SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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ROCHELLE BARNETT, AS ADMINISTRATRIX OF THE ESTATE OF WARREN HIRSCH,
Plaintiff,

-against-

FIVE-ONE-FIVE OWNERS, INC.,
Defendant.

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Index Number 109623/2009E
Mot. Seq. No. 002

DECISION AND ORDER

Appearances:

For the Plaintiff:
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E-filed papers considered in review of this motion:	E-filing Document Numbers:
Notice of motion, Kaufman affirmation and annexed exhibits 1 - 6	22 - 29
Milito affirmation in opposition and annexed exhibits A - F	34 - 34-6
Pashman reply affirmation	35
Oral argument transcript	36

PAUL G. FEINMAN, J.:

Plaintiff, Rochelle Barnett, as Administratix of the Estate of Warren Hirsch, moves to dismiss this action without costs to any party as having been rendered moot by the death of Warren Hirsch and his Estate's payment of all outstanding maintenance, late fees and special assessments owed to defendant, Five-on-Five Owners, Inc., and because there is no "prevailing party" for purposes of defendant's counterclaim for recovery of attorney's fees. Defendant opposes only that portion of plaintiff's motion seeking dismissal of its counterclaim for attorney's fees. For the reasons set forth below, the motion is granted in part, and denied in part.

BACKGROUND

Defendant, Five-on-Five Owners, Inc., is the owner of the residential cooperative housing corporation located at 515 East 88th Street, New York, New York. Warren Hirsch was a shareholder and holder of the proprietary leases for apartments 5A and 5B in the cooperative building. By a notice of objectionable conduct dated January 29, 2009, the cooperative's Board accused Hirsch of engaging in "disruptive and unpleasant" behavior in violation of the relevant terms of his proprietary leases and the cooperative's rules. Subsequently, Hirsch was notified that a special shareholders meeting was to be held on June 16, 2009, for the purpose of considering whether to terminate Hirsch's proprietary leases. Hirsch commenced an action in this court seeking a temporary restraining order enjoining the holding of the special shareholders meeting by order to show cause on June 12, 2009. The court denied Hirsch's request, and the special shareholders meeting was held on June 16, 2009. At the meeting, after Hirsch and his attorney spoke in his defense, 89.2% of the shares outstanding voted to terminate Hirsch's two leases for objectionable conduct pursuant to Paragraph 31 (f) of the proprietary lease.

Immediately thereafter Hirsch commenced this action seeking declaratory and injunctive relief enjoining defendant from terminating his proprietary leases and evicting him from his apartments. The amended complaint alleged that the cooperative's Board's actions to terminate his leases were taken in retaliation for his years of objecting to the allegedly improper and self-serving conduct of certain Board members (Doc. 11, Amended complaint). In support of the first cause of action for a declaration that the termination of Hirsch's proprietary leases was null and void, the amended complaint alleged that the vote at the June 16, 2009 meeting was not legitimate because the 66 2/3 % threshold required in the proprietary lease was only reached by

fraudulently obtained proxies, there was no allegation that Hirsch's misdeeds had been repeated after the written notice of objectionable conduct, and the accusations against him "were and are wholly false" (*id.* at ¶¶ 41-45). The second cause of action sought to enjoin defendant from terminating the lease, commencing any action to declare the lease terminated or a summary holdover proceeding to recover possession of the apartment, and interfering with plaintiff's quiet enjoyment of the apartment (*id.* at ¶ 53). The third cause of action sought damages of $5 million for defendant's alleged intentional infliction of emotion distress. For his fourth cause of action, sounding in breach of warranty of habitability, the amended complaint alleged that conditions in the apartment – "serious infiltration of water into the apartment by reason of the roof directly over the apartment leaking during and in the aftermath of rain storms" – were detrimental to Hirsch's health, safety and welfare, and contrary to Hirsch's reasonable expectations in renting the apartment (*id.* at ¶¶ 64-67). The fifth and sixth causes of action sounded in property damage and constructive eviction based on the alleged breaches of the warranty of habitability.

Defendant answered and asserted two counterclaims (Doc. 25, Verified answer). The first counterclaim seeks a declaration that defendant is the owner in fee of the Building and directing the sheriff to remove plaintiff and all other persons found in the apartment forthwith so as to place defendant in exclusive possession. For the second counterclaim, defendant seeks a money judgment for all maintenance, assessments, additional rent, and use and occupancy at market rates accruing from March 1, 2008 until plaintiff is removed from the apartment. Defendant also requests its costs, attorney's and disbursements in this proceeding.

Discovery proceeded in this action pursuant to the preliminary conference order entered into on December 16, 2009, and subsequent compliance conference orders and stipulations.

Pursuant to the court's order of May 12, 2010, any motion for summary judgment would not be the basis for deferring discovery, including depositions. However, as discovery progressed, Hirsch's health deteriorated. Thus, the court's order of November 17, 2010, adjourned several dates related to discovery, including depositions. Even though he was suffering from Stage IV liver cancer, Hirsch, through his attorney, had asked to adjourn the deposition of two individuals being deposed on behalf of defendant to allow himself time to recover so he could "exercise his right to be present" at the depositions (Doc. 17). Because these depositions had already been delayed several times, the November 17, 2010 order made it clear that this was the "final adjournment" (*id.*).

On the same date that order was issued, Hirsch passed away. His death divested this court of jurisdiction to conduct proceedings in this action until a proper substitution could be made (CPLR 1015 [a]; *see Noriega v Presbyterian Hosp. in the City of New York*, 305 AD2d 220, 221 [1st Dept 2003] [*internal citations omitted*]). On May 13, 2011, the court so-ordered a stipulation in which the administratrix of Hirsch's Estate was substituted in as plaintiff. A compliance conference was held on July 6, 2011, and the resulting order set the deadline for filing the note of issue at November 1, 2011, with a final compliance conference to be held on October 19, 2011 (Doc. 21). The final conference was never held and a note of issue was not filed. Instead, on July 22, 2011, the substituted plaintiff, Barnett, sent a check to defendant for $19,029.78 for outstanding maintenance, late charges and special assessments; however, there is nothing in the motion papers that memorializes a settlement between the parties as to any claim or counterclaim. Barnett subsequently brought on the instant motion to dismiss arguing that

Hirsch's death and the substituted plaintiff's July 2011 payment rendered all claims and counterclaims moot.

ANALYSIS

"Any action, other than an action for injury to person or property, may be maintained by and against a personal representative in all cases and in such manner as such action might have been maintained by or against his [or her] decedent" (EPTL § 11-3.1). Under this provision, Hirsch's contract and property rights claims survived his death and could be maintained by plaintiff upon her substitution under CPLR 1015. Subject to any limitations imposed by the proprietary lease, Hirsch's interest in the cooperative apartment would be an asset of his estate (*see* 41 NY Jur 2d Decedents' Estates § 1908). Under EPTL § 11-3.2, Hirsch's personal injury and property damage claims survived his death. Pursuant to these statutory provisions, defendant's counterclaims against Hirsch also would survive his death. Thus, contrary to plaintiff's contention, which is not supported by reference to any statute or case law, Hirsch's death did not in itself render *all* of the claims or counterclaims asserted in this action moot.

However, aside from the mootness argument, plaintiff's motion papers clearly manifest an intent to either withdraw, voluntarily discontinue or abandon all claims asserted in this action by Hirsch. Relevant to plaintiff's first and second causes of action for declaratory and injunctive relief, as well as defendant's first counterclaim, plaintiff has relinquished any claim as to the issue of possession of the apartment at issue. Plaintiff claims that her third, fourth, fifth and sixth causes of action should each be dismissed as moot based on plaintiff's own determination "that there is no further value to be gained by pursuing [these] claims" (Doc. 23, Kaufman affirm. at ¶¶ 30-31). However, plaintiff's determination as to the value of pursuing these claims does not

render them moot. It simply means they have been abandoned. Finally, even accepting plaintiff's contention that all outstanding maintenance, late fees and other charges sought by defendant's second counterclaim were paid in full in July of 2011, there is nothing in the record to suggest that such payment was accepted by defendant in full satisfaction of defendant's counterclaim for attorney's fees pursuant to paragraph 28 of the proprietary lease.

At oral argument, plaintiff's counsel emphasized that defendant does not object to dismissal of any claim other than its counterclaim for attorney's fees. He argued that without a substantive claim, neither party could "prevail" for the purpose of recovering attorney's fees (Doc. 36, Transcript at 9). However, while defendant's counterclaim for attorney's fees may be interrelated with its other counterclaims, it is "clearly distinct, and it is common practice to sever a derivative claim for attorneys' fees [from] ... the main claim" (*815 Park Ave. Owners, Inc. v Metzger*, 250 AD2d 471, 471 [1st Dept 1998]; *see also The Bd. of Mgrs. of the Amherst Condominium v CC Ming (USA) Ltd. Partnership*, 308 AD2d 380, 380 [1st Dept 2003]). Thus, the dismissal of plaintiff's claims does not extinguish defendant's counterclaim (*see H.M. Village Realty v Caccavale*, 5 AD3d 289, 290 [1st Dept 2004] ["[d]efendant's counterclaim for attorneys' fees was not extinguished upon dismissal of the landlord's main claim"]).

