

**Getty Props. Corp. v Getty Petroleum Mktg. Inc.**

2014 NY Slip Op 33699(U)

August 20, 2014

Supreme Court, New York County

Docket Number: 651762/12

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

GETTY PROPERTIES CORP.

INDEX NO. 651762/2012

-v-

MOTION DATE

GETTY PETROLEUM MARKETING INC.

MOTION SEQ. NO. 022

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

Upon the foregoing papers, it is ordered that this motion is Renewed Reference is resubmitted to Special Referee JHO Ira Gammaman to compute attorney fees per the attached Renewed Reference.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 20, 2014

MELVIN L. SCHWEITZER S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X  
GETTY PROPERTIES CORP. and GETTYMART INC., :

Plaintiffs, :

-against- :

GETTY PETROLEUM MARKETING INC., :  
1314 SEDGWICK AVE, LLC, 262-12 HILLSIDE AVE :  
LLC a/k/a 262-12 HILLSIDE AVE. LLC, 1224 ROUTE :  
22 LLC, 310 BAY SHORE ROAD LLC, 751 WHITE :  
PLAINS ROAD LLC, 1245 NEPPERHAM AVE, LLC, :  
26-27 COLLEGE POINT BOULEVARD #2 LLC, :  
2 MONTAUK HIGHWAY LLC, 1714 NEW YORK AVE, :  
LLC, 292 RAILROAD AVE, LLC, 600 WHITE PLAINS :  
ROAD LLC, 286 ASHBURTON AVE, LLC, 857 RT. 6 :  
MAHOPAC LLC, 49-25 VAN DAM STREET a/k/a :  
49-25 VAN DAM STREET LLC, 31-05 QUEENS BLVD, :  
LLC a/k/a 31-05 QUEENS BLVD, LLC a/k/a :  
31-05 QUEENS BLVD LLC, 6 BK STREET LLC a/k/a :  
69 BK STREET, LLC, 67 QUAKER RIDGE ROAD LLC, :  
ONE PLEASANTVILLE ROAD LLC, 894 ROUTE 109, :  
LLC, 185 EAST LINCOLN AVENUE LLC, ROBERT G. :  
DEL GADIO and FRANK MASCOLO, :

Defendants. :

-----X

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RENEWED REFERENCE

**MELVIN L. SCHWEITZER, J.:**

By Order and Judgment dated July 23, 2013, the court referred the computation of attorneys' fees in the captioned action to a Special Referee ("There will be, before a Special Referee, a hearing who shall hear and report with respect to plaintiffs' claims for expenses, including attorneys' fees, and all damages. . .").

The court's award of attorneys' fees was affirmed by the Appellate Division, by Decision and Order entered March 27, 2014 ("Judgment, Supreme Court, New York County [Melvin Schweitzer, J.], entered July 23, 2013, *inter alia*, . . . directing that a hearing be

conducted to ascertain plaintiffs' damages, expenses and attorneys' fees . . . unanimously affirmed . . . and the matter is remitted to Supreme Court for further proceedings consistent herewith.").

The court has had the opportunity to read the transcript of the Special Referee's hearing before JHO Ira Gammerman. The Special Referee disputed the basis for the award. He stated,

"No, he [Justice Schweitzer] doesn't hold that....There's nothing--these are leases that didn't provide for a landlord's attorneys' fees, I take it. There's nothing else in the lease that calls for attorneys' fees....These leases don't contain that provision."  
(Tr. 15)

\* \* \*

"I don't think the words attorneys' fees both in Judge Schweitzer's decision and the Appellate Division decision, in my judgment, does not deal with attorneys' fees under Article 23 of the lease, and I don't see any other provision covering attorneys' fees." (Tr. 34-35)

\* \* \*

"If Judge Schweitzer thinks that there's some basis for attorneys' fees in this case I would like him to articulate it rather specifically and he can incorporate it in another order." (Tr. 35)

"All Judge Schweitzer has to do is tell me why he thinks attorneys' fees are appropriate. I don't think he's awarded attorneys' fees. He has to tell me that I am awarding attorneys' fees. He has to tell me that I am awarding attorneys' fees based on the following. And then I will have a hearing on attorneys' fees." (Tr.35)

\* \* \*

"I report that no attorneys' fees were due, based on my reading of the document. That's my report to Judge Schweitzer. If he disagrees with me, he tells me why they are due and refers the matter back to me and I will give him a number." (Tr. 35)

The court respectfully disagrees with the Special Referee in this matter and refers the matter back to him to hear and report with respect to the computation of plaintiffs' award for attorneys' fees, as previously referenced, that the court determined are rightfully due to the plaintiffs. However, to dispel the Special Referee's doubt, the court will explain the basis for its award.

