18,378.92 per month for the first base year (July 2008- June 2009) and a three (3%) increase per annum each year thereafter until the expiration of the lease.

Mitchell C. Shelowitz ("Shelowitz") attests that starting in December 2009, Shelowitz and Associates realized that it would not be able to timely pay rent. On January 4, 2010, Shelowitz requested from Access.1 "a temporary 10% rent reduction for the first six (6) months of the year," explaining that the economic slowdown resulted in delays of payment on the law firm's accounts receivable. Access.1, however, rejected any changes in the payment plan. After unsuccessful attempts at finding a suitable co-sublessee, Shelowitz informed Access.1 that Shelowitz and Associates would not be able to stay on the premises in light of "an overabundance of available low rent, high quality professional office space in the market." Shelowitz also offered Access.1 to move into the part of the subleased premises that Shelowitz and Associates did not use, but Access.1 declined the offer and insisted on the terms of the sublease.

On April 22, 2010, Shelowitz and Associates served on Access.1 a notice of surrender of the sublease as of May 31, 2010, additionally conceding the security deposit in the amount of \$55,136.76 toward rent payments for the months of March, April and May. Access.1 initially rejected the notice of surrender and commenced a summary non-payment proceeding in the New York Civil Court, entitled *Access.1 Communications v. Shelowitz & Associates, L&T*, Index No. 66073/2010. The parties settled the housing court action by stipulation dated June 3, 2010, pursuant to which Access.1 agreed to apply Shelowitz & Associates' security deposit, plus an additional payment of \$3,846.75 to the rent payments through May 2010 and acknowledged that Shelowitz and Associates

surrendered the keys and possession of the premises to Access.1. (Pl.'s Cross-Mot. Ex. D). The stipulation further provides that "the petitioner [Access.1] reserves its right to seek future rent that will accrue pursuant to the Sublease as well as for damages, if any, to the subject premises." (Pl.'s Cross-Mot. Ex. D).

On June 16, 2010, Access.1 commenced this action asserting two causes of action against Shelowitz and Associates for rent due on the sub-lease for the period from May, 2010 to August, 2011 and for the attorney's fees for prosecuting the Civil Court proceeding, in the total amount of \$315,156.24 and for the attorney's fees in the amount of no less than \$10,000.00 for this action. The complaint's third cause of action is against Shelowitz to pierce the corporate veil.

On July 28, 2010, Shelowitz moved to dismiss the action against him personally, and Access.1 cross-moved for summary judgment. By order dated November 17, 2010, the Court granted Shelowitz's motion to dismiss and reserved decision on the part of Access.1's cross-motion for rent arrears and attorney's fees as against Shelowitz and Associates.

On the cross-motion, Access.1 argues that it is entitled to all the rent payments for the full duration of the sublease, and it reserved its rights in the June 3, 2010 stipulation to claim rent arrears for the remainder of the sublease term after Shelowitz and Associated vacated the premises on May 28, 2010. In opposition, Shelowitz and Associates argues that the evidence raises an issue of fact on its affirmative defense of failure to mitigate

-damages and a counterclaim in the amount of \$150,000.00 for a breach of the implied covenant of good faith and fair dealing.<sup>1</sup> Specifically, Shelowitz and Associates points to the communications between the parties prior to May, 2010 as proof that Access.1 failed in good faith to either lower the rent payments or find an alternative use for the vacant portion of the sublease as an accommodation in light of the economic downturn and the law firm's professional obligation to stay solvent and continue competent representation of its clients.

On its counterclaim for material misrepresentation, Shelowitz and Associates also argues that summary judgment is further precluded by the discrepancy in the description of the size of the area in the lease and the sublease documents. The Access.1's overlease states the size of the area to be 4,345 sq.ft., while in the sublease agreement, Access.1 represented the areas size to be 5,129 sq.ft., which allegedly resulted in the overpayment of rent in the amount of \$2,809.33 each month that Shelowitz and Associates was occupying the premises, for an approximate total of \$61,805.00.

Additionally, Shelowitz and Associates argues that summary judgment should be denied because Access.1 submitted unsigned copies of the lease in support of the cross-motion. With respect to the attorney's fees, Shelowitz and Associates argues that Access.1 may recover none, because the sublease agreement and the overlease agreement,

---

<sup>1</sup>Insofar as Shelowitz and Associates did not include any argument in the opposition to the cross-motion on its remaining affirmative defenses, the Court deems them abandoned.

incorporated in the sublease by reference, do not expressly provide for the recovery of “attorney’s fees,” “legal fees,” or “counsel’s fees.”

### Discussion

Under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1<sup>st</sup> Dep’t 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material issue of fact for trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1<sup>st</sup> Dep’t 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

New York courts have repeatedly held that in a commercial lease, the lessor is not under a duty to mitigate damages and may recover the full amount set out in the lease agreement. *See Sage Realty Corp. v Kenbee Management-New York, Inc.*, 182 A.D.2d 480, 481 (1<sup>st</sup> Dep’t 1992) (citations omitted). Even after the commercial tenant vacates or is evicted from the premises, the parties to the lease are not foreclosed to collect rent on the full term of the lease as long as the parties so provide in their agreement. *See Holy*

*Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 134 (1995). Nor may the landlord's refusal to lower rent support a claim of breach of an implied covenant of good faith and fair dealing, because this covenant of good faith and fair dealing does not create any obligations beyond those stated in the contract. *See Triton Partners LLC v Prudential Securities Inc.*, 301 A.D.2d 411, 411 (1<sup>st</sup> Dep't 2003) (finding that inquiry into ulterior motives behind termination of contract is unnecessary where the contract expressly permits that action).