Generally, New York public policy disfavors any award of attorneys' fees to the prevailing party in a litigation (*see Horwitz v 1025 Fifth Ave., Inc.*, 34 AD3d 248, 249 [1st Dept 2006]; citing *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). Thus, a prevailing party may not collect attorney's fees that are incidents of litigation unless an award is authorized by agreement between the parties, statute or court rule (*see Atlantic Dev. Group, LLC v 296 E. 149th St., LLC*, 70 AD3d 528, 529 [1st Dept 2010]; quoting *Hooper Assoc. v AGS*

Computers, 74 NY2d 487, 491 [1989]). Here, attorney's fees are authorized by the paragraph 28 of the proprietary lease, which provides:

> "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"

(Doc. 34-5, ex. E, Lease excerpt). To be entitled to attorney's fees under this provision, the claimant must substantially prevail on the central claims advanced, and receive substantial relief in consequence thereof" (*id.* at 279; citing *Bd. of Mgrs. of 55 Walker St. Condominium v Walker St., LLC*, 6 AD3d 279, 280 [1st Dept 2004]). So long as the claimant is the prevailing party on the central claims advanced, it is not necessary that each of the claimant's claims raised in the lawsuit are adopted (*Bd. of Mgrs. of 55 Walker St. Condominium*, 6 AD3d at 280).

Plaintiff argues that attorney's fees may not be recovered because "[t]here has been no judicial finding that Mr. Hirsch was in breach of his proprietary lease," and therefore, defendant is "not a 'substantially prevailing' party for purposes of recovering attorneys' fees" (Doc. 23, Kaufman affirm. at ¶¶ 35-36). However, a party may be found to have prevailed for the purpose of awarding attorney's fees even in absence of a judicial determination (*see Sykes v RFD Third Ave. I Assocs., LLC*, 39 AD3d 279, 279 [1st Dept 2007] [funds received through stipulation, not judicial determination]).

The central claims involved in this litigation involve Hirsch's entitlement to possession of the apartment, defendant's liability for intentional infliction of emotional distress, breach of the warranty of habitability, property damage, and constructive eviction, and defendant's right to

recover outstanding maintenance, late fees, and attorney's fees. Defendant has apparently regained possession of the apartment. Plaintiff has voluntarily abandoned the personal injury, property damage, and warranty of habitability claims based on her determination that they are of no further value, notwithstanding the fact that Hirsch's complaint sought $5 million in damage for the intentional infliction of emotional distress claim alone. Defendant received substantial relief on its second counterclaim seeking payment for outstanding maintenance and related charges from plaintiff's July 2011 payment. In stating that her July 22, 2011 voluntary payment of $19,029.78 to defendant consisted of $17,005.18 in outstanding maintenance, $1,934.81 in late charges, and $89.79 in special assessments, plaintiff lends support to defendant's contention that plaintiff was in default of the lease and that defendant was forced to assert a counterclaim to obtain this payment. Thus, dismissal of defendant's counterclaim, to the extent it seeks to recover reasonable attorney's fees and disbursements pursuant to paragraph 28 of the proprietary leases, is not warranted.

The court notes that defendant has not cross-moved for summary judgment on its counterclaim for attorney's fees. However, upon a search of the record, it appears that defendant is entitled to summary judgment on its claim for reasonable attorney's fees. This is because plaintiff's voluntary payment of the maintenance arrears, late fees, and special assessments serves as a tacit concession of the merit of the counterclaim. Accordingly, it is

ORDERED that plaintiff's motion to dismiss the is granted without opposition to the extent that all claims and counterclaims are dismissed *except* the portion of defendant's counterclaim which seeks attorney's fees pursuant to the proprietary lease, which is severed and continued *under* this index number; and it is further

ORDERED that, upon a search of the record, defendant is awarded summary judgment on the attorney's fees portion of its counterclaim; and it is further

ORDERED that defendant shall, within fifteen (15)days of entry of this order:

(1) serve notice of entry of this order upon the plaintiff, and the Clerk of Court who shall enter judgment in accordance with the foregoing; and

(2) serve a copy of this order, together with proof of notice of its entry, as well as proof of service of a note of issue, and payment of any appropriate fees, upon the Clerk of Trial Support and the Special Referee Clerk; and it is further

ORDERED that the issue of the amount of reasonable attorney's fees shall be referred to a Special Referee to hear and determine and that upon such determination the Clerk of Court shall enter judgment in defendant's favor on its continued counterclaim and against the plaintiff for the amount determined.

This constitutes the decision and order of the court.

Dated: May 24, 2012
New York, New York

J.S.C.