A number of clauses in the Master Lease and the Subleases, when read individually, and as an integrated whole, as previously done by the court and by the Appellate Division, make it clear that attorneys' fees are due to the plaintiffs here.

The provisions are as follows:

Section 32.3 of the Master Lease states:

Legal Costs, Generally. If either party prevails in any litigation or other dispute relating to the enforcement or interpretation of this Restated Lease or arising from this Restated Lease, a Power Test Lease, the Leemilt's Lease, the Gettymart Lease, a Third Party Lease, or the landlord/tenant relationship under this Lease (as determined by the judge presiding over such litigation or dispute), then the losing party shall promptly after Notice (accompanied by reasonable backup documentation), reimburse the prevailing party's Legal Costs incurred in such litigation or other dispute. In addition, Tenant shall promptly after Notice (accompanied by reasonable backup documentation), reimburse Landlord's Legal Costs and other actual, out-of-pocket expenses incurred by Landlord in exercising Landlord's remedies against Tenant upon an Event of Default under this Restated Lease or pursuant to and in any proceeding under the federal bankruptcy code or similar statute affecting Tenant.

\* \* \*

GPMI subleased 20 of the Properties (the "Sites") to the defendant limited liability companies (the "LLCs"), which are controlled solely by Mr. Del Gadio. There was one Sublease

agreement between GPMI and an LLC for each of the Sites. Each Sublease states that it “is subject and subordinate to the Master Lease.” (emphasis supplied)

\* \* \*

Paragraph 19 or 20 of each Sublease provides, in pertinent part, as follows:

“In the event of any default by Lessee . . . Lessee shall be responsible for the following: . . .

c) Reasonable attorney’s fees and expenses resulting from Lessor enforcing any of the remedies described herein, or in the enforcement of this Sublease or in defending any claim brought against Lessor by Lessee against which Lessor successfully defends.” (emphasis supplied)

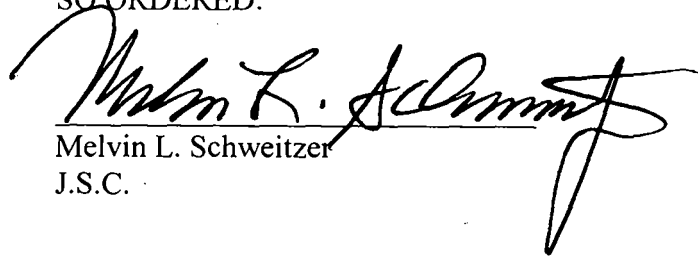
\* \* \*

Paragraph 23 or 24 of each Sublease is an indemnification clause, which states as follows:

“Lessee shall defend, indemnify and hold harmless Lessor, Getty Properties Corp., Getty Realty Corp., and each of their parent and subsidiary companies and affiliates, and each of their officers, directors, shareholders, employees and agents (‘Additional Indemnitees’) from and against any and all losses, claims, demands, suits, actions, judgments, fines, costs, expenses or payments, environmental or otherwise, for, or in connection with this Sublease, any accident, injury or damage whatsoever caused to any person or property arising, directly or indirectly, out of the business conducted at the Premises or on any of the sidewalks adjoining the same, or arising, directly or indirectly, from any violation of any law, agency ruling or regulation, or from any act or omission of Lessee or any subtenant and their respective licenses, servants, agents, customers, employees or contractors, and from and against all costs, expenses and liabilities incurred whether or not in connection with any such claim or proceeding brought in connection therewith. Lessor may select counsel to defend Lessor’s interest in any defense, in which event such counsel shall be at the sole cost and expense of Lessee. Lessee’s obligations

under this Paragraph shall survive in perpetuity any expiration or termination of this Sublease." (emphasis supplied).

SO ORDERED:

 8/20/14

Melvin L. Schweitzer  
J.S.C.