

433 Sutton Corp. v Broder

2012 NY Slip Op 33210(U)

February 24, 2012

Sup Ct, New York County

Docket Number: 110071/11

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 15

Index Number : 110071/2011
433 SUTTON CORP.
vs.
BRODER, ROBERT
SEQUENCE NUMBER : 002
COUNSEL FEES, EXPENSES

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2, 3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

FEB 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/28/12


HON. EILEEN A. RAKOWER 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

433 SUTTON CORP.,

Plaintiff,

Index No.
110071/11

- against -

FILED

Decision and
Order

ROBERT BRODER,

FEB 28 2012

Mot. Seq. 002

Defendant.

NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff moved this Court, by Order to Show Cause, for a preliminary injunction and, upon presentation, for temporary relief. Certain relief was afforded Plaintiff pending a hearing on the preliminary injunction. A hearing was held and witnesses and evidence was presented, at the conclusion of which, this Court denied injunctive relief. This Court also denied attorneys fees to the plaintiff at that time, stating "there is no award of attorneys fees, there's no award of costs. Indeed, on balance, Mr. Broder has endured costs as well." Defendant now moves this Court to award him attorneys fees. Plaintiff opposes the motion.

Plaintiff initially sought relief to address a noxious odor emanating from Mr. Broder's apartment. Plaintiff, unable to reach Mr. Broder, gained entry into the apartment prior to bringing this action with the help of a locksmith and in the presence of a police officer, believing Mr. Broder was deceased and decomposing in the apartment. Testimony described the strength of the odor. Upon entry into the apartment, it was discovered that Mr. Broder was not inside, but a cat was living there, and feces, food and filth were the source of the stench.

The proprietary lease and house rules require tenants to maintain their units in a good state of preservation and cleanliness. Additionally, no animal shall be kept or harbored in the building unless expressly permitted in writing by the Lessor. It is clear from the testimony and evidence adduced at the hearing that Mr. Broder violated these provisions.

It has been found appropriate to deny counsel fees where tenants breached the lease, even where the landlord's action has been dismissed. (*See, Ram I, LLC v. Stuart*, 248 AD2d 255 [1st Dept., 1998], *Giddings v. Waterside Redevelopment Co.*, NYLJ June 30, 1998, p.26, c.1 [AT 1st Dept], *Ariel Associates LLC v Brown*, NYLJ April 14, 1999, p.26, c.2 [AT 1st Dept.]) "In each of these cases neither the tenants nor the landlords were found to have prevailing party status; thus, no party was awarded attorneys' fees. In each of these cases, the appellate courts framed the denial of attorneys' fees to the tenants in terms of equitable considerations." *350 East 62nd Street Associates v. Vecilla*, 182 Misc2d 68 at 70 (Civ Ct NY, 1999).

The Court notes that the interim relief plaintiff received upon presentation of the order to show cause involved permission to enter the apartment (Mr. Broder was away from New York City at the time) and remove the noxious producing organic matter. This entry and the removal of feces and other filth were captured on a video played for the Court at the hearing. Also, Mr. Broder returned to the apartment at some point and removed the cat. The emergency relief, removal of the noxious causing matter, was accomplished prior to the decision on the action for a preliminary injunction. Thus, denial of the injunction at the conclusion of the hearing did not render Mr. Broder the "prevailing party."

The plaintiff was forced to take action to protect complaining neighbors from what was described as "this stench [that] had started a week prior and had grown progressively worse during the course of that week." "The stench was overwhelming." "The stench had so permeated the hallway it was – that it was evident through the hallway. Apartment owners on the hallway had placed towels under the doorway to the door to Mr. Broder's apartment in an attempt to stop the stench." "They had actually thought that there were human remains in the apartment at the time."

There was testimony at the hearing that Plaintiff's employee heard the cat being taken out in the middle of the night. In fact, when he heard the cat screaming, he investigated, and noted that Mr. Broder was removing the cat. This testimony showed that Plaintiff's representations in support of the interim relief were not entirely forthright. Indeed, Plaintiff made much of the cat being a continuing source of odors, and alluded to the dangers to the animal itself in not having water and being trapped without care. Defendant, however, did not appear at the request for interim relief, despite notice. Instead of responding to Plaintiff's legal challenge, Mr. Broder

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chose to fetch his cat from the apartment and left Plaintiff's representations uncontested.

Credible testimony, however, revealed Plaintiff's genuine concern that the uncleanliness of the apartment would continue to attract vermin and remain a source of noxious odors and nuisance, even after the cat was removed. The entry and cleaning of the unit was videotaped and preserved. The denial of the preliminary injunction was not a finding that Mr. Broder was in compliance with house rules and the proprietary lease, but that there was no demonstrated continuing harm.

Equitable considerations dictate that the instant motion for attorneys' fees by Mr. Broder be denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 24, 2012



Eileen A. Rakower, J.S.C.

FILED

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