

**Treiman v 13-19 Duke Ellington Blvd. Hous. Dev.
Fund Corp.**

2012 NY Slip Op 30032(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 104853/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

RALF TREIMAN,

Plaintiff,

INDEX NO. 104853/11

-against-

MOTION SEQ. NO. 001

13-19 DUKE ELLINGTON BOULEVARD
HOUSING DEVELOPMENT FUND CORPORATION,

FILED

Defendant.

JAN 11 2012

The following papers, numbered 1-6 were considered on this motion for summary judgment:

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<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2, 3</u>
Answering Affidavits — Exhibits _____	<u>4, 5</u>
Replying Affidavits _____	<u>6</u>
Cross-Motion: [] Yes [X] No	_____

Upon the foregoing papers, it is ordered that this motion for summary judgment by plaintiff is decided as set forth below.

Plaintiff brings this action to recover attorneys' fees incurred while defending an action in New York State Supreme Court, commenced in 2009 (Prior Action), by defendant 13-19 Duke Ellington Boulevard HDFC (defendant). Plaintiff purchased apartment 1C at 19 West 106th Street, New York, New York (the Apartment). In the Prior Action, defendant herein sought the ejection of plaintiff Ralf Treiman, on the basis that he had an illegal sublet and that he purchased the Apartment under false pretenses by using a false name and identification. On February 1, 2011, the Prior Action was discontinued by defendant herein and all parties reserved their rights to attorneys' fees.

BACKGROUND

Plaintiff has filed the within motion for summary judgment, seeking dismissal of defendant's answer and affirmative defenses. Plaintiff argues that there are no contested, material issues of fact.

Specifically, plaintiff maintains that defendant commenced the Prior Action, that plaintiff had to retain counsel to defend the Prior Action which threatened ejectment from his own property, that defendant agreed to discontinue the Prior Action, and that the stipulation of discontinuance reserved plaintiff's right to seek attorneys' fees. Additionally, plaintiff states that his Proprietary Lease contains a clause entitling defendant to attorneys' fees, such that plaintiff has a right to attorneys' fees pursuant to New York Real Property Law § 234.

In opposition, defendant argues that plaintiff is not entitled to attorneys' fees, as there was no ultimate outcome or prevailing party in the Prior Action. Defendant further argues that causes of action in the Prior Action are capable of, and will be prosecuted on the same grounds, in a future action.

DISCUSSION

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *Id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility". *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). The court's role is "issue-finding, rather than issue-determination." *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395,

404 (1957) (internal quotations omitted).

Here, plaintiff failed to establish entitlement to judgment as a matter of law, since plaintiff did not demonstrate that he was the prevailing party in the Prior Action. "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 rule". *Hooper Assoc., Ltd. v AGS*

Computers, Inc., 74 NY2d 487, 491 (1989). The New York Real Property Law (RPL) § 234 states that:

"[w]henever 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...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 successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease".

Plaintiff's Proprietary Lease provides for attorneys' fees and costs incurred by defendant if plaintiff defaults under the lease or if defendant is required to commence an action or proceeding. Proprietary Lease, p. 24, ¶ 6.01(c). Accordingly, pursuant to RPL § 234, plaintiff would be entitled attorneys' fees if plaintiff successfully defended the Prior Action which reached an ultimate outcome.

Plaintiff argues that no issues of material fact exist, and thus, summary judgment should be granted. Plaintiff alleges that he prevailed in the Prior Action by virtue of defendant's discontinuance of said action. However, the entirety of the stipulation settling the Prior Action, dated February 1, 2011, states as follows:

1. That this action is discontinued without prejudice.
2. Defendant Ralf Treiman and plaintiff 13-19 DEB HDFC reserve their rights to attorney fees relating to this action in any future action brought by plaintiff."

Plaintiff claims that he prevailed in the Prior Action as defendant agreed to discontinue after plaintiff provided documentary evidence demonstrating that he used his real name and proper identification to purchase the Apartment.

Defendant argues that an ultimate outcome was not reached in the Prior Action. In opposition to

* 4]

plaintiff's motion for summary judgment, defendant has submitted documentation showing that plaintiff has been issued numerous false identification documents, including two passports under two different names, neither of which are Ralf Treiman. Defendant contends that it agreed to discontinue the Prior Action after receiving a plausible presentation of some evidence that plaintiff might be Ralf Treiman. Defendant further contends that although it agreed to discontinue the Prior Action, the discontinuance was without prejudice and that an ultimate outcome was not reached, as the action can and will likely be recommenced.

The threshold issue before the court is whether plaintiff was the prevailing party in the Prior Action which reached an ultimate outcome. The Supreme Court of the United States has stated that "to qualify as a prevailing party, a...plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought...or comparable relief through a consent decree or settlement." *Farrar and Smith v Hobby*, 506 US 103, 111 (1992). Additionally, "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Id.* Similarly, the Appellate Division, First Department states that "[t]he determination of the 'prevailing party,' and with it, of the party or parties entitled to an attorney fee award pursuant to *Real Property Law* § 234 requires the initial consideration of the true scope of the dispute litigated, followed by comparison of the amount actually sought by the tenant, as determined by the pleadings, offers of proof, or other means". *Mosesson v 288/98 West End Tenants Corp.*, 294 AD2d 283, 284 (1st Dep't 2002). Furthermore, the Appellate Division, First Department has held that attorneys' fees is recoverable when an "ultimate outcome" of the action or proceeding has been reached, whether or not such "ultimate outcome" is on the merits of the case. *Centennial Restorations Co. v Wyatt*, 248 AD2d 193, 197 (1st Dep't 1998). The *Centennial* court held that an "ultimate outcome" had been reached as the case was not permitted to be restored and dismissal was mandated. *Id.*

[* 5]

Here, the merits of the claims were not resolved in the Prior Action and neither party obtained relief on the claims litigated. Defendant agreed to voluntarily discontinue the action and no judgment was obtained by either party. The legal relationship between plaintiff and defendant was not affected by the resolution of the Prior Action and the status quo was left unaltered. The stipulation signed by the parties specifically indicate that the discontinuance was "without prejudice" and therefore, the issues raised in the Prior Action may be sued upon in future litigation. In fact, defendant has submitted an affidavit stating that certain causes of action asserted in the Prior Action will be prosecuted on the same grounds in a future action. As plaintiff has failed to demonstrate that he was the prevailing party in the Prior Action, which reached an ultimate outcome, he is not entitled to summary judgment.

Moreover, pursuant to CPLR 3212 (b), a court presented with a motion for summary judgment is empowered to search the record and grant summary judgment to any party, including a non-moving party, which is entitled to such relief. *See Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 (1996), *Levin v 117 Limited Partnership*, 291 AD2d 304 (1st Dep't 2002), citing *Merritt Hill Vineyards Inc. v Windy Heights Vineyard, Inc.*, 61 NY2d 106, 110-11 (1984). Here, although defendant has not submitted a cross motion for summary judgment since there are no factual issues and the court has already determined that plaintiff is not entitled to prevail on his claims herein for attorneys' fees, defendant is entitled to summary judgment dismissing this case. Thus, summary judgment is granted in favor of defendant, dismissing this action.

Accordingly, it is

ORDERED that plaintiff's motion to for summary judgment is denied; and it is further

ORDERED that summary judgment is granted in favor of defendant; and it is further

ORDERED that this action is dismissed; and it is further

ORDERED that the Clerk of the court is directed to enter a judgment of dismissal in

[* 6]
favor of defendant, without costs

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

This constitutes the decision/order of the Court.

Dated: _____

1/9/12


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if Appropriate: DO NOT POST

J:\Summary Judgment\Treiman v 13-19 Duke Ellington Blvd HDPC - attorneys' fees, prevailing party.wpd

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