Here, Shelowitz and Associates has not offered any legal authority to support its argument that Access.1's decision to insist on payment of rent as the sublease agreement expressly provides may violate the implied covenant of good faith and fair dealing. The sublease and the overlease, incorporated by reference pursuant to Paragraph 5 of the sublease, do not provide for any reduction of rent or other financial accommodation in event of an economic downturn. Moreover, Access.1 is entitled to recover rent from May, 2010, when Shelowitz and Associates vacated the premises, through the unexpired period of the lease to August, 2011, without having to re-sublease the premises, because the overlease so provides in Section 21.1(B), which is incorporated into the sublease through Section 5.1 and 5.2, and because Access.1 reserved this right in the June 3, 2010 stipulation settling the Civil Court action. *See Ring v The Printmaking Workshop, Inc.*, 70 A.D.3d 480, 480-81 (1<sup>st</sup> Dep't 2010).

Further, Shelowitz and Associates' argument is unavailing in its emphasis on Access.1's submission of unsigned versions of the relevant lease agreements. In support of its cross-motion, Access.1 submitted a copy of the sublease with a fully executed rider and amendment to the sublease and an unsigned copy of the overlease, and subsequently remedied the latter omission by submitting with its reply an executed copy of the overlease, together with an executed amendment to the overlease and consent to the sublease. Considering that no party disputes the accuracy of any provisions in the sublease and overlease agreements that Access.1 submitted, the Court overlooks this procedural mishap that has been fully corrected.

Shelowitz and Associates' dispute regarding the discrepancy in the square footage between the figures given in the sublease and overlease also does not preclude summary judgment, because both parties acknowledged in the sublease that the accurate area figures of the demised premises was not material to the agreement. Section 1.12 states the following:

**Sublease Premises Rentable Area**

Approximately 5,129 rentable square feet. This area is agreed upon by Sublandlord and Subtenant, and shall be used for purposes of this Sublease regardless of the actual square footage of the Sublease Premises. Sublandlord shall not be deemed to have represented the accuracy of the Sublease Premises Rentable Area.

(Access.1 Cross-Mot. Ex A., p.2). The clear and unequivocal language of Section 1.12 precludes Shelowitz and Associates maintaining any claim for offset on the basis of lower

actual square footage, because it conclusively accepted and agreed to 5,129 sq.ft. as being the relevant figure for the purposes of the sublease.

Access.1 seeks to recover for attorney's fees expended in the prosecution of this action based on the terms of Section 22.1, which states in relevant part that "Tenant [subtenant] shall pay to Landlord [sublandlord] an amount equal to the costs that Landlord [sublandlord] incurs in instituting or prosecuting any legal proceeding against Tenant [subtenant]."<sup>2</sup> (Access.1 Reply Affirm. Ex. B, p. 62). Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rules. *See Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989) (citations omitted). Parties to a contract may include a promise to compensate for reasonable legal expenses in case of a breach. *Id.* In landlord-tenant agreements, attorney's fee clauses have become standard and are readily enforced by the courts. *See Cier Indus. Co. v Hessen*, 136 A.D.2d 145, 149 (1<sup>st</sup> Dep't 1988).

Here, while Section 22.1 does not specify "legal fees," "attorney's fees" or "counsel's fees," the only interpretation that would meet the intent of the parties is that

---

<sup>2</sup>Section 5.2 of the sublease substitutes words "sublandlord" and "subtenant" for "landlord" and "tenant" in the overlease.

the costs incurred by [sublandlord] in instituting or prosecuting a legal proceeding have to necessarily include reasonable attorney's fees, because Access.1, which is an incorporated entity, may not commence and conduct legal proceeding *pro se* and is required to appear by attorney under CPLR 321(a). Further, the parties' intent to provide for recovery of attorney's fees was made evident by reference in the June 3, 2010 settlement stipulation to Access.1's right "to seek attorney's fees against [Shelowitz and Associates] for its commencement and prosecution of [the Civil Court] action." (Access.1 Cross-Mot. Ex. D, p. 2). Therefore, Access.1 is entitled to recover attorney's fees for maintaining Civil Court proceeding and this action.

In accordance with the foregoing, it is

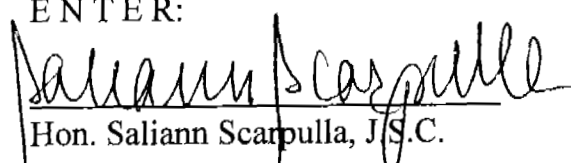
ORDERED that plaintiff's cross-motion for summary judgment is granted on plaintiff's first and second causes of action for unpaid rent from June, 2010 to, and inclusive of August 2011, in the amount of \$312,308.74, and the Clerk of the Court is directed to enter judgment in favor of plaintiff Access.1 Communications Corp.-NY and against defendant Shelowitz & Associates PLLC in the amount of \$312,308.74; and it is further

ORDERED that defendant Shelowitz and Associates PLLC's affirmative defenses and counterclaims are dismissed; and it is further

ORDERED that plaintiff's second cause of action, the claim for attorney's fees, is severed, and plaintiff shall file a note of issue to schedule a hearing to determine the amount of attorney's fees recoverable, and plaintiff shall be awarded a separate judgment for this amount.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
April 11, 2011

ENTER:  
  
Hon. Saliann Scarpulla, J.S.C.

**FILED**  
APR 13 2011  
NEW YORK  
COUNTY CLERK'S OFFICE