

Fiondella v 345 W. 70th Tenants Corp.
2019 NY Slip Op 32963(U)
October 4, 2017
Supreme Court, New York County
Docket Number: 100594/2014
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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PAUL FIONDELLA,

Index No. 100594/2014

Plaintiff

- against -

DECISION AND ORDER

345 WEST 70TH TENANTS CORP.,

Defendant

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LUCY BILLINGS, J.S.C.:

I. PLAINTIFF'S MOTION FOR REARGUMENT

Plaintiff, a proprietary lessee and shareholder in defendant's residential cooperative corporation, moves to reargue, C.P.L.R. § 2221(d), his prior motion for partial summary judgment on his third claim. The court granted his motion insofar as it sought a declaratory judgment that he is not obligated to pay attorneys' fees incurred by defendant in defending a proceeding by his rent controlled tenant Adolfo Meana and Meana's licensee Christopher Cohen to correct deficient conditions in the leased apartment for which Cohen claimed defendant was responsible. C.P.L.R. §§ 3001, 3212(b). In calculating the attorneys' fees claimed in defendant's bills to which defendant was not entitled, however, the court overlooked \$2,951.25 for which defendant billed plaintiff as part of its fees incurred in seeking to recover prior fees to which defendant was not entitled under the provision in the parties' proprietary lease authorizing recovery of attorneys' fees. Ricketts v. Cuffe

Auto Sales, Inc., 106 A.D.3d 635, 635 (1st Dep't 2013); N450JE LLC v. Priority I Aviation, Inc., 102 A.D.3d 631, 632 (1st Dep't 2013); Martin v. Portexit Corp., 98 A.D.3d 63, 65 (1st Dep't 2012); 1735 Univ. Ave. Assoc. LLC v. Andrews Dev. Corp., 92 A.D.3d 516, 516 (1st Dep't 2012). See People v. D'Alessandro, 13 N.Y.3d 216, 219 (2009); Board of Educ. of City Sch. Dist. of City of N.Y. v. Grullon, 117 A.D.3d 572, 573 (1st Dep't 2014); Windham v. New York City Tr. Auth., 115 A.D.3d 597, 600 (1st Dep't 2014).

II. DEFENDANT'S CROSS-MOTION FOR REARGUMENT

Defendant cross-moves to reargue plaintiff's motion for partial summary judgment based on the provision defendant previously relied on and other provisions of the proprietary lease, which defendant claims do authorize recovery of the attorneys' fees to which the court found defendant was not entitled. The provision on which defendant relied in opposition to plaintiff's motion for partial summary judgment allowed defendant to collect attorneys' fees only in specified circumstances:

28. If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent.

Aff. of Charla Bikman Ex. A, at 9. The proceeding for which defendant claimed fees was not a proceeding based on plaintiff's default nor a proceeding commenced by plaintiff. Defendant

incurred its attorneys' fees defending the proceeding in the New York City Civil Court Housing Part by Meana and Cohen, who were not lessees under the proprietary lease. Id. See Conniff v. 32 Gramercy Park Owners Corp., 91 A.D.3d 510, 510 (1st Dep't 2012); Jo-Fra Props., Inc. v. Bobbe, 81 A.D.3d 29, 35 (1st Dep't 2010); Silverstein v. Westminster House Owners, Inc., 50 A.D.3d 257, 258 (1st Dep't 2008); Dupuis v. 424 E. 77th Owners Corp., 32 A.D.3d 720, 722 (1st Dep't 2006).

No provision of the proprietary lease allows defendant to collect from plaintiff attorneys' fees incurred in any proceeding by Meana, by a subtenant, or by a licensee. Bikman Aff. Ex. A, at 10. Paragraph 11, an indemnification provision in the lease on which defendant now relies, is not a provision on which defendant relied for its attorneys' fees in opposition to plaintiff's motion for partial summary judgment. Its motion for reargument is not its opportunity to raise new points not raised in the context of the prior motion to be reargued. People v. D'Alessandro, 13 N.Y.3d at 219; Onglingswan v. Chase Home Fin., LLC, 104 A.D.3d 543, 544 (1st Dep't 2013); Tounkara v. Fernicola, 63 A.D.3d 648, 649 (1st Dep't 2009). In any event, this paragraph is inapplicable, because the claims in the Housing Part proceeding were not for "liability, loss, damage and expense arising from injury to person or property." Aff. of Alexander J. Drago ¶ 11.

Finally, defendant ignores the court's primary basis for finding that defendant was not entitled to the attorneys' fees

claimed: it failed to seek the fees incurred for the Housing Part proceeding in that proceeding where they were incurred and, by seeking them through a separate claim, was impermissibly splitting a claim. Emery Roth & Sons v. National Kinney Corp., 44 N.Y.2d 912, 914 (1978); 930 Fifth Corp. v. King, 42 N.Y.2d 886, 887 (1977); O'Connell v. 1205-15 First Ave. Assoc., LLC, 28 A.D.3d 233, 234 (1st Dep't 2006); Wavertree Corp. v. 136 Waverly Assoc., 258 A.D.2d 392, 392 (1st Dep't 1999). Insofar as defendant claimed the Housing Part proceeding involved plaintiff's default under the proprietary lease, the prohibition against splitting a claim barred defendant from remaining silent regarding its recovery of attorneys' fees for litigating that issue in the Housing Part proceeding and then seeking that recovery through a separate claim. E.g., 67-25 Dartmouth St. Corp. v. Syllman, 29 A.D.3d 888, 889-90 (2d Dep't 2006). Thus, even if the lease entitles defendant to attorneys' fees for the Housing Part proceeding against defendant, the prohibition against splitting claims bars defendant's claims for attorneys' fees.

III. CONCLUSION

As set forth above, defendant presents no facts or law that the court overlooked or misapprehended in its prior order, C.P.L.R. § 2221(d)(2); Windham v. New York City Tr. Auth., 115 A.D.3d at 600; Social Serv. Empls. Union, Local 371 v. New York City Bd. of Correction, 93 A.D.3d 454, 454 (1st Dep't 2012); Hernandez v. St. Stephen of Hungary School, 72 A.D.3d 595, 595

(1st Dep't 2010). See People v. D'Alessandro, 13 N.Y.3d at 219; Board of Educ. of City Sch. Dist. of City of N.Y. v. Grullon, 117 A.D.3d at 573; Scelzo v. Acklinis Realty Holding LLC, 101 A.D.3d 468, 468 (1st Dep't 2012). Therefore the court denies defendant's motion for reargument and adheres to the declaratory judgment that plaintiff is not obligated to reimburse defendant for its attorneys' fees incurred in the New York City Civil Court Housing Part proceeding by Meana and Cohen or in subsequently seeking reimbursement of those fees. C.P.L.R. §§ 2221(d), 3001. For the reasons explained above, the court grants plaintiff's motion for reargument and declares that plaintiff is not obligated under the parties' proprietary lease to reimburse defendant for its attorneys' fees incurred in defending against that proceeding or in seeking to collect those fees, a claimed total of \$14,089.09. C.P.L.R. §§ 2221(d), 3212(b) and (e).

DATED: October 4, 2017

Lucy Billings

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