

**CGM-LLNR LLC v Sylvia Ward & Po Kim Art
Gallery**

2024 NY Slip Op 30702(U)

March 5, 2024

Supreme Court, New York County

Docket Number: Index No. 153910/2017

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

CGM-LLNR LLC,

Plaintiff,

- v -

THE SYLVIA WARD AND PO KIM ART GALLERY,

Defendant.

-----X

THE SYLVIA WARD AND PO KIM ART GALLERY

Third-Party Plaintiff,

-against-

EPSTEIN ENGINEERING P.C.

Third-Party Defendant.

-----X

BELLET CONSTRUCTION CO. INC.,

Second Third-Party Plaintiff,

-against-

ONLY PROPERTIES LLC.

Second Third-Party Defendant.

-----X

INDEX NO. 153910/2017
MOTION DATE 07/14/2023
MOTION SEQ. NO. 014

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595488/2020

The following e-filed documents, listed by NYSCEF document number (Motion 014) 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 339, 340, 373, 374, 392, 401, 402, 403

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, Only Properties' motion for summary judgment is granted.

New York follows the general rule that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule". Courts must 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." *Matter of Part 60 Put-Back Litigation*, 36 NY3d 342, (2020); See also *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, (1989).

Here, it is undisputed that the parties' contracted for attorney's fees in compliance with *Hooper*. As such, Only Properties asserts that because Bellet's third-party complaint against it was dismissed, Only is entitled to attorney's fees from The Sylvia Ward and Po Kim Art Gallery pursuant to the agreement. In opposition, the Ward Gallery contends that while Only succeeded in getting the third party complaint dismissed, it did not prevail on the merits and thus is not entitled to attorney's fees.

The relevant provision of the parties' contract reads,

Notwithstanding anything to the contrary herein, it is expressly understood and agreed that in any case between the parties arising out of any damage to 415 and out of this Agreement - that is, in any case not involving a claim against ONLY by a Third Party - 417 OWNER shall indemnify ONLY for its attorneys' fees if ONLY is the prevailing party. It is expressly agreed and understood that by executing this Agreement, the parties intend to waive the American Rule. In addition, 417 OWNER agrees that this waiver meets the test announced in *Hooper Associates v. AGS Computers*, 74 N.Y.2d 487 (1989) and its progeny. Nothing herein shall be deemed to impair ONLY's rights under this Agreement to recover its attorneys' fees from 417 OWNER under Section 6 of this Agreement.

The First Department has held that an award for attorney's fees may be based on the ultimate outcome of the controversy, whether or not such outcome is on the merits. See *Soho Village Realty, Inc., v. Gaffney*, 188 Misc.2d 261, 262 [1st Dept 2001] (citing *Elkins v. Cinera Realty, Inc.*, 61 A.D.2d 828 [2d Dept 1978]). The party who prevails with respect to "the central relief sought" is considered the prevailing party. See *Wiederhorn v J. Ezra Merkin*, 98 A.D.3d

859 [1st Dept 2012]. The Ward Gallery acknowledges this standard but argues prevailing on the “central relief sought” requires winning on the merits of the case. However, this argument is unsupported by the case law.

Here, pursuant to the guidance of the First Department, as well as a reading of the plain meaning of the contractual text, Only Properties is entitled to attorney’s fees. In other words, the central relief Only Properties sought was dismissal of the meritless complaint filed by Bellet, and ONLY properties was the prevailing party. Therefore, Only Properties motion for summary judgment is granted.

Accordingly, it is hereby

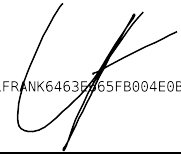
ADJUDGED that ONLY Properties motion for summary judgment is granted; and it is further

ORDERED that a trial of the issues regarding the amount of attorneys’ fees, is directed; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

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3/5/2024

DATE

LYLE E. FRANK, 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