

Park Union Condominium v 910 Union St., LLC

2017 NY Slip Op 32487(U)

November 22, 2017

Supreme Court, New York County

Docket Number: 650291/2015

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 39

-----X

THE PARK UNION CONDOMINIUM, THE BOARD OF
MANAGERS OF THE PARK UNION CONDOMINIUM,

INDEX NO. 650291/2015

Plaintiff,

MOTION DATE 3/10/2017

- v -

MOTION SEQ. NO. 009

910 UNION STREET, LLC,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 349, 350, 351

were read on this application to/for Attorney - Fees

Upon the foregoing documents, it is

The Park Union Condominium (the "Condominium") and the Board of Managers of the Park Union Condominium (the "Board") move (in motion sequence number 009) for an order awarding them their costs, expenses, attorneys' fees, and interest incurred in connection with this action to enforce a November 10, 2014 settlement agreement (the "Agreement") entered into by the Board, Condominium and unit owners and defendant 910 Union Street, LLC ("Sponsor").

The action before me was initiated, on February 2, 2015, by the Condominium and the Board against the Sponsor via a motion for summary judgment in lieu of complaint, seeking enforcement of the Agreement.

The Agreement provides in relevant part:

1. **SETTLEMENT AMOUNT.** The Sponsor has offered and the Board has agreed to accept, in consideration of the settlement of the Board Claims and the Sponsor Action, a total amount of \$550,000.00 (the "Settlement Amount"), subject to the terms and conditions set forth below.

* * *

3. **PAYMENT OF SETTLEMENT AMOUNT.** Upon execution and delivery of this Agreement, the Sponsor shall pay the Settlement Amount as follows:

(a) **Initial Payment.** Within forty-five (45) days of the execution and delivery of this Agreement, the Sponsor shall deliver checks to counsel for the Condominium totaling Five Hundred Thousand Dollars (\$500,000) (the "Initial Payment")... in partial settlement of the Board Claims and the Sponsor Action, except for such obligations that are to survive as are specifically set forth in this Agreement, including, without limitation, any payment obligation separately provided in this Agreement.

(b) **Second Payment.** Within sixty (60) days from the execution and delivery of this Agreement, or upon the transfer or sale of the Commercial Unit (as defined below), whichever shall occur first, the Sponsor shall deliver checks to counsel for the Condominium totaling Fifty Thousand Dollars (\$50,000) (the "Second Payment")... in full settlement of the Board Claims and the Sponsor Action, except for such obligations that are to survive as are specifically set forth in this Agreement.

(c) **Receipt of Releases.** In the event the Sponsor does not receive all of the executed copies of the releases set forth in paragraph 2 above, the Sponsor shall not be obligated to pay (i) the Initial Payment until ten (10) business days following its receipt of the last such release, and (ii) the Second Payment until fifteen (15) days following the date upon which it is obligated to pay the Initial Payment as set forth in paragraph 3(c)(i) above. Nothing

contained herein shall relieve the Sponsor of its obligation to make the Initial Payment and/or Second Payment, but shall only extend the time within which it is obligated to do so upon receipt of the fully executed Releases and Settlement Agreement.

4. SPECIAL ASSESSMENT AND COMMERCIAL UNIT. Upon timely receipt of the Settlement Amount, the Board agrees (a) that the Commercial Unit's share of the special assessment, assessed by the Board on or about June 5, 2014 (the "Special Assessment"), including, all interest, late fees, and attorneys' fees incurred in connection therewith, shall be deemed paid in full; and (b) to discharge Sponsor's responsibility and/or liability as it relates to the Special Assessment.

* * *

8. RELEASES.

(a) Upon execution of this Agreement, the Parties agree to execute Releases (the "Releases") in favor of one another in the forms annexed hereto as **Exhibits "E," "F," and "G."**

(b) Said Releases, referenced in paragraphs 2 and 8 (a) above, shall not become effective unless and until the Board receives timely payment of the full Settlement Amount (*i.e.*, Initial Payment and Second Payment).

(c) It is expressly understood and agreed that the Releases do not abrogate any responsibilities or obligations of the Parties under this Agreement.

On July 9, 2015, I denied the Condominium's and Board's motion for summary judgment in lieu of complaint and treated the affidavit in support thereof as the complaint (the "July 2015 decision").

Following an appeal of my July 2015 decision by the Board and the Condominium, the First Department reversed and granted the Condominium's and the Board's motion for summary judgment in lieu of complaint (the "First Department Decision"). The First Department noted that the Board's and Condominium's motion was granted "with costs." It further held that:

...the parties' settlement agreement constituted 'an instrument for the payment of money only' (CPLR 3213) and that [the Sponsor] defaulted by failing to make payment under its terms. ...In opposition, [the Sponsor] failed to raise a triable issue as to a defense to the instrument []. The agreement contained an unconditional promise by defendant to pay plaintiffs upon the execution of releases attached to the agreement, and it required no additional performance by plaintiffs as a condition precedent to payment or otherwise made defendant's promise to pay something other than unconditional.

The Park Union Condominium v. 910 Union Street, LLC, 140 A.D.3d 673, 673-674 (1st Dept. 2016).

The Condominium and Board now move for attorneys' fees, costs and disbursements, statutory interest and "fees on fees" incurred in this action.

Discussion

In general, "a party must pay his or her own attorney's fees unless an award is authorized by an agreement between the parties, or by statute or court rule." *Degregorio v. Richmond Italian Pavillion, Inc.*, 90 A.D.3d 807, 808 (2d Dept. 2011); *City of New York v. Zuckerman*, 234 A.D.2d 160, 161 (1st Dept. 1996). An award of attorney's fees is within the sound discretion of the trial court. *Mastrandrea v. Mastrandrea*, 268 A.D.2d 293, 293 (1st Dept. 2000).

According to the Condominium and Board, they are entitled to an award of their costs, expenses and attorneys' fees pursuant to Section 16 of the Agreement. Section 16, entitled "Costs and Attorneys' Fees in Event of Breach," provides that

Should it be necessary for any Party to commence legal action to enforce the terms of this Agreement, the prevailing party in such action shall be entitled to recover all costs and expenses, including the costs of investigation, expert fees, court costs, and reasonable

attorneys' fees and disbursements, incurred in connection with the prosecution or defense of such action, as fixed by a court of competent jurisdiction.

To determine if 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 v. RFD Third Ave. I Assoc., LLC*, 39 A.D.3d 279, 279 (1st Dept. 2007). A party may be deemed a prevailing party when it was successful "on the central claims advanced." *Board of Mgrs. of 55 Walker St. Condominium v. Walker St.*, 6 A.D.3d 279, 280 (1st Dept. 2004); *see also 25 East 83 Corp. v. 83rd Street Associates*, 213 A.D.2d 269, 269 (1st Dept. 1995).

Here, in the First Department Decision, the Board's and Condominium's motion for summary judgment in lieu of complaint was granted. In its decision, the First Department determined that: (1) the parties' Agreement was "an instrument for the payment of money only," and (2) the Sponsor defaulted by failing to make payment under the terms of the Agreement.

Hence, the Condominium and Board are the prevailing parties with respect to this action because they succeeded on their appeal on June 30, 2016 and were granted summary judgment "on the central claim[] advanced" – that the Sponsor breached the Agreement. *See 25 E. 83 Corp.*, 213 A.D.2d at 269; *Sykes*, 39 A.D.3d at 279-280. And, pursuant to Section 16 of the Agreement, the Condominium and Board are therefore entitled to reasonable attorneys' fees and expenses incurred with respect to this action.

The award of attorneys' fees is within the discretion of the trial court. *542 East 14th Street LLC v. Lee*, 66 A.D.3d 18, 24 (1st Dept. 2009). Further, an award of attorneys' fees pursuant to a contractual provision is only enforceable if the amount of fees requested is "reasonable and warranted for the services actually rendered." *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363, 365 (2d Dept. 1999). As I noted during oral argument on this motion, I reviewed the bills and did not find them to be excessive. Consequently, I order a hearing before a Special Referee to determine the attorneys' fees, costs and expenses that the Condominium and Board expended in this action.

Interest

The Condominium and Board contend that they are entitled to recover statutory interest on the principal contract amount as well as interest on their attorneys' fee award. In opposition, the Sponsor argues that because interest "is not mentioned as recoverable" in the Agreement, it is not recoverable.¹

Despite the Sponsor's contention, the Agreement's lack of reference to "interest" does not prohibit the Condominium and Board from recovering interest as CPLR § 5001 confers the right to interest in cases involving breach of contract.² Under CPLR § 5004,

¹ The Sponsor also argues that the First Department's failure to specifically award interest to the Condominium and Board mandates denial of their claim of interest. I disagree that the First Department's omission of the word "interest" in its decision finding breach of contract should be interpreted to mean that the Condominium and Board are not entitled to interest under the statute.

² CPLR § 5001 states that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract."

such interest “shall be at the rate of nine per centum per annum.” A settlement agreement is a contract, so I grant the Condominium’s and Board’s request for statutory interest, at the rate of “nine per centum per annum,” on the principal contract amount. *See Town House Stock LLC v. Coby Hous. Corp.*, 49 A.D.3d 456, 457 (1st Dept. 2008) (finding that lower court “properly awarded interest and prevailing-party attorneys’ fees... since this action is premised upon a breach of the [] settlement Agreement.”)³

Further, New York courts have held that CPLR § 5001 enables parties to recover interest on attorneys’ fees and that such interest accrues from the date that the moving party is deemed the prevailing party. *See, e.g., Housing Corp. v. Jimco Restoration Corp.*, 77 A.D.3d 502, 503 (1st Dept. 2010) (“prejudgment interest on the attorneys’ fee claim was properly awarded from the date of the underlying judgment on plaintiff’s breach of contract claim”); *Solow Management Corp. v. Tanger*, 19 A.D.3d 225, 226 (1st Dept. 2005) (“[i]t has been observed, in applying CPLR 5001(a) to a request for prejudgment interest on an award of attorneys’ fees...that the date on which the right to interest on the fees accrues is that on which the party seeking fees was determined to be the prevailing party); *Carco Group, Inc. v. Maconachy*, 718 F.3d 72, 87 (2d Cir. 2013). Thus, I find that the Condominium and Board may recover interest on their attorneys’ fees award at the statutory rate of 9% from the date they prevailed, June 30, 2016.

Lastly, the Condominium and Board request an award of “fees on fees” as reimbursement for expenses incurred from efforts to collect their contractual costs and

³ Because the parties’ do not agree on the date of the breach, I request the Special Referee to determine the breach date based upon the terms of the parties’ Settlement Agreement.

expenses and their statutory interest. Under New York law, “an award of fees on fees must be based on a statute or on an agreement.” *546-552 West 146th Street LLC v. Arfa*, 99 A.D.3d 117, 120 (1st Dept. 2012) (citation omitted). Here, the Agreement does not explicitly provide for an award of fees on fees. I therefore deny the Condominium’s and Board’s request for an award of fees on fees. *See Jones v. Voskresenskaya*, 125 A.D.3d 532, 534 (1st Dept. 2015) (finding referee’s decision denying “recovery of ‘fees on fees’” to be appropriate because “the parties’ agreement [did] not explicitly provide for such fees”); *Batsidis v. Wallack Management Co., Inc.*, 126 A.D.3d 551, 553 (1st Dept. 2015) (“Because it is not ‘unmistakably clear’ from the parties’ agreement that fees on fees were contemplated, such an award is not allowed”); *546-552 West 146th Street LLC*, 99 A.D.3d at 120.

The Sponsor posits that because this action was commenced pursuant to CPLR § 3213, the Condominium and Board are not entitled to interest from the date of the breach, but does not cite any cases for this proposition. I find this argument, and Sponsor’s remaining contentions, to be unavailing.

In accordance with the foregoing, it is hereby

ORDERED that The Park Union Condominium’s and the Board of Managers of the Park Union Condominium’s motion for an order awarding their costs, expenses, attorneys’ fees and interest incurred in this action to enforce the parties’ Settlement Agreement is granted except as to the request for fees on fees which is denied; and it is further

ORDERED that a hearing shall be conducted before a Special Referee on: (1) the amount of reasonable attorneys' fees and costs to be awarded The Park Union Condominium and the Board of Managers of the Park Union Condominium; and (2) the date of breach of the parties' settlement agreement. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that counsel for The Park Union Condominium and the Board of Managers of the Park Union Condominium shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part SOR) for the earliest convenient date; and it is further

ORDERED that a final judgment shall be entered after a hearing to determine the amount of reasonable attorneys' fees, costs and interest to be awarded to The Park Union Condominium and the Board of Managers of the Park Union Condominium.

This constitutes the decision and order of the Court.

11/22/2017

DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: