

Mulholland v Moret
2015 NY Slip Op 32201(U)
September 29, 2015
Supreme Court, Kings County
Docket Number: 503882/2014
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 503882/2014
Motion Date: 4-27-15
Motion Cal. No.: 44-46

-----X
EVELYN MULHOLLAND, MICHAEL MULHOLLAND,
SHAWN MULHOLLAND & JACQUELINE
MULLHOLLAND,

SEQ 003, 004, 005, 006

Plaintiff,

DECISION/ORDER

-against-

RAMON RIVERA MORET and ELIZABETH DONSKY,

Defendants,
-----X

The following papers numbered 1 to 8 were read on this motion:

Papers:	Numbered
Plaintiffs' Motion for Re-argument:	
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	1
Answering Affirmations/Affidavits/Exhibits.....	2
Reply/Affirmations/Affidavits/Exhibits.....	
Other.....	
Defendants' Motion to Reargue and for Attorneys Fees:	
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	3
Answering Affirmations/Affidavits/Exhibits.....	
Reply/Affirmations/Affidavits/Exhibits.....	4
Other.....	
Defendants' Cross-motion for Leave to Amend:	
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	5
Answering Affirmations/Affidavits/Exhibits.....	6
Reply/Affirmations/Affidavits/Exhibits.....	7
Other.....	
Plaintiffs' Motion for Summary Judgment and to Dismiss:	
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	8
Answering Affirmations/Affidavits/Exhibits.....	
Reply/Affirmations/Affidavits/Exhibits.....	
Other.....	

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FILED
KINGS COUNTY CLERK

In this action for declaratory and injunctive relief, there are various motions before the Court, all of which are consolidated for disposition. Upon the foregoing papers, the motions decided as follows:

Plaintiffs' motion for re-argument is **DENIED**.

A motion for re-argument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*see*, CPLR 2221[d][2]; *Rodney v. New York Pyrotechnic Prods. Co.*, 112 A.D.2d 410, 411, 492 N.Y.S.2d 69; *Loland v. City of New York*, 212 A.D.2d 674, 674, 622 N.Y.S.2d 762, 763). Here, plaintiffs have not demonstrated that the court overlooked or misapprehended the facts or law in granting defendants' cross-motion for summary judgment and denying plaintiff's request for injunctive relief.

Defendants' motion to reargue is **GRANTED** and upon re-argument, defendants' motion for summary judgment dismissing plaintiff's fourth cause of action is **GRANTED**. On their original motion, defendants established their entitlement to judgment as a matter of law by showing that the plaintiffs have not alleged in their complaint that any of the photographs and/or videos of the defendants have been used commercially. Plaintiffs failed to raise a triable issue of fact.

Defendants have not demonstrated that the court overlooked or misapprehended the facts or law in denying their motion to dismiss plaintiff's fourth cause of action.

Defendants' motion for attorneys fees is **DENIED**.

Defendants contend that they are entitled to an award for reasonable attorney's fees and costs on their Fourteenth counterclaim pursuant to paragraph 27 of the lease agreement

which states: “Legal Fees. The successful party in a legal action or proceeding between Landlord and Tenant for non-payment of rent or recovery of possession of the Apartment may recover reasonable attorneys fees and costs from the other party.”

Plaintiffs correctly contend that they commenced the action for a judgment declaring the parties rights with respect to the backyard, not to recover possession of defendants’ apartment.

Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule (*Hooper Assocs, Ltd v. AGS Computers, Inc*, 74 NY2d 487, 491 (1989). Here, defendants’ claim for attorneys fees is based solely on paragraph 27 of the lease agreement. An attorney's fees clause in a lease or agreement must be strictly construed (*see Andrews 44 Coffee Shops Inc. v. TST/TMW 405 Lexington, L.P.*, 40 A.D.3d 544, 545, 837 N.Y.S.2d 634, 635 (2007); *Gottlieb v. Such*, 293 A.D.2d 267, 268, 740 N.Y.S.2d 44 [2002], *lv. denied* 98 N.Y.2d 606, 746 N.Y.S.2d 457, 774 N.E.2d 222 [2002]; *see also Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 492, 549 N.Y.S.2d 365, 548 N.E.2d 903 [1989]) and the Court should not infer a party's intention to waive the benefit of the well-understood rule that the parties to an action are responsible for their own attorney's fees unless the intention to do so is unmistakably clear from the language of the promise (*Hooper Assocs, Ltd v. AGS Computers, Inc, supra* at 492).

Here, the action between the parties is not for the non-payment of rent or for the recovery of defendants’ apartment. The essential relief sought by the plaintiffs was a declaration of parties rights to the backyard. Defendants’ reliance on *Soundview Shopping Ctr. v. Port Bay Associates*, 230 A.D.2d 729, 730, 646 N.Y.S.2d 159, 160 is misplaced in that the relevant lease provision in that case permitted the landlord to recover attorneys fees

for the enforcement of the covenants and provisions of the lease. No such provision or similar provision is contained in the lease in this case.

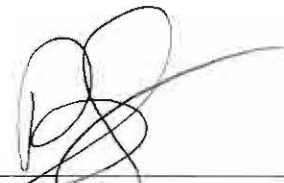
Defendants' motion to serve an amended verified answer containing new counterclaims is **GRANTED** but only to the extent that defendants may serve the proposed first amended verified answer once all the counterclaims that are now moot given that defendants are no longer in possession have been deleted.

It is well established that leave to amend pleadings shall be freely given unless the party opposing the motion can demonstrate prejudice or surprise from a delay and that mere delay, absent a showing of prejudice, is insufficient to deny such leave (*see. Girardi v. Community Hosp. of Brooklyn*, 137 A.D.2d 788, 525 N.Y.S.2d 335; *Covert Ave. Apts. v. Town of Babylon*, 134 A.D.2d 230, 520 N.Y.S.2d 575; *Buley v. Beacon Tex-Print*, 118 A.D.2d 630, 499 N.Y.S.2d 782). Here, plaintiffs have failed to demonstrate that they would be prejudiced in anyway if the motion is granted.

Plaintiffs' motion to dismiss plaintiffs first through fourteenth counterclaims as set forth in their Answer dated May 28, 2014 is **DENIED**, without prejudice to renewal once defendants have served plaintiffs with an amended verified answer in accordance with this order.

This constitutes the decision and order of the Court.

Dated: September 29, 2015



PETER P. SWEENEY, A.J.S.C.

HON. PETER P. SWEENEY, J.S.C.

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