

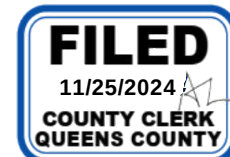
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| <b>Pan v Lo</b>                                                                                                                                                                                                                |
| 2024 NY Slip Op 35358(U)                                                                                                                                                                                                       |
| November 15, 2024                                                                                                                                                                                                              |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 704720/2023                                                                                                                                                                                           |
| Judge: Nicole McGregor Mundy                                                                                                                                                                                                   |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. NICOLE McGREGOR MUNDY**  
**Acting Justice**

IA PART 7



-----X  
 Bessie Pan and P&C International Trading Inc.,

Plaintiff(s),

-against-

Roger Lo, Harriette Lo, and Edward Sun,

Defendant(s).  
 -----X

Index  
 No.: 704720/2023  
  
 Motion Date:  
 December 12, 2023

Motion  
 Seq. No.: 007

The following numbered papers, read on this motion by defendants Roger Lo and Harriette Lo for: (1) judgment for breach of contract against plaintiff Bessie Pan and an order to pay defendants monetary damages for such breach and for use and occupancy; (2) an order for an award of attorney's fees incurred in this proceeding in favor of defendants, including, attorney's fees incurred by defendant Roger Lo in enforcing the terms and conditions of the October 31, 2017 Stipulation of Settlement; and on this cross-motion by plaintiff for an Order denying defendants' motion or, in the alternative, an order to compel the defendants to discontinue with prejudice the holdover proceeding pending in the Queens County Housing Court and to resolve the penalty that the Cooperative Management issued against the subject property and refund the remaining \$22,000 to plaintiff Bessie Pan with interests.

Papers  
Numbered

|                                                       |               |
|-------------------------------------------------------|---------------|
| Notice of Motion – Affirmation – Exhibits .....       | EF 33 – EF 49 |
| Notice of Cross Motion – Affirmation – Exhibits ..... | EF 50 – EF 56 |
| Answering Affidavits – Exhibits .....                 | EF 57 – EF 61 |

Upon the foregoing papers, it is Ordered that the motion and the cross-motion are determined as follows:

On February 19, 2013, plaintiff commenced this breach of contract action involving the sale of a cooperative apartment (hereinafter the co-op) located at 42-11 Kissena Boulevard in Flushing, New York. On October 31, 2017, the parties entered into a so-ordered Stipulation of Settlement. The stipulation provides, in part, that defendants will pay plaintiffs \$130,000 in full

satisfaction of all claims for damages, costs, disbursements and legal fees, and plaintiff Bessie Pan will vacate the co-op within 30 days of payment to her attorney.

According to Pan's and defendant Roger Lo's respective affidavits, it is uncontested that in September 2019, the parties amended the stipulation and defendant's attorney wired \$108,000 to plaintiff's attorney while holding \$22,000 in escrow to cover any damages to the co-op and unpaid common charges. In June 2022, defendant Roger Lo commenced a holdover proceeding in Queens County Housing Court against Pan. Defendants Roger Lo and Harriette Lo (hereinafter the Lo defendants) allege that Pan is still in possession of the co-op and has not paid defendants for use and occupancy since November 1, 2019. Pan, on the other hand, avers that she moved out of the co-op since December 2019, the penalty owed was due to defendants' prior actions and the amount outstanding is more than \$100,000.

The Lo defendants now move: (1) to restore this matter to the court calendar for a hearing, (2) for a judgment against plaintiff Pan in the amount of \$105,600, and (3) for attorney's fees. Pan cross-moves for an order (1) denying defendants' motion in its entirety, or in the alternative, compelling defendants to discontinue the holdover proceeding pending in Queens County Housing Court and (2) compelling defendants to resolve the penalty issued against the property and to refund the remaining \$22,000 plus interest to plaintiff. Defendant Edward Sun admits service of the Lo defendants' motion but otherwise does not oppose the instant motion and cross-motion.

New York Courts favor the enforcement of stipulations. "Stipulations not only provide litigants with predictability and assurance that courts will honor their prior agreements, but also promote judicial economy by narrowing the scope of issues for trial. To achieve these policy objectives, a stipulation is generally binding on parties that have legal capacity to negotiate, do in fact freely negotiate their agreement and either reduce their stipulation to a properly subscribed writing or enter the stipulation orally on the record in open court. When a stipulation meets these requirements, . . . courts should construe it as an independent contract subject to settled principles of contractual interpretation." (*McCoy v. Feinman*, 99 NY2d 295, 302 [2002] [internal citations omitted].)

This Court will first address Pan's cross-motion. The branch of Pan's cross-motion for an order compelling defendants to discontinue the holdover proceeding is denied. New York City Civil Court Act § 110 provides that the housing part of the New York City Civil Court is:

"devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York, as follows: . . . (5) Actions and proceedings under article seven-A of the real property actions and proceedings law, and all summary proceedings to recover possession of residential premises to remove tenants therefrom, and to render judgment for rent due."

The Civil Court has jurisdiction over landlord tenant disputes (New York City Civil Court Act § 204) and when it can decide the dispute, as in this case, it is desirable that it do so (*See Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28 [1984]). Contrary to plaintiff's contention, under the circumstances of this case, *res judicata* is not applicable (*See generally Simmons v Trans Express Inc.*, 37 NY3d 107, 111 [2021]; *Beneficial Homeowner Serv. Corp. v Francis*, — AD3d —, 2024 NY Slip Op 04945 [2d Dept 2024]). Furthermore, plaintiff failed to cite any legal authority to support her contention that the holdover proceeding should be discontinued or resolved by this court.

The remaining branch of Pan's cross-motion to compel defendants to resolve the penalty issued against the property and to refund the remaining \$22,000 plus interest is also denied. Pan failed to demonstrate that the unpaid fees were accrued prior her occupancy of the co-op and that she moved out of the co-op in accordance with the parties' stipulation. She relies solely on her affidavit, which contains inadmissible hearsay statements that are both self-serving and conclusory (*See Perez v Brux Cab Corp.*, 251 AD2d 157, 159 [1st Dept 1998]; *First N. Mortgagee Corp. v Yatrakis*, 154 AD2d 433, 433 [2d Dept 1989]; *Daliendo v Johnson*, 147 AD2d 312, 321 [2d Dept 1989]). Therefore the Court is unable to award plaintiff the remaining \$22,000 held in escrow at this juncture.

This Court will now address the Lo defendants' motion. The first branch seeks a judgment against plaintiff for breach of contract and for damages in the amount of \$105,600 for said breach and for use and occupancy of the co-op from November 1, 2019, to October 31, 2023. Here, the Lo defendants failed to produce competent evidence indicating that Pan continued to occupy the co-op in violation of paragraph five of the stipulation. Moreover, in light of defendants seeking damages for four years of use and occupancy, from November 1, 2019, to October 31, 2023, the Lo defendants also failed to demonstrate reasonable efforts to mitigate their damages. (*See Wilmot v State*, 32 NY2d 164, 168-69 [1973]; *see generally Mack Cali Realty, L.P. v Everfoam Insulation Sys., Inc.*, 110 AD3d 680, 682 [2d Dept 2013]). Therefore, defendants have not demonstrated on the record before the court entitlement to an award of damages for breach of contract and use and occupancy of the co-op.

With respect to the branch of the Lo defendants' motion for attorney's fees and cost, as a general rule, attorneys' fees are incidents of litigation and the prevailing party may not collect them from the losing party unless an award is authorized by agreement between the parties or by statute or court rule (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *see IG Second Generation Partners, L.P. v Kaygreen Realty Co.*, 114 AD3d 641 [2d Dept 2014]). The Lo defendants fail to demonstrate their entitlement to attorney's fees and the Court, in the exercise of its discretion, declines to award attorney's fees on this application (*See Brisk v Bloch*, 165 AD3d 745, 748 [2d Dept 2018].) *Broich v Nabsico, Inc.*, 2 AD3d 474 [2d Dept 2003]).

Finally, the Court notes that the Lo defendants' request to restore this matter to the court's calendar for a hearing to determined the relief sought herein will not be considered inasmuch as this request was not properly identified in the Notice of Motion (CPLR §2214(a)). In any event, the relief sought in the motion has been denied as above.

The parties' remaining contentions either are without merit or need not be addressed in light of the court's determination.

Accordingly, the motion and cross-motion are denied.

Dated: November 15, 2024

  
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NICOLE MCGREGOR MUNDY  
A.S.C.J.

