

Sun v Lawlor

2013 NY Slip Op 33228(U)

December 17, 2013

Supreme Court, New York County

Docket Number: 115206/2010

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 12/26/2013
[* 1]
**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number : 115206/2010
SUN, GEORGE
vs.
LAWLOR, BRAIAN E.
SEQUENCE NUMBER : 002
MONEY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 12/17/13
which disposes of motion sequence(s) no. 002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
DEC 20 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/17/13

(Signature), J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
GEORGE SUN,

Petitioner,

- against-

Index No.: 115206/2010
Submission Date: 8/7/13

BRIAN E. LAWLOR AS COMMISSIONER OF THE,
NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

DECISION AND ORDER

Respondent.

- and-

210 W 94 LLC,

Respondent-Landlord.

FILED

DEC 20 2013

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Petitioner Pro Se:
George Sun
210 West 94th Street Apt. 5B
New York, NY 10025

For Respondent:
Gary Connor Esq.
25 Beaver Street
New York, NY 10004

COUNTY CLERK'S OFFICE
NEW YORK

For Respondent-Landlord:
Belkin Burden Wenig & Goldman LLP
270 Madison Avenue
New York, NY 10016

Papers considered in review of this motion for a money judgment (motion seq. no. 002):

Notice of Motion/Affirm. of Counsel in Supp./Exhibits.....	1
Affidavit in Opp.....	2
Reply Affirm.....	3

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, respondent-landlord 210 W 94 LLC (the "Owner") moves for a money judgment against petitioner George Sun (the "Petitioner") for attorney's fees and costs in the amount of \$41,714.20. In the alternative, the Owner requests a hearing to determine the amount of reasonable attorney's fees and costs that it is entitled to recover from Petitioner.

DEC 19 2013

Petitioner is a tenant residing at 210 West 94th Street, Apt 5B, New York, NY, a building that is owned and managed by 210 W 94 LLC. On November 19, 2010, Petitioner commenced this proceeding against respondents Division of Housing and Community Renewal (“DHCR”) and the Owner seeking to vacate DHCR’s September 22, 2010 order. DHCR cross-moved to remit the proceeding so that it could reconsider its order in light of *Matter of Cintron v. Calogero*, 15 N.Y.3d 347 (2010). The Owner did not file an answer to the petition, but submitted an opposition to DHCR’s cross-motion.

On June 17, 2011, I issued a judgment denying the petition and dismissing this proceeding. After the judgment was rendered, Petitioner proceeded *pro se* and he appealed the judgment to the Appellate Division, First Department. On June 28, 2012, the Appellate Division affirmed the judgment, and later denied Petitioner’s motion to reargue on January 8, 2013.

The Owner now seeks attorney’s fees and costs from Petitioner for its defense of this proceeding, including Petitioner’s appeal to the First Department. The Owner argues that it is entitled to attorney’s fees because: (1) the Owner prevailed at all stages of this litigation; and (2) the lease between Petitioner and Owner contains a provision for attorney’s fees (“the lease”).

The Owner submits a copy of the lease. Paragraph 20 of the lease states that the Petitioner must reimburse the Owner for “[a]ny legal fees and disbursements . . . for defending lawsuits brought against Owner because of your actions.”¹

Petitioner opposes the Owner’s application for attorney’s fees on several grounds. Petitioner contends that the Owner’s delay in filing an application for attorney’s fees has resulted in prejudice to him. Petitioner submits an affidavit stating that “[h]ad I been informed of their fees at an earlier time and at regular intervals, I would have been able to form different decisions regarding the pursuit of the enforcement of the 1994 Order.”

Petitioner further argues that RPL § 234 prohibits an owner from collecting attorney’s fees even under the plain terms of the lease. In addition, Petitioner argues that attorney’s fees are unavailable because this action resulted from an administrative proceeding.

In reply, the Owner argues that its application for attorney’s fees is based on the terms of the lease, not based on RPL § 234. The Owner also claims that it did not assert a claim for attorney’s fees prior to this motion because it never had an opportunity to file an answer to the petition. In the event that the Court denies this motion, the Owner seeks leave to file an answer.

¹ The Owner submits a copy of the lease between Petitioner and Owner’s predecessor dated February 1, 1996. Owner’s counsel, Phillip L. Billet, submits an affirmation stating that Petitioner signed subsequent leases that adopted the terms of the February 1, 1996 lease. Petitioner does not oppose this assertion.

Discussion

I find here that the Owner's claim for attorney's fees is barred by the doctrine of laches. Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003). Although the lease contains a provision under which the Owner may recover attorney's fees,² I find that the Owner's delay in asserting its claim resulted in prejudice to the Petitioner, and therefore the Owner's claim for attorney's fees is barred by laches.

First, it is evident from the procedural history of this proceeding that the Owner delayed in asserting a claim for attorney's fees. Petitioner commenced this proceeding on November 19, 2010, with notice to be heard on December 21, 2010. I then issued a judgment on June 17, 2011, which was later affirmed on June 28, 2012. The Owner did not assert a claim for attorney's fees until May 10, 2013 – almost two years after a judgment was rendered.

² The language of the lease provides the Owner with a right to recover attorney's fees from Petitioner. *Rose v. Montt Assets, Inc.*, 187 Misc.2d 497, 498 (App. Term 1st Dep't 2000) (construing identical contract language to find that landlord could recover attorney's fees where "a tenant's own actions in prosecuting a claim cause the landlord to incur legal expenses"). In addition, RPL § 234 is not relevant here because this statute does not apply to Article 78 proceedings. *Blair v. New York State Div. of Hous. and Comm. Renewal*, 96 A.D.3d 687, 688 (1st Dep't 2012).

The Owner argues that it did not have an earlier opportunity to file an answer and assert a counterclaim for attorney's fees until now. However, the Owner did have an opportunity to file an answer to the petition and assert a counterclaim for attorney's fees. CPLR § 7804 provides that an answer must be served at least five days before the petition is noticed to be heard. Here, the Owner did not file an answer, but instead chose to file an opposition to DHCR's cross-motion to remit the proceeding.

Second, the Owner's delay resulted in prejudice to the Petitioner. After I denied the petition in June 2011, Petitioner proceeded *pro se*, and he filed an appeal and a subsequent motion to reargue. Without access to counsel, Petitioner was never advised that he could be held liable for the Owner's attorney's fees. Petitioner only became aware of the Owner's claim for attorney's fees in May 2013, after his appeal and motion to reargue had already been denied. Petitioner stated in his affidavit that if he had been aware of the Owner's claim for attorney's fees earlier, he would have made different decisions in pursuing his claims. Petitioner has been clearly prejudiced by the Owner's delay because he did not have the opportunity to mitigate his liability for attorney's fees, and the Owner now seeks to hold him liable for \$41,714.20.

Given that Petitioner experienced such a disadvantageous "change in position" attributable to the Owner's delay, it would be inequitable to allow the Owner to assert its claim for attorney's fees against this *pro se* Petitioner at this late date. *Seligson v. Weiss*, 222 A.D. 634, 638 (1928); *Conti v. Citrin*, 239 A.D.2d 251, 251 (1st Dep't 1997).

For the above stated reasons, I deny the Owner's motion for a money judgment awarding it attorney's fees against Petitioner.

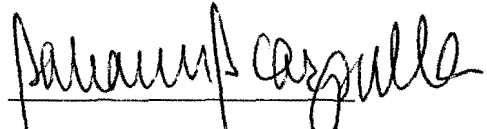
In accordance with the foregoing, it is hereby

ORDERED that respondent-landlord 210 W 94 LLC's motion for a money judgment against petitioner George Sun in the amount of \$41,714.20 for attorney's fees and costs is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 17, 2013

ENTER:



Saliann Scarpulla, J.S.C.

FILED
DEC 20 2013
COUNTY CLERK'S OFFICE
NEW YORK