

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: Part:32

-----X  
ANTHONY JACKSON,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 022581/2015

MICKAYEN REALTY GROUP LLC and  
ANTHONY LEWIS,

Defendants.

-----X  
HON. THERESA M. CICCOTTO:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	..... 3.....
ANSWERING AFFIDAVITS.....	.....4.....
REPLY AFFIDAVITS.....	.....
EXHIBITS.....	.....
MEMORANDA OF LAW.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE FOREGOING CITED PAPERS IS AS FOLLOWS:

Plaintiff moves for an Order granting summary judgment pursuant to CPLR § 3212 on his claims seeking to recover “attorneys’ fees, costs and disbursements pursuant to the parties’ Lease and/or RPL § 234 as a result of Jackson’s successful dismissal of Defendants’ Non-Payment Action commenced by defendant, Mickayen Realty Group, LLC (“Mickayen”), the self-proclaimed successor-in-interest to Anthony Lewis (“Lewis’); and dismissing Defendant’s affirmative defenses and counterclaim, or at the very least, severing the counterclaim from this action.”

Defendants oppose. After a review of the papers presented, all relevant statutes and case

law, the Court **grants** the motion.

Factual and procedural background:

Plaintiff Anthony Jackson has been a tenant residing in the premises known as 262 Quincey Street, Apt. 1R, Brooklyn, N.Y. 11215, since June 7, 2011. Defendant Anthony Lewis is the former owner of the subject building wherein Apt. 1R is located, and is also a member of co-defendant, Mickayen Realty Group LLC. Mickayen currently owns the subject building. Mr. Lewis and Mr. Jackson entered into a two year stabilized rent lease agreement, commencing on June 1, 2011 and terminating on May 31, 2013. The monthly rent was \$1,100.00.

Upon expiration of the lease, defendants commenced a holdover proceeding against Mr. Jackson, entitled Mickayen Realty Group LLC v. Anthony Jackson, followed by a non-payment proceeding, with the same caption, and different Index Number. The holdover proceeding was subsequently dismissed. However, Mr. Jackson retained the legal services of Adam Michael Levy, P.C., to represent him in the non-payment proceeding. Following nearly a year of extended litigation, on the designated date of trial, March 24, 2015, defendants' counsel apprised the court that she was unable to proceed. Mr. Levy made an oral application seeking dismissal of the non-payment proceeding, which was granted by Housing Court Judge Susan Avery. However, Judge Avery dismissed the matter without prejudice.

Positions of the parties:

The issue for this Court's determination is whether Judge Avery's dismissal without prejudice constitutes a decision on the merits.

Mr. Jackson argues that he is entitled to recover the legal fees he expended in relation to the non-payment action based on paragraph 27 of the Lease which provides that "[T]he successful party in a legal action between Landlord and Tenant for non-payment of rent or recovery of possession of

the [Premises] may recover reasonable legal fees and costs from the other party.” Additionally, he argues that Real Property Law § 234 entitles him to recover his “attorney’s fees and/or expenses” from defendants because the lease also provides that defendants could have recovered their attorneys’ fees from him had he failed to pay his rent.

Mr. Jackson also argues that “it is undisputed that [the holdover action against him] was dismissed and in deliberate defiance of a DHCR Order requiring Defendants to provide a Rent Stabilized renewal lease to Jackson, Defendants instead commenced the Non-Payment Action” (Aff in Support of Motion, ¶5). Therefore, defendants are both contractually and statutorily obligated to pay his requested legal fees and costs. He notes that the instant lease merely requires “success” in the non-payment action, to warrant attorney’s fees.

Defendants agree that the non-payment proceeding was dismissed without prejudice in response to plaintiff’s application. However, they argue that because this was a dismissal on procedural grounds, and not on the merits, (i.e. whether or not Mr. Jackson was obligated to pay rent to Mickayen), plaintiff is not entitled to legal fees. Defendants also argue that pursuant to Rent Stabilization Code § 2520.6(d), rent stabilized tenancies can be created between parties even in the absence of the signing of a formal lease agreement.

Conclusions of law:

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1<sup>st</sup> Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba*

*Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]).

It is well settled that since the majority of leases related to residential property provide that a landlord may recover attorneys' fees if he/she is compelled to initiate litigation against a tenant for breach of the lease, Real Property Law § 234 was specifically enacted to award, in appropriate circumstances, attorneys' fees to a tenant who is the prevailing party in a controversy that has reached what is considered to be an "ultimate outcome" (*Elkins v. Cinera Realty*, 61 A.D.2d 828, 828 [2d Dept. 1978]; see also *640 Broadway Renaissance Co. v. Rossiter*, 256 A.D.2d 568 [2d Dept. 1998]; *J.P. & Assoc. Props. Corp. v. Krautter*, 128 A.D.3d 963 [2d Dept. 2015]). A dismissal "without prejudice" is not a final determination of the merits (see *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13 [2008]), as by that language, the court expressly reserved the right to maintain a subsequent proceeding. Consequently, it has been held that an application for attorney's fees is premature before the "ultimate outcome" of a controversy has been reached, (*Elkins v. Cinera Realty*, supra).

A determination of whether a tenant is the prevailing party "requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope" (*J.P. & Assoc. Props. Corp. v. Krautter*, supra; *Excelsior 57<sup>th</sup> Corp. v. Winters*, 227 A.D.2d 146, 147 [1<sup>st</sup> Dept. 1996]), that is, whether the tenant has obtained the "central relief sought" (*Nester v. McDowell*, 81 N.Y.2d 410, 416 [1993]; see *Sykes v. RFD Third Ave. I Assoc., LLC*, 39 A.D.3d 279 [1<sup>st</sup> Dept. 2007]).

In the case at bar, the dismissal arose out of the recent non-payment action wherein Michele Hagler, Esq., counsel for petitioner requested that Judge Avery "discontinue" same. The fact that Judge Avery choose to dismiss the proceeding "without prejudice" is of no consequence, as the non-payment action could not be sustained, and there was no other legal avenue for petitioner to explore or legal remedy to pursue. In fact, it is important to note that defendants have tendered a renewal

lease to plaintiff, thus indicating their intention to eschew any further eviction proceedings. Indeed, it seems rather clear that the “ultimate outcome” has been reached.

Moreover, the Court cannot ignore the explicit language contained in the lease annexed to the instant motion as Exhibit “B.” Paragraph 27 specifically addresses legal fees and provides: [T]he successful party in a legal action or proceeding between Landlord and Tenant for non-payment of rent or recovery of possession of the Apartment may recover reasonable legal fees and costs from the other party.” The Court notes that a lease is deemed a valid contract and must be enforced according to its terms (see *Brickman v. Brickman Estate at Point*, 6 A.D.3d 474 [2d Dept. 2004]). The Court further notes that “a party who executes a contract is presumed to know its contents and to assent to them” (*Golden Stone Trading, Inc. v. Wayne Electro Sys. Inc.*, 67 A.D.3d 731, 732 [2d Dept. 2009]; see also *Metzger v. Aetna Ins. Co.*, 227 N.Y. 411, 416 [1920]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED, that plaintiff Jackson’s motion for summary judgment is granted; and it is further

ORDERED, that the amount of attorney’s fees to be awarded to plaintiff’s counsel is to be determined via a hearing scheduled for March 31, 2006 at 2:30 P.M. in Room 1102.

This constitutes the decision and order of the Court.

DATED: February 2, 2016

ENTERED:



Hon. Theresa M. Cicotto  
Judge of the Civil Court