SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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RAHAMIM KATTAN and LEOR SCHEUER,

Plaintiffs,

- v -

119 CHRISTOPHER LLC C/O SABET GROUP, successor to WBS ASSOCIATES,

Defendant.

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INDEX NO. 156876/2016
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151

were read on this motion for ATTORNEY FEES.

Sutton Sachs Meyer PLLC, New York, NY (Zachary G. Meyer of counsel), for plaintiffs.
Golino Law Group PLLC, New York, NY (Brian W. Shaw of counsel), for defendant.

Gerald Lebovits, J.:

In this landlord-tenant action, plaintiffs previously sought (i) a declaratory judgment voiding a settlement in a prior rent-overcharge action against defendant's predecessor-in-interest and determining plaintiffs' lawful regulated rents, and (ii) damages for an asserted rent overcharge. Defendant counterclaimed for unjust enrichment and attorney fees.

This court granted summary judgment to defendant on plaintiff's declaratory-judgment and damages claims, without addressing the counterclaims. (*See* NYSCEF No. 123.) The Appellate Division, First Department, affirmed (*see Kattan v 119 Christopher LLC*, 180 AD3d 566 [1st Dept 2020]; and the Court of Appeals denied leave to appeal on the ground that this court's order was not a final judgment (*see* 35 NY3d 1004 [2020]).

Defendant now moves for summary judgment on its attorney-fee counterclaim, arguing that it is entitled to approximately $51,000 in fees as the prevailing party under a provision of the underlying lease agreements between plaintiffs and defendant. This court concludes that defendant is not entitled to summary judgment; and that plaintiff is instead entitled to summary judgment on this counterclaim as the non-moving party. (*See* CPLR 3212 [b].)

DISCUSSION

As an initial matter, this court agrees with defendant that its attorney-fee counterclaim was not resolved by this court's grant of summary judgment on plaintiff's claims—particularly

given the Court of Appeals's express holding that this court's prior order was not a final judgment. This court also agrees with defendant that it may seek summary judgment on its attorney-fee counterclaim relying on an argument based on the terms of the underlying leases, as opposed to the stipulation that resolved the prior action. On the merits, however, this court concludes that plaintiff is entitled to judgment as a matter of law.

"Under the general rule," a prevailing party in litigation may not collect attorney fees "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].) Defendant's attorney-fee counterclaim is based on an agreement among the parties: specifically, the second clause of § 20 (A) (5) of the separate leases between each plaintiff and defendant. That lease provision requires the tenant to reimburse the owner for "[a]ny legal fees and disbursements for legal actions or proceedings brought by Owner against [tenant] because of a Lease default by [tenant] or for defending lawsuits brought against Owner because of [tenant's] actions." (NYSCEF No. 142 at 4.) Defendant contends that because it incurred substantial legal fees in defending against plaintiff's claims in this lawsuit, those legal fees were incurred "because of [tenant's] actions," and may thus be recovered under § 20 (A) (5). This court disagrees.

The Court of Appeals has emphasized that "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Hooper Assocs.*, 74 NY2d at 491.) Given the general rule that each party bears its own attorney fees, an indemnity provision should not be construed to require indemnification of fees "unless the intention to do so is unmistakably clear from the language of the promise." (*Id.* at 492.) Under this demanding standard, an attorney-fee indemnity provision may be interpreted as applying to "disputes between the parties" only when it is "*unequivocally* . . . meant to cover claims between the contracting parties rather than third party claims." (*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 207 [1st Dept 2010] [reversing award of attorney fees] [emphasis in original].) That is, either the provision itself "must explicitly so state" (*id.* at 209), or the context of the parties' agreement must show that the provision would be essentially meaningless if it did not cover disputes between the parties (*see Breed, Abbott & Morgan v Hulko*, 74 NY2d 686 [1989]). Neither condition is satisfied here.

Although the drafters of this lease were well aware of how to craft an indemnity provision explicitly to cover fees incurred in actions between the parties, they did not do so in the lease clause defendant relies on. That is, the first clause of § 20 (A) (5) of the lease expressly applies to actions between landlord and tenant—but only when the claims arise from the tenant's default under the lease. That is not the case here.[1]

By contrast, the second clause of § 20 (A) (5), on which defendant relies, does not expressly or unmistakably apply to lawsuits between the parties. Instead, it covers "lawsuits brought against Owner because of [tenant's] actions." (NYSCEF No. 142 at 4.) That language is

[1] Section 20 (b) of the lease and Real Property Law § 234 reciprocally obligate the landlord to pay a prevailing tenant's defense costs in such an action, or the prevailing tenant's fees in a claim against the landlord arising from the landlord's lease default.

best read as pertaining to suits brought against the landlord by third parties—for example, a tort or insurance-subrogation action against the owner for damages stemming from the tenant's conduct.[2] And for that same reason, the *Breed, Abbott* exception does not apply here, either: The second clause of § 20 (A) (5) is still meaningful if construed to apply only to third-party claims rather than to suits between landlord and tenant.

In short, this court sees no basis to interpret the indemnity provision in § 20 (A) (5) as encompassing defendant's attorney fees incurred in this action. Nor is this court persuaded by defendant's argument that the court should interpret a different lease provision, § 20 (B), as *implying* an indemnity obligation on plaintiff into § 20 (A) (5). (*See* NYSCEF No. 150 at 5-6.)

Section 20 (B) provides as long as § 20 (A) (5) remains in the lease, the tenant may "collect reasonable legal fees and expenses incurred in a successful defense by [the tenant] of a lawsuit brought by Owner against [the tenant] or brought by [the tenant] against Owner to the extent provided by Real Property Law, section 234." (NYSCEF No. 142 at 4.) Real Property Law (RPL) § 234 provides that if a residential lease allows the landlord to recover attorney fees "incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease," a reciprocal lease provision will be implied by law under which the landlord commits to pay attorney fees "incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease," or incurred in the "successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease."

Defendant argues that because § 20 (B) references RPL § 234 and provides that a tenant can recover fees if they prevail in a suit by the landlord, "the inverse must be true as well," *i.e.*, "section 20(A)(5) authorizes fees to landlord for the successful defense of [an] action commenced by the tenant." (NYSCEF No. 150 at 6.) But that does not follow. RPL § 234, as incorporated by reference in § 20 (B), permits a tenant to recover fees as the prevailing party if the lease contains a provision permitting the landlord to recover attorney fees incurred as a result of the tenant's default under the lease. And, as discussed above, the first clause of § 20 (A) (5) expressly permits the landlord to recover attorney fees incurred because of tenant's default. (*See* NYSCEF No. 142 at 4.) Sections 20 (A) (5) and 20 (B) of the lease (and RPL § 234) thus function as a harmonious whole already, without a need to imply a further indemnity obligation into § 20 (A) (5). And indemnity-by-implication would not satisfy the requirements of *Hooper Associates* and *Gotham Partners* in any event.

This court admittedly reached a different conclusion two years ago, relying on a decision of the Appellate Term, First Department, construing the same lease language at issue in this case. (*See Mendez v 21 W. 86 LLC*, 2018 NY Slip Op 32642[U], at *4 [Sup Ct, NY County Oct. 16,

[2] This is not to say defendant's interpretation of the language of the second clause of § 20 (A) (5) is irrational or plainly foreclosed by the contractual text. Rather, even if defendant offers a permissible or "arguable inference of what the parties must have meant," the "strict standard imposed by *Hooper* requires more than that" to require indemnification of fees incurred in suits between the contractual parties. (*Gotham Partners*, 76 AD3d at 207, 209.)

2018], citing *Rose v Montt Assets, Inc.*, 187 Misc 2d 497, 498 [App Term, 1st Dept 2000].[3]) But decisions of the Appellate Term are merely persuasive, rather than binding, authority on this court. (*See People v Burgos*, 37 Misc 3d 394, 409-410 [Sup Ct, NY County 2012] [Marcy Kahn, J.] [discussing issue in detail]; *cf. Mears v Chrysler Fin. Corp.*, 243 AD2d 270, 272 [1st Dept 1997] [noting that the Appellate Term is a court of coordinate jurisdiction to that of Supreme Court, Trial Term, and lacks power to review rulings of Supreme Court].) And this court concludes now that the decisions of the Court of Appeals and the First Department in *Hooper Associates*, *Gotham Partners*, and other cases cannot be reconciled with the decision of this court in *Mendez* and that of the Appellate Term in *Montt Assets*. Having been persuaded that its prior interpretation was mistaken, this court declines to perpetuate the error further.

This court agrees with defendant that the question of how to interpret the lease provision in this case is an issue of law, not an issue of fact. (*See* NYSCEF No. 150 at 6.) And this court concludes as a matter of law that the lease in this case does not require plaintiffs to pay the attorney fees that defendant incurred in successfully defending against plaintiff's claims.

Accordingly, for the foregoing reasons it is hereby

ORDERED that defendant's motion under CPLR 3212 for summary judgment on its attorney-fee counterclaim is denied; and it is further

ORDERED that under CPLR 3212 (b) summary judgment is awarded to plaintiff on defendant's attorney-fee counterclaim, and that counterclaim is dismissed; and it is further

ORDERED that defendant shall within 30 days notify the court (by efiled letter and email to mhshawha@nycourts.gov) whether it intends to pursue or to withdraw its unjust-enrichment counterclaim; and it is further

ORDERED that plaintiffs are to serve a copy of this order with notice of its entry on all parties and on the office of the General Clerk, which is directed to restore the case to active status.

12/11/2020
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[3] *Cf. Sun v Lawlor*, 2013 NY Slip Op 33228[U], at 4 n 2 [Sup Ct, NY County Dec. 17, 2013] [noting in dicta that under the Appellate Term's decision in *Montt Assets*, this same lease language "provides the Owner with a right to recover attorney's fees" from the tenant].)