SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 3

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TAMU LOLA, LLC

Plaintiff,

- v -

WALSAM 40 EAST 20 LLC,

Defendant.

**INDEX NO.** 653730/2015

**MOTION DATE** 10/22/2018

**MOTION SEQ. NO.** 003

**DECISION AND ORDER**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80
were read on this motion for HEARING ON ATTORNEYS' FEES.

This case began almost four years ago, when Plaintiff Tamu Lola LLC ("Plaintiff") sought a *Yellowstone* injunction to avoid imminent eviction by its landlord, Defendant Walsam 40 East 20 LLC ("Defendant"). This Court (Bransten, J.) granted the *Yellowstone* injunction and ordered Plaintiff to address the issues raised in Defendant's Notice to Cure.[1] A year-and-a-half passed, and Plaintiff did not cure. At that point, the Court permitted Defendant to amend its pleadings to add a counterclaim for attorneys' fees. (*See* NYSCEF 59). Another year went by. The case stalled. Plaintiff expressed "no interest" in litigating, while Defendant showed no signs of movement on its counterclaim. (NYSCEF 70). Finally, on June 4, 2018, the Court "discontinue[d] the case" as to Plaintiff's claims, but not Defendant's counterclaim, and suggested that Defendant "get going on it." (*Id.*) Defendant did so, and that is the motion now before the Court.

[1] A more complete summary of the factual background can be found in the record of the Court's June 13, 2017 proceeding. (NYSCEF 59).

The motion must be denied because it fails to establish Defendant's entitlement to attorneys' fees under the counterclaim. Instead, Defendant's motion requests a hearing to calculate the amount of attorneys' fees without elucidating, as a threshold matter, the basis for those fees. This approach follows from Defendant's apparent belief—not supported by any Court order—that the counterclaim for attorneys' fees has already been won, leaving only the question of how much in attorneys' fees should be awarded. But that is not the case. The counterclaim was not decided on its merits previously and—based on the instant motion—cannot be decided in Defendant's favor now.[2]

"Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule." *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 5 (1986); *Dupuis v. 424 E. 77th Owners Corp.*, 32 A.D.3d 720, 722 (1st Dep't 2006) ("[E]ach party is presumed responsible for his or her own attorneys' fees unless an award is authorized by agreement, statute or court rule.") (dismissing counterclaim for attorneys' fees based on lease provision). In the absence of a governing contract, statute, or court ruling, "there is no authority to grant [Defendant] attorneys' fees or costs of litigation," and the counterclaim must be dismissed for "fail[ing] to set forth a cause of action." *Silberstein v. First Wall St. Capital Corp.*, 128 A.D.2d 516 (1st Dep't 1987).

Defendant's motion rests on the presumption that this Court has already reached the merits of the counterclaim, and ruled in Defendant's favor:

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[2] The counterclaim alleges, in relevant part: "Pursuant to Article 19 of the Lease, Plaintiff is and will be indebted to Defendant for attorney fees in an amount to be determined by the Court but in any event for not less than $15,000.00." (Amended Answer with Counterclaim (the "Answer") ¶11) (NYSCEF 61)).

> Based upon the determination of Judge Bransten held on June 4, 2018, Defendant has the right to bring an application for a hearing on its attorney fees. Defendant has a proper counterclaim for attorney fees which were not discontinued in this action.

(Aff. of Adam Pollack ("Pollack Aff.") ¶9 (NYSCEF 64); *see* Reply Aff. of Adam Pollack ("Pollack Reply Aff.") ¶23 ("The Court has . . . determined that Defendant does indeed have the right to bring an application for a hearing on its attorney fees, despite Plaintiff's case in chief being discontinued.") (NYSCEF 77); *see also* Affidavit of Mark Torre ¶9 ("I am advised that Defendant has a valid counterclaim for attorney fees based on an appropriate provision in the Lease.") (NYSCEF 65)).[3]

Justice Bransten, however, made no substantive "determination" on Defendant's counterclaim. Quite the opposite, at the June 4, 2018 hearing the Court lamented the *absence* of substantive motion practice to advance the counterclaim. For a year-and-a-half after the Court allowed Defendant to add the counterclaim, it sat inert. That prompted the Court to remark on the record at the June 4 hearing: "Mr. Pollack, you have to move on your counterclaim. I'm not going to let it wallo[w]. You have to do something." (NYSCEF 70). In Defendant's retelling, this was the Court's way of granting them "the right to bring an application for a hearing on its attorneys' fees." (Pollack Reply Aff. ¶23). But in fact, the Court was urging Defendant to "get going on" proving its entitlement to attorneys' fees in the first instance—a necessary precondition to holding a hearing on such fees. To do so, Defendant could have moved for partial summary judgment on that issue, reserving for later the determination of reasonable attorneys' fees. *See, e.g.*, *Grutman*

[3] Defendant submitted no memorandum of law in support of its motion, only an affirmation and reply affirmation containing no legal citations. Justice Bransten previously admonished Defendant on the record for "not fil[ing] a memorandum of law" and "not provid[ing] any case law in support of [their] motion." (NYSCEF 59) ("That is a requirement. . . . You do memos of law, and if you don't, go out and do one.").

*Katz Greene & Humphrey v. Goldman*, 195 A.D.2d 331, 333 (1st Dep't 1993) (reviewing "motion for summary judgment on [plaintiff's] counterclaims seeking damages and disgorgement of counsel fees").

The motion Defendant did file, however, cannot rely on any previous "determination" by this Court to obtain the relief it now seeks under the counterclaim. None of the Court's previous statements or decisions amounted to a ruling that the counterclaim was meritorious or otherwise substantively "proper" or "valid," only that "the counterclaim remain[ed]" in the case awaiting a motion addressed to the merits. *See Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.*, 273 A.D.2d 55, 57 (1st Dep't 2000) (distinguishing between a "motion to discontinue the action" and a "decision on the merits").[4]

The wait continues. Neither party's papers address the specific contentions laid out in the counterclaim—*i.e.*, that a provision in the party's lease agreement entitles Defendant to "attorney fees in an amount to be determined by the Court but in any event for not less than $15,000.00." (Answer ¶11). Plaintiff concentrates solely on the underlying landlord-tenant dispute, arguing "that the motion [should] be denied because we never had a real opportunity to cure, i.e. the deck was always stacked against us by 'landlord.'" (Pl.'s Aff. in Opp. to Motion for Fees) (NYSCEF 73). Defendant mentions the relevant lease provision only in passing, *see* Pollack Aff. ¶8 (noting that the Answer "include[d] a claim for attorney fees under the Lease"), and did not include the lease as an exhibit in its supporting papers.

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[4] Relatedly, the Court's granting Defendant leave to amend its pleadings under CPLR § 3025 did not constitute a binding decision on the merits of the counterclaim. Although leave to amend will not be granted when the proposed new claims are "palpably insufficient or clearly without merit," the movants "are not required to prove their allegations at [that] stage." *Cohen v. Saks Inc.*, 169 A.D.3d 515, 515 (1st Dep't 2019).

The dearth of substantive argument on the counterclaim is particularly troublesome because, at least on its face, the lease does not entitle Defendant to the specific relief the counterclaim seeks. Article 19 provides for "reasonable" attorneys' fees under specific circumstances:

> If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease . . . and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any actions or proceeding and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefor, and if Tenant's lease term shall have expired at the time of making such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages.

(NYSCEF 9). As relevant here, the lease would require the tenant (Plaintiff) to pay landlord (Defendant) "reasonable attorneys' fees" if the landlord "defend[s] any actions or proceeding" necessitated by the tenant's default—but only if the landlord "prevails in any such action or proceeding." (NYSCEF 9). These conditions for payment under Article 19, however, go unaddressed in Defendant's motion.

First, Defendant has not shown that it has "prevail[ed]" here. The *Yellowstone* injunction "maintain[ed] the status quo pending a determination on the merits, *inter alia*, of the declaratory judgment." (NYSCEF 59 (citing *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 514 (1999)). But the Court never reached the merits of Plaintiff's declaratory judgment claim. (*See* NYSCEF 70). Nor did Defendant receive a declaratory judgment in *its* favor, or damages. Because there has been no "actual relief on the merits of [the] claim" which "materially alter[ed] the legal relationship between the parties," Defendant cannot be said to have "prevail[ed]." *See Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992) (describing

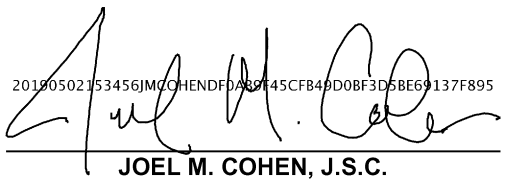
"prevailing party" inquiry under federal statute which entitles "the prevailing party" to "reasonable attorney's fee[s]").

Second, even if Defendant is indeed the prevailing party, Defendant's motion fails to explain how it is entitled to "not less than $15,000.00" in attorneys' fees "[p]ursuant to Article 19 of the Lease." (Answer ¶11). Again, Article 19 refers only to "reasonable" attorneys' fees. And this Court is not bound by what the counterclaim purports to be reasonable. *See Prince v. Schacher*, 125 A.D.3d 626, 628 (2d Dep't 2015) (noting that court "[is] not bound by the fixed percentage set forth in the [agreement], but [has] the inherent authority to determine reasonable attorneys' fees"); *see generally First Nat. Bank of E. Islip v. Brower*, 42 N.Y.2d 471, 474 (1977) (noting "the strong public policy of our State which condemns the contractual imposition of a penalty" in the context of agreements "purporting to fix attorneys' fees").

Therefore, it is:

**ORDERED** that Defendant's motion seeking attorneys' fees and a hearing to assess attorneys' fees is DENIED.

This constitutes the Decision and Order of the Court.




5/2/2019
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JOEL M. COHEN, J.S.C.

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| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
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