

Gramercy Park Residence Corp. v Ellman

2015 NY Slip Op 31860(U)

September 29, 2015

Supreme Court, New York County

Docket Number: 603071/02

Judge: Nancy M. Bannon

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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 - PART 42**

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GRAMERCY PARK RESIDENCE CORP.

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 603071/02

ELAINE ELLMAN

Defendant

-----x

NANCY M. BANNON, J.

In this action seeking declaratory and other injunctive relief in regard to the defendant shareholder's construction of an enclosed terrace in the plaintiff's cooperative apartment building, this court (Tingling, J.) by an order dated July 9, 2014, granted the plaintiff's motion for summary judgment dismissing the defendant's first counterclaim for damages for breach of a proprietary lease (seq. 006), which is the last remaining counterclaim. However, the court did not rule on the branch of the motion seeking contractual attorneys' fees and costs and disbursements accrued in regard to that counterclaim since 2006, when a Special Referee determined the amount due to the plaintiff up until that time. Thereafter, in August of 2014, the plaintiff moved pursuant to CPLR 2221 to reargue that motion, requesting that the court decide the open branch of the motion (seq. 007). No decision was rendered and, after Justice Tingling's retirement from the bench in December 2014, the action was assigned to this part.

Although sequence 007 is denominated as a motion for reargument pursuant to CPLR 2221, the plaintiff is actually seeking an order determining the undecided branch of its motion for summary judgment under sequence 006 seeking contractual attorneys' fees and costs and disbursements. This the court can do, as that branch of the motion remains pending and undecided (see Pietrafesa v Canestro, 130 AD3d 602 [2nd Dept. 2015]; Katz v Katz, 68 AD2d 536 [2nd Dept. 1979]), purely legal questions are at issue, this court has reviewed the original motion papers and the transcripts of oral argument, and the court is not called upon to weigh

conflicting testimony or assess credibility. See Judiciary Law § 21; See People v Hampton, 21 NY3d 277 (2013); Weiss v City of New York, 277 AD2d 36 (1st Dept. 2000); Plunkett v Emergency Med. Serv. of New York City, 234 AD2d 162 (1st Dept. 1996). Indeed, the open branch of the motion is granted upon the legal principle of law of the case.

By an order dated July 8, 2005, the court (Richter, J.) granted a prior application for attorneys' fees based on the same provision of the proprietary lease that the plaintiff is relying on here, Section 28. That section requires the defendant to reimburse the plaintiff for legal fees and costs and disbursements arising from, *inter alia*, its successful defense of any counterclaim asserted in an action arising from the plaintiff's default under the proprietary lease. On appeal, the First Department, in modifying the order to the extent of denying the defendant's motion for summary judgment on the first counterclaim, noted that the proprietary lease clearly provided for an award of attorneys' fees. See Gramercy Park Residence Corp. v Ellman, 96 AD3d 423 (1st Dept. 2012). The Court held that the amount attorneys' fees due to the prevailing party on the defendant's first counterclaim may be determined only after issues of fact pertaining that counterclaim were resolved. See Id. The prevailing party's entitlement to an award of attorneys' fees is, therefore, law of the case. See Golden City Comm. Bank v 207 Second Avenue Realty Corp., 100 AD3d 403 (1st Dept. 2012); Brownrigg v New York City Housing Auth., 29 AD3d 721 (2nd Dept. 2006). Indeed, courts have consistently found such provisions to be enforceable. See A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1 (1986); 715 Ocean Parkway Owners Corp. v Klagsburn, 74 AD3d 1314 (2nd Dept. 2010); Sempra Energy Trading Corp. v PG & E Texas VGM, L.P., 284 AD2d 253 (1st Dept. 2001); Isaacs v Jefferson Tenants Corp., 270 AD2d 95 (1st Dept. 2000). On remittal, the court (Tingling, J.) resolved the first counterclaim in the plaintiff's favor. Because Section 28 of the proprietary lease remains enforceable just as it was at the time of the prior application, the plaintiff is entitled to an award of attorneys' fees.

The court notes that Justice Richter's July 8, 2005 order referred the issue of, *inter alia*, the amount of costs, fees, and expenses recoverable by the plaintiff from the defendant to a Special Referee to hear and report pursuant to CPLR 4212. After the parties then stipulated that the plaintiff's reasonable net attorney's fees would be \$81,000 and costs for incurred bond premiums was \$15,000, the Special Referee, in a decision dated November 3, 2006, determined that the plaintiff was due other costs and expenses in the amount of \$1,082.50.

However, the parties failed to file a motion to confirm or reject the Special Referee's report until 2010, and their respective motion and cross-motion for such relief were denied as untimely by Justice Tingling on February 28, 2011. There is no indication that any appeal of that order was ever perfected.

The plaintiff now seeks attorneys' fees and costs and disbursements on the first counterclaim, including those relating to the 2012 appeal of Justice Richter's July 8, 2005 order. Due to the protracted nature of this litigation and because the issue of the amount due to the plaintiff for contractual attorneys' fees and costs and disbursements is not ascertainable on the papers before the court, the matter is referred to a Judicial Hearing Officer or Special Referee to hear and report on the issue. See CPLR 4212. As the prior report of the Special Referee, dated November 3, 2006, accounted for attorney's fees and costs and disbursements up until that date, the Judicial Hearing Officer or Special Referee shall hear and report on any such claims of the plaintiff incurred after that date.

The court notes that the plaintiff's pre-argument statement on its cross-appeal asks the Appellate Division to decide the open branch of the motion. However, there is no stay of the July 9, 2014 order and, in any event, the matter would likely be remitted to the Supreme Court for that determination.

To the extent the motion under sequence 007 seeks any further relief, that motion is denied.

Accordingly, and upon the foregoing papers, it is

ORDERED that the branch of the plaintiff's motion (seq. 006) seeking an award of attorneys' fees and costs and disbursements is granted, and the matter is referred to a Judicial Hearing Officer ("JHO") or Special Referee to hear and report, as below, and it is further,

ORDERED that the plaintiff's motion for reargument (seq. 007) is granted to the extent that the open branch of the motion under sequence 006 is decided as above, and the motion under sequence 007 is otherwise denied, it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

1. the issue of the amount due to the plaintiff for attorneys' fees and costs and disbursements after November 3, 2006, and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above, and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, and it is further

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above, and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by

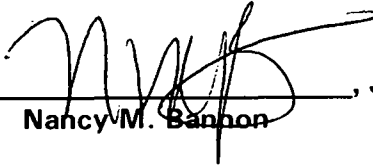
the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the Decision and Order of the court.

Dated: September 29, 2015


_____, JSC
Nancy M. Bannon