Great Neck Terrce Owners Corp. v McCabe

2011 NY Slip Op 32128(U)

July 25, 2011

Sup Ct, Nassau County

Docket Number: 13884-10

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

GREAT NECK TERRACE OWNERS CORP.,	TRIAL/IAS, PART 43 NASSAU COUNTY INDEX NO.: 13884-10
Plaintiff,	MOTION SUBMISSION DATE: 5-5-11
-against-	
JULIE F. MCCABE,	MOTION SEQUENCE NO. 2
Defendant.	

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition	X
Reply Affirmation	X
Memorandum of Law in Support	X

Motion by plaintiff Great Neck Terrace Owners Corp. ("the Co-op") for an order pursuant to CPLR 3212 granting it partial summary judgment against defendant and awarding attorneys' fees and costs in connection with this action and dismissing plaintiff's counterclaim is determined as hereinafter provided.

Plaintiff is a domestic corporation and a residential cooperative consisting of 28 buildings of garden-style apartments containing 644 apartments in total. Defendant Julie F. McCabe is a tenant-shareholder in the Co-op, owning the stock and Proprietary Lease appurtenant to 46 Terrace Circle, Apt. 3C, Great Neck, New York (the "Apartment").

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The Co-op has received numerous complaints from defendant's neighbors regarding cat urine odors emanating from the Apartment, commencing in 2005.

The Co-op's management inspected the Apartment, the common hallway, and adjacent apartments, and confirmed the existence of cat urine odors emanating from the Apartment. The Co-op, through management and its attorneys, communicated with defendant on numerous occasions, requesting elimination of the cat urine odors. The Co-op had consulted with SW Engineering, which company recommended that the Apartment be inspected and specifications be prepared for work necessary to eliminate the cat urine odors, including possible replacement of portions of the floor in the Apartment. The Co-op again, through management, communicated verbally and in writing with defendant, demanding access to the Apartment and defendant failed and refused to provide access to the Apartment.

On March 12, 2010, the Nassau County Department of Health issued the Co-op a violation citing "pollution of atmosphere – offensive cat odors" in connection with the Apartment, and ordered that the violative conditions be remedied.

On or about August 9, 2010, plaintiff filed an Order to Show Cause for a Temporary Restraining Order and Preliminary Injunctive Relief enjoining the defendant from denying the Co-op's employees and agents access to the Apartment to effectuate necessary repairs, and for an order declaring that the defendant is contractually obligated under the Proprietary Lease to grant the Co-op's employees and agents access to the Apartment (the "OSC").

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On or about August 10, 2010, the parties appeared in court for arguments on the OSC. At this time, the Hon. Edward W. McCarty III ordered that the "defendant must provide the Co-op's employees, agents, contractors and/or other representatives with access to the Apartment on August 13, 2010, from 1:00 p.m. to 5:00 p.m. for the purposes of inspection only." Defendant acquiesced and the Co-op's agents and engineer inspected the Apartment after which it was determined by the engineer that repair work needed to be effectuated to alleviate the urine smell. Defendant agreed to do the repair work and to allow further follow-up inspections on September 19, 2010 and October 7, 2010. Plaintiff withdrew the OSC on or about December 14, 2010.

Plaintiff commenced this action in July, 2010, seeking, *inter alia*, preliminary and permanent injunctions, a declaratory judgment and damages for breach of contract and an award of attorneys' fees.

In her answer, defendant asserts three affirmative defenses and one counterclaim for reasonable attorney fees for the successful defense of the proceeding pursuant to Real Property Law § 234.

Plaintiff now moves for summary judgment on the fourth cause of action for breach of contract and an award of attorneys' fees, claiming defendant breached the Proprietary Lease between the parties by not providing the required access to her Co-op and dismissing defendant's counterclaim. In support thereof, plaintiff relies upon ¶¶ 25 and 28 of the Proprietary Lease.

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Paragraph 25 provides that:

> "[t]he Lessor and its agents and their authorized workman shall be permitted to visit, examine, or enter the apartment, the parking space(s), and any secured storage unit(s) at any reasonable hour of the day upon notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the building or to cure and default by the Lessee and to remove such portions of the walls, floors and ceilings of the apartment and secured storage unit as may be required for such purpose . . ."

Paragraph 28 states that:

> "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."

By refusing to provide access, when requested, plaintiff argues that defendant breached the Proprietary Lease and caused the plaintiff to incur legal fees and costs in the amount of seventeen thousand six hundred fifty-three dollars and thirty-five cents ($17,653.35) to institute this Supreme Court action and bring the motion by OSC to obtain the needed access. Plaintiff has submitted copies of legal bills from their attorneys.

In opposition to the motion, defendant contends, *inter alia*, that: any "nuisance" has been cured; plaintiff is not entitled to "unconditional access" to defendant's Co-op as no emergency existed when plaintiff commenced this action; an award of attorneys' fees is premature since no prevailing party has been determined; defendant has an equal and reciprocal right to an award of attorneys' fees in the event that she is found by the court to be the prevailing party.

On a motion for summary judgment, it is incumbent upon the movant to 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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2nd Dept. 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2nd Dept. 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see Kriz v Schum*, 75 NY2d 25 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*Rudnitsky v Robbins*, 191 AD2d 488, 489 [2nd Dept. 1993]).

Generally, "an award of an attorney's fee as part of an action is not permitted, unless the right to such an award has been established by agreement, statute, or court rule." *RAD Ventures Corp. v Artamac*, 31 AD3d 411 [2nd Dept. 2006]; *see US Underwriters Insurance Co. v City Club Hotel LLC*, 3 NY3d 592 [2004]; *Hooper Assoc. v*

AGS Computer, 74 NY2d 487 [1989]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12 [1979]; *Levine v Infidelity Inc.*, 2 AD3d 691 [2nd Dept. 203]; *Culinary Connection Holdings v Culinary Connection of Great Neck*, 1 AD3d 558 [2nd Dept. 2003]. Here, ¶ 28 of the Lease contains such a provision and an award of an attorney's fee is available to plaintiff. *RAD Ventures Corp. v Artamac, supra; see Levine v Infidelity Inc., supra.*

The Court finds that there are no material issues of fact as to the breach. Therefore, the Court finds that defendant breached the Propriety Lease by permitting noxious cat urine odors to enter the hallway and by refusing access and/or performing the needed repairs. Nevertheless, "the award of an attorney's fee, whether pursuant to agreement or statute must be reasonable and not excessive" *RAD Ventures Corp. v Artamac, supra; see Solow Mgt. Corp. v Tanger,* 19 AD3d 225, 227 [1st Dept. 2005].

"In determining what is reasonable compensation for an attorney, the court may consider a number of factors including 'the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained' " (*Miller Realty Associates v Amendola*, 51 AD3d 987 [2nd Dept. 2008], quoting *Granada Condominium I v Morris*, 225 AD2d 520, 522 [2nd Dept. 1996]; *see also M. Sobol, Inc. v Wykagyl Pharm.*, 282 AD2d 438, 439 [2nd Dept. 2001]). The determination of a reasonable attorney's fee is generally left to the discretion of the trial court, which is often

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in the best position to determine those factors integral to the fixing of a reasonable fee (*see Clifford v Pierce*, 214 AD2d 697, 698 [2nd Dept. 1995]).

Under the circumstances, a hearing on the issue of actual damages, if any, and reasonable attorneys' fees is necessary. The issue of damages and reasonable attorneys' fees is referred for a hearing to the Calendar Control Part on September 19, 2011 for assignment, in the discretion of the Justice presiding, to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee.

Movant is directed to file a Note of Issue no later than ten (10) days prior to such date accompanied by a copy of this Order. A copy of the Note of Issue and this Order shall be served on the Clerk of the Calendar Control Part when the Note of Issue is filed.

If the reference is assigned to a Judicial Hearing Officer or a Court Attorney/Referee, it shall be to hear and report unless the parties agree otherwise. In that connection counsel's attention is directed to the transcript requirements of 22 NYCRR §202.44. The cost of such transcript shall be borne equally by the parties with the right of the prevailing party to seek to recover the expense as a disbursement.

The branch of plaintiff's motion which seeks dismissal of defendant's counterclaim for an award of attorney's fees is granted in light of the foregoing determination.

This Court has considered defendant's remaining contentions and find them to be without merit.

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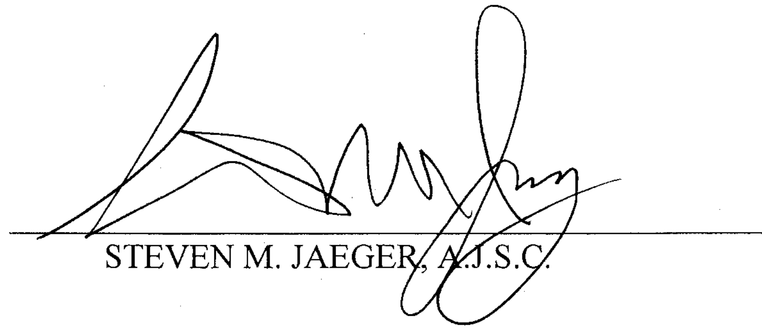
This constitutes the Order and Judgment of this Court.

Dated: July 25, 2011



STEVEN M. JAEGER, A.J.S.C.

ENTERED
JUL 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE