

McKenzie v 517-525 W. 45 LLC

2023 NY Slip Op 32470(U)

July 20, 2023

Supreme Court, New York County

Docket Number: Index No. 153180/2016

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

MARYBETH MCKENZIE, THE PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK ON BEHALF OF THE ESTATE OF TONY MYSAK, ZSUZSA MYSAK, CHARLOTTE PFAHL, DANIEL SCHNEIDER, MAX SCHNEIDER,

Plaintiff,

- v -

517-525 WEST 45 LLC and NEW YORK CITY LOFT BOARD,

Defendant.

-----X

INDEX NO. 153180/2016

MOTION DATE 12/17/2022

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 409, 410, 411, 412, 413, 440

were read on this motion to/for ATTORNEY - FEES

In this action by tenants of five loft buildings located at 517-525 West 45th Street in Manhattan, the court, by an order dated July 21, 2020, granted a motion by the defendant 517-525 West 45 LLC, the landlord, for summary judgment, denied the plaintiffs' motion for summary judgment and dismissed the complaint, with costs and disbursements to the defendant (MOT SEQ 006, 007). As the action was previously discontinued against defendant New York City Loft Board, the matter was marked disposed. A judgment was entered by the defendant on August 18, 2020, in the sum of \$445.00, representing costs and disbursements.

On October 16, 2020, the defendant filed the present motion to recover attorney's fees in the sum of \$149,758.50 (MOT SEQ 008). The defendant argues that it is the prevailing party and entitled to fees in this protracted litigation as per a 2006 agreement (the "2006 Stipulation")

between a tenants' association and the defendant's predecessor in interest. It further argues that, notwithstanding the disposition of the matter, the court granted its request to sever and continue its counterclaim for breach of contract, which purportedly included a demand for attorney's fees. The plaintiffs oppose the motion arguing, *inter alia*, that the action was already concluded, marked disposed, and reduced to a final judgment before the motion was made; the defendant is not entitled to any fees because it is not the prevailing party; the court found the 2006 Stipulation unenforceable as against these plaintiffs; and, contrary to the defendant's contention, its counterclaim was not severed and continued. For the reasons that follow, the defendant's motion is denied.

The defendant's motion is premised on the erroneous assumption that its answer properly pleaded a claim for attorneys' fees. "[A] generalized request for 'costs' . . . d[oes] not constitute an adequately pleaded claim for attorney's fees" (Yacono v United Mgmt. Corp., 185 AD3d 985, 986 [2nd Dept. 2020]), and "the bare mention of 'attorneys' fees' in the . . . answer[]" may likewise be "nothing more than a disregardable anomaly with 'very little tangible existence'" (Caracaus v Conifer Cent. Square Assocs., 158 AD3d 63, 72 [4th Dept. 2017]). Here, the answer did not include an express claim for attorneys' fees. Rather, it included a counterclaim sounding in breach of contract, for which the defendant sought damages, including "reasonable costs and expenses[.]" Absent from the answer is any reference to "attorneys' fees," "legal fees," "counsel fees," or any other similar formulation, nor is there any mention of the fee shifting provision in the 2006 Stipulation (Section V, Paragraph 41) upon which the defendant's claim for fees is based. Thus, a claim for attorneys' fees was not adequately pleaded in the first instance. See Vertical Computer Sys., Inc. v Ross Sys., Inc., 59 AD3d 205, 206 (1st Dept. 2009) ["claim for attorney fees, set forth only in (the answer's) wherefore clause and not in any counterclaims to

which it could be deemed an integral part, was not adequately pleaded” (internal citations omitted); see also Abyssinian Dev. Corp. v Bistricher, 133 AD3d 435 (1st Dept. 2015) [attorneys’ fees properly denied where no request for attorneys’ fees asserted in wherefore or an ad damnum clause].

Further, the defendant’s request in its summary judgment papers to sever and continue its counterclaim was not granted. The court’s July 21, 2020, summary judgment decision did not expressly sever or reserve any claims or issues for later adjudication, nor did it direct entry of a partial or interlocutory judgment or otherwise indicate a non-final disposition. Rather, it dismissed the action in its entirety, directed the entry of judgment, and marked the case disposed. Compare Anderson v Anderson, 291 AD2d 836 (4th Dept. 2002) [post-judgment determination of attorney’s fees proper where trial court “clearly reserved judgment on the issue of attorneys’ fees prior to entry of judgment” (internal citations omitted)]; Shapiro v Shapiro, 179 AD2d 525, 526 (1st Dept. 1992) [post-judgment award of attorneys’ fees proper where fees were requested prior to judgment and trial court “specifically deferred” its determination].

Indeed, it would have been illogical to sever the defendant’s counterclaim given the substance of the court’s summary judgment decision. The defendant’s counterclaim was for breach of contract based on the plaintiffs’ alleged violation of Section III(E) of the 2006 Stipulation. However, in dismissing the plaintiffs’ complaint, which likewise asserted a breach of contract claim based on the same Section III(E), the court expressly held that section of the 2006 Stipulation to no longer be enforceable. That determination was just as fatal to the defendant’s contract claim as it was to the plaintiffs’, and thus effectively mooted and denied the defendant’s severance request.

Moreover, given that its counterclaim was effectively rendered a dead letter and dismissed alongside the plaintiffs' complaint, the defendant can hardly be deemed to have prevailed on its claims in this litigation as it argues. Therefore, any reliance by the defendant on the fee shifting provision of the 2006 Stipulation is misplaced.

Finally, the time in which to make a request for attorneys' fees was before the entry of judgment, and the defendant did not do so. See Golden v Multigas Distributors, Ltd., 256 AD2d 215, 216 (1st Dept. 1998) [affirming denial of plaintiff's claim for attorneys' fees because plaintiff failed to make an application for fees "at any time prior to the entry of judgment"]. Rather, the defendant submitted a proposed final judgment, which contained no mention of attorneys' fees or the purported severance of any counterclaim. That judgment was duly entered by the County Clerk. The omission of a provision for attorneys' fees from the judgment is thus entirely of the defendant's own doing.

Accordingly, for these reasons and upon the foregoing papers, it is

ORDERED that the defendant's motion to recover attorney's fees (MOT SEQ 008) is denied.

This constitutes the Decision and Order of the Court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

<u>7/20/2023</u>			
DATE			
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"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE