# Attorney's Fees

## *Pleadings Can Be Judicial Admission*

**BY WARREN A. ESTIS AND WILLIAM J. ROBBINS**

Under New York law, attorney's fees cannot be collected by a prevailing party unless they are authorized by an agreement between the parties or by statute. Residential leases—invariably drafted by the landlord—frequently contain a provision requiring the tenant to pay the landlord's attorney's fees if the landlord prevails in a lawsuit based on the tenant's breach of the lease. Of course, a corollary provision allowing the tenant to collect attorney's fees from the landlord is not part of most residential leases.

To achieve parity, the Legislature in 1966 enacted RPL §234, which provides in relevant part that:

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorney's fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such a lease a covenant by the landlord to pay to the tenant the reasonable attorney's 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.

What if a prevailing residential tenant is unable to produce the lease, so it cannot be verified whether the lease contains a provision allowing the landlord to recover attorney's fees so as to trigger the reciprocity provisions of RPL §234? Can the court still award a prevailing residential tenant attorney's fees on the theory of judicial estoppel, based on assertions about the lease made in the landlord's pleadings? That is the question which Judge Pam B. Jackman-Brown, supervising judge of the Housing Part of the New York County Civil Court, addressed in a recent decision in *Schwartz v. Lambise*.[1]

In that case, the petitioners brought a holdover proceeding to recover the respondents' rent-stabilized apartment for their personal use. The respondents were awarded summary judgment on the ground that the predicate notice of non-renewal was legally insufficient. At the conclusion of the decision, the court held that the respondents were the prevailing parties, but had not shown an entitlement to legal fees pursuant to RPL §234. The respondents had been unable to produce the initial 1992 rental agreement for the apartment.

However, the court stated that the respondents could "renew their claim therefor upon such showing accompanied [by] a statement that itemizes any such claim." The respondents then moved to restore the matter to the calendar for a hearing on their claim for $12,593.28 in legal fees, citing judicial estoppel as grounds for recovery. Petitioners opposed the motion and cross-moved for leave to amend their pleadings to withdraw their claim for legal fees. That is the motion and cross-motion which Judge Jackman-Brown decided.

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**LANDLORD-TENANT**

In seeking attorney's fees based on judicial estoppel, the tenants alleged that they had relied on admissions in the landlord's petition and asserted that they might have charted a different course of defense if they had known they would not be able to recover attorney's fees if victorious in their defense. The paragraph of the petition upon which the tenants relied stated as follows:

> Pursuant to the terminated lease between the parties, the Petitioner is entitled to the reasonable value of the legal fees incurred in the successful prosecution of the instant proceeding in an amount to be determined by the Court, but estimated to equal at least $5,000.

The court also noted that the final paragraph of the petition requested a judgment for "legal fees in an amount to be determined..."

The court stated that the case of *East Egg Associates v. Diraffaele*[2] "sets forth facts and circumstances nearly identical to the case at bar." In *East Egg*, neither party was able to produce the lease, which, they conceded, had been lost. The petition alleged an express obligation on the part of the tenant to pay attorney's fees "[i]n accordance with the terms of the most recent rental agreement between the parties."

Citing Richardson on Evidence §216 (Prince 10th ed), the *East Egg* court stated that "[f]acts admitted by the pleadings constitute one of the most important examples of formal judicial admissions." The court continued:

> The allegations of the verified petition in this case, where the lease has been lost, are specific enough to constitute a formal judicial admission that a valid lease exists between the parties, containing an attorney's fee provision...thus triggering the reciprocity provisions of RPL §234. Because petitioner is held to have admitted the facts alleged, the respondent is not required to produce the lease in order to prove her entitlement to attorney's fees.[3]

According to the court's decision in *Schwartz*, the tenants in that case also relied on the Appellate Division, First Department decision in *Nestor v. Britt*[4] and the Appellate Term, First Department decision in *Evans v. Schneider*[5] as instances where judicial estoppel was applied in the context of a tenant's claim for attorney's fees. In *Nestor v. Britt*, after a judgment of possession in favor of the landlord was reversed by the Appellate Term, the tenant moved for an award of attorney's fees. The Civil Court awarded the tenant attorney's fees in an amount that was then reduced by the Appellate Term, and the Appellate Division affirmed the Appellate Term.

In support of the claim for attorney's fees, the tenant relied on a 1983 rent-stabilized lease between the parties that included an attorney's fee provision in favor of the landlord and expressly gave the tenant the right to recover attorney's fees if he prevailed "to the extent provided by Real Property Law §234." Seeking to avoid liability for attorney's fees, the landlord argued that a 1970 lease, which made no mention of attorney's fees, was purportedly controlling rather than the 1983 lease. The Appellate Division rejected that argument on the grounds that "[h]aving employed the 1983 lease as the exclusive contractual predicate for the relief sought in their petition and, indeed, as a predicate for their legal fee claim, petitioners may not now...seek to invalidate provisions of that lease by relying upon an earlier lease, the provisions of which they have belatedly discovered are more to their liking."

In *Evans v. Schneider*, the tenant, after prevailing in an owner-use proceeding, sought to recover attorney's fees pursuant to RPL §234 on the basis of a fees provision set forth in several renewal leases. Neither side could produce the original 1970 lease. The Appellate Term affirmed the Civil Court's denial

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of attorney's fees. In pretrial motion practice, the tenant had opposed the landlord's reliance on a jury waiver provision contained in the renewal leases, because there was no proof that the same provision was contained in the original expired lease. The court stated that "tenant should not now be permitted to choose a provision in the renewal leases favorable to him [i.e., an attorney's fees provision] absent the same proof previously demanded of landlord, namely, that the clause was in the original expired lease."

In *Schwartz*, Judge Jackman-Brown found inapplicable various arguments by the landlord in response to the tenant's assertion that judicial admissions in the petition barred the landlord from denying the existence of a lease provision for attorney's fees. For example, the landlord argued that the tenants' "general denial in their answer should be viewed as a judicial admission [by the tenant] that there was no lease and no right to attorney fees for the petitioner." After stating that argument in its decision, the court pointedly commented that "of course the general denial is followed by a specific counterclaim seeking to enforce the legal fees provision as asserted in the petition".

The court also distinguished, and held inapplicable, two cases upon which the landlord relied, *Corastor Holding Company, Inc. v. Mastny*[6] and *Partnership 92 West, L.P. v. Woods*.[7] In *Corastor*, the landlord misstated in the petition that the unit at issue was subject to the Loft Law. The Appellate Term, Second and Eleventh Judicial Districts, held that this was "not a judicial admission of a fact but a misstatement of the legal status of the premises...[and] should be seen as an amendable defect made in good faith which caused no prejudice to tenant." Judge Jackman-Brown distinguished that case as follows:

> [T]he parties [in *Corastor*] could not by agreement or otherwise make the premises subject to a regulatory status for which it did not qualify. This holding cannot be compared to [the] instant case where the petition discusses a contractual obligation between the parties to pay attorney fees, with no relation to the regulatory status of the premises.[8]

The *Schwartz* court also found *Partnership 92 West* inapplicable. In that case, in rejecting a judicial admission argument for the existence of a fees provision, the Appellate Term, First Department noted that the petition "did not allege the existence of a rental agreement in which tenant agreed to pay reasonable attorney's fees incurred by the landlord." There was only a reference in the "prayer for relief" in the petition to "legal fees" in addition to rent and use and occupancy. That contrasted with the *Schwartz* situation where the petition contained a specific allegation that the petitioner purportedly was entitled to legal fees "[p]ursuant to the terminated lease between the parties."

After discussing these various cases, the court in *Schwartz* concluded that "it is clