

244 Linwood One LLC v Tio Deli Grocery Corp.

2020 NY Slip Op 33568(U)

October 26, 2020

Supreme Court, Kings County

Docket Number: 514636/17

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of October, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

----- X
244 LINWOOD ONE LLC AND 244 LINWOOD TWO LLC,

Plaintiffs,

- against -

Index No. 514636/17

TIO DELI GROCERY CORP.

Defendant.

----- X
The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion, Affidavit, Affirmation + Annexed Exhibits	<u>54-58</u>
Opposing Affirmation + Annexed Exhibits	<u>59-62</u>
Reply Affidavits (Affirmations)	<u>63-66</u>

Upon the foregoing papers, plaintiffs 244 Linwood One LLC and 244 Linwood Two LLC (plaintiffs) move, in motion sequence (mot. seq.) three, for an order restoring the case to the calendar and awarding them reasonable attorney's fees.

Background

On November 17, 2015,¹ plaintiffs purchased the land and building known as 3002 Fulton Street in Brooklyn (the Building) from owner Latchman Awad (Awad). At

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The complaint alleges that the purchase occurred on November 17, 2017, but plaintiffs' affirmation in support of the motion notes that the purchase occurred on November 17, 2015.

closing, as successors to Awad, plaintiffs received a commercial lease between the Building and its commercial occupant, Sandwich Heaven Corp. (Sandwich). Subsequently, plaintiffs became aware that by assignment and assumption of lease executed on September 28, 2015, Sandwich purportedly assigned the lease covering the rental period of January 18, 2014 to January 1, 2024 (the old lease) to defendant Tio Deli Grocery Corp. (defendant). A subsequent lease dated October of 2015 and notarized on November 3, 2015 (the new lease), which was the subject of this litigation and which purportedly superseded the prior lease, covered a fifteen-year rental period from October 1, 2015 through September 30, 2030.

Plaintiffs commenced this action on July 28, 2017 by filing a summons and complaint alleging four causes of action seeking: (1) a judgment declaring the lease between Awan and defendant invalid *ab initio* because it was not a result of bargained for consideration but rather a result of a conspiracy to defraud Consolidated Edison (Con Ed), (2) a judgment declaring the assignment between defendant and Sandwich invalid for the same reasons, (3) ejectment of defendant from the commercial space, and (4) restitution damages for plaintiff's lost income. In addition, the plaintiff sought in the complaint "such additional relief as this Court deems just and proper," but did not specifically request attorney's fees.

A trial of this action was commenced and concluded on November 22, 2019. In the May 7, 2020 decision, order and judgment, the Honorable Richard Montelione found that plaintiffs proved that the new October 2015 lease was never intended to create a new tenancy and, instead, was created for a fraudulent purpose (*see* NYSCEF Doc. No. 61 at

9-10). More specifically, the decision, order and judgment noted that the new lease was signed “only as a means of having defendant Tio Grocery Corp. avoid paying the prior tenant’s Consolidated Edison’s electric bill” (*id.* at 9) and that the facts show that Awad and defendant “reach[ed] an ‘accommodation’ to avoid defendant paying for another tenant’s utility bills or simply the prior tenant, Sandwich Heaven Corp. and landlord, attempting to defraud Consolidated Edison” (*id.* at 10). Justice Montelione therefore found the October 2015 lease unenforceable and void.

Justice Montelione further upheld the assignment regarding the prior lease with Sandwich. Having found the lease assignment valid, Justice Montelione dismissed plaintiffs’ claim for ejectment, and dismissed plaintiffs’ restitution damages claim. Justice Montelione further ordered: “any other claims of the plaintiff are dismissed” (*id.* at 14). Finally, Justice Montelione dismissed all of defendant’s counterclaims.

The Parties’ Contentions

Plaintiffs contend that they are entitled to reasonable attorney’s fees and costs as “restitution” for prosecuting this action due to defendant’s alleged frivolous conduct of asserting material factual statements that are false. Plaintiffs assert that defendant allegedly conspired to defraud a public utility, Con Ed, by allegedly signing an invalid lease which it then used for its claims and counterclaims in this action. Plaintiffs note that the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (a) vests a court with discretion to award attorney’s fees for frivolous conduct, which, according to Section 130-1.1 (c) (3), includes asserting false material facts. Plaintiff also argues that the court should exercise its inherent power pursuant to the New York State Constitution

to grant attorney's fees. Plaintiffs contend that the lack of legal or factual basis should have been apparent to defense counsel and was also brought to defense counsel's attention.

Plaintiffs state that they expended \$36,169.50 in reasonable attorney's fees.

Defendant contends that there is no basis to award attorney's fees on restitution grounds, since the court found that plaintiffs did not prove their restitution damages claim at trial. Defendant also denies asserting false material facts and asserts that it did not know the lease was fraudulent or that it was intended to mislead Con Ed. Defendant argues that there was no proof at trial that Con Ed was defrauded, and that plaintiffs cannot plead fraud of a third party to obtain recovery of attorney's fees. Defendant notes that it has appealed Justice Montelione's order and judgment to the Appellate Division, Second Department on multiple grounds.

Discussion

The court, in its discretion, may award reasonable attorney's fees resulting from frivolous conduct, and in lieu of or in addition to attorney's fees, may also award financial sanctions upon an attorney, a party to the litigation or both, limited to \$10,000, as a result of frivolous conduct (Rules of Chief Admin of the Cts [22 NYCRR] § 130-1.1, [22 NYCRR] § 130-1.2; *Kamen v Diaz-Kamen*, 40 AD3d 937, 937-938 [2d Dept 2007]). Conduct is frivolous if it (1) is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;" (2) is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another;" or (3) "asserts material factual statements that are false" (22 NYCRR § 130-1.1 [c]).

“In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party” (*id.*).

“A party seeking the imposition of a sanction or an award of an attorney’s fee pursuant to 22 NYCRR 130—1.1 (c) has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule, or that the action or proceeding was commenced or continued in bad faith” (*Matter of Miller v. Miller*, 96 AD3d 943, 944 [2d Dept 2012]; *see Stone Mtn. Holdings, LLC v Spitzer*, 119 AD3d 548, 550 [2d Dept 2014]).

An award of costs or sanctions may be made upon motion, pursuant to CPLR 2214 or 2215 or upon the court’s own initiative, after a reasonable opportunity to be heard (Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1[d]). “The court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate” (*id.* at § 130.1-2). However, the procedural dictates of the Rules of the Chief Administrator of the Courts (22 NCYRR) § 130.1-2 need not be followed “in any rigid fashion” so long as the court sets forth the reason for the fee or sanction award and the conduct upon which it was based (*see Duncan v Popoli*, 105 AD3d 803, 805 [2d Dept 2013]).

Here, the court declines to exercise its discretion to award attorney’s fees to plaintiffs’ counsel pursuant to either the Rules of the Chief Administrator of the Courts.

(22 NYCRR § 130-1.1 [c]) or on constitutional grounds. Plaintiffs have not met their burden of demonstrating that defendant's conduct was frivolous within the meaning of the rule. In that regard, at trial, Justice Montelione did not conclusively find that defendant entered into the new lease to defraud Con Ed. Rather, Justice Montelione found that the new lease was signed "only as a means of having defendant Tio Grocery Corp. avoid paying the prior tenant's Consolidated Edison's electric bill" (NYSCEF Doc. No. 61 at 9) and that Awad and defendant "reach[ed] an 'accommodation' to avoid defendant paying for another tenant's utility bills or simply the prior tenant, Sandwich Heaven Corp. and landlord, attempting to defraud Consolidated Edison" (*id.* at 10). The fact that Justice Montelione did not conclusively find that defendant perpetrated a fraud, rather than Awad, is further supported by his observation that the "fraud [was] perpetrated by *defendant and/or Awad*" (*id.* at 11 [emphasis added]).

Plaintiffs alleged that defendant engaged in misconduct by purportedly seeking to defraud Con Ed in its complaint, but plaintiffs did not request attorney's fees in their complaint. Nor did plaintiffs apparently demand attorney's fees at trial, as Justice Montelione's decision after trial does not address any such request. Even if plaintiffs requested fees at trial, Justice Montelione effectively denied that request by ordering and adjudging that "any other claims of the plaintiff are dismissed" (NYSCEF Doc. No. 61 at 14).

In addition, plaintiffs are not completely victorious in this action. Justice Montelione found the assignment of the old lease valid, and defendant apparently continues to pay rent. Justice Montelione also dismissed the restitution damages and ejectment claims, which further weighs against awarding attorney's fees.

Hence, the court declines to restore this case to the calendar for the purpose of awarding attorney's fees. The parties' remaining contentions have been reviewed and found without merit. Accordingly, it is

ORDERED that plaintiffs' motion (mot. seq. three), for an order restoring the case to the calendar and awarding them reasonable attorney's fees is denied in its entirety.

This constitutes the decision and order of the court.

ENTER,

J. S. C.


Justice Lawrence Knipel