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| <b>Raynier v 159 Eluji Assoc., LLC</b>   |
| 2011 NY Slip Op 34024(U)   |
| June 29, 2011  |
| Supreme Court, New York County   |
| Docket Number: 111901/99   |
| Judge: Doris Ling-Cohan  |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**DORIS LING-COHAN**

PRESENT: *Yen Ling-Cohan*  
*Justice*

PART *36*

Index Number : 111901/2009  
RAYNIER, LAARA  
vs.  
159 ELUJI ASSOCIATES, LLC  
SEQUENCE NUMBER : 001  
DISMISS ACTION

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

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

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

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

this motion to/for *dismiss*  
*1-4*

PAPERS NUMBERED

*1, 2*  
*3* *①*  
*4*

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

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

Replying Affidavits *memo 3/11 ① 2/4*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is granted in* *to dismiss by defendant*  
*is granted in* accordance with the attached  
*memorandum decision. Clerk to*  
*enter judgment of dismissal.*

**FILED**

JUL 01 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: *6/29/11*  
*OTT mislabelled one memo as defendant's.*

*[Signature]*  
DORIS LING-COHAN, 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 36

-----X

LAARA RAYNIER,

Plaintiff,

Index No.: 111901/09  
DECISION/ORDER

-against-

Motion Seq. No.: 001

159 ELUJI ASSOCIATES, LLC,

Defendant.

-----X

**HON. DORIS LING-COUAN, J.S.C.:**

In this action, defendant moves to dismiss the complaint, pursuant to CPLR §3211 (motion sequence number 001). By interim order, in accordance with CPLR §3211( c), this court provided the parties with notice that it was treating defendant’s motion as one for summary judgment pursuant to CPLR §3212. since it is not disputed that the issues raised in the submissions are legal and that there are no factual issues.<sup>1</sup> The parties were given an opportunity to submit additional submissions and any evidence which may be considered on a motion for summary judgment.

**FILED**

JUL 01 2011

The parties were also required, to brief the following issue:

“Whether a party may recover legal fees incurred in an appearance before the New York State Division of Housing and Community Renewal or other governmental agency, in accordance with the terms of the parties’ lease which allows for the recovery of attorneys’ fees in a legal action or proceeding between landlord and tenant for the non-payment of rent or the recovery of possession of a rented space, and/or in conjunction with Real Property Law §234”.

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Upon review of the parties’ submissions and for the following reasons, dismissal is granted.

\_\_\_\_\_

<sup>1</sup> The parties also appeared before this court for a settlement conference.

## BACKGROUND

Plaintiff Laara Raynier (Raynier) is the tenant of apartment 1R in a residential, rent stabilized apartment building (the building) located at 161 Stanton Street in the County, City and State of New York. *See* Notice of Motion, Exhibit A (complaint), ¶ 1. Defendant 159 Eluji Associates, LLC (159 Eluji), a New York limited liability corporation, is the owner of the building. *Id.*, ¶¶ 2-3. Raynier took possession of the apartment pursuant to a lease (the lease) that she executed with 159 Eluji on May 15, 1990, the pertinent portion of which provides as follows in ¶27:

Legal Fees. The successful party in a legal action or proceeding between Landlord and Tenant for non-payment of rent or recovery of possession of the Apartment may recover reasonable legal fees and costs from the other party.

*Id.*; Exhibit A-1, at 2. The parties have renewed the lease several times since such date.

On May 9, 2006, 159 Eluji filed an application before the New York State Division of Housing and Community Renewal (DHCR) for an “Order Granting Approval to Refuse Renewal of Lease and/or to Proceed for Eviction of the Subject Tenant Pursuant to Section 2524.5 (a) (1)<sup>2</sup> of the Rent Stabilization Code.” *Id.* ¶ 7; Olson Affirmation, ¶ 8. In conjunction with such application, the DHCR thereafter conducted several days of hearings, however, at the continued hearing on August 12, 2009, 159 Eluji withdrew its application. *Id.*, ¶ 10.

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Section 2524.5 of the Rent Stabilization Code is titled “Grounds for refusal to renew lease or discontinue hotel tenancy and evict which require approval of the DHCR” and provides in subsection (a)(1) as follows:

The Owner shall not be required to offer a renewal lease to a tenant...and shall file...an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any of the following grounds: (1) Withdrawal from the rental market...(2) Demolition...”.

On September 23, 2009, the DHCR issued an “Order Denying Application or Terminating Proceeding” (“the DHCR order”) that stated, in pertinent part, as follows:

“The instant proceeding was commenced on May 9, 2006 based on the owner’s application for an Order Granting Approval to Refuse Renewal of Lease and/or to Proceed for Eviction of the Subject Tenant Pursuant to Section 2524.5 (a) (1) of the Rent Stabilization Code.

The owner subsequently withdrew its application during the hearing held on August 12, 2009. This withdrawal is with prejudice, and precludes the owner from reasserting the claim under this docket number. The tenant may file a lease violation complaint if the owner fails to renew the lease.

Therefore, it is ordered that the relief requested is denied, and/or this proceeding is terminated.”

*Id.*, Exhibit B.

Raynier commenced this action on August 19, 2009, to recover from 159 Eluji the legal fees she allegedly incurred while defending the DHCR proceeding, in the amount of \$51,853.51<sup>3</sup>, plus the fees associated with this action, approximately \$48,146.49<sup>4</sup>, for a total of \$100,000. The complaint sets forth causes of action for: 1) legal fees resulting from breach of the lease; and 2) legal fees pursuant to Real Property Law (RPL) § 234. *See* Notice of Motion, Exhibit A.

Rather than file an answer, 159 Eluji has moved to dismiss the complaint pursuant to CPLR §3211(a)(7), for failure to state a cause of action and pursuant to CPLR §3211(a)(1), based upon documentary evidence. As indicated above, such motion was converted to a motion for summary

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<sup>3</sup> Such legal fees of *over \$50,000* are allegedly attributable to the preparation of written submissions, two (2) preliminary conferences and two (2) days of trial before an administrative tribunal.

<sup>4</sup> Inexplicably, plaintiff’s counsel was able to enumerate in the complaint, with specificity, the amount of attorneys’ fees expected to be incurred in this case.

judgment as permitted by CPLR §3211( c), since the facts are not in dispute and the parties agree that the issues are purely legal.

### DISCUSSION

Raynier's first cause of action alleges breach of the lease; that 159 Eluji violated paragraph 27 of the lease by refusing to reimburse her for the legal fees that she incurred during the proceedings before the DHCR. *See* Notice of Motion, Exhibit A, ¶¶ 11-20. In seeking dismissal, 159 Eluji argues that it did not violate paragraph 27 of the lease because the application it filed with the DHCR against Raynier with respect to the rent stabilized tenancy, was not an "action or proceeding ... for non-payment of rent or recovery of possession of the apartment." *See* Notice of Motion, Olson Affirmation, ¶¶ 18-22. This court agrees.

The language of the lease is clear that to be entitled to legal fees, a party must have been successful "in a legal action or proceeding...for *non-payment of rent or recovery of possession of the Apartment*". Notice of Motion, Exh. A (emphasis supplied). Here, the application filed with the DHCR was not "a legal action or proceeding...for non-payment of rent or recovery of possession" as required by the lease, but rather merely sought from the DHCR, an "Order Granting Approval to Refuse Renewal of [the] Lease and/or to Proceed to eviction of the subject tenant ...", in accordance with the governing Rent Stabilization Code section. The hearing held before the DHCR, was merely in conjunction with 159 Eluji's administrative application, which was required by statute, for a preliminary determination of the parties' rights and, thus, by its own terms, the application was *not* an action or proceeding for non-payment of rent or recovery of possession of the subject apartment, as required by the terms of the lease.

As indicated above, section 2524.5(a)(1) of the Rent Stabilization Code *specifically requires* that, under certain limited circumstances, where an owner would not be required to offer a renewal lease to a rent stabilized tenant, an application be filed with the DHCR for approval, *before the commencement of an action or proceeding to recover possession* of a rent stabilized apartment. Specifically, Rent Stabilization Code section 2524(a)(1) provides that “the Owner ...shall file...an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term...”. Thus, as the application before the DHCR did not seek rent or possession, plaintiff is not entitled to attorneys’ fees based upon the terms of the parties’ lease.

Raynier’s second cause of action alleges a “statutory entitlement to attorney’s fees”; specifically, that RPL § 234 affords her the right to collect the legal fees that she incurred while defending against 159 Eluji, at the DHCR. *See* Notice of Motion, Exhibit A, ¶¶ 21-25.

RPL § 234 provides as follows:

Tenants’ right to recover attorneys’ fees in *actions or summary proceedings* arising out of leases of residential property.

Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys’ fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys’ fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or *in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease*, and an agreement that such fees and expenses may be recovered as provided by law in *an action commenced against the landlord or by way of counterclaim in any action or summary proceeding* commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy.

(emphasis supplied).

Such statute, which provides a tenant with a reciprocal right to attorneys' fees where a landlord would have been entitled, is triggered *only after* a tenant is successful in defending an "action or summary proceeding commenced by the landlord against the tenant arising out of the lease", which as indicated above, was not the case herein with respect to the underlying DHCR application. 159 Eluji's DHCR application was not an action or summary proceeding, and was not based upon a breach of parties' lease, but rather merely sought an administrative determination as to the landlord's statutory rights, as required by law, before it could exercise any legal right to commence an action or summary proceeding to recover possession.

As the Appellate Division, First Department held in, *Chessin v. New York City Conciliation and Appeals Bd.* (100 AD2d 297 [1984]), RPL §234 is not applicable with respect to [a claim] before an administrative tribunal, since it is neither an "action or summary proceeding". The *Chessin* court specifically stated that "[a]n administrative proceeding is not an 'action' (*Matter of Fiedelman v. New York State Dept. of Health*, 58 NY2d 80 [1983])". Similarly, in the *Matter of Ista Mgt. v. State Div. of Hous. and Community Renewal*, 161 AD2d 424 (1<sup>st</sup> Dept 1990), the Appellate Division, First Department agreed with the DHCR that RPL §234 was not applicable to a proceeding brought before the DHCR, with respect to a fair market rent appeal, pursuant to Rent Stabilization Code §2526.1(g).

Raynier's reliance on *Galiccia v. Rota Holding* (57 AD3d 293 [1<sup>st</sup> Dept 2008]) and *Chechak v. Hakim* (269 AD2d 333 [1<sup>st</sup> Dept 2000]) is misplaced. In *Galiccia*, the First Department allowed plaintiff's recovery of legal fees incurred in a Supreme Court action, which was commenced by the tenant "to enforce, modify or vacate" the DHCR's determination in which the tenant was a party. The *Galiccia* court did *not*, however, permit the recovery of the legal fees which may have

been incurred by the tenant in the administrative proceeding before the DHCR, as plaintiff is seeking in this case; rather, the fees were awarded in conjunction with the subsequent action, which sought to enforce the DHCR order and, thus, *Garcia* is not controlling.

Additionally, in *Checkhak*, while the First Department affirmed a decision which awarded attorneys' fees pursuant to RPL §234 to a tenant who was compelled to bring a plenary action to enforce an order rendered by the DHCR, the tenant was *not* awarded the attorneys' fees relating to the DHCR proceeding. Thus, *Checkhak* does not support plaintiff's arguments. Therefore, plaintiff's second cause of action for attorneys' fees based upon RPL §234 is also without merit.

It is noted that, despite having been afforded ample opportunity to do so, plaintiff failed to provide this court with applicable legal authority that would warrant an award of attorneys' fees under the within circumstances, which were allegedly incurred during an administrative application. Thus, defendant's motion to dismiss this case is granted.

Accordingly, for the foregoing reasons, it is

ORDERED that the motion by defendant 159 Eluji Associates, LLC to dismiss is granted and the Clerk of the Court shall enter a judgment of dismissal in favor of defendant, *without* costs; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: New York, New York  
June 29, 2011

**FILED**

JUL 01 2011

  
Hon. Doris Ling-Cohan, J.S.C.

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