

Goldstone v Gracie Terrace Apt. Corp.

2012 NY Slip Op 32548(U)

October 2, 2012

Sup Ct, New York County

Docket Number: 604235/07

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

MARO A. GOLDSTONE and THOMAS R. NEWMAN,
Plaintiffs,

Index No.: 604235/07

Motion Date: 06/12/12

Motion Seq. No.: 10

- v -

GRACIE TERRACE APARTMENT CORPORATION,
Defendant.

FILED
OCT 05 2012
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 5 were read on this motion for counsel fees.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1
Answering Affidavits - Exhibits	No (s) .	2 - 3
Replying Affidavits - Exhibits	No (s) .	4 - 5

Cross-Motion: Yes No

Plaintiff Maro A. Goldstone (Goldstone) moves, pursuant to CPLR 5001 (a) and Real Property Law (RPL) § 234, for an order awarding her the sum of \$376,006.29 for her attorney's fees associated with obtaining an order of the Appellate Division that she is entitled to a 100% abatement of her maintenance from August 16, 2003 until her unit is restored to a habitable condition. Defendant cross-moves for an order: (1) deferring the determination of an award of attorney's fees to the end of litigation; (2) reserving its rights to seek attorney's fees, costs and interest until the end of litigation; or in the

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

- 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

alternative, (4) directing an evidentiary hearing on Goldstone's motion for attorney's fees; and (5) directing plaintiff to provide records supporting her claim.

This case involves a dispute between the owner of a cooperative unit and the cooperative corporation arising out of the flooding of the plaintiffs' unit in 2003. On May 11, 2010, the Appellate Division, First Department, determined that Goldstone was entitled to summary judgment on her first cause of action, seeking a declaration that she is entitled to a 100% abatement on the maintenance of her unit, finding that the unit is uninhabitable.¹ On August 25, 2011, this court granted Goldstone partial summary judgment with respect to liability on her second cause of action for breach of contract (warranty of habitability) and her fourth cause of action for breach of contract (repairs).

In support of her motion, Goldstone has provided the affidavit of co-plaintiff Thomas R. Newman (Newman), an attorney who has been representing the parties, who indicates the number of hours that he has spent on this matter, and includes surveys and summaries of average legal billing costs in New York City. In addition, Newman has provided bills for the expenses that the plaintiffs incurred with respect to the appeal noted above, which

¹*Goldstone v Gracie Terrace Apartment Corp.*, 73 AD3d 506 (1st Dept 2010).

total \$5172.23, and for court reporting services incurred in taking the depositions of witnesses, totaling \$14,569.30. Although Newman asserts that Goldstone will be billed by Duane Morris, LLP, there are no bills from the law firm with which Newman is associated as "counsel," Duane Morris, LLP to Goldstone, or any retainer agreement executed between the parties. Nor is there any record differentiating between legal work that Newman performed on his own behalf and that performed on behalf of Goldstone.

It is Goldstone's contention that Newman's fees are reasonable and that she is entitled to receive those fees, plus interest, because the Appellate Division determined that she is entitled to declaratory relief in her favor and because this court granted her summary judgment on the issue of liability with respect to two of her fourteen causes of action.

In its cross motion, defendant argues that an attorney's affirmation alone, in this case an affidavit since Newman is a party to the action, may not be the basis of determining reasonable attorney's fees. Defendant maintains that a hearing is necessary to determine the reasonableness of the fees, and in this context, defendant demands the records that are probative on the issue of lawyers fees, such as a retainer letter and/or letter of engagement signed by plaintiffs and her attorney;

Newman's agreements with any firm with which he is associated; bills for the years 2003 to present for the firms with which he alleges an association; billing records for Goldstone from the law firm regarding legal work performed on her behalf in this matter from 2003 to present; retainer statements filed with the Office of Court Administration.

Defendant contends that, until the entire matter is resolved, the court cannot determine who, if anyone, is the prevailing party who might be entitled to attorney's fees. Further, defendant claims that it has tried to repair plaintiffs' unit over the years but that its attempts have been stymied by Goldstone, and that defendants have prevailed on its third counterclaim regarding the business judgment rule.

Lastly, defendant asserts that any award of attorney's fees would be premature at this juncture, where there are still eleven causes of action, plus counterclaims, to be determined.

In reply and opposition to defendant's cross motion, Newman has submitted a copy of his agreement with Duane Morris, LLP, dated May 2, 2003, in which Newman is confirmed to be Duane Morris, LLP's "Of Counsel." In addition, Newman asserts that his representation of Goldstone does not require a retainer agreement because he was providing the same type of counsel that he has previously provided to Goldstone in the 1980s.

Newman says that Goldstone is only seeking attorney's fees for work involved with the claims upon which she has already prevailed, not for the entire action, and so the motion is not premature.

Newman reiterates his arguments regarding the reasonableness of his fees, and claims that it would be unjust to delay awarding fees to Goldstone until the conclusion of this case.

However, Newman states that Goldstone agrees to a hearing on the reasonableness of the legal fees, but that defendants are not entitled to pre-hearing discovery for the documents sought. Moreover, Newman, in his affidavit, states that there are no records of the type defendant demands, and that to produce all of his billing records for the years 2003 to present is unduly burdensome.

Goldstone's motion seeking partial attorney's fees and prejudgment interest prior to the conclusion of the action is denied.

[I]n applying CPLR 5001 (a) to a request for prejudgment interest on an award of attorneys' fees pursuant to a residential lease and Real Property Law § 234, the date on which the right to interest on the fees accrues is that on which the party seeking fees was determined to be the prevailing party: 'In the ordinary contract or property action, interest is computed on damages for breach of contract or property right and flows from the date of the breach. Attorney fees are not damages for breach of any substantive provision of a contract or substantive property right. Rather, they represent a conditional award or prerogative which does not mature until the underlying action or proceeding has been determined. In the court's opinion that

establishes the appropriate date from which interest should flow' [internal citations omitted].

Solow Management Corp. v Tanger, 19 AD3d 225, 226-227 (1st Dept 2005).

"To be considered a 'prevailing party,' one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof." Sykes v RFD Third Avenue I Associates, LLC, 39 AD3d 279, 279 (1st Dept 2007). In the case at bar, only three out of fourteen claims have been decided in favor of plaintiffs, with the remaining 11 causes of action to be determined. Further, defendant has prevailed on one counterclaim, with additional counterclaims still to be adjudicated. At this juncture, it would be premature to award attorney's fees since the ongoing action has yet to be concluded. Siamos v 36-02 35th Avenue Development, LLC, 54 AD3d 842 (2d Dept 2008).

While the court agrees with the parties that an evidentiary hearing on the reasonableness of the attorney's fees sought is appropriate, the court simply lacks the time or the resources to hold multiple attorney's fee hearings in a piecemeal fashion, which would, in any event, go against the weight of the judicial authority cited above that only the prevailing party is entitled to such fees and the prevailing party cannot be determined until the entire case is concluded.

Finally, either party has the right to use pretrial procedures to demand discovery of records that are pertinent to the question of attorneys fees incurred in the prosecution or defense of this action (Aranow, Brodsky, Bohlinger, Benetar, Einhorn & Dann v Silverman, 38 AD2d 531 [1st Dept 1971], aff'd 30 NY2d 904 [1972]), once the determination of the prevailing party is made. Of course, any billing invoices or retainers, and the like, would be subject to the court's in camera review so as to exclude any portions thereof that would reveal client confidences as to services and strategy. Fochetta v Schlackman, 257 AD2d 546 (1st Dept 1999).

Accordingly, it is hereby

ORDERED that both the motion and the cross motion are denied, with leave to move again at the conclusion of the litigation.

This is the decision and order of the court.

Dated: October 2, 2012

ENTERED
FILED
 OCT 05 2012
 COUNTY CLERK'S OFFICE
 NEW YORK
 DEBRA A. JAMES
 J.S.C.