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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

FRIENDS OF HUDSON RIVER PARK, FRIENDS OF CLINTON COVE, HELL'S KITCHEN NEIGHBORHOOD ASSOCIATION, HON. GALE BREWER, HON. TOM DUANE, FRANZ LEICHTER, KATHLEEN STASSEN BERGER, TOBI BERGMAN, KRISTIN DIONNE, JOHN GARCIA, NICHOLAS HABER, CORY OLICKER HENKEL, LAUREN MCGRATH, DARCI OBERLY, SHELLY SECCOMBE, PETER SIRIS, ARTHUR STOLIAR, and DAVID TILLYER,

Plaintiffs,

- v -

NEW YORK CITY DEPARTMENT OF SANITATION, THE CITY OF NEW YORK, THE STATE OF NEW YORK, and HUDSON RIVER PARK TRUST,

Defendants.

INDEX NO. 105763/05

MOTION DATE 1/12/12

MOTION SEQ. NO. 002

The following papers, numbered 1 to 6 were read on this motion for attorney's fees

Notice of Motion— Affirmation — Affidavit	No(s). 1-3
Answering Affirmation — Affidavit — Exhibits A-E	No(s). 4-5
Replying Affirmation	No(s). 6

FILED

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

MAR 2 1 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 3/19/12
New York, New York

, J.S.C.

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

1. Check one: .....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

X CASE DISPOSED ☐ NON-FINAL DISPOSITION
☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

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FRIENDS OF HUDSON RIVER PARK, FRIENDS OF CLINTON COVE, HELL'S KITCHEN NEIGHBORHOOD ASSOCIATION, HON. GALE BREWER, HON. TOM DUANE, FRANZ LEICHTER, KATHLEEN STASSEN BERGER, TOBI BERGMAN, KRISTIN DIONNE, JOHN GARCIA, NICHOLAS HABER, CORY OLICKER HENKEL, LAUREN MCGRATH, DARCI OBERLY, SHELLY SECCOMBE, PETER SIRIS, ARTHUR STOLIAR and DAVID TILLYER,

Plaintiffs-Petitioners,

-against-

NEW YORK CITY DEPARTMENT OF SANITATION, THE CITY OF NEW YORK, THE STATE OF NEW YORK, and HUDSON RIVER PARK TRUST,

Defendants-Respondents.

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Index No. 105763/05

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

Plaintiff-petitioner Friends of Hudson River Park (Friends) moves for an order awarding attorney's fees for movant's efforts to enforce the terms of a 2005 Stipulation of Settlement between the parties.

BACKGROUND

The dispute in this action arose under the 1998 Hudson River Park Act whereby defendant City of New York (City) was to have vacated Pier 97 at West 57th Street by December 2003. The City was using the Pier for sanitation operations. Defendant did not vacate Pier 97 by the 2003 deadline. Friends commenced this "hybrid" action and special proceeding. Friends

sought monetary and equitable relief in order to accelerate the recovery of the subject designated parkland for park purposes. The equitable relief included a judgment declaring illegal the Department of Sanitation's continued use and occupation of the Pier. Friends also sought injunctive relief, enjoining construction of a new sanitation building on the Pier. Additionally, Friends sought monetary relief in the form of rent for the continued use and occupation of the Pier and damages for the increased cost of creating the Park. (Verified Complaint at ¶ 2.)

Friends is a New York not for profit corporation. Its mission is to advocate and provide private sector support for the new Hudson River Park on the West Side waterfront between West 59th Street and Battery Park. (*Id.* at ¶ 3.) Friends asserts that is has close to 1000 individual and business members, many of whom live or own property in close proximity to Pier 97. It alleges that many members use the walking and bike paths and the park playground and that a number of members also conduct business on or near the waterfront. (*Id.* at ¶ 4.) The principal goals and activities of the organization are: undertaking the advocacy required to secure the public funding needed to complete the park; undertaking the advocacy and other efforts to ensure that the Park is built in accordance with the Park Act; sponsoring public programs, including educational programs, in the Park; and raising and contributing private sector funding to help build and maintain the park. (*Id.* at ¶ 3.) Friends' members claimed that they were being adversely affected by the noise, traffic, air pollution, and visual impact of the sanitation operations on the Pier as well as being exposed to the added danger created by the frequency which truck traffic and salt carriers cross the walking and bike paths as they enter and exit the sites. (*Id.* at ¶ 4.)

The parties entered into a Stipulation of Settlement of the lawsuit in October 2005. That stipulation provided, in part, that defendant was to vacate Pier 97 by May 1, 2008, although the

settlement contemplated that the "City might continue to use and occupy Pier 97 for sanitation purposes until January 1, 2009." (Defendant's memorandum of law at 3.) Defendant planned to move its sanitation operations from Pier 97 to a new sanitation garage, then already under construction, at West 57th Street and West Street. The new garage was not completed in time for the City to move its operations by the January 1, 2009 deadline set forth in the 2005 Settlement Agreement. Therefore, the parties entered into a supplemental agreement, dated January 30, 2009, which extended further the time given to defendant to vacate the premises to October 31, 2009 (First Supplemental Agreement). Defendant was also unable to meet the October 31, 2009 deadline, and once again the parties entered into a supplemental agreement, dated July 1, 2010, further extending the deadline for the defendant's vacatur to November 1, 2010 (Second Supplemental Agreement). Defendant was unable to meet that deadline too, and did not vacate the premises until March 14, 2011, when Pier 97 was finally turned over to the Hudson River Park Trust. Pursuant to the agreements and other stipulations, the City paid agreed-upon sums for use and occupancy to the Hudson River Park Trust.

Plaintiff alleges that defendant did not act in good faith regarding its attempts to comply with the deadlines imposed by the 2005 Agreement and its subsequent extensions. Defendant allegedly did not comply with the requirement that it alert petitioners "to any circumstances or issues which had a likelihood of changing the scheduled vacatur date(s) beyond any information received on the mandated periodic reports and in the frequent conference calls scheduled at the direction of the Court." (Plaintiff's reply memorandum of law at 1.) Defendant contends that it did comply with all the "informational requirements of the Agreements and regularly informed this Court and all parties of its progress as it completed construction of the new garage and

prepared to move its operation off Pier 97." (Defendant's memorandum of law at 3-4.)

Plaintiff also alleges that "the main impediment to a more timely vacatur by the Defendants appeared to be a serious inability on the part of Defendants to anticipate for and plan for known and likely contingencies." (Plaintiff's memorandum of law at 7.) Plaintiff lists a number of steps not yet completed that were necessary for occupying the new garage where defendant was moving its sanitation operations, such as a fire department inspection to obtain a temporary certificate of occupancy, installation of appliances, cleaning and turning over of keys. (*Id.*) Defendant, however, alleges that it was "not required to do more than it did." (Defendant's memorandum of law at 4.) Plaintiff also alleges that, even after the deadline of November 1, 2010 had passed, defendant had unfinished work left on the new garage, and thus could not meet the deadline imposed by the second supplement to the 2005 Agreement. Plaintiff cites the cleaning of concrete dust at the new sanitation facility as one example of unfinished work after the November 1, 2010 deadline passed. Plaintiff alleges that

> "it is inconceivable that it was not known or anticipated at least months prior to February 2011, when the last of the structural concrete work and the majority of the balance of the structured work on the garage was already complete, that there would be a significant amount of accumulated concrete dust in the garage facility...the need for surface and air cleaning would have been part of the original specifications...there is no excuse why the extent of cleaning needed was not assayed by Defendants in a timely manner." (Plaintiff's memorandum of law at 8-9.)

Plaintiff also alleges that the City did not respond to "[p]laintiff's regular requests for information." (*Id.* at 10.)

Plaintiff contends that, because it continually and frequently followed up with defendant and requested more and more frequent conference calls and demands for information, it is entitled to attorney's fees. It alleges that its

> "advocacy was not only a significant factor in insuring Pier 97 was vacated in time to meet the 2011 window for the Trust's marine construction, but also in insuring the Trust had sufficient information to be assured it could move ahead with its bid, bid approval, and contract processes without the risk that the time and expense so incurred would not actually result in the timely start of the marine work." (*Id.*)

Defendant, however, alleges that it did all it was required to do and that plaintiff is not entitled to attorney's fees because neither the 2005 Settlement Agreement nor the supplemental agreements provided for attorney's fees.

I.

New York State follows the well-settled "American Rule" regarding responsibility for attorney's fees. This rule prevents a prevailing party from "recouping legal fees from the losing party 'except where authorized by statute, agreement or court rule.'" (*Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203 [1st Dept 2010] quoting *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004].)

In this case, Plaintiff argues that the language of the Second Supplemental Agreement, so ordered July 1, 2010, entitles them to attorney's fees. Paragraph 2 of the Second Supplemental Agreement states that,

> "In the event the City has not removed its sanitation operations from Pier 97 by November 1, 2010, Plaintiff Friends of the Hudson River Park ("Friends") may move before this Court for any attorneys' fees incurred in connection with this Second Supplemental Agreement and any further actions Friends may take in the future related to the City's continued sanitation operations on Pier 97. Nothing in this paragraph shall waive the City's right to oppose any motion Friends may make for attorneys' fees or be deemed to indicate the City's agreement that such attorneys' fees are appropriate or warranted." (Plaintiff's memorandum of law at 2.)

Plaintiff argues that this language creates a "right" to attorney's fees.

Under the American rule in New York, the agreement would have had to specifically

provide for attorney's fees for the prevailing party. As the Court of Appeals stated in *Hooper Associates Ltd. v AGS Computers, Inc* (74 NY2d 487, 492 [1989]), "[i]nasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should 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." The language of the Second Supplemental Agreement in this case does not create a "right" to the attorney's fees; it merely says that plaintiff may make a motion to this Court as to whether it would be entitled to, and be awarded attorney's fees, which it would be able to do irrespective of the agreement. The plain meaning of paragraph 2 of the Second Supplemental Agreement is that plaintiff may move for attorney's fees and the defendant may oppose the motion, but it does not guarantee an award of attorney's fees. Furthermore, "there is no provision in the stipulation requiring a deviation from the American rule, and we decline to read one into the stipulation." (*Towne Partners, LLC v RJZM, LLC*, 79 AD3d 489, 490 [1st Dept 2010].) Thus, because paragraph 2 does not specifically provide for an award of attorney's fees and because the Court will not read a provision for attorney's fees into the agreement, plaintiff is not entitled to an award of attorney's fees under the Second Supplemental Agreement.[1]

II

Plaintiff also argues that, even without the language in the Second Supplemental Agreement, it would be entitled to attorney's fees under state and federal case law. However,

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[1]The Court notes that when the Second Supplemental Agreement was negotiated, the parties agreed that all issues concerning attorney's fees be deferred until the conclusion of the case; the subject language, quoted above, resulted.

plaintiff misreads *Moses Production, Inc. v Sweetland Films B.V.* (12 Misc 3d 1158[A] [Sup Ct, NY County 2006]), which it cites for the proposition that attorney's fees may be awarded irrespective of whether the parties had an agreement regarding attorney's fees. Plaintiff argues that the court in *Moses Production, Inc.* awarded the plaintiff attorney's fees even though there was no agreement between the parties and no applicable statute regarding payment of attorney's fees. However, in that case, Section 13 of the stipulation of settlement between Moses Production, Inc. and Sweetland Films B.V. did provide for attorney's fees for the prevailing party. (*Id.* at 3.) By an Order dated January 19, 2005, Justice Fried awarded plaintiffs attorney's fees "pursuant to Section 13 of the Stipulation and Order of Settlement." (Defendant's exhibit B.) Therefore, the court in *Moses* does not seem to depart from the American rule, because the fees were apparently awarded pursuant to a stipulation.

Additionally, plaintiff argues that federal case law allows for a divergence from the American rule, citing *Vari-O-Matic Machine Corp. v New York Sewing Machine Corp.* (638 F Supp 713 [SD NY 1986].) Plaintiff argues that *Vari-O-Matic* stands for the proposition that attorney's fees may be awarded to serve as a deterrent of an action commenced in bad faith, vexatiously, or for oppressive reasons. However, the decision that petitioner cites must be read in context with a prior decision in that case. The first decision, decided in January 1986, reveals that the attorney's fees were awarded because defendant "apparently felt free to delay and frustrate resolution of the action...defendant has acted in bad faith." (*Vari-O-Matic Machine Corp. v New York Sewing Machine Attachment Corp.*, 629 F Supp 257, 259 [SD NY 1986].)

The federal judiciary has long recognized an exception to the American rule where "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith,

vexatiously, wantonly, or for oppressive reasons." (*F.D. Rich Co., Inc. v U.S. for Use of Indus. Lumber Co., Inc.*, 417 US 116, 129 [1974].) Plaintiff cites no New York State case applying the federal exception of "bad faith, vexatiously, or for oppressive reasons" for assessing attorney's fees against the losing party. Under the New York standard,

> "the court, in its discretion, may award to any party or attorney in any civil action or proceeding...costs in the form of...reasonable attorney's fees, resulting from frivolous conduct...conduct is frivolous if: (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." (22 NYCRR 130-1.1.)

In determining whether conduct is frivolous the Court

> "shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." (*Id.*)

Under the New York State standard, defendant's conduct was not frivolous, and an award of attorney's fees to the plaintiff is therefore not warranted.

To the extent that the federal standard might differ from the New York standard, and assuming only for purposes of argument that the federal standard might be applied, plaintiff would still not be entitled to an award of attorney's fees under the federal standard. In this case, plaintiff has not demonstrated that the defendant has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." (*Alyeska Pipeline Service Co. v Wilderness Society*, 421 US 240, 259 [1975].) It is true that defendant was unable to adhere to the various deadlines agreed upon, which movant asserts caused it to take an aggressive "litigation and negotiation posture." (Plaintiff's reply memorandum of law at 4.) Rather, as movant forthrightly indicates, it is also

true that "there is no question that throughout this process, all parties have maintained an attitude of respect and have engaged in extensive negotiations in order to avoid the expense and uncertainty of yet more protracted litigation." (Plaintiff's reply memorandum of law at 2.) Moreover, in this situation where construction was largely dependent on contractors and others not within the City's control, it cannot be said that the City's conduct was egregious or in bad faith. To the extent that the Court required, and the parties agreed, that the City pay use and occupancy for its continued use of the property, the Park Trust was compensated for the delay in redeveloping the space for park space with substantial sums that can be used for redevelopment construction. According to the second *Vari-O-Matic* decision, "fee shifting is designed to prevent a recurrence of defendant's egregious conduct." (*Vari-O-Matic*, 638 F Supp at 714.) In this case, defendant's conduct was not egregious and thus, an award of attorney's fees is not warranted under the bad faith exception to the American rule. Thus, even though petitioners' counsel's skilled advocacy and reasoned cooperation helped the process, the law does not permit the Court to make an attorney's fee award.

III.

Plaintiff also briefly argues that the common fund exception to the American rule applies in this case. However, plaintiff argues this point for the first time in its reply memorandum. "The function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion." (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept, 1992].) Plaintiff did not previously raise this argument; it cannot now do so in its reply.

CONCLUSION

For the forgoing reasons, it is ORDERED that plaintiff's motion for attorney's fees is denied.

ENTER

Dated: March 19, 2012
New York, NY

J.S.C.

HON. MICHAEL D. STALLMAN