437 W. 16th St. LLC v 17th & 10th Assoc. LLC
2017 NY Slip Op 30460(U)
February 15, 2017
Supreme Court, New York County
Docket Number: 600100/07
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK—PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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437 WEST 16TH STREET LLC,

Plaintiff,

-against-

Index No.: 600100/07

17TH AND 10TH ASSOCIATES LLC, et al.,

DECISION/ORDER

Defendants.

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This is a breach of contract action for damage to a building caused by construction at an adjoining property. Plaintiff 437 West 16th Street LLC (16th Street LLC) is the owner of the building located at 437 West 16th Street in Manhattan. Defendant 17th and 10th Associates LLC (17th LLC) is the owner and developer of the adjacent property, and defendant The Related Companies, L.P. (Related) is the guarantor of certain obligations of the developer. By decision and order, dated April 17, 2015 (2015 Decision), this court determined the categories of damages that were caused by the construction. By decision and order, dated June 27, 2016 (2016 Decision), this court awarded judgment in favor of plaintiff and against defendants in the amount of $1,191,692.45, and held the judgment in abeyance pending briefing on the date from which interest should be awarded. The court also directed affidavits on plaintiff's claim for attorney's fees. (2016 Decision at 22-23.)[1]

Attorney's Fees

As a threshold matter, defendants dispute that plaintiff is entitled to attorney's fees. Defendants argue that the court should exercise its discretion to reverse the prior decision of this Court, dated May 29, 2010 (Fried, J.),[2] holding that under section 4.2 (B), the indemnification

[1] These decisions were made after trial and contain a full recitation of the facts, which will not be repeated here.
[2] This court assumed Justice Fried's docket upon his retirement.

provision in a Zoning Lot Development Agreement (ZLDA) to which plaintiff and defendants were parties, defendants have an obligation to indemnify plaintiff for intra-party claims, including reasonable attorney's fees. (437 W. 16th St., LLC v 17th and 10th Assocs., LLC, 2010 NY Slip Op 50971[U], 2010 WL 2217822 [Sup Ct, NY County 2010] [2010 Decision]; see Aff. of Seth Weinstein [Defs.' Atty] In Opp., ¶¶ 8-16 [Defs.' Aff. In Opp.].)

This court declines to exercise its discretion to reconsider the May 29, 2010 decision. This decision expressly rejected the argument, which defendants make here, that the ZLDA provides for indemnification only for third-party claims. (2010 WL 2217822, at * 4.) The decision was made after a full and fair opportunity to be heard, and is law of the case. (See generally Martin v City of Cohoes, 37 NY2d 162, 165 [1975], rearg denied 37 NY2d 817; Delgado v City of New York, 144 AD3d 46, 51-52 [1st Dept 2016]; Carmona v Mathisson, 92 AD3d 492, 492-493 [1st Dept 2012].)

Defendants further argue that plaintiff should not be awarded attorney's fees because plaintiff was not the "prevailing party" in the litigation. (Defs.' Aff. In Opp., ¶¶ 17-26.) Plaintiff counters that the ZLDA provision does not "mention" the term "prevailing party," and does not condition plaintiff's entitlement to attorney's fees on its status as a prevailing party. In the alternative, plaintiff argues that it is in fact the prevailing party. (Aff. of Christian Habersaat [Pl.'s Attorney] In Supp., ¶¶ 12, 15 [Pl.'s Aff. In Supp.].)

As the Court of Appeals has explained:

> "Under the general rule, 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. It is not uncommon, however, for parties to a contract to include a promise by one party to hold the other harmless for a particular loss or damage and counsel fees are but another form of damage which may be indemnified in this way."

(Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989] [internal citations omitted].) The absence of the words "prevailing party" in an indemnification provision is not determinative as to whether the indemnitee must be a prevailing party in order to be entitled to attorney's fees for litigation. (See generally Matter of Wiederhorn v Merkin, 98 AD3d 859, 862-863 [1st Dept 2012], lv denied 20 NY3d 855; Firemen's Assn. of State of New York v 99 Washington, LLC, 73 AD3d 1320, 1323-1324 [3d Dept 2010].)

The court holds that the indemnification provision in the ZLDA conditions plaintiff's entitlement to attorney's fees for this action on prevailing party status, and finds that plaintiff was the prevailing party pursuant to this court's 2016 Decision. In order to qualify as a prevailing party, the party seeking attorney's fees must succeed "on the central claims advanced, and receive substantial relief in consequence thereof." (Board of Mgrs. of 55 Walker St. Condo. v Walker St., LLC, 6 AD3d 279, 280 [1st Dept 2004], citing 501 E. 87th St. Realty Co., LLC v Ole Pa Enters., Inc., 304 AD2d 310, 311 [1st Dept 2003]; Sykes v RFD Third Ave. I Assocs., LLC, 39 AD3d 279, 279 [1st Dept 2007]; see also Nestor v McDowell, 81 NY2d 410, 416 [1993], rearg denied 82 NY2d 750 [holding that plaintiff was not entitled to attorney's fees because plaintiff had "not prevailed with respect to the central relief sought"].) A party is not required to have prevailed on all of its claims in order to be considered a prevailing party. (Matter of Wiederhorn, 98 AD3d at 863.) "To determine whether a party has 'prevailed' for the purpose of awarding attorneys' fees, the court must consider the 'true scope' of the dispute litigated and what was achieved within that scope." (Sykes, 39 AD3d at 279; Excelsior 57th Corp. v Winters, 227 AD2d 146, 147 [1st Dept 1996].)

Here, the true scope of the dispute is whether defendants breached the ZLDA by undertaking construction activities in a manner that caused damage to plaintiff's building. (See

Compl., First Cause of Action; 2010 Decision, 2010 WL 2217822, at * 5-6 [rejecting defendants' claim that the indemnitor's negligence was a requisite to summary judgment on the issue of the applicability of the ZLDA indemnification provision, and awarding plaintiff partial summary judgment holding defendants "liable to plaintiff for vibration-related, underpinning-related and foundation-related damage to plaintiff's building, as well as for masonry and roof damage to plaintiff's building," with the amount of the judgment to be determined]; 2015 Decision [decision after trial determining what damages, in particular, were caused by the construction and what costs were reasonably necessary to remediate such damages].)[3]

Moreover, plaintiff achieved substantial relief, notwithstanding that it was not awarded all of the damages it sought. As held in the 2016 Decision, which quantified the damages, both parties took extreme positions at the trial. Plaintiff's damages request, even after reduced by plaintiff at trial from $4.92 million to $2.86 million, included costs for improvements undertaken in connection with a gut renovation of plaintiff's building, and not only costs for the remediation of damage caused to the building by the adjacent construction. Defendants asserted at trial that plaintiff's damages were "nominal," even though their structural engineer prepared a damages estimate in 2007 acknowledging damages of over $600,000. (2016 Decision at 21-22.) Nevertheless, as also held in the 2016 Decision, plaintiff proved damages of over $1.191 million attributable to defendants' construction. Plaintiff thus achieved a substantial recovery on its indemnification claim under the ZLDA.[4]

[3] The action was tried under the first cause of action in the complaint for breach of the ZLDA. The complaint also pleaded a third cause of action for negligently caused damage, which was not tried.
[4] As held at the trial, damages for the costs of remediation to the building are recoverable by plaintiff, notwithstanding that the invoices were paid by Kleinberg Electric Inc. This holding applies equally to plaintiff's claim for attorney's fees.

Although plaintiff's failure to recover the total amount of its requested damages does not undermine its status as the prevailing party, the result achieved is properly considered in "determining the reasonableness of the amount of the award." (See Levine v Catskill Regional Off-Track Betting Corp., 57 AD3d 624, 626 [2d Dept 2008], lv denied 14 NY3d 705 [2010]; see also RSB Bedford Assocs. LLC v Ricky's Williamsburg, Inc., 112 AD3d 526, 528 [1st Dept 2013] [holding that while plaintiff was the prevailing party, the Referee properly reduced the amount of fees sought by plaintiff, because plaintiff did not prevail on all of its claims].)

The factors to be considered in assessing the reasonableness of the requested attorney's fees include "time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved." (Matter of Freeman, 34 NY2d 1, 9 [1974]; accord Safka Holdings, LLC v 220 W. 57th St. L.P., 142 AD3d 865, 866 [1st Dept 2016]; S.T.A. Parking Corp. v Lancer Ins. Co., 128 AD3d 479, 480 [1st Dept 2015].)

Here, the request for attorney's fees is not reasonable on its face given the results obtained. It is nevertheless clear that plaintiff incurred, and is entitled to recover, significant legal fees. The moving affidavits, however, lack both an overview of, and supporting detail as to, the services performed, before and after the commencement of this action. As the affidavits do not provide a sufficient basis on which to assess the amount of reasonable attorney's fees, the matter will be referred to a Special Referee for a hearing.[5]

[5] Defendants claim, among other things, that plaintiff was not the prevailing party because plaintiff rejected a settlement from defendants' insurer in approximately the amount that plaintiff ultimately recovered. (Defs.' Aff. In Opp., ¶¶ 25-26.) The court rejects that claim. Although it appears that there is some authority that settlement alternatives may be considered in determining the reasonableness of the amount of attorney's fees claimed (as

Interest

CPLR 5001 (a) provides for the award of interest as a matter of right for "breach of performance of a contract." CPLR 5001 (b) provides that "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed," but that where "damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." It is undisputed that interest here must be awarded at the statutory rate of nine percent, as the parties have not agreed to a different rate in their contract (the ZLDA). (See CPLR 5004; 23 E. 39th St. Mgt. Corp. v 23 E. 39th St. Dev., LLC, 134 AD3d 629, 631 [1st Dept 2015].) It is also undisputed that it is appropriate to compute the award of pre-decision interest from a single reasonable intermediate date. (Defs.' Supp. Memo. On Pre-Judgment Interest, at 1 [Defs.' Supp. Memo.].) The parties, however, dispute the proper start and end dates for framing the midway point. As defendants acknowledge, plaintiff incurred expenses for Allowed Work (i.e., remediation that was necessary due to the adjacent construction and for which this court allowed damages, as opposed to improvements) between February 13, 2006 and March 2, 2012. The midway date is February 21, 2009. (Defs.' Supp. Memo., at 5.)

The court will award interest from this midway date. In so holding; the court rejects plaintiff's contention that damages for Allowed Work were last incurred in July, 2010. (Pl.'s Supp. Memo. On PreJudgment Interest, at 5 [Pl.'s Supp. Memo.].) This argument ignores that

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opposed to prevailing party status) (see Hinman v Jay's Village Chevrolet, Inc., 239 AD2d 748, 749 [3d Dept 1997]), this issue has not been fully briefed by the parties, and they have not addressed the impact of CPLR 4547 on whether the amount of a settlement offer may be considered in assessing the reasonableness of the claimed attorney's fees. The parties also have not addressed whether the attorney's fees for which plaintiff was invoiced were reduced or compromised and, if so, the effect on plaintiff's claim for fees.

It is noted that defendants oppose the amount of the requested attorney's fees on numerous grounds. It will be for the Special Referee to apply the traditional factors articulated in Matter of Freeman (34 NY2d 1, supra) in comprehensively assessing the legal and factual merit of these grounds.

Allowed Work was incurred for an invoice dated February 26, 2012 (Supreme General Contracting). (See Defs.' Supp. Memo., at 4; 2016 Decision, at 12, Defs.' Trial Ex. LLL [Brower Spreadsheet].) Although the 2012 invoice represents a small percentage of the total Allowed Work, the Allowed Work was performed over a protracted period. It is not feasible to parse the hundreds of invoices to determine the percentages of work performed at the various stages of plaintiff's remediation.[6]

In accepting the February 21, 2009 midway date, the court also rejects defendants' contention that no interest should be awarded until after the payment that plaintiff received from its insurer, Seneca Insurance Company, is exhausted by applying it to the Allowed Work. (Defs.' Supp. Memo., at 3.) It is not unfair to require defendants to pay interest from the midway point of plaintiff's remediation, as defendants had the use of the money during the time of their dispute with plaintiff. (See Spodek v Park Prop. Dev. Assocs., 96 NY2d 577, 581 [2001].)

Finally, it is undisputed that plaintiff is entitled to interest on the reasonable attorney's fees to be awarded to it. The parties, however, again dispute the date from which the interest should be awarded. Defendants claim that plaintiff did not prevail, if at all, until June 27, 2016, the date of this court's award of damages, and that the date for interest on attorney's fees should be the intermediate date between June 27, 2016 and the future date of the attorney's fees award. (Defs.' Supp. Memo., at 7.) Plaintiff contends that interest should be awarded on the attorney's fees from October 15, 2011, "the midway point of Plaintiff's paid legal invoices." (Pl.'s Supp. Reply Memo., at 5.)

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[6] While it is not feasible to determine the percentages of Allowed Work performed on the various dates over the lengthy period of plaintiff's repair of its building, the dates on which Allowed Work was performed are reasonably ascertainable, and were summarized at trial. (See Defs.' Trial Ex. LLL; New York City Hous. Auth. v Spectrum Contr. Group, Inc., 2014 NY Slip Op 30568[U], 2014 NY Misc Lexis 977 [Mar. 6, 2014, No. 450992/10] [this court's prior decision imposing pre-judgment interest from midway date between first and last payments made by plaintiff to remediate damages due to defendant's breach of construction contract].)

Contrary to plaintiff's contention, the start date for the award of interest on attorney's fees is "the date of the underlying judgment on plaintiff's breach of contract claim" (see 1199 Hous. Corp. v Jimco Restoration Corp., 77 AD3d 502, 503 [1st Dept 2010]), as that is the date on which the party seeking attorney's fees has been determined to be prevailing party. (Solow Mgt. Corp. v Tanger, 19 AD3d 225, 226 [1st Dept 2005].) Here, although no express findings were made in the 2016 Decision as to plaintiff's prevailing party status, the date of that decision, June 27, 2016, is the date on which plaintiff prevailed on the central relief sought. Interest should, however, be awarded from an intermediate date between June 27, 2016 and the date of the ultimate attorney's fees award. (See Solow Mgt. Corp. v Tanger, 43 AD3d 691, 691 [1st Dept 2007], lv denied 10 NY3d 708 [2008]; Miller Realty Assocs. v Amendola, 51 AD3d 987, 990 [2d Dept 2008] [awarding interest on the attorney's fee award from the midpoint date between "the date the court determined that the plaintiff had prevailed on its claim" and "the date that the court awarded the attorney's fees"].)

It is hereby ORDERED that the stay of entry of judgment imposed by the court's order dated June 27, 2016 is vacated; and it is further ORDERED that the Clerk shall enter judgment in favor of plaintiff 437 West 16th Street LLC and against defendant 17th and 10th Associates LLC and defendant The Related Companies, L.P., jointly and severally, in the amount of $1,191,629.45 (representing $890,230.29 found to be for Allowed Work by defendants' expert, Barry Brower, plus $133,854.38 for adjustments allowed by this court for vendors other than Erwin Lobo, plus Erwin Lobo invoices in the amount of $167,544.78, with interest on said amount of $1,191,629.45 from February 21, 2009 at the statutory rate of nine percent per annum until the date of decision, June 27, 2016; and interest from June 28, 2016 at the statutory rate of

nine percent per annum until the date of entry of judgment; together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the issue of the amount of plaintiff's reasonable attorney's fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the Special Referee's report shall provide for interest on the reasonable amount of attorney's fees from an intermediate date between June 27, 2016 and the date of the ultimate attorney's fees award; and it is further

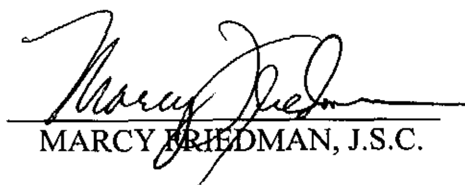
ORDERED that, within 15 days from the date of entry of this decision and order, plaintiff shall serve a copy of this decision and order with notice of entry upon defendants by NYSCEF, unless any party is exempt, and by overnight mail, and shall e-file proof of compliance within 10 days after the aforesaid service; and it is further

ORDERED that, within 30 days of the date of entry of this decision and order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Special Referee's Office (Room 119); and it is further

ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report; and it is further

This constitutes the decision and order of the court.

Dated: New York, New York
February 15, 2017



MARCY FRIEDMAN, J.S.C.