SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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FIRST EQUITY REALTY,

Plaintiff,

- v -

THE HARMONY GROUP, II, MADISON AVENUE INVESTMENT PARTNERS, LLC,

Defendant.

INDEX NO. 650273/2015

MOTION DATE N/A

MOTION SEQ. NO. 027

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 027) 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164

were read on this motion for EXPENSES UNDER CPLR 3220.

Defendants The Harmony Group II, LLC and Madison Avenue Investment Partners, LLC ("Defendants") move (NYSCEF 1155) pursuant to CPLR 3220 for attorneys' fees and disbursements in the amount of $299,280.36 against Plaintiff First Equity Realty ("Plaintiff"). Defendants argue that the costs sought were "necessarily incurred" in connection with the trial on damages after offers to compromise were served on December 10, 2019. Plaintiff opposes.

For the reasons that follow, the motion is GRANTED IN PART. Under CPLR 3220, Defendants are entitled to recover their "expenses necessarily incurred . . . for trying the issue of damages from the time of the offer" (CPLR 3220) with respect to Count I, in an amount to be determined. However, because Defendants' papers seek recovery of expenses going beyond the scope permitted under CPLR 3220, they must make a revised submission to narrow the issues in advance of the hearing, as described herein. Defendants are not entitled to recover expenses relating to Count II, which was withdrawn prior to trial.

The parties are directed to submit a proposed briefing schedule and, barring an agreement (which, of course, is strongly encouraged), a hearing will take place on January 5, 2023, before the Court.

BACKGROUND

On December 10, 2019, Defendants offered to liquidate damages conditionally as to Counts I and II of the Complaint (NYSCEF 1158, 1159 [Affirmation of Barbara L. Seniawski Exs. A-B] [the "Offers"]). Specifically, Defendants offered $278,451.00 plus applicable costs and interest as to Count I and $10.00 plus applicable costs and interest as to Count II. Plaintiff did not accept the Offers and the parties proceeded to file summary judgment motions, which were granted in part and denied in part (*First Equity Realty v Harmony Group, II*, 68 Misc 3d 1216(A) [Sup Ct New York County 2020]).

Prior to trial, on April 20, 2021, Plaintiff withdrew Counts II, III, IV and V (NYSCEF 843). Trial was held on June 1-2, 2021, on Plaintiff's Counts I and V and Defendants' Counterclaims I and II. On March 3, 2022, the Court issued a Decision After Non-Jury Trial ("Decision") awarding Plaintiff $276,768.00 in damages on Count I of its Complaint (*First Equity Realty v The Harmony Group, II*, 2022 N.Y. Slip Op. 30674[U], 24 [N.Y. Sup Ct, New York County 2022]).

On May 19, 2022, Defendants moved for costs and fees (NYSCEF 1155) under CPLR 3220 on the ground that the Decision awarded damages of less than the amounts in the Offers. Defendants submit sixty-seven (67) pages of attorney invoices (Seniawski Aff. Ex. C [NYSCEF 1160]) to support their requested fee award. Defendants requested that the motion be held in abeyance, if necessary, pending entry of a final judgment (Moving Memo at Note 1 [NYSCEF 1156]).

On June 30, 2022, Plaintiff filed opposition arguing (1) that the Offers were withdrawn after ten days; (2) that fees are not warranted for Count II, which was withdrawn; (3) that the costs sought are not reasonably related to Count I; and (4) that the costs sought were not "necessarily incurred" in connection with Count I (Opp. Memo at 1 [NYSCEF 1162]). Plaintiff requests that the Court hold a hearing in the event it finds that any costs are recoverable (*Id.* at 11).

On July 27, 2022, final judgment ("Judgment" [NYSCEF 1166]) was entered in the amount of $276,768.00 plus interest as specified in the Decision for a total of $577,585.25. Accordingly, the motion is ripe for disposition.

DISCUSSION

CPLR 3220 provides:

> At any time not later than ten days before trial, any party against whom a cause of action based upon contract, express or implied, is asserted may serve upon the claimant a written offer to allow judgment to be taken against him for a sum therein specified, with costs then accrued, if the party against whom the claim is asserted fails in his defense. If within ten days thereafter the claimant serves a written notice that he accepts the offer, and damages are awarded to him on the trial, they shall be assessed in the sum specified in the offer. If the offer is not so accepted and the claimant fails to obtain a more favorable judgment, he shall pay the expenses necessarily incurred by the party against whom the claim is asserted, for trying the issue of damages from the time of the offer. The expenses shall be ascertained by the judge or referee before whom the case is tried. An offer under this rule shall not be made known to the jury.

The Judgment obtained after trial as to Count I was for less than the Offer. Therefore, CPLR 3220 applies (*Free People of PA LLC v Delshah 60 Ninth, LLC*, 169 AD3d 622, 623 [1st Dept 2019] *citing Abreu v Barkin & Assoc. Realty, Inc.,* 115 AD3d 624 [1st Dept. 2014] ["The court correctly awarded defendant its expenses, including attorneys' fees, incurred in trying the issue of damages from the date of its offer pursuant to CPLR 3220 to settle the action"]). The Offer complied with the statute by remaining open for ten (10) days and Plaintiff elected not to

accept the Offer with respect to Count I. Plaintiff's reliance on *Deck v Chautauqua County Patrons' Fire Relief Assn.*, 73 Misc.2d 1048, 343 N.Y.S.2d 855 [Sup. Ct. Chautauqua County 1973], which did not involve an offer to liquidate damages under CPLR 3220, is misplaced.

However, even a cursory review of Defendants' application for expenses indicates that they seek recovery beyond the scope of what is permissible under CPLR 3220. Defendants appear to take the view that, with limited exceptions, they are entitled to recover "*all* costs and fees incurred after their 3220 offers" because "the issues of liability and damages are inextricably intertwined" (NYSCEF 1164 at 4 [emphasis added]). That is not the law.

CPLR 3220 provides for a recovery of "expenses" only for "trying the issue of damages from the time of the offer." As Justice Dillon's Practice Commentary to this provision points out, "[t]he court, upon determining the amount of trial-related costs and attorney's fees, should make an award only to the extent of the damages portion of the trial, as the issues of liability were never conceded and are not within the scope or intendment of CPLR 3220" (Practice Commentary McKinney's CPLR § 3220; *see also* 2PT1 West's McKinney's Forms Civil Practice Law and Rules § 5:285 ("although the expenses recoverable by defendant under N.Y. C.P.L.R. 3220 may include attorney's fees, those expenses are only those 'necessarily incurred . . . for trying the issue of damages from the time of the offer.' . . . Thus, any expenses not necessarily incurred or attributable to trying liability or incurred before the offer will not be recoverable. Those restrictions limit the desirability of N.Y. C.P.L.R. for defendants"). That approach is consistent with the general principal that "[s]tatutes authorizing an award of costs and sanctions are in derogation of common law and, therefore must be strictly construed" (*Saastomoinen v Pagano*, 278 AD2d 218, 218 [2d Dept 2000].

Consistent with the foregoing, Defendants must submit a more narrowly targeted request that focuses on the question of damages, rather than liability. In this regard, the Court will consider at the hearing whether expenses with respect to the statute of limitations defense – to the extent it impacted the scope of recoverable damages – comes within the scope of CPLR 3220.

With respect to Count II, Plaintiff argues that because the claim was voluntarily withdrawn prior to trial there can be no "expenses … necessarily incurred … for trying the issue of damages from the time of the offer" under CPLR 3220. The parties have not cited any authority directly on point. In *Abreu v Barkin and Assoc. Realty, Inc.*, 115 AD3d 624 [1st Dept 2014], the First Department held that a defendant was entitled to pursue expenses under CPLR 3220 with respect to a claim that was withdrawn by the plaintiff "in a stipulation on the record at trial." By contrast, in *Saul v Cahan*, 153 AD3d 951 [2d Dept 2017], the court held that a defendant was not entitled to expenses under CPLR 3220 with respect to a claim that was dismissed by the court prior to trial on a motion to dismiss, thus obviating the need for trial on *any* claim.

This case falls somewhere between those two. Here, there was a trial, but not on the voluntarily dismissed claim (Count II). In view of the general principle of strictly construing a cost-shifting statute, the Court concludes that the most reasonable reading of CPLR 3220 is that there can be no recovery of expenses with respect to Count II because *that claim* did not proceed to trial.[1]

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[1] The parties' submissions make clear that "this case boiled down to a dispute about how much Defendants owed Plaintiff on Count I" (Reply Memo at 3 [NYSCEF 1164]). Thus, whether expenses are separately recoverable with respect to Count II does not appear to be an integral part of the motion.

* * * *

Accordingly, it is

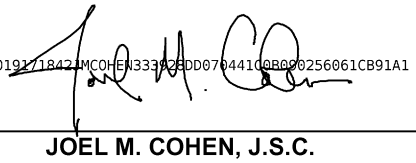
ORDERED that the motion for costs and fees is **GRANTED IN PART** insofar as Defendants shall recover their "expenses necessarily incurred. . . for trying the issue of damages" on Count I of the Complaint in an amount to be determined by the Court, and the motion is otherwise **DENIED;** it is further

ORDERED that the Court will hold a hearing on January 5, 2023, to determine the issue of expenses necessarily incurred for trying the issue of damages with respect to Count I; it is further

ORDERED the parties jointly submit a proposed briefing schedule by October 26, 2022; it is further

ORDERED that the parties promptly advise the Court if they reach an agreement or if they believe an informal settlement conference in advance of the January 5, 2023, hearing would be productive.

This constitutes the decision and order of the Court.



10/19/2022
DATE

JOEL M. COHEN, 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**