

Matter of Kotler v 979 Corp.
2021 NY Slip Op 33566(U)
August 24, 2021
Supreme Court, New York County
Docket Number: Index No. 653398/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 6
Justice

In the Matter of the Application of

**STUART B. KOTLER, as Executor of
the Estate of Gail Lowe Haymes,**

Petitioner,

**INDEX NO. 653398/2019
MOTION SEQ. NO. 001**

**For an order Pursuant to Article 78
of the Civil Practice Law and Rules,**

-against-

979 CORPORATION,

Respondent.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

- Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
- Answer — Affidavits — Exhibits _____
- Replying Affidavits

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Petitioner Stuart B. Kotler, as Executor of the Estate of Gail Lowe Haymes as executor of the estate of Gail Lowe Haymes (“Petitioner” or the “Estate”) brought this proceeding to reverse the board of directors of Respondent 979 Corporation’s (“Respondent” or “the Co-Op”) decision to refuse the transfer of 510 shares (the “Shares”) and the assignment of the proprietary lease (the “Lease”) allocated to Apartment 2/3 (the “Apartment”) located at 9 E. 79th Street, New York, New York, from the Petitioner, to the deceased’s daughter, Ms. Kempin. Respondent filed a motion to dismiss the Petition.

Oral argument was held on December 3, 2019 and January 7, 2020. On January 7, 2020, the Court granted the Petition and denied Respondent’s motion to dismiss. The Court annulled and vacated the Co-Op’s decision, made on February 21, 2019, that refused Petitioner’s request to transfer the 510 shares allocated to the Apartment in the Building. The Court ordered the Co-Op to “to approve and effect the transfer of the Shares and Lease” from the Estate to Ms. Kempin. The Court further ordered Petitioner to cover reasonable legal and other expenses of Respondent in connection with such assignment and transfer of shares and reasonable attorneys’ fees and disbursements incurred in connection with this proceeding. The Court also held that “Petitioner is entitled to his reasonable attorneys’ fees and disbursements incurred in connection with this proceeding.”

On February 9, 2021, the First Department affirmed this Court’s decision, except for the denial of damages for breach of the lease. The First Department held:

Petitioner is entitled to damages caused by the Co-op's breach of the proprietary lease in unreasonably withholding consent to the transfer (*see WG Three Assoc., LLC v Portofino Chelsea, LLC*, 179 AD3d 604 [1st Dept 2020]). The measure of those damages is "the amounts paid after [owner] unreasonably withheld its consent to the assignment" (*id.* at 604). Those damages are properly recoverable as incidental to this CPLR article 78 proceeding (*see* CPLR 7806; *Matter of Y & O Holdings [NY] v Board of Mgrs. of Exec. Plaza Condominium*, 278 AD2d 173, 173-174 [1st Dept 2000]).

In light of the proprietary lease's provision for attorneys' fees, as the prevailing party, petitioner is entitled to a reciprocal award of attorneys' fees (*see* Real Property Law § 234; *Estate of Del Terzo*, 136 AD3d at 489-490).

Kotler v 979 Corp., 191 AD3d 473, 475 [1st Dept 2021].

The First Department directed that this Court award such damages to Petitioner. The matter has been remanded to this Court to determine the amount of monetary damage.

The parties agreed to provide written submissions of their respective positions in lieu of a hearing. On April 27, 2021, Petitioner filed its submissions, which included an affidavit of Stuart Kotler ("Kotler") and an affirmation of David L. Berkey, Esq. ("Berkey") along with exhibits. June 21, 2021, Petitioner filed a supplemental affidavit from Kotler and a supplemental affirmation of Berkey. Petitioner claimed that since the filing of its submissions in April 2021, the transfer of the Shares and the Lease still had not taken place and the Estate incurred an additional \$47,448.96 in damages.

Petitioner's Submission on Damages

A. Monetary Damages

Petitioner seeks \$618,561.49 in total monetary damages, which is comprised of payments for maintenance, homeowner's insurance, utilities, and cleaning. The damages sought are for the period commencing in February 2019 through June 2021.

Petitioner seeks reimbursement for maintenance payments in the amount of

\$358,882.07. Petitioner states that the Estate has made maintenance payments to the Co-op between February 2019 and April 2019 totaling \$335,717.31. Petitioner states “[t]he monthly maintenance charge is typically \$10,529.44, but several months carried a larger fee between \$25,000 and \$38,000 to account for assessments,” and “[a]s of March 2021, the monthly maintenance was increased to \$11,582.38.” Petitioner states that the Estate made maintenance payments of \$23,164.76 for the months of May 2021 and June 2021. (See Exhibits D, G, and H).

Petitioner also seeks reimbursement for homeowner’s insurance premiums paid to Chubb Personal Risk Services in the amount of \$89,896.00. Petitioner states that the Estate paid the amount of \$79,268.50 for the period of time from March 2019 through April 2021. Petitioner states that for the month of May 2021, the Estate made homeowners’ insurance payments of \$10,627.50. (See Exhibits E, G, and I).

Petitioner also seeks reimbursement for utilities the Estate paid in the amount of \$26,931.02. Petitioner states that from the date of the Co-Op’s improper refusal to transfer, Petitioner has incurred \$25,908.98 in utility bills, comprised of \$24,527.39 to Con Edison for gas and electric services, and \$1,381.59 to Verizon for cable/internet/phone services. Petitioner states that the Estate continued to make monthly payments for the Apartment’s utility costs to Con Edison. Petitioner states that the Con Edison utility bill paid on May 5, 2021 was for \$592.74, and the utility bill paid on June 3, 2021 was for \$429.30. In total, the Estate made payments to Con Edison for gas and electrical services of \$1,022.04 between May 2021 and June 2021. (Exhibits G and K).

Petitioner also seeks reimbursement for cleaning services in the amount of \$15,765.00. Petitioner argues that in order to maintain the Apartment in good repair, Estate hired Julie Monge to clean the apartment, for which she billed the Estate every month. Petitioner states that between February 2019 and April 2021, Petitioner paid Ms. Monge a total of \$14,165.00. Petitioner states the Estate continued to engage the cleaning services of Ms. Monge and made payments to her of \$1,600.00 in May 2021 and June 2021. (Exhibits F, G, J).¹

B. Attorneys’ fees

¹ In its initial submission, Petitioner sought reimbursements for the holiday bonuses the Estate paid to the doormen and porters of the Building. Petitioner states that the Estate made total payments in 2019 and 2020 in the amount of \$11,550. In its subsequent submission filed on June 21, 2021, the claim has been omitted.

Petitioner seeks \$127,087.40 in attorneys' fees and disbursements, plus statutory interest on such fees, calculated from February 21, 2019 at the rate of 9% per annum. Petitioner states that the Estate paid \$110,412.24 in legal fees and disbursements and owes additional legal fees to its lawyers, Gallet Dreyer & Berkey, LLP, for a total of legal fees and disbursements due through March 31, 2021, of \$116,627.74, in order to overturn the Co-op's wrongful refusal to transfer the Shares and Lease. Petitioner further states that the Estate paid \$11,034.66 in legal fees and disbursements to Gallet Dreyer & Berkey, LLP, in May and June 2021, for services in connection with the instant application, upcoming hearing, and consummation of the transfer of the Shares and Lease as directed by this Court and the First Department. Petitioner provides the affirmation and supplemental affirmation of Berkey, along with the legal bills and the time sheets depicting the work performed as exhibits.

The Co-Op's Response to Offer of Proof

The Co-Op argues that "the Estate's damages should be limited to the period commencing January 2020 and ending in April 2021 because: (a) It was only in January 2020 when the Trustees submitted an agreement to this court attesting to assurances that the Trusts would cover the expenses of the Apartment and this court determined that the Apartment should be transferred; and (b) While the Co-op was prepared to close in early May 2021, the Estate was unable to close because it could not produce the original stock certificate and for the shares in the Co-op and the original proprietary lease which had to be surrendered to complete the transfer." The Co-Op states that "[b]ecause the original documents could not be surrendered, the closing was delayed until June 25, 2021."

The Co-Op further argues that the Estate has failed to mitigate its damages with respect to certain expenses. Specifically, the Co-Op argues that "if the Apartment could not be utilized, there should be no reason to have to pay expenses for telephone, television or internet service or for cleaning services on a regular basis." The Co-Op claims that "payments to Verizon for cable and internet (\$1,381.59) and to Julie Monge of a cleaning service (\$15,765.00) should not be charged to the Co-op."

Discussion

The damages should start when "[t]he daughter produced financial statements and other documents showing assets of magnitude greater than the annual maintenance and other costs associated with the apartment, as well as annual income more than double those costs" – i.e. when the Co-Op unreasonably

withheld its consent to transfer the Shares and Lease. Petitioner provided the Board with financial assets showing over \$80 million, liquid assets of approximately \$3 million, and projections from accountants of future trust income. The Board denied transferring the Shares and Lease on February 21, 2019, even after Petitioner provided documentation showing the necessary income. Therefore, the damages period should commence February 2019.

The damages should end in April 2021, because the closing in May 2021 did not go forward because the Estate could not produce the original stock certificate and for the shares in the Co-Op and the original proprietary lease.

Additionally, Petitioner has not failed to mitigate damages. Petitioner incurred expenses for utilities and cleaning to maintain the value of the Apartment. Moreover, the House Rules require the lessee to keep their apartments "in a good state of preservation and cleanliness."

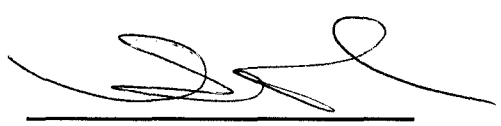
Wherefore it is hereby

ORDERED that Petitioner Stuart B. Kotler, as Executor of the Estate of Gail Lowe Haymes as executor of the estate of Gail Lowe Haymes is awarded damages in the amount of \$455,059.79, plus statutory interest of 9% on such damages pursuant to CPLR § 5001, accruing as of February 21, 2019; and it is further

ORDERED that Petitioner Stuart B. Kotler, as Executor of the Estate of Gail Lowe Haymes as executor of the estate of Gail Lowe Haymes is awarded reasonable attorneys' fees and disbursements in the amount of \$133,904.45 through August 4, 2021, plus statutory interest on such fees, calculated from February 21, 2019 at the rate of 9% per annum.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: August 24, 2021



EILEEN A. RAKOWER, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION