

**Moskowitz Children Irrevocable Trust v Tribeca  
Hospitality Corp.**

2018 NY Slip Op 30575(U)

April 2, 2018

Supreme Court, New York County

Docket Number: 159188/2013

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH
Justice

PART 29

THE MOSKOWITZ CHILDREN IRREVOCABLE TRUST,

INDEX NO. 159188/2013

Plaintiff,

MOTION DATE 3/20/18

- v -

MOTION SEQ. NO. 003

TRIBECA HOSPITALITY CORP. d/b/a THE GREEK,

Defendant.

The following papers, numbered 80-107, were read on this motion for summary judgment.

Notice of Motion-Affirmation in Support-Aff in Support-Exhibits A-1-
Memorandum of Law in Support

Nos. 80-92

Substitution/Change of Attorney-Stipulation to Adjourn Motion Return
Date-Affirmation in Opposition-Exhibits A-B-Aff in Opposition-Ltr

Nos. 93-102

Reply Affirmation in Further Support-Exhibits A-B-Reply Memorandum of
Law in Further Support-So-Ordered Stipulation Dismissing Counterclaims
with Prejudice and Adjourning Case to March 20, 2018

Nos. 103-107

Motion by Plaintiff The Moskowitz Children Irrevocable Trust ("Moskowitz")
pursuant to CPLR 3212 for summary judgment against Defendant Tribeca
Hospitality Corp. d/b/a The Greek ("Tribeca") and for an order granting
Moskowitz attorney's fees is granted to the following extent.

Moskowitz brought the underlying action on October 7, 2013, by e-filing a
summons and complaint. Moskowitz alleged, in sum and substance, that certain
work that was done by Tribeca needed various sign-offs which had not been
obtained as requested. Tribeca then complied with these requests after the
underlying action had been commenced. As such, the underlying action was
deemed moot by Moskowitz, and on August 25, 2015, the action was marked off
by the Court pursuant to 22 NYCRR 202.27 due to the nonappearance of both
sides. (NY State Cts Elec Filing [NYSCEF] Doc No. 45).

Thereafter, by a motion brought by an order to show cause dated March 2,
2016, Tribeca sought to restore the action to pursue its counterclaims against
Moskowitz. (NYSCEF Doc No. 46.) Moskowitz then cross-moved for attorney's

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

fees for arguing the order to show cause. Moskowitz argued in its papers that Article 19 of the lease between Plaintiff/landlord and Defendant/tenant provides for an award of reasonable attorney's fees to the prevailing party in litigation between the landlord and tenant relating to any default on the lease. Per its decision and order dated April 6, 2016, this Court granted Tribeca's motion, to the extent that it restored the action to the calendar "as to the Defendant's counterclaims against the Plaintiff," and denied Moskowitz's cross-motion as premature. (NYSCEF Doc No. 78.)

At a status conference held on June 15, 2017, the Court directed Tribeca to file its note of issue on the counterclaims by July 21, 2017. The Court stated to Tribeca "[i]f you do not file the note of issue and place this case on the calendar, the Court will dismiss your counterclaim[s]." (June 15, 2017 tr at 3, lines 1-3.) The Court then indicated at a status conference held on August 1, 2017, that it would, in 30 days, dismiss the counterclaims for failure to prosecute due to Tribeca not filing the note of issue. The Court also gave Moskowitz until September 19, 2017, to make the instant motion. Counsel for Moskowitz stated on the record at the August 1, 2017 conference that "[t]he attorneys' fees will be from the time that [Tribeca] sought to restore [the] counterclaim [] and then tried to get out of the counterclaim by saying [Tribeca] want[s] it dismissed." (August 1, 2017 tr at 4, lines 7-11.)

The Court periodically reviewed NYSCEF in the interim and determined that the note of issue had not been filed. The Court nevertheless, as indicated on the record, forestalled dismissing Tribeca's counterclaims to allow for time to consider any application by Moskowitz for attorney's fees. The Court did not dismiss the counterclaims from the bench at any status conference.

Moskowitz filed the instant motion on September 6, 2017, seeking dismissal of the counterclaims and an award of attorney's fees. At a conference on January 9, 2018, the court so-ordered a stipulation by and between the parties wherein Moskowitz and Tribeca agreed that "[t]he Defendant's counterclaims are dismissed with prejudice." (NYSCEF Doc No. 107.) In Plaintiff's reply papers, Plaintiff indicated that he would withdraw that portion of its summary judgment motion which sought dismissal of the counterclaims if Defendant would agree to discontinue the counterclaims with prejudice.

## DISCUSSION

In light of the January 9, 2018 stipulation dismissing the counterclaims with prejudice, the Court will consider Moskowitz's summary judgment motion withdrawn as to Tribeca's counterclaims. The sole issue now before the Court is whether a party may be considered to have "prevailed," and therefore be entitled to attorney's fees under a lease provision similar to article 19 of the parties' lease in the instant case, where a party discontinues a claim with prejudice.

In *Goidel v Siegel, LLP v 122 East 42nd Street, LLC* (143 AD3d 567 [1st Dept 2016]), the Appellate Division, First Department held that a landlord was the prevailing party where, in multiple litigations brought against each other, the parties stipulated to a settlement whereby: a) the parties discontinued the remaining claims with prejudice; and b) the tenant agreed to pay, among other things, certain allegedly unpaid and additional rent obligations. The *Goidel* Court found that the proceedings in the case were effectively over because of the stipulation and that the landlord had obtained all the relief it had sought except for legal fees.

Here, there is no dispute that the underlying action was rendered moot and settled when Tribeca provided Moskowitz with the relief sought in its complaint. Further, if Tribeca had not moved by order to show cause in March 2016 to restore the action to pursue its counterclaims, Moskowitz would not have needed to expend time and legal resources to defend itself against such claims, which were eventually discontinued with prejudice.

As the remaining counterclaims have now been discontinued with prejudice by agreement of the parties, the proceedings in the instant action are effectively over, with Moskowitz having obtained the central relief it sought in the action. As such, the Court finds that Moskowitz is the prevailing party for purposes of article 19 of the lease and is entitled to an award of reasonable attorney's fees from March 3, 2016, when Tribeca brought its motion to restore by order to show cause, to the date of this decision and order.

**CONCLUSION**

Accordingly, it is

ORDERED that the motion by Plaintiff The Moskowitz Children Irrevocable Trust pursuant to CPLR 3212 for summary judgment against Defendant Tribeca Hospitality Corp. d/b/a The Greek and for an order granting Moskowitz attorney's fees is granted to the extent that it is

ORDERED that the motion for summary judgment is resolved as academic based upon the January 9, 2018 stipulation of discontinuance; and it is further

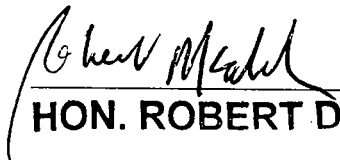
ADJUDGED that Moskowitz is the prevailing party in the instant action; and it is further

ORDERED that the issue of the amount of reasonable attorney's fees Moskowitz may recover against Tribeca from March 3, 2016 to the date of this order is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

The foregoing constitutes the decision and order of the Court.

Dated: April 2, 2018  
New York, New York

 J.S.C.  
**HON. ROBERT D. KALISH**

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED                       NON-FINAL DISPOSITION
- GRANTED     DENIED     GRANTED IN PART     OTHER
- SETTLE ORDER                       SUBMIT ORDER
- DO NOT POST     FIDUCIARY APPOINTMENT     REFERENCE