

310 E. 74th LLC v Farrell
2014 NY Slip Op 32334(U)
September 5, 2014
Supreme Court, New York County
Docket Number: 57374/2010
Judge: Jack Stoller
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R

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310 EAST 74th LLC,

Petitioner,

Index No. 57374/2010

- against -

DECISION/ORDER

PATRICK FARRELL, LINDA BARR GALE, et al.,

Respondents.
----- X

Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

Papers	Numbered
Notice of Motion and Supplemental Affidavits Annexed.....	1
Notice of Cross-Motion and Supplemental Affidavits Annexed	2
Affirmation In Opposition Respondents’ Cross-Motion and in Further Support	3
Reply Affirmation	4

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

310 East 74th LLC, the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Linda Barr Gale, the respondent in this proceeding (“Respondent”)¹ seeking possession of 310 East 74th Street, Apt. 6G, New York, New York (“the subject premises”) on the ground that Respondent is a licensee whose license to reside in the subject premises had terminated. Respondent interposed an answer, alleging, *inter alia*, that she was entitled to succeed to the tenancy of a prior rent-controlled tenant of the subject premises (“the

¹ Other respondents were named, but Linda Barr Gale is the only respondent to oppose the relief Petitioner seeks on this motion and the only respondent to cross-move for relief on this motion, so for the sake of convenience only the Court refers to Linda Barr Gale as “Respondent.”

Prior Tenant”). The Court held a trial of this matter. The Court found that the Prior Tenant died on December 13, 2009. The Court found that Respondent did not prove that she is entitled to succeed to the Prior Tenant’s tenancy and awarded Petitioner a final judgment of possession.

Petitioner now moves for an order awarding Petitioner a money judgment against Respondent to cover attorneys’ fees Petitioner paid its counsel and for an order awarding Petitioner a money judgment covering the difference between the fair market rent and the use and occupancy that Respondent paid during the pendency of this proceeding. Respondent cross-moves for an order covering the costs of introducing evidence that Petitioner should have admitted pursuant to a notice to admit served according to CPLR §§3123 and 408.² The Court consolidates both motions for consideration herein.

In support of its motion for attorneys’ fees, Petitioner annexes to its motion a lease commencing August 1, 1957 (“the Lease”), that had been executed by, *inter alia*, the Prior Tenant and the Prior’s Tenant’s landlord at the time, presumably Petitioner’s predecessor-in-interest. The Lease contains a clause that provides that in case of, *inter alia*, dispossession by summary proceedings, attorneys’ fees that Petitioner’s predecessor-in-interest may incur are additional rent.

When an occupant to an apartment establishes her right to succeed to a rent-controlled tenancy, the Court of Appeals found it fair to award that occupant a judgment for her attorneys’

² Respondent attempted to cross-move for other relief. However, Respondent submitted papers late according to a submission schedule that the Court had ordered. The Court granted Respondent’s application to submit late papers only with regard to opposition to Petitioner’s motion and Respondent’s cross-motion for relief according to the notice to admit.

fees, in part because, “had [the occupant’s landlord] prevailed on the merits, [the landlord] would have been entitled to reimbursement from [the occupant] for [the landlord’s] legal expenses.”

Duell v. Condon, 84 N.Y.2d 773, 781 (1995). Similarly, where a licensee did not establish succession rights to a rent-regulated tenancy, the Appellate Division remanded the matter to a lower Court for a determination of reasonable attorneys’ fees. Greenberg v. Coronet Properties Co., 167 A.D.2d 291 (1st Dept. 1990).

However, appellate authority both pre-dating and post-dating these two decisions holds that a licensee who is unsuccessful at proving succession rights is *not* bound by an attorneys’ fees clause in a lease signed by the tenant whose tenancy that the licensee could not succeed to. 67-15 102nd St., L.L.C. v Whitman-Gross, 43 Misc.3d 135A (App. Term 2nd Dept. 2014), 360 W. 55th St. L.P. v. Anvar, 13 Misc.3d 7, 9 (App. Term 1st Dept. 2006), East Four-Forty Assocs. v. Ewell, 138 Misc.2d 235, 248 (App. Term 1st Dept. 1988). Rather than find that two departments of the Appellate Term violated a proposition of law set forth by the Court of Appeals and the Appellate Division, this Court is first tasked with harmonizing these two strands of authority.

The justiciable controversy before the Court in Duell, *supra*, resolved upon a finding that the respondent in that matter was a statutory successor-tenant, Duell, *supra*, 84 N.Y.2d at 780-781, the opposite of the outcome of the instant matter, thus limiting the precedential value of the language regarding a fact scenario not before that Court. A judicial opinion, like a judgment, must be read as applicable only to the facts involved and is an authority only for what is actually decided. Rolfé v. Hewitt, 227 N.Y. 486, 494 (1920). While dictum in a Court of Appeals decision carries considerable weight, it is not controlling. Adirondack Trust Co. v. Farone, 245

A.D.2d 840, 842 (3rd Dept. 1997). Therefore, in order for a statement of the law made by the Court of Appeals to have binding precedential effect, it must have addressed an issue that was before that Court. Robinson Motor Xpress, Inc. v. HSBC Bank, USA, 37 A.D.3d 117, 123 (2nd Dept. 2006). A case, therefore, is precedent only as to those questions presented, considered, and squarely decided. Wellbilt Equip. Corp. v. Fireman, 275 A.D.2d 162, 168 (1st Dept. 2000), People v. Bourne, 139 A.D.2d 210, 216 (1st Dept.), *leave to appeal denied*, 72 N.Y.2d 955 (1988). As the facts before the Court in Duell, *supra*, did not involve a licensee who did not prevail on her succession claim, as is the matter here, the statements in Duell, *supra*, about what would happen if the outcome were different for the party in front of the Court was not what was “actually decided” in such a way as to contravene the other appellate authority standing for a different proposition. The same goes for Greenberg, *supra*, 167 A.D.2d at 291, wherein the remand for attorneys’ fees does not actually appear in the body of the opinion, but in the disposition section, which is separate from the opinion.³

Despite the fact that Respondent is not a party to the Lease, Petitioner argues RPL §234 still entitles it to a money judgment sounding in attorneys’ fees. RPL §234, entitled “[t]enants’ right to recover attorneys’ fees in actions or summary proceedings arising out of leases of residential property,” provides that when a residential lease allows a landlord to recover

³ Further muddying the waters is 72A Realty Assoc. v. Kutno, 15 Misc.3d 100, 102-103 (App. Term 1st Dept. 2007), where, upon finding that a landlord was entitled to a judgment against a tenant who did not maintain the subject apartment as his primary residence and against the tenant’s former girlfriend’s claim of succession, the Court remanded the matter to determine attorneys’ fees against only the tenant and use and occupancy only against the tenant’s former girlfriend, compelling the conclusion that the Appellate Term yet again did not find that a licensee is bound to a term of a lease that the licensee is not a party to.

attorneys' fees, "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 ... in the successful defense of any ... summary proceeding commenced by the landlord against the tenant arising out of the lease."

The starting point in any case of statutory interpretation must always be the language itself, giving effect to the plain meaning thereof. Raynor v. Landmark Chrysler, 18 N.Y.3d 48, 56 (2011). The statute does not refer merely to parties to a lease, but uses the words "landlord" and "tenant" and expressly gives a tenant a reciprocal right to attorneys' fees under certain circumstances if the lease gives a landlord that right. Applying a plain read of the statutory text to this case reveals that this case does not involve the application of an implied covenant on a landlord to pay the attorneys' fees for a successful tenant in a summary proceeding.

Petitioner argues that policy and equity support a judgment in attorneys' fees against Respondent, in particular a spirit of reciprocity that RPL §234 endorses. However, to the extent that reciprocity and equity are factors for the Court to consider in this instance, Petitioner's remedy can be to have joined the estate of the Prior Tenant, who is deceased, in this proceeding and then to obtain an award of attorneys' fees against that entity. 245 Realty Assocs. v. Sussis, 243 A.D.2d 29, 36 (1st Dept. 1998), Classic Props. v. Martinez, 173 Misc. 2d 556, 557 (App. Term 1st Dept. 1997).

A bigger problem with Petitioner's argument is a powerful countervailing policy against awarding parties judgments for attorneys' fees. Normally, each side in litigation in New York State bears its own litigation costs in the absence of a statute or an agreement to the contrary.

Flemming v. Barnwell Nursing Home & Health Facilities, Inc., 15 N.Y.3d 375, 379 (2010). New York public policy disfavors any award of attorneys' fees to the prevailing party in a litigation. Pickett v. 992 Gates Ave. Corp., 114 A.D.3d 740, 741 (2nd Dept. 2014). The rule is based upon the high priority accorded free access to the courts and a desire to avoid placing barriers in the way of those desiring judicial redress of wrongs. A. G. Ship Maint. Corp. v. Lezak, 69 N.Y.2d 1, 5 (1986), Horwitz v. 1025 Fifth Avenue, Inc., 34 A.D.3d 248, 249 (1st Dept. 2006).

Given the plain language of RPL §234, the policy considerations against awarding attorneys' fees, Petitioner's potential remedy against the Prior Tenant's estate, and the propositions of law in holdings on cases where licensees did *not* prevail on a succession claim – the facts on this matter – as opposed to propositions of law in cases where successor-tenants *did* prevail on succession claims – the Court finds that the appellate authority of 360 W. 55th St. L.P., *supra*, 13 Misc.3d at 9, *et al.*, did not violate any rule established by Duell, *supra*, upon holding that a licensee who could not prove entitlement to succession did not have an agreement with the owner of the property rendering her liable for the owner's attorneys' fees.

Petitioner also argues that Respondent is judicially estopped from opposing its motion for a judgment sounding in attorneys' fees because Respondent interposed a counterclaim for a judgment sounding in her own attorneys' fees. However, Respondent was unsuccessful in the outcome on trial of this matter. Unsuccessfully raising a claim does not compel invocation of the doctrine of judicial estoppel, as the party doing so has not secured a judgment in its favor by assuming a certain position in a prior legal proceeding and then assuming a contrary position in another action. Pierre v. Mary Manning Walsh Nursing Home Co., Inc., 93 A.D.3d 541, 542 (1st

Dept. 2012).

Petitioner also moves for a judgment sounding in the difference between use and occupancy Respondent has been paying Petitioner and the fair market rent. As a threshold matter, Respondent argues that Petitioner's motion for this relief is untimely, as Petitioner did not seek such relief at trial. However, a landlord's entitlement to use and occupancy does not ripen until the Court grants a possessory judgment. 40 W. 55 LLC v. Kurland, 2003 N.Y. Misc. LEXIS 153 (App. Term 1st 2003). Accordingly, Petitioner's motion for this relief is not untimely.

Respondent also argues that the subject premises remains in rent-controlled status and that Petitioner therefore has no cause of action having to do with market-rate use and occupancy. However, when an occupant of an apartment is not found to have had a right to a regulated rent, there is no basis for using the regulated rent to determine use and occupancy. Katz Park Ave. Corp. v. Jagger, 98 A.D.3d 921, 922 (1st Dept. 2012).

A predicate notice served on a non-regulated occupant of an apartment previously occupied by a rent-regulated tenant marks the point at which a property owner's entitlement pivots from the regulated rent to fair-market use and occupancy. See South St. Ltd. Partnership v. Jade Sea Restaurant, Inc., 187 A.D.2d 397 (1st Dept. 1992), *leave to appeal denied*, 81 N.Y.2d 705 (1993) (in an action to recover possession of real property, damages for the withholding of the property, including the value of use and occupancy are recoverable from the time the tenant begins to hold over without the landlord's consent); Midway Hotel, Inc. v. Forestal, 21 Misc.3d 137A (App. Term 1st Dept. 2008) (fair market use and occupancy collectible from the effective

date of the notice of termination); 230 E. 14th St. LLC v. Klufas, 16 Misc.3d 132A (App. Term 1st Dept. 2007) (a landlord is entitled to recover fair market use and occupancy, inasmuch as the apartment premises was removed from the purview of rent control upon the termination of the tenancy there); Hudson Waterfront Assocs. IV, L.P. v. MTP 59 St LLC, 8 Misc.3d 136A (App. Term 1st Dept. 2005); 40 W. 55 LLC, *supra*, 2003 NY Slip Op. at 50606U (a landlord is entitled to reasonable use and occupancy for the period of the unauthorized holdover subsequent to the time for which rent was payable). The petition herein is predicated upon a notice to quit served upon Respondent that gave notice to Respondent that Petitioner would commence a holdover proceeding if Respondent did not surrender the subject premises on or before February 7, 2010.


Accordingly, the Court denies so much of Petitioner's motion as seeks a judgment sounding in Petitioner's attorneys' fees. The Court grants so much of Petitioner's motion as seeks a judgment sounding in fair market use and occupancy to the extent of finding that Petitioner is entitled to such relief upon Petitioner of bearing its burden of proving,⁴ at a hearing, the reasonable value of the fair market use and occupancy for the subject premises from March of 2010 through the date Respondent surrendered possession of the subject premises. As Respondent's extant cross-motion raises factual issues as to whether Petitioner had knowledge of the evidence Respondent sought in her notice to admit and/or could obtain such knowledge on inspection, the Court also grants Respondent's cross-motion to the extent of calendaring a hearing on that issue as well.

⁴ See 2641 Concourse Co. v. City University of New York, 137 Misc.2d 802, 804-805 (Ct. Cl. 1987), *affirmed for reasons stated*, 147 A.D.2d 379 (1st Dept. 1989).

The Court restores this matter to October 24, 2014 at 9:30 a.m. in part R, Room 851 of the Courthouse located at 111 Centre Street, New York, New York for a hearing as provided herein.

This constitutes the decision and order of this Court.

Dated: New York, New York
September 5, 2014



HON. JACK STOLLER
J.H.C.