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LANDLORD-TENANT

Attorney Fees Under RPL Section 234


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Real Property Law (RPL) Section 234 provides in pertinent part that "[w]henever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease…, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses 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 in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease…."

Thus, under RPL §234, when a residential lease contains a provision entitling the landlord in a summary proceeding to recover attorney fees and/or expenses based on the tenant's breach of the lease, there is implied in the lease a reciprocal covenant for the landlord to pay the tenant's attorney fees and/or expenses based on the landlord's default or when the tenant is successful in defending a summary proceeding.

In a 3-2 decision decided just last week by the Appellate Division, First Department in *Graham Court Owner's Corp. v. Taylor*,[1] the issue before the court was whether the following language in paragraph 15 of the parties' residential lease was adequate to invoke the reciprocal mandate of RPL §234:

> "(D) If this Lease is cancelled, or Landlord takes back the Apartment, the following takes place:
> (3) Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes under this Lease. Landlord's expenses include the costs of getting possession and re-renting the Apartment, including, but not only reasonable legal fees, brokers fees, cleaning and repairing costs, decorating costs and advertising costs."[2]

Relying in part on the First Department's 1992 ruling in *Bunny Realty v. Miller*[3], the majority in *Graham*, in an opinion written by Justice Dianne T. Renwick in which Justices Karla Moskowitz and Judith J. Gische concurred, held that the lease provision at issue did entitle the tenant to recover his attorney fees under RPL §234 and remanded the matter to Civil Court for a hearing to determine the tenant's attorney fees.

In so holding, the majority refused to follow the First Department's prior holdings in *Oxford Towers.v. Wagner*[4] and *Madison-68 v. Malpass*,[5] which both held that RPL §234 was not invoked by the virtually identical language at issue in *Bunny Realty* and now in *Graham*. Justices John W. Sweeny, Jr. and Leland G. DeGrasse dissented.

'Graham'

The facts as recited by the majority in *Graham* are as follows. In May 2004, the tenant and landlord entered into a lease for an unregulated apartment in Manhattan for $2,200 per month. In October 2005, the tenant filed a rent overcharge complaint with the New York State Division of Housing and Community Renewal (DHCR), claiming that he was never made aware that the apartment was subject to rent stabilization when he took occupancy. The landlord opposed the complaint on the ground that the apartment became deregulated because the landlord performed $60,000 in renovations to the apartment before the tenant took occupancy. In response, the tenant submitted proof that he, not the landlord, performed the renovations. DHCR ruled in favor of the tenant and found that there had been an overcharge and that the apartment remained rent-regulated. Supreme Court thereafter dismissed the landlord's Article 78 petition challenging DHCR's ruling, and the Appellate Division affirmed.

Thereafter, the landlord accused the

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tenant of having made unauthorized alterations to the apartment, in violation of the lease provision requiring the tenant to obtain the landlord's "prior written consent" before making any alterations. On March 30, 2007, the landlord served the tenant with a notice to cure claiming that the tenant had installed a new electrical system in the kitchen without landlord's prior written consent and thereafter, on April 23, 2007, served a notice of termination citing the tenant's failure to cure.

The landlord thereafter commenced a summary holdover proceeding in Civil Court, New York County in which the landlord sought an award of possession of the apartment and "legal fees in the amount of $3,000." The tenant asserted a defense of retaliatory eviction and counterclaims for attorney fees and damages. The tenant claimed that his work in the apartment did not violate the lease because the work "was performed to remedy hazardous conditions…."[6]

After a non-jury trial, Civil Court dismissed the holdover proceeding, finding that the landlord's agents had specifically authorized the tenant to make the alterations. The court specifically found that the landlord's principal had "lied repeatedly and obviously" at trial.[7] The court further found that the landlord had commenced the proceeding in retaliation for the tenant's successful rent overcharge claim. The court denied the tenant's claim for attorney fees under RPL §234, but granted the tenant attorney fees under RPL §223-b(5) as part of his damages for retaliatory eviction.

Remedial Scheme

On appeal, the Appellate Term, First Department modified the order to the extent of denying the tenant attorney fees under RPL §223-b(5) and otherwise affirmed. The Appellate Division thereafter granted the tenant leave to appeal with respect to the denial of attorney fees.

The three judge majority of the Appellate Division, First Department modified the Appellate Term's decision, finding that the tenant, having prevailed in the defense of the holdover proceeding, was entitled to recover his attorney fees under RPL §234. In so holding, the court found that the language in paragraph 15(D)(3) of the lease that "[a]ny rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes under this Lease" and that "Landlord's expenses include the costs of getting possession and re-renting the Apartment, including, but not only reasonable legal fees" triggered the reciprocal mandate of RPL §234.[8]

At the outset, the court noted that the "overriding purpose of [RPL §234] is to provide a level playing field between landlords and tenants" and that "[a]s a remedial statute, [RPL §234] should be accorded its broadest protective meaning consistent with legislative intent."[9]

> The Appellate Division, First Department has now taken an expansive view of RPL §234 in finding that the reciprocal mandate of the statute was triggered in 'Graham.'

The court interpreted the "remedial scheme" of paragraph 15 of the lease to permit the landlord, in the event of a lease default by the tenant, to cancel the lease and regain possession of the premises via a holdover proceeding, and then to recoup the attorney fees incurred in the litigation by re-renting the premises. "Any new rent received by the landlord after re-renting the apartment would be used first to pay the 'Landlord's expenses,' including 'reasonable legal fees.'"[10] The court thus concluded that:

> "[p]aragraph 15…literally fits within the language of Real Property Law §234, since it does 'provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease.'"[11]

Supporting Precedent

The majority further stated that their interpretation "of the remedial scheme of Paragraph 15" was supported by the court's 1992 holding in *Bunny Realty*. The majority observed that in *Bunny Realty*, the First Department held that RPL §234 applied to a virtually identical lease provision "establishing, like here, that upon the cancellation of the lease, any new rent received by the landlord after re-renting the apartment 'shall be used first to pay the Landlord's expenses,' including 'reasonable legal fees.'"[12]

The majority further relied on the Appellate Division, Second Department's decision in *Matter of Casamento v. Juaregui,*[13] in which that court found, in interpreting a lease provision virtually identical to the provision at issue in *Graham*, that the court's "reasoning in *Bunny Realty* is persuasive" and that the provision triggered RPL §234. In so ruling, the Casamento court found that under the subject lease provision, "[t]he landlord…may recoup the attorneys[']fee[s] incurred in the litigation by re-renting, in the same manner as the quoted portion of the lease provision in *Bunny Realty*."[14]

Lastly, the majority went to great lengths to distinguish the court's 2009 holdings in *Oxford Towers* and *Madison-68*, both of which ruled that the virtually identical lease language did not trigger the reciprocal mandate of RPL §234.

As to *Oxford Towers*, the majority noted that it involved a separate "agreement, not the lease," and that the tenant's incurred the attorney fees in the successful defense of the landlord's cause of action to rescind the agreement. Thus, according to the majority, "the attorneys' fees provision was not triggered by a breach of the lease."[15] The majority also found that:

> Under the circumstances…, the statement in *Oxford Towers* that the lease provision at issue was 'not the type of provision covered by Real Property Law §234 cannot be construed liter-

> ally to hold that any lease provision containing the language quoted in the First Department's decision and order in *Oxford Towers* is, as a matter of law, insufficient to trigger the implied covenant under section 234'. We concur with the Second Department [in *Casamento*] that, '[t]o the extent that the phrase can be so interpreted, it constitutes dicta which we decline to follow.'[16]

The majority also rejected the landlord's reliance on the First Department's decision in *Madison-68* which, relying on *Oxford Towers*, held that the identical lease provision to that in *Oxford Towers* was not covered by RPL §234.[17]

First, the majority observed that "while it appears that the Court in *Madison-68* considered a lease provision identical to that in *Oxford Towers*, which, in turn, contained some language similar to the portion of the lease provision quoted in *Bunny Realty*, the Court did not expressly overrule *Bunny Realty* or even cite it."[18] Second, the majority found, relying on the court's recent decision in *Katz Park Ave. Corp. v. Jagger*,[19] that the court's holding in *Madison-68* has "limited precedential value":

> in *Katz Park Ave. Corp. v. Jagger* …, this Court, in granting attorneys' fees to a landlord, distinguished *Oxford Towers* on the ground that, '[i]n that case, we denied attorneys' fees where the agreement was not a lease and the landlord sought rescission of that agreement.'… Moreover, in support, this Court in *Katz Park Ave.* cited approvingly to *Casamento*, which, as explained above, rejects the dicta in *Oxford Towers* upon which *Madison-68* relies."[20]

The Dissent

The dissent observed that RPL §234 entitles a tenant to recover attorney fees only where the lease provides for the recovery of such fees in an action or proceeding or as additional rent, neither which was present in *Graham*. The dissent further found that "nothing" in the subject lease provision provided for the tenant's payment of attorney fees, and that the language "merely provides for an offset of rents collected in the event of a reletting."[21]

The dissent also observed that the majority's reliance on *Bunny Realty* was misplaced, observing that:

> After *Bunny Realty* was handed down, the Court of Appeals decided *Gottlieb v. Kenneth D. Laub & Co.* (82 NY2d 457 [1993]) where it held that a statute providing for an award of attorneys' fees should be narrowly construed in light of New York's adherence to the common-law rule disfavoring any award of attorneys' fees to a prevailing party in litigation.[22]

The dissent thus found that "[b]ecause the lease in question does not provide for an award of attorneys' fees,…the majority's interpretation of Real Property Law §234 as well as our decision in *Bunny Realty* cannot be reconciled with the strict construction standard articulated by the court in *Gottlieb*."[23]

> The court noted that the "overriding purpose of [RPL §234] is to provide a level playing field between landlords and tenants."

Finally, the dissent observed that the majority's determination was at odds with the overriding purpose of RPL §234, as stated by the Court of Appeals in *Matter of Duell v. Condon*:

> The overriding purpose of Real Property Law §234 was to level the playing field between landlords and residential tenants, creating a mutual obligation that provides an incentive to resolve disputes quickly and without undue expense. The statute thus grants to the tenant the same benefit the lease imposes in favor of the landlord.[24]

The dissent found that the majority's determination "enables [the] tenant to recover attorneys' fees by virtue of a determination in his favor" but at the same time "there can be no doubt that the language of the lease would not have provided for a similar recovery by landlord if it had prevailed."[25] Thus, the dissent concluded that within the meaning of *Duell*:

> the mere possibility of landlord's offset of reletting expenses can hardly be considered the 'same benefit' as today's outright award of attorneys' fees to tenant. Today's ruling makes for the mutuality of a 'heads, I win; tails, you still don't win' coin toss.[26]

Conclusion

As noted by the dissenting opinion, the Appellate Division, First Department has now taken an expansive view of RPL §234 in finding that the reciprocal mandate of the statute was triggered in *Graham*. Thus, landlords should now take careful note that similar lease provisions in their residential leases will be found to entitle the prevailing tenant to recover their attorney fees. In light of the two justice dissent in *Graham*, however, this issue may ultimately be resolved by the Court of Appeals.

1. 2014 N.Y. Slip. Op. 00311, 2014 WL 211224 (1st Dept. Jan. 21, 2014).
2. 2014 WL 211224 at *2.
3. 180 A.D.2d 460 (1st Dept. 1992).
4. 58 A.D.3d 422 (1st Dept. 2009).
5. 65 A.D.3d 445 (1st Dept. 2009).
6. 2014 WL 211224 at *2.
7. Id. at *3.
8. Id. at *4.
9. Id.
10. Id. at *5.
11. Id.
12. Id. at *6.
13. 88 A.D.3d 345 (2d Dept. 2011).
14. Id. at 346.
15. 2014 WL 211224 at *7.
16. Id.
17. 65 A.D.3d at 445.
18. 2014 WL 211224 at *7.
19. 98 A.D.3d 921 (1st Dept. 2012).
20. 2014 WL 211224 at *8.
21. Id. at *9.
22. Id. at *10.
23. Id.
24. 84 N.Y.2d 773, 780 (1995).
25. 2014 WL 211224 at *10.
26. Id.