

**South Tower Residential Bd. of Mgrs. of Time
Warner Ctr. Condominium v Ann Holdings, LLC**

2017 NY Slip Op 31231(U)

June 8, 2017

Supreme Court, New York County

Docket Number: 156148/2012

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

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

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THE SOUTH TOWER RESIDENTIAL BOARD OF
MANAGERS OF TIME WARNER CENTER
CONDOMINIUM,

Plaintiff,

-against-

THE ANN HOLDINGS, LLC f/k/a THE ANN LLC,

Defendant.
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**DECISION AND
ORDER**

Index No.
156148/2012
Mot. Seq. 008

HON. ANIL C. SINGH, J.:

Plaintiff The South Tower Residential Board of Managers of Time Warner Center Condominium (the "Board") moves for an award of attorneys' fees as the prevailing party in an appeal before the Appellate Division, First Department against defendant The Ann Holdings, LLC f/k/a The Ann LLC ("Ann Holdings"); directing the release of \$220,695.62 held by Kensington Vanguard Land Services of NY, LLC ("the Escrow Agent"); and to modify the judgment to reflect the increase of statutory interest that has accrued since the date of the judgment.

Ann Holdings opposes an award of additional attorneys' fees incurred in the appeal. Further, it maintains that the escrow funds should not be disbursed pending resolution of this dispute.

On February 25, 2014, this Court granted the Board summary judgment motion on its cause of action for specific performance. (the “February 2014 Order”). The Court held that Ann Holdings breached the Condominium’s by-laws by failing to convey title to the Board’s exercise of the right of first refusal.

A judgment, filed on April 23, 2014, contained a provision requiring a Special Referee to determine the legal fees and costs due the Board. Ann Holdings appealed the decision and order dated February 25, 2014, as well as the judgment. In a memorandum opinion dated April 9, 2015, the Appellate Division unanimously affirmed the judgment and underlying order.

Thereafter, Ann Holdings moved to strike the Board’s request for attorneys’ fees in the underlying action. The Court denied the motion reasoning that a final judgment had been entered in April 2014 and affirmed by the Appellate Division in April 2015. The action had been fully resolved with an award of attorneys’ fees.

In addition, the Court stated that the Board was entitled to recover its attorneys’ fees under Section 6.20.1(iii) of the bylaws “to have its costs and expenses by reason of such breach or violation repaid to it”

Board of Mgrs. of Amherst Condominium v. CC Ming (USA) Ltd. Partnership, 17 A.D.3d 183 [1st Dept., 2005].

The matter was referred to a Special Referee to hear and determine the amount of reasonable attorneys' fees due to the Board. By decision dated April 22, 2016, the Special Referee awarded the Board the sum of \$185,633.73 for costs and reasonable attorneys' fees with statutory interest. A judgment in the amount of \$220,695.62 was entered by the Clerk of the Court on August 4, 2016 (the "Fee Award").

Ann Holdings deposited \$360,000.00 with the Escrow Agent, pursuant to an escrow agreement dated November 12, 2015 (the "Escrow Agreement"). The Escrow Agreement provided that the funds would be held until the Escrow Agent received (i) either writing signed by both parties directing disbursement of the escrow, or (ii) a writing signed by one party, with a copy of a final and non-appealable judgment from the court directing disbursement of a specific sum. (NYSCEF No. 135, p. 15, para. 5)

Ann Holdings then unsuccessfully appealed the Fee Award (the "Second Appeal"). By Decision and Order dated December 22, 2016, the First Department unanimously affirmed the Fee Award holding that the issue of attorneys' fees should have been raised in its prior appeal and will not be considered in this appeal. However, the Appellate Division went on to state that "[t]he error in allowing plaintiff to obtain attorneys' fees is not so fundamental as to impel us to address this issue in the interest of justice (citation omitted)" (at p. 2).

By letter dated January 30, 2017, the Board requested that the Escrow Agent release \$220,695.62 to the Board. The Escrow Agent declined to disburse the sum as requested because the January 30, 2017 letter was only signed by the Board, and not by Ann Holdings.

Discussion

Fees for Second Appeal and Fees on Fees

The Board argues that it is the law of the case to receive fees for the Second Appeal. The law of the case doctrine prohibits a party from re-litigating pre-judgment rulings “made by courts of coordinate jurisdiction in a single litigation.” People v. Evans, 94 N.Y.2d 499, 503 (2000) (citing Martin v. Cohoes, 37 N.Y.2d 162 (1975)). “[A]pplication of [the law of the case doctrine] necessarily requires an identity of issues between the earlier determination and the matter sub judice.” Brown v. Sears Roebuck & Co., 297 A.D.2d 205, 208 (1st Dept 2008). The doctrine “contemplates that the parties had a full and fair opportunity to litigate when the initial determination was made.” Chanice v. Fed. Express Corp., 118 A.D.3d 634 (1st Dept 2014) (citing Evans, 94 N.Y.2d at 502). The “law of the case doctrine ‘is not inflexible, and applies only to issues decided, directly or by implication, at an earlier stage of the action.’” Matter of Brian L. v. Admin. for Children’s Servs., 51 A.D.3d 488, 492 (1st Dept 2008).

The law of the case doctrine has no application here as the issues are different. Plaintiff was awarded attorneys' fees based on a judgment. Ann Holding appealed the judgment but not the Fee Award. The judgment was affirmed on appeal and plaintiff was foreclosed from challenging the Fee Award. The action is now fully resolved and the underlying judgment may not be utilized to seek yet another award of attorneys' fees.

Furthermore, the February 2014 Order awarding attorneys' fees was based on a breach of the by-laws' general fee provision. The request for attorneys' fees incurred in the Second Appeal does not arise from breach of the by-laws but rather from a challenge to the Fee Award. The by-laws do not support legal fees incurred appealing an award of attorneys' fees.

As for the issue of fees on fees, the Board argues that fees on fees should be granted due the language of the by-laws' general fee provision. Fees on fees "is, the recovery of fees and costs for preparing for an attorneys' fee application", or more specifically, related to preparation in connection with defending the Fee Award. RSB Bedford Assoc., v Ricky's Williamsburg, Inc., 112 A.D.3d 526 (1st Dept 2013). Generally, when a statute or contract is silent on such relief, this Court finds that fees on fees is not recoverable. City of Buffalo v. Clement Co., 28 N.Y.2d 241, 262-263 (1971); Equitable Lbr. Corp. v. IPA Land Development Corp., 38 N.Y.2d 516 (1976). There is no specific language in the general fee

provision that mentions or remotely alludes to fees on fees. Additionally, the Special Referee previously decided on this issue, and determined that the Board was not entitled to this type of relief. (NYSCEF No. 130, p. 15). Accordingly, the Board is not entitled to any fees on fees.

Modification of Fee Award to Include Statutory Interest Rate

The Board seeks a further modification of the Fee Award to include statutory interest from August 5, 2016 to the current time. This branch of the motion is granted without opposition. Statutory interest is granted through the date of entry of an amended judgment reflecting accrued interest only.

Escrow Fund Release

The Court directs that the Escrow Agent disburse the sum of \$220,695.62 to the Board, pursuant to the Escrow Agreement with accrued interest through the entry date of the judgment as amended by this order.

Accordingly, it is


ORDERED that The South Tower Residential Board of Managers of Time Warner Center Condominium's motion for additional attorneys' fees and costs including fees on fees is denied; and it is further

ORDERED that Kensington Vanguard National Land Services of NY, LLC be directed to disburse the \$220,695.62 in its escrow plus the sum that reflects

accrued interest within ten day of service of the amended judgment by the Board upon Ann Holdings and the Escrow Agent.; and it is further

ORDERED that The South Tower Residential Board of Managers of Time Warner Center Condominium is awarded \$220,695.62 with interest at the statutory rate of nine percent (9%) from August 5, 2016 until entry of the amended judgment, as calculated by the Clerk of the Court.

Date: June 8, 2017
New York, New York



Anil C. Singh