SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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GLAZE TERIYAKI, LLC,

Plaintiff/Counterclaim-Defendant,

- v -

MACARTHUR PROPERTIES I, LLC,

Defendant/Counterclaim-Plaintiff.

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INDEX NO.	653883/2013
MOTION DATE	
MOTION SEQ. NO.	011

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Before the Court in this extraordinarily protracted commercial landlord-tenant dispute, involving claims and counterclaims between plaintiff Glaze Teriyaki, LLC as the Tenant and defendant MacArthur Properties I, LLC as the Owner, is a motion by the Owner for attorney's fees and disbursements. The parties' relationship was governed by a lease dated July 31, 2010 for the ten-year period through July 31, 2020 for the use of the premises as a restaurant ("the Lease", NYSCEF Doc. No. 325). The Tenant's possessory rights were terminated and the Tenant was evicted on April 20, 2018 pursuant to the November 9, 2017 Decision and Order of the Appellate Division, First Department (NYSCEF Doc. No. 169). Additionally, a money judgment was entered in favor of the Owner on May 7, 2021 in the sum of $600,500.62 based on this Court's April 15, 2021 Decision and Order awarding the Owner use and occupancy (NYSCEF Doc. No. 309). The full procedural history is quite complex, involving proceedings before two different Supreme Court Justices, two different Referees, and the Appellate Division, and the Court incorporates here by reference the summary in the Appellate Division's November 9, 2017 Decision and Order, rather than recount all the details. In this motion, the Owner seeks an award of $214,286.81 plus interest for attorney's fees, $13,424.00 for an engineer's expert witness fees, and $4,085.81 for printing costs. The motion is granted in part and denied in part as follows.

The Owner's motion is supported by an Affirmation from Kirk P. Tzanides, Esq., the attorney who has represented the Owner since the commencement of this action by the Tenant, and a memorandum of law (NYSCEF Doc. Nos. 324 and 333). There the Owner relies on Articles 19 and 52 of the Lease for its claim. Article 19 provides in relevant part (with emphasis added) that:

> ***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, then***, unless otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform the obligation of Tenant thereunder, 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 attorneys' fees, instituting, prosecuting or defending any actions or proceedings, 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 fifteen (15) 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 of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages.

As the Owner correctly notes, and as the Appellate Division confirmed, the dispute between these parties began when the Owner served the Tenant with a notice dated October 23, 2013, claiming that the Tenant was in default of the Lease due to an improper exhaust system that violated the 2008 New York City Mechanical Code in the Administrative Code of City of New York. On November 7, 2013, the Tenant commenced this action pursuant to *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 N.Y.2d 630 (1968), seeking, among other things, to enjoin the Owner from terminating the Lease and for a declaration that the Tenant was not in default of the Lease. Thus, the Owner argues here, the Owner's fee application falls squarely within the terms of Article 19 of the Lease because the Owner incurred fees in an action involving a lease default.

The Owner also relies on Article 52 of the Lease, which states in relevant part that:

> D. In addition to any other indemnities required to be furnished by Tenant to Landlord and the Managing Agent under the terms of this Lease, Tenant shall indemnify and save harmless Landlord and the Managing Agent against and from all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses, including architect's and attorneys' fees and disbursements, which may be imposed upon or incurred by or asserted against Landlord and Managing Agent by reason of any of the following occurring during the term of this lease (unless arising out of Landlord's or Managing Agent's negligence): … (v) Any failure on the part of Tenant to perform or comply with any of the covenants, agreements, terms or conditions contained in this Lease, or on its part to be performed or complied with.

In addition to these points, Mr. Tzanides details his experience and qualifications and describes the legal services he rendered, with copies of invoices documenting his time (NYSCEF Doc. Nos. 327-329). Counsel also addresses the various criteria this Court must consider in determining the reasonableness of the fees under *In re Freeman's Estate*, 34 NY2d 1 (1974) and its progeny, including the time and labor required, the difficulty of the issues involved, and the results and benefits to the client.

The Tenant vigorously opposes the motion, insisting that neither of the cited Lease provisions, nor any other provision in the Lease, entitles the Owner to attorney's fees. Further, pointing to various specific aspects of the proceedings, the Tenant argues that much of the litigation was unnecessary and that the Owner could have obtained possession of the premises in a much more cost-effective manner in the Commercial Landlord and Tenant Part in the Civil Court, rather than here in Supreme Court.

As the Tenant correctly argues, it is well-established that: "Under 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 N.Y.2d 487, 491 (1989). The Court also agrees with the Tenant that Article 52 does not provide for an award of attorney's fees under these

circumstances because that Article is intended merely to provide for indemnification of costs incurred in suits commenced by third parties against the Owner based on acts or omissions by the Tenant that cause third parties to incur injury.

However, the Court rejects the Tenant's argument and agrees with the Owner that Article 19 provides an adequate basis for the attorney's fees claims in this case. Citing *Matter of Krodel v Amalgamated Dwellings Inc.,* 166 AD3d 412 (1st Dep't 2018), the Tenant argues that Article 19 constitutes an unenforceable penalty because it requires the Tenant to pay the Owner's attorney's fees without any mention of prevailing party status.

But *Krodel* is distinguishable on a number of grounds. First, it applies to a residential tenant-shareholder being asked to pay attorney's fees pursuant to the cooperative's standard form proprietary lease, whereas here we have two sophisticated business people who heavily negotiated the terms of a commercial lease. Further, the holding in *Krodel* was specific, and the First Department limited its ruling to its finding that "an attorneys' fees provision which provides that the tenant must pay attorneys' fees if it commences an action against the landlord based upon the default of the landlord is unconscionable and unenforceable as a penalty." 166 AD3d at 414. The tenant in *Krodel* had commenced suit against the cooperative corporation alleging that the cooperative had defaulted under the terms of the lease by refusing to transfer to the tenant certain shares owned by the tenant's husband. In contrast, the Tenant in the present action before this Court commenced this action for a *Yellowstone* injunction and a finding that the Tenant was not in breach of its Lease. The Tenant did not sue the Owner for breach of the Lease. Therefore, *Krodel* has no application here, and the Court does not find that Article 19 as drafted constitutes and unenforceable penalty. It is also noteworthy that the Tenant itself included in its Complaint a cause of action for attorney's fees under the Lease (NYSCEF Doc. No. 1).

As to the amount, the Court finds that Mr. Tzanides is highly experienced in the field and well-qualified to litigate the issues raised in this case, which forms a more than adequate basis for the hourly rate of $300.00 that he charged. And it was not unreasonable for the Owner to assert counterclaims and litigate in this Court issues related to those raised by the Tenant in its Complaint, rather than commence a separate suit in the Civil Court. However, some of the motion practice was unnecessary, such as the effort to obtain a judgment for rent covering a period of time resolved by Stipulation before Judicial Hearing Officer Ira Gammerman. But overall, the Owner would qualify as the prevailing party as it obtained a favorable ruling from the Appellate Division on the claim that the Tenant had breached the Lease, it ultimately obtained possession of the premises, and it was awarded a significant sum for rent and/or use and occupancy, although not all it demanded. Accordingly, a moderate reduction in the amount demanded is appropriate, and the Court awards the Owner $175,000.00 for attorney's fees. Article 19 also provides a basis for the engineer's expert witness fees in the sum of $13,424.00, as those services were critical to the Owner's success in proving a violation of the Mechanical Code and fall within the broad terms of Article 19. The request for reimbursement for appellate printing costs is denied, as that type of cost should be absorbed by the party.

Turning to interest, the Owner offers November 9, 2017 (when the Appellate Division granted the Owner a possessory judgment) as an intermediate date for the accrual of interest pursuant to the CPLR, and the Court accepts that date. The Owner seeks a rate of 18%, citing Article 59A of the Lease, which provides for interest at the "maximum legal rate permitted to be charged on short term loans (currently 18%)." As the Owner has offered no evidence of the rate for short term loans, and the 18% was simply offered as an example based on the rate in effect in 2010, the Court finds the statutory rate of 9% per annum to be more appropriate.

Accordingly, it is hereby

ORDERED that the Owner's motion is granted in part and denied in part, and the Clerk is directed to enter judgment in favor of defendant/counterclaim-plaintiff MACARTHUR PROPERTIES I, LLC, against plaintiff/counterclaim-defendant GLAZE TERIYAKI, LLC, on the Sixth Counterclaim in the Answer (NYSCEF Doc. No. 27) upon the Owner's efiling of a Proposed Judgment directed to the County Clerk providing for a judgment in the amount of $175,000.00 for attorney's fees and $13,424.00 for expert witness fees plus interest on the total amount at the statutory rate of 9% per annum, as calculated by the Clerk of the Court from November 9, 2017 through the entry of judgment, with interest continuing to accrue thereafter at the statutory rate until the judgment is paid in full.

As far as the Court is aware, this decision resolves the last issue remaining open in this 2013 case. However, the Court will proceed with the status conference on November 23, 2021 at 10:30 a.m. unless counsel efile a joint letter confirming that the case is disposed and that no issues remain outstanding for this Court to determine.

Dated: November 22, 2021

BARRY R. OSTRAGER, J.S.C.

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