

**1010 Tenants Corp. v Hubshman**

2012 NY Slip Op 30221(U)

January 27, 2012

Sup Ct, NY County

Docket Number: 602966-2009

Judge: Judith J. Gische

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

PRESENT: GISCHE  
Justice

PART 10

1010 TENANTS CORP

INDEX NO.

602966/09

MOTION DATE

MOTION SEQ. NO.

04

MOTION CAL. NO.

BARBARA HUBSHMAN

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

PAPER NUMBER

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION**

*and  
order +  
judgment*

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).

Dated: Jan 27, 2012

JUDITH J. GISCHE, J.S.C.  
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):

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

1010 Tenants Corp.,

Plaintiff (s),

-against-

Barbara Hubshman,

Defendant (s).

-----X

DECISION/ORDER AND JUDGMENT

Index No.: 602966-2009

Seq. No.: 004

PRESENT:

Hon. Judith J. Gische

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):*

<b>Papers</b>	<b>Numbered</b>
Def's OSC w/BHW affirm, exhs .....	1
Pltf's x/m (discovery) w/SNV affirm, exhs .....	2
Def's reply w/BHW affirm .....	3

*Upon the foregoing papers, the decision and order of the court is as follows:*

This action for a declaratory judgment has been decided. In its decision, order and Judgment dated September 22, 2011, the court granted defendant Barbara Hubshman ("Hubshman) reverse summary judgment on her 2<sup>nd</sup> and 3<sup>rd</sup> counterclaims against plaintiff 1010 Tenants Corp. ("coop" sometimes "lessor"). The coop's cross motion for summary judgment was denied in all respects and the complaint was dismissed.

Hubshman now moves for summary judgment on her sole remaining counterclaim which is for a declaration that the coop breached the proprietary lease and that she, as the prevailing party, is entitled to have her reasonable legal fees and disbursements paid for by the coop.

The coop opposes Hubshman's motion and has cross moved for discovery.

Given the extensive history of this case, including the court's prior order on summary judgment, the reader is presumed to be familiar with this case and all prior orders.

### **Arguments**

Paragraph 28 of the proprietary lease (Reimbursement of Lessor's Expenses) provides that:

If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expenses (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 Lease, the expenses thereof to the Lessor, including reasonable attorneys' fees and disbursement, shall be paid by the Lessee to the Lessor, on demand as additional rent.

It is unrefuted that despite the language allowing the "lessor" to recover its legal fees from a lessee, a lessee may also recover his her legal fees from the coop, if it is determined that the lessee is the "prevailing party" (RPL § 234 "tenants' right to recover attorneys' fees in actions or summary proceedings arising out of residential leases"). The coop's opposition to Hubshman's motion focuses on the following: 1) attorneys' fees are not available in this action for declaratory relief, 2) even if they are, each side prevailed in a meaningful way, and 3) there has been no discovery on the issue of damages.

In the court's prior order deciding the coop's cross motion for summary judgment, the court wrote the following:

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

\* 4]  
further

ORDERED that the court has searched the record and granted the non-moving defendant summary judgment in her favor; and it is further

ORDERED, DECLARED AND ADJUDGED that:

The coop has the authority and responsibility for repairs, as set forth in paragraph 2 of the proprietary lease. If the coop determines that pursuant to the terms of the proprietary lease, work is required to be performed on the roof terrace of Hubshman's apartment, the coop shall prepare the plans and specifications for such work, including protection and restoration of the garden, and obtain a proposed contract for the work to be done with professionals of its own choosing. The coop shall then submit its proposed contract to Hubshman. Hubshman shall then have five (5) business days after receipt of such contract within which to notify the coop in writing whether or not she elects to perform such work. If Hubshman so elects, the coop shall, upon completion of such work, reimburse Hubshman for her actual costs for such work up to the amount of the proposed contract originally obtained by the Coop and presented to Hubshman. If an emergency requires immediate repairs, then the coop may immediately perform such work as is necessary to deal with the emergency and thereafter the foregoing provisions shall be applicable to the performance of any additional work in connection with the condition which gave rise to the emergency, and the court issued its decision, order and judgment and a permanent injunction.

As a general rule, attorneys fees are not available in an action for a declaratory judgment where the lessee is simply seeking a declaration as to their rights and there is no default alleged (Braun v. 941 Park Ave., 32 A.D.3d 21 [1<sup>st</sup> Dept 2006]). In the case at bar, the coop sought a declaration that "defendant [Hubshman] is in default of her Proprietary Lease with the Co-op, in that she has refused to allow the Co-op to remove the roof garden on the terrace outside her penthouse apartment to repair the roof,

\* 5]

despite the fact that there are leaks in the apartment below the terrace, and despite the fact that the shareholder in the apartment below has been unable to complete her renovations and move in" (complaint ¶1). Thus, attorney fees are an available remedy to the defendant under the applicable lease provisions, if Hubshman is the prevailing party.

In deciding whether a party has "prevailed," the court considers such things as the "true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (Excelsior 57th Corp. v Winters, 227 A.D.2d 146, 147 [1<sup>st</sup> Dept 1996]). Although the coop argues that each side has prevailed in a meaningful way, this is an overly optimistic view of the court's judgment. Hubshman moved for a preliminary injunction, the coop cross moved for summary judgment and then Hubshman asked the court to search the record. In searching the record and granting Hubshman reverse summary judgment, Hubshman is clearly the prevailing party. The court expressly denied the coop's motion for summary judgment. In making that decision, the court found that the relief sought by Hubshman in her counterclaims was more closely in line with the parties' obligations under the proprietary lease. Thus, any claim that this action has resulted in a "draw" and not a clear victory, is rejected as a reason to deny defendant's motion for attorneys' fees.

Although the court believes that limited discovery may be needed before the issue of attorneys' fees can be heard, the motion at bar is for summary judgment on the issue of liability. Consequently, incomplete discovery on the issue of damages is not a reason to deny defendant summary judgment, if there is otherwise no issue of fact to be tried. Consequently, the court grants Hubshman summary judgment on the issue of

liability since she has met her burden and the coop has not raised issues of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). The issue of damages (i.e. attorneys fees that Hubshman may recover from the coop) must be heard. The hearing shall be before a special referee who shall report his or her recommendations to the court. The issue of what discovery, if any, is available on the limited issue to be tried, is best addressed by the Referee and is also within the scope of this reference. Hubshman shall serve this order on the plaintiff and the Office of the Special Referee no later than twenty (20) days after it appears as entered on SCROLL (Supreme Court Records On-line Library) so the hearing can be scheduled.

**Conclusion**

In accordance with the foregoing it is hereby

ORDERED that defendant Barbara Hubshman's motion for summary judgment on the issue of liability on her first counterclaim is granted; and it is further

ORDERED, DECLARED AND ADJUDGED that defendant Barbara Hubshman, as the prevailing party in this action, is entitled to recover her reasonable attorneys' fees and disbursements from the plaintiff/lessor, 1010 Tenants Corp.; and it is further

ORDERED that the issue of what reasonable legal fees and disbursements defendant is entitled to is referred to a Special Referee who shall hear the matter referred and report to the court his or her recommendations; and it is further

ORDERED that the issue of discovery pertaining to the limited issue referred (i.e. legal fees and disbursements Hubshman has incurred) is also within the scope of this reference; and it is further

ORDERED that Hubshman shall serve this order on the plaintiff and the Office of the Special Referee no later than twenty (20) days after it appears as entered on SCROLL (Supreme Court Records On-line Library); and it is also

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York  
January 27, 2012

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**UNFILED JUDGMENT**

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