

Cicccone v One W. 64th St., Inc.
2019 NY Slip Op 34027(U)
July 24, 2019
Supreme Court, New York County
Docket Number: 651748/2016
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 651748/2016

MADONNA CICCONE,

MOTION DATE 03/22/2019

Plaintiff,

MOTION SEQ. NO. 004

- v -

ONE WEST 64TH STREET, Inc.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 120, 122, 123, 124, 125, 126, 128, 129, 130

were read on this motion for

ATTORNEY FEES

Shaw & Binder P.C. (Stuart F. Shaw and Daniel S. LoPresti of counsel), for plaintiff.

Holland & Knight LLP (Benjamin R. Wilson and Zalika T. Pierre of counsel), for defendant.

Gerald Lebovits, J.:

Plaintiff, Madonna Ciccone, is a shareholder in defendant, One West 64th Street, Inc., a residential cooperative. Plaintiff sued One West for a declaratory judgment that One West's amendment to a provision of the co-op lease was ultra vires; she also sought One West books and records relating to her declaratory-judgment claim.

This court dismissed plaintiff's declaratory-judgment claim as time-barred on September 14, 2017.1 (See NYSCEF No. 34.) Notwithstanding that dismissal, plaintiff continued to assert her books-and-records cause of action until November 19, 2018, when this court dismissed that, too. (See NYSCEF No. 98.)

One West now moves as the prevailing party for attorney fees and costs under paragraphs 28 and 53 of the co-op lease. (See Board of Mgrs of 55 Walker St. Condominium v Walker St., LLC, 6 AD3d 279, 280 [1st Dept 2004].) This court concludes that One West is not entitled to recover attorney fees under paragraph 28, but that it is entitled to recover fees under paragraph 53. One West's motion is granted to the extent that the matter is set down for a hearing to determine reasonable attorney fees and disbursements.

Paragraph 28 of the lease provides that One West may recover expenses (including attorney fees) incurred in "stopping Lessee from taking an action Lessee was not permitted to

1 The Appellate Division, First Department later affirmed the dismissal of the declaratory-judgment claim. (See Ciccone v One W. 64th St., Inc., 171 AD3d 481 [1st Dept 2019].)

take, or in instituting any action or proceeding based on such default, or defending . . . in any action or proceeding brought by the Lessee.” (NYSCEF No. 9.) One West argues that this paragraph applies where One West “defend[s] itself in an action initiated by lessee seeking to validate his or her nonperformance or noncompliance” with the terms of the lease, and that plaintiff’s declaratory-judgment action here sought to enable her to avoid complying with the terms of the lease. (NYSCEF No. 104, at 5.)

One West has not, however, submitted evidence — or even directly alleged — that plaintiff was breaching the lease provision that she was challenging as void, as distinct from temporarily complying under protest while preparing and pursuing her legal challenge. Absent some showing that plaintiff was in default, One West may not recover fees under paragraph 28. (*See Gray v Hilltop Vill. Co-op # Three, Inc.*, 50 AD3d 739, 741 [2d Dept 2008] [collecting cases construing the language used in paragraph 28].)

One West asserts, though, that plaintiff is judicially estopped from contesting One West’s entitlement to fees under paragraph 28, because plaintiff herself construed that paragraph quite broadly in making a fees request of her own. This court is not persuaded.

To be sure, plaintiff’s amended complaint did assert, in general terms, that she “commenced this action based on defaults by One West” and that she is therefore entitled under paragraph 28 to recover fees incurred in “prosecuting this action based on One West’s breach of the proprietary lease.” (NYSCEF No. 2, at ¶¶ 51, 53, 54.) But as plaintiff points out, the doctrine of judicial estoppel applies only where a party takes a position after previously having *successfully* maintained a different, inconsistent position. (*See Kalikow 78/79 Co. v State*, 174 AD2d 7, 11 [1st Dept 1992]; *Meyers v Geller*, 194 AD2d 595, 595 [2d Dept 1993]; *accord Nestor v Britt*, 270 AD2d 192, 193 [1st Dept 2000] [estopping petitioners challenging the validity of a lease where they had previously prevailed using arguments based on the terms of that lease].) Here, plaintiff undisputedly did not prevail on her claim for fees.

Nonetheless, although One West is not entitled to fees under paragraph 28 of the co-op lease, it is entitled to recover fees under paragraph 53. That provision provides that if (i) a One West shareholder brings an action or proceeding against One West on a matter relating to the lease or the affairs of the co-op, (ii) “there is an adverse determination by the court against the Shareholder . . . or the action or proceeding is dismissed,” and (iii) the court determines “that such action or proceeding was not brought in good faith,” then (iv) the shareholder must reimburse One West for attorney fees and disbursements. (NYSCEF No. 9.)

Plaintiff brought her challenge to One West’s amendment of the co-op lease well after the statute of limitations for that challenge had expired, according to well-established First Department precedent. After this court dismissed plaintiff’s challenge to the lease in September 2017, plaintiff continued to pursue her books-and-records claim, though the sole purpose for that claim was to support the lease-challenge this court had already dismissed. Indeed, in the spring of 2018, plaintiff *moved for summary judgment* on her now-pointless books-and-records claim. In denying plaintiff’s summary judgment motion, this court expressly noted that to “seek the records at this phase is merely harassing.” (NYSCEF No. 77, at 5.) Yet plaintiff continued to

maintain her claim for books and records until this court finally dismissed the claim in November 2018. (See NYSCEF No. 98.)

In these circumstances, this court concludes that plaintiff brought and continued to pursue her claims in this action in bad faith within the meaning of paragraph 53 of the co-op lease.

Accordingly, it is

ORDERED that One West's motion for attorney's fees is granted to the extent that a hearing is directed to ascertain all reasonable attorney fees and disbursements; and it is further

ORDERED that the issue of the amount of reasonable attorney fees and disbursements is referred to a Special Referee to hear and report; and it is further

ORDERED that One West shall, within 30 days from the date of this order, serve a copy of this order with notice of its entry on all parties and upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

7/24/2019

DATE



GERALD LBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE