

Gorman v 69-73 Greene St. Owners, LLC

2016 NY Slip Op 30061(U)

January 12, 2016

Supreme Court, New York County

Docket Number: 158575/13

Judge: Jennifer G. Schechter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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PATRICK GORMAN and PATRICIA PORTELA,

Index No.158575/13

Plaintiffs,

-against-

69-73 GREENE STREET OWNERS, LLC,
Defendant.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212 and 3211(a)(1), (5) and (7),
defendant moves for summary judgment dismissing plaintiffs'
third cause of action for attorneys' fees. Plaintiffs oppose
the motion. The motion is denied.

Background

Plaintiffs Patrick Gorman and Patricia Portela occupy the
fifth-floor loft in the building located at 71 Greene Street
in Manhattan (Premises). Gorman has lived in the Premises
since 1969 and Portela moved in around 1980 (Supp, Ex G
[Complaint] at ¶ 9).

At the time Gorman moved into the Premises, Danzlor
Realty Corp. owned the building (*id.* at ¶ 10). In 1970, the
building was purchased by 71 Greene Street Inc., whose
principal was Henry Zeisel (*id.* at ¶ 11). Upon Henry Zeisel's
death, his son, Robert Zeisel, became the president and owner
of 71 Greene Street Inc. (*id.* at 13).

Upon conversion of the premises to residential use and completion of legalization through the New York City Loft Board, plaintiffs became the rent stabilized tenants of the Premises and executed a lease commencing April 1, 1997 (Affirmation in Support [Supp], Ex B). Attached to the Lease is a rider (Rider), which was negotiated between Robert Zeisel and Gorman. In pertinent part, the Rider provides in ¶ 5 that "[a]s agreed, elevator will be available upon request based upon our oral understandings. Elevator usage terminates with this tenant." (Supp, Ex B at Rider ¶ 5).

In 2012, Gorman commenced a Housing Part proceeding in Civil Court, New York County (HP Proceeding), alleging that Robert Zeisel and the building's managing agent at the time, created a condition hazardous to his health and safety in violation of the Multiple Dwelling Law and New York City Housing Maintenance Code by deliberate intermittent discontinuation of elevator service (Supp, Ex C at ¶ 7). The proceeding was dismissed by Decision and Order dated September 25, 2012. The court held, among other things, that it had no jurisdiction over the elevator matter in an HP proceeding (Supp, Ex A at 10, 16). In addition, the court held that there was "no lease provision permitting the recovery of attorneys' fees" in the HP Proceeding (*id.* at 16).

Subsequently, in November 2012 defendant 69-73 Greene Street Owner, LLC purchased the building.

In this action, commenced in 2013, plaintiffs allege that defendant refused to honor plaintiff's lease with regard to the elevator" (Supp, Ex G at ¶ 25). Plaintiffs further allege that the "failure by defendant to provide any evening or weekend elevator access is in contravention of the plaintiffs' lease . . ." (*id.* at ¶ 31). In their first cause of action, plaintiffs' allege that such failure "to provide elevator access to plaintiffs upon request violates the terms of the lease by which defendant is bound" and that as a consequence they are entitled to a declaration as to the extent of elevator usage that they are entitled to (*id.* at ¶ 33 [emphasis added]). In the second cause of actions plaintiffs reassert that defendant's failure to provide elevator access upon request violates the terms of the Lease and they seek an injunction requiring defendant to provide appropriate elevator access. Finally, in their third cause of action, plaintiffs seek attorneys' fees pursuant to Real Property Law (RPL) § 234.

Defendant now seeks dismissal of plaintiffs' third cause of action for attorneys' fees, urging that, based on the September 2012 HP proceeding, *res judicata* precludes the recovery sought. It also argues that the attorneys'-fees

claim should be dismissed based on documentary evidence and because RPL § 234 does not apply (Supp at 7-8).

Analysis

In *Graham Court Owners Corp. v Taylor* (24 NY3d 742 [2015]), the Court of Appeals established that a lease provision permitting a landlord to recover attorneys' fees because of a tenant's default under the lease, triggers RPL § 234's reciprocal-attorneys'-fees provision.

RPL § 234 sets forth:

"Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, 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 as a result of the failure of the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy."

(RPL § 234).

In order for RPL § 234 to be triggered, the lease must permit the landlord, in any action or summary proceeding, to recover attorneys' fees as a result of tenant's breach. Where the lease provides for such recovery, the court interprets the lease to similarly permit the tenant to seek fees for the landlord's breach under the lease.

Here, there are two provisions in the Lease that trigger the application of RPL § 234:

"16(D)(3). Tenant's default . . . Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes under the Lease. Landlord's expenses include the costs of getting possession and re-renting the Apartment, including, but not only reasonable attorneys' fees . . .

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

(Supp, Ex B at ¶¶ 16(D)(3) and 27).

In *Graham Court Owners Corp. v Taylor*, 24 NY3d 742 [2015], the court held that a clause identical to paragraph 16(D)(3) of the Lease in this action, triggered RPL § 234. The court explained that the subject paragraph of the lease "titled 'Tenant's default,' sets forth the landlord's remedies and the tenant's liabilities upon the tenant's failure to comply with a term or rule in the lease . . . the landlord's

rights to attorneys' fees are set forth in clause (D)(3) . . . [this section] complies with the requirements of Real Property Law § 234 that the lease provide 'in any action or summary proceeding' for the landlord's recovery of attorneys' fees 'incurred as a result of the failure of tenant to perform any covenant or agreement contained in such lease'" (*id.* at 748).

The landlord argues that an agreement calling for attorneys' fees should be narrowly interpreted (Supp at ¶ 23; Memo in Supp at 8-9). However, as explained, the issue is whether the landlord may recovery attorneys' fees incurred as a result of the tenant's breach of a leasehold covenant or agreement. Here, section 16(D)(3) does provide for such recovery by permitting the landlord to recover attorneys' fees for getting possession and re-letting the premises when the tenant breaches the lease (*id.* at 749).

The landlord also urges that RPL § 234 is inapplicable because a determination that the landlord breached the lease is not a part of this case. The landlord contends that the tenants do not seek a declaration that the landlord breached the lease, rather, they seek declaratory and injunctive relief with regard to elevator usage (Memo in Reply at 6-7, 9-10).

Plaintiffs, however, specifically allege that the landlord breached paragraph 5 of the Rider by not providing

service as agreed upon in the lease in addition to seeking declaratory and injunctive relief to enforce paragraph 5 of the Rider (Supp, Ex G ¶¶ 25 ["Defendant has refused to honor Plaintiffs lease with regard to the elevator"], 33-34 [Defendant's failure to provide elevator access to Plaintiffs upon request violates the terms of the lease by which Defendant is boundAs a consequence Plaintiffs are entitled to a declaratory judgment"] and 35-36 ["Defendant's failure to provide elevator access to Plaintiffs upon request violates the terms of the lease by which Defendant is bound. . . . Consequently, Plaintiffs are entitled to an injunction"]).

Defendant's argument that plaintiffs' cause of action for attorneys' fees should be dismissed based on documentary evidence and res judicata also fails.

"The doctrine of res judicata is designed to put an end to a matter once duly decided. It forbids relitigation of the matter as an unjustifiable duplication, an unwarranted burden on the courts as well as on opposing parties. Its main predicate is that the party against whom it is being invoked already had a day in court, and, if it was not satisfactory, the proper course was to appeal the unsatisfactory result rather than ignore it and attempt its relitigation in a separate action" (Siegel, NY Prac § 442 at 772 [5th ed 2011]).

The prior HP proceeding does not bar plaintiffs' claims in this action. First, that action was not between the same parties. In addition, claims raised in this action were not raised and could not have been raised in the HP proceeding. In fact, that court held, among other things, that there was no violation under the law which the elevator service fell, which would confer jurisdiction for an HP Proceeding (Supp, Ex A at 10, 16). Additionally, that court held that the landlord, under those circumstances, was not entitled to attorneys' fees pursuant to paragraph 27 of the Lease (*id.* at 16-17). Tenant's potential to recover attorneys' fees and RPL § 234 and paragraph 16(D)(3) could not have been addressed in that context.

Accordingly, it is

ORDERED that defendant's motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: January 12, 2016



HON. JENNIFER G. SCHECTER