

730 West 183rd St. LLC v Nouredine

2014 NY Slip Op 30768(U)

March 26, 2014

Sup Ct, New York County

Docket Number: 157514/2013

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

730 WEST 183rd STREET LLC,

Index No.: 157514/2013

Plaintiff,

Motion Date: 03//25/13

- v -

Motion Seq. No.: 002

NORMAN KHADAIDI NOUREDDINE a/k/a NOUREDDINE
KHADAIDI and CARL CARSON,

Motion Cal. No.: _____

Defendants.

ORDER

The following papers, numbered 1 to 3 were read on this motion to discharge undertaking and for reasonable attorneys fees.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
_____	1
_____	2
_____	3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the plaintiff's motion for an order discharging the undertaking (Bond No. K089345990) and permitting plaintiff's attorney to release \$5,000 held in escrow in the account of Aury Bennett Stollow, P.C. shall be granted, and to recover attorneys fees shall be denied.

Plaintiff commenced this action for specific performance of \$15, inter alia, of the Lease dated December 21, 2000 between the parties, wherein defendant Nouredine agreed that plaintiff may enter the Apartment during reasonable hours and with reasonable notice to make repairs. By order dated September 20, 2013 (Order), this court granted plaintiff a preliminary injunction, permitting plaintiff access to the Apartment for the purpose of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

eradicating bed bugs, on condition that plaintiff file an undertaking in the amount of \$5,000. Such Order also directed defendants to file a formal answer to the complaint.

Plaintiff moves for an order discharging the undertaking, for attorney's fees and for "such other and further relief in Plaintiff's favor as to this Court seems just and proper." Plaintiff does not seek a default judgment but argues "The Order constitutes a final determination on the merits that Plaintiff was entitled to the injunctive relief sought by the complaint". Though defendant Nouredine responds to the motion at bar and claims that he suffered from exposure to bedbugs and pesticides as a result of plaintiff's negligence and seeks dismissal of the action, neither he nor defendant Carson has filed an answer, and defendant Nouredine has neither interposed a counterclaim nor moved by notice of motion to dismiss the complaint.

Since neither defendant opposes an order discharging the undertaking the court grants such relief.¹

¹Upon further deliberation following oral argument, the court notes that plaintiff's counsel has misstated the holding in J A Preston Corp v Fabrication Enters, 68 NY 2d 397 (1986). As no permanent injunction has been rendered, had defendants objected, a discharge of the undertaking would not lie. Plaintiff agrees that defendants complied with the preliminary injunction, and counsel for plaintiff is correct that such compliance moots the ultimate relief sought in the first and second causes of action of the complaint. However under J A Preston Corp, such compliance is not tantamount to an adjudication on the merits, and a discharge, if opposed, would

As to the third cause of action for attorneys fees, the court has further deliberated on the terms of the provisions of the Lease, after making a preliminary ruling on the record. The court agrees that were the Lease to so provide, plaintiff, as prevailing party in this action, would be entitled to recover from defendant Nouredine reasonable attorneys fees incurred by the plaintiff in prosecuting this action. However, under § 18 of the Lease, plaintiff is entitled to recover "Owner's expenses for attorneys fees" from defendant Nouredine only "(i)f this Lease is ended by Owner because of your default". Though on oral argument plaintiff's counsel stated that defendant Nouredine has vacated the Apartment upon the issuance of a warrant of eviction, he submits no evidence of such a warrant, and no such warrant has either been sought, much less issued in this action. Nor is there any evidence that the Lease ended, let alone of the circumstances surrounding the purported ending of the Lease. Further, the "Owner's expenses for attorneys fees" language in the Lease is preceded by ***, which refers to a footnote on the same page of the Lease that states "This may be deleted", rendering the "Owner's expenses for attorneys fees" provision ambiguous. In conclusion, since § 20(A)(7) of the Lease, upon which plaintiff's counsel relies, makes no reference to "attorney", "counsel" or "legal" fees, plaintiff is not entitled

be improper.

to recover attorneys fees in this action before the court. Frank B. Hall & Co of NY v Orient Overseas, 84 AD2d 338 (1st Dept 1982).

Accordingly, it is

ORDERED that the motion of plaintiff to discharge the Undertaking (Bond No. K08934599 is granted; it is further

ORDERED that Bond No. K08934599 be discharged of record, and that upon the filing of a certified copy of this order with notice of entry in the offices of the Clerk of the County of New York, such Bond be marked as discharged from the records of such office; and it is further

ORDERED that the motion of plaintiff to permit its attorney Aury Bennett Stollow PC to release the \$5,000 of collateral held in escrow is granted; and it is further

ORDERED that the motion of plaintiff for an award of attorneys fees against defendant Norman Khdaidi Nouredine is denied.

This is the decision and order of the court.

Dated: March 26, 2014

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.