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| <b>Flynn v Red Apple 670 Pac. St., LLC</b>   |
| 2022 NY Slip Op 31745(U)   |
| June 2, 2022   |
| Supreme Court, New York County   |
| Docket Number: Index No. 159187/2020   |
| Judge: Debra James   |
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: DEMI COMMERCIAL DIVISION PART 59

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| JASON FLYNN, on behalf of himself and others similarly situated, | INDEX NO.                  | <u>159187/2020</u> |
| Plaintiffs,  | MOTION DATE                | <u>06/01/2022</u>  |
| - v -  | MOTION SEQ. NO.            | <u>003</u>         |
| RED APPLE 670 PACIFIC STREET, LLC,                               | <b>DECISION + ORDER ON</b> |                    |
| Defendant.   | <b>MOTION</b>              |                    |

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HON. DEBRA JAMES:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81 were read on this motion to/for ATTORNEY - FEES.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant to recover from plaintiffs its attorneys' fees and legal expenses incurred in successfully defending against this action, including appeal therein brought by plaintiffs, in an amount to be determined by the Court, is DENIED.

DECISION

This court agrees with plaintiffs that attorney fee shifting provisions of contracts, such as Articles 20(A) and Additional Rider Paragraph 9 of the Lease at bar, are to be strictly construed. As stated by the Court of Appeals in Hooper Assoc v AGS Computers, 74 NY2d 487, 491 (1989):

"Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might 'seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view' (citation omitted).

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"Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise (citations omitted)".

Article 20(A) of the Lease provides, in pertinent:

"FEES AND EXPENSES A. Owner's Right. You must reimburse Owner for any of the following fees and expenses incurred by Owner:

5. Any legal fees and disbursements for legal actions or proceedings brought by Owner against You because of a Lease default by You or **for defending lawsuits against Owner because of Your actions**".

Defendant would have this court award it legal fees against plaintiffs, on the basis that defendant prevailed in this lawsuit, by construing the language "for defending lawsuits against Owner because of Your actions", as including the phrase "legal or other" between the words "Your" and "actions". Such insertion, this court cannot make, as "'courts may not by construction add or excise terms'", Vermont Teddy Bear Co., Inc., 1 NY3d 470, 475 (2004).

This court likewise disagrees with defendant's argument that such phrase "for defending lawsuits against Owner because of Your Actions" cannot be read as limited to cases brought by

third parties against defendant, without violating another rule of contract construction, which is that no provision should be left without force and effect. Defendant urges that such a construction would render meaningless paragraph 9 of the Additional Rider, captioned "Indemnity", as duplicative of Lease Article 20(A) (5), leaving such provision without force and effect.

Additional Rider, paragraph 9 reads:

"This agreement is made upon the express condition that the Owner shall be free from all liabilities and claims for damages and/or suits for or by reason of any injury or injuries to any person or persons or property of any kind whatsoever, whether to Tenant' person or property, Tenant's agent or employees, or third persons, from any cause or causes during the term of this agreement or occasioned by any occupancy or use of said premises or any activity carried on by you in connection therewith. Tenant hereby agree to indemnify and hold Owner harmless from any liabilities, charges, expenses (including counsel fees) and costs on account of or by reason of any such injuries, liabilities, claims, suits or losses however occurring or damages arising out of same."

Such indemnity provision clearly pertains to a negligence or insurance-subrogation action brought by a third party against defendant, which claim arises from a plaintiff's, as tortfeasor's, conduct. In contrast, Lease Article 20(A) (5) "for lawsuits because of Your [plaintiff's-tenant's] actions" would encompass third party actions that do not implicate plaintiff-tenant's negligence, such as plaintiff-tenant's action in causing the defendant to be in violation of a municipal building code or other regulation,

such as the illegal conversion that took place in Kurtin v City of New York, 78 AD3d 473 (1<sup>st</sup> Dept 2010). Thus, as required in Muzak Corp v Hotel Taft Corp, 1 NY2d 42, 46 (1956), this court's construction of the phrase "for lawsuits because of Your actions" as providing for recovery of attorneys' fees from a plaintiff-tenant, should defendant prevail in a lawsuit brought by a third party against defendant stemming from the actions of such plaintiff-tenant, (as opposed to lawsuits between the parties, like the lawsuit herein), follows the rule of construction that "require[s]. . . adopt[ion of] an interpretation which gives meaning to every provision of a contract, or in the negative, no provision of a contract should be left without force and effect."

In summary, as the plain meaning of the Lease provisions at bar, strictly construed, does not provide for an award of attorneys' fees in favor of defendant, as successful party in this lawsuit wherein plaintiffs-tenants challenges the defendant's setting of rent under governmental regulations, the application of defendant for an award of attorneys' fees must be denied. The court finds defendant's estoppel argument as lacking merit.

*Debra A. James*

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| <u>6/2/2022</u><br>DATE |   |  | <u>DEBRA JAMES, J.S.C.</u>         |
| CHECK ONE:              | <input checked="" type="checkbox"/> CASE DISPOSED   | <input type="checkbox"/> NON-FINAL DISPOSITION |                                    |
|                         | <input type="checkbox"/> GRANTED                    | <input checked="" type="checkbox"/> DENIED     | <input type="checkbox"/> OTHER     |
| APPLICATION:            | <input type="checkbox"/> SETTLE ORDER               | <input type="checkbox"/> SUBMIT ORDER          |                                    |
| CHECK IF APPROPRIATE:   | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |