

**Hantz v Hillman Hous. Corp.**

2011 NY Slip Op 31472(U)

May 31, 2011

Supreme Court, New York County

Docket Number: 103836/10

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
*Justice*

PART 55

Mel Hartz

INDEX NO. 103836/10

MOTION DATE 5/2/11

MOTION SEQ. NO. 001

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

- v -

Hillman Housing Corp

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for 55

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

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

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

PAPERS NUMBERED

1-3

4-6

7

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

NB  
"PC" on for

6/28/11



Dated: 5/31/11

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 55

-----X  
MEL HANTZ,

Plaintiff,  
  
-against-

DECISION AND ORDER  
  
Index No. 103836/10

HILLMAN HOUSING CORPORATION,  
  
Defendant.

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

Plaintiff Mel Hantz moves, pursuant to CPLR 3212 (a), for summary judgment declaring that he owes defendant no legal fees, and awarding him the attorney's fees that he has incurred in this action. Defendant Hillman Housing Corporation (the Co-op) cross-moves for summary judgment dismissing the complaint, and on its counterclaims for the attorney's fees that it incurred in two prior proceedings that were brought by plaintiff, as well as its fees in this action.

The relevant facts are undisputed. Plaintiff, who has a sinus condition that was exacerbated on and after 9/11, when, as a volunteer, he was exposed to toxic pollutants, sought permission from the Co-op board to install a through-the-wall central air conditioning system on the terrace of his apartment. When permission was denied, plaintiff, in or about July 2008, brought a plenary action against the Co-op. The Co-op moved to dismiss on the basis of documentary evidence, consisting of plaintiff's proprietary lease, and on the basis of untimeliness. By decision and order, dated December 16, 2008, I granted the Co-op's motion, on the grounds that the action should have been

brought as an Article 78 proceeding, and that, because it had not been brought within four months of the Board's decision, it was untimely. Shortly thereafter, plaintiff brought an Article 78 proceeding seeking the same ultimate relief that he had sought in the first action. The Co-op moved to dismiss on grounds of res judicata; I denied the motion; the Appellate Division, First Department, granted the Co-op a stay, and on appeal, held that the proceeding was, indeed, barred by res judicata. *Hantz v Hillman Hous. Corp.*, 67 AD3d 420 (1st Dept 2009).

Plaintiff's proprietary lease provides that

[i]f the Lessor shall incur any cost, fee, or expense ... including reasonable legal fees ... in connection with any action or proceeding brought by the Lessee against the Lessor ... which is based on an alleged default of the Lessor hereunder or which is based on an other matter or thing relating to this Lease ... then such cost or expense shall be paid by the Lessee to the Lessor, on demand, as additional rent ... .

The Co-op did not seek attorney's fees in either of plaintiff's prior actions, but in a notice, dated March 19, 2010, it demanded payment of its attorney's fees, in the asserted amount of \$167,090.27, by April 6, 2010, failing which, it demanded that plaintiff surrender possession of his apartment. Plaintiff then brought this action seeking a declaration that the Co-op is barred from seeking repayment of those fees, and to recoup his attorney's fees for this action.

Plaintiff contends that the doctrine forbidding claim-splitting bars the Co-op from recovering the fees that it incurred in prior proceedings. See *930 Fifth Ave Corp. v King*, 42 NY2d 886 (1977). The Co-op responds that this doctrine is

inapplicable here, because the Co-op made no claim in either of the two preceding actions, but prevailed, in each case, on a pre-answer motion to dismiss, and that, therefore, it had no opportunity to make an application for fees.

This action is controlled by *O'Connell v 1205-15 First Ave. Assoc., LLC*, 28 AD3d 233 (1st Dept 2006). In that case, the landlord had brought an action against the tenant. The tenant made a pre-answer motion to dismiss, which was granted. *1205-15 First Ave. Assoc., LLC v O'Connell*, NY County index No. 105698/02. Subsequently, the tenant commenced an action to recover his attorney's fees in the prior action. The motion court dismissed the action on the ground that there was no prevailing party, inasmuch as, once the landlord had withdrawn certain claims, the action no longer sought any remedies under the lease between the parties. The Appellate Division affirmed, but it did so on the ground that "the prohibition against the splitting of causes of action required plaintiff to seek attorneys' fees within the action in which they were incurred, not a subsequent action." *O'Connell, supra*, at 234. The Co-op, here, is exactly in the position of the tenant in *O'Connell*. Cf *930 Fifth Corp. v King*, 54 AD2d 636 (1st Dept 1976), *affd* 42 NY2d 886 (1977); *Columbia Corrugated Container Corp. v Skyway Container Corp.*, 37 AD2d 845 (2d Dept 1971), *affd* 32 NY2d 818 (1973).

*Board of Managers of Amherst Condominium v CC Ming (USA) Ltd. Partnership* (308 AD2d 380 [1st Dept 2003]) is not to the contrary. In that case, the Court held that the plaintiff

landlord could recover the fees that it had incurred in a prior action, because the condominium's bylaws expressly provided for the recovery of legal fees by means of subsequently imposed common charges. Here, by contrast, nothing in the record indicates that the Co-op's claim to legal fees is based upon anything other than plaintiff's proprietary lease. That the lease provides that attorney's fees are to be charged as additional rent, rather than providing only that the Co-op will be entitled to its legal fees, does not distinguish the lease, in any legally significant manner, from the ordinary fee shifting provisions found in other leases. See *67-25 Dartmouth St. Corp. v Syllman*, 2005 WL 6044304 (Sup Ct Queens County 2005), *affd* 29 AD3d 888 (2d Dept 2006).

Finally, the Co-op is wrong in arguing that it had no opportunity to request attorney's fees in connection with its pre-answer motions to dismiss. Such motions often contain a request for attorney's fees, where a lease, or another contract that includes a fee-shifting provision, is at issue. See e.g. *Village in the Woods Owners Corp. v Powels*, 25 Misc 3d 10 (App Term, 2d Dept 2009); *Williamsen v Bugay*, 21 Misc 3d 1128 (A), 2008 NY Slip Op 52264 (U) (Civ Ct, NY County 2008); *Parkview Apartments v Guy*, 15 Misc 3d 1106 (A) (Justice Ct, Town of Ossining, Westchester County 2007).

Accordingly, it is hereby

ORDERED that plaintiff's motion for a declaratory judgment is hereby severed; and it is further

ADJUDGED and DECLARED that plaintiff owes no attorney's

fees to defendant; and it is further

ORDERED that defendant's cross motion is denied; and it is further

ORDERED that plaintiff is granted partial summary judgment as to his entitlement to attorney's fees incurred in this action; and it is further

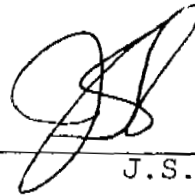
ORDERED that counsel for the parties are directed to report to the court no later than June 28, 2011 (for which purpose this matter will appear for a "preliminary conference" at noon on the Part 55 calendar) whether they have agreed on the amount of attorney's fees to which plaintiff is entitled in connection with this action. Failing such agreement, the court will schedule a hearing on the matter.

Dated: May 31, 2011

ENTER:

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J.S.C.

JANE S. SOLOMON