

**325 E. 14th St. Corp. v Marie France Realty Corp.**

2018 NY Slip Op 31002(U)

May 18, 2018

Supreme Court, New York County

Docket Number: 651074/2014

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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325 EAST 14TH STREET CORPORATION,

Plaintiff,  
-- against --

Index No.: 651074/2014

MARIE FRANCE REALTY CORP. and MARIE  
PERUGINI,

DECISION/ORDER

Defendants.

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This is an action arising out of a commercial lease, dated August 19, 2003 (Lease), for a bar and restaurant known as the Crocodile Lounge. The action was brought in response to a “Thirty (30) Days Notice of Cancellation of Lease,” dated February 24, 2014 (Notice of Cancellation or Notice). The Notice of Cancellation alleged violations of the Lease by Tenant, 325 East 14th Street Corporation, consisting primarily of unauthorized uses of the premises and alterations that were allegedly performed without the consent of Landlord, Marie France Realty Corp., and without required Department of Buildings (DOB) permits. The Notice stated that the Lease would be terminated on a specified date — 30 days from the mailing of the Notice — unless Tenant cured the defaults enumerated in the Notice. By decision on the record on December 11, 2014, this court granted Tenant a Yellowstone injunction. After a four-day bench trial, the court issued a decision, dated February 3, 2018 (Decision After Trial), which awarded a judgment affording Tenant an opportunity to cure specified conditions at the premises.

Tenant now moves for an order awarding Tenant its attorney’s fees in the amount of \$42,720.00, plus costs and disbursements, as the prevailing party in this action. (Order to Show Cause, dated Mar. 12, 2018 [Motion. Seq. No. 003]; Tenant’s Memo. In Supp. of Tenant’s Motion,

at 2.) Landlord also moves for an order finding that it is the prevailing party and awarding it reasonable attorney's fees and "professional fees" in an amount to be determined by a Special Referee. (Order to Show Cause, dated Mar. 12, 2018 [Motion Seq. No. 004].)

As the Court of Appeals has explained, "[u]nder 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." (Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989] [internal citations omitted].) "In order to justify an award of contractual attorneys' fees, the court need not adopt each claim raised in a lawsuit. Rather, the claimant must simply be the prevailing party 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] [other internal citations omitted]; Sykes v RFD Third Ave. I Assocs., LLC, 39 AD3d 279, 279 [1st Dept 2007] [same]; 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 v Merkin, 98 AD3d 859, 863 [1st Dept 2012], lv denied 20 NY3d 855 [2012].) "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, citing Excelsior 57th Corp. v Winters, 227 AD2d 146, 147 [1st Dept 1996].)

In the Decision After Trial, the court found that Tenant made specified alterations to the premises, which constituted a substantial violation of the Lease. (Decision After Trial, at 4-5, 19; see also id., at 6-18.) The court found, however, that Landlord waived the no-waiver and no-alterations provisions of the Lease. (Id., at 19-24.) In particular, the court found that the overwhelming evidence at trial established complicity on Landlord's part in permitting the illegal alterations to be made, that virtually all of the alterations were made at the outset of the tenancy, and that Landlord's long-standing forbearance from objecting to the alterations was not "passive acquiescence," as Landlord claimed, but acquiescence that amounted to active involvement in illegally altering the premises. (Id., at 5, 21-23.) The court further held that, although Landlord waived Tenant's violations of the Lease, Landlord could not effectively waive compliance with DOB regulations enacted for the protection of the public. (Id., at 24-25.) The court concluded that Tenant was entitled to an opportunity to cure (i.e. legalize) the conditions identified in the Decision After Trial. (Id., at 25-31.)

Under the circumstances, neither party obtained substantial relief on its claims and therefore neither is the prevailing party. Although Tenant was afforded the opportunity to legalize numerous alterations to the premises, the central relief sought by Tenant was a determination that it was not in substantial violation of the Lease and that it was not obligated to repair the conditions it alleged were "caused by the owner." (See Compl., ¶ 20, first, second, & third bullet points.)

Landlord also did not obtain the central relief it sought in its Notice of Cancellation<sup>1</sup>— that is, termination of the Lease upon Tenant's failure to cure the alleged violations within the 30-day

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<sup>1</sup> The parties dispute whether the Lease in fact provides for attorney's fees to Landlord under the circumstances of this case. Tenant relies on section 20 of the Lease and claims that it only permits Landlord to obtain attorney's fees if it institutes an action and is a "prevailing party." (Aff. of Joseph Altman [Tenant's Atty.] In Reply, ¶ 15.) Landlord

period specified in the Notice. As the court held that Landlord waived its objection to Tenant's violations of tenancy (Decision After Trial, 5, 21-24), Landlord also did not prevail on its counterclaims, which sought a declaration that the various alleged unauthorized uses of, and alterations to, the premises were "default[s] under the Lease."<sup>2</sup> Moreover, although Landlord's counterclaims sought an injunction directing Tenant to legalize the alterations and uses (Am. Ans., ¶¶ 37, 44, 69, 77, 91, 98, Wherefore Clause), Landlord effectively abandoned these claims at trial, taking the position that the tenancy must be terminated. Landlord did not prevail on this relief, as the court held that Tenant was entitled to an opportunity to legalize specified conditions. (Decision After Trial, at 30.)

Finally, 490 Owners Corp. v Israel (189 Misc 2d 34, 35 [App Term, 2d Dept 2001]), on which Landlord relies, is not to the contrary. There, the Court held that the fact that the tenant was granted a cure period did not alter the landlord's status as the prevailing party. In that case, the court found that the residential tenant had breached the lease, awarded a judgment of possession to the Landlord, and granted the tenant the 10-day statutory cure period. Here, the court did not find that Tenant was in default, based on the court's separate finding that Landlord waived its right to

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claims attorney's fees under section 51 of the Rider to the Lease, which provides for attorney's fees in the event any "action or inaction by Tenant causes Landlord to incur reasonable attorneys' fees." (Lease, annexed as Ex. A to the Complaint.) The court assumes for purposes of these motions that attorney's fees would be available to Landlord under section 51 if it were the prevailing party. The court notes that Landlord does not contest that the prevailing party standard applies to this section. (See Landlord's Memo. In Opp. to Tenant's Motion, at 5 ["Rider paragraph 51 . . . does not require that Landlord have actually instituted a proceeding in order to be entitled, as a prevailing party, to attorneys' fees"].)

<sup>2</sup> Although the court found that Tenant made numerous alterations to the premises with Landlord's knowledge and acquiescence but without necessary permits, the court rejected numerous other claims by Landlord as to illegal alterations or unauthorized uses. (See Decision After Trial, at 6-18.)

enforce the no-alterations clause of the Lease. The court, however, ordered Tenant to cure the alterations because Landlord could not waive compliance with DOB regulations.

It is accordingly hereby ORDERED that the motion of 325 East 14th Street Corporation for an order awarding it its attorney's fees is denied; and is further

ORDERED that the motion of Marie France Realty Corp. for an order awarding it its reasonable attorney's and professional fees is denied.

Dated: New York, New York  
May 18, 2018



MARCY FRIEDMAN, J.S.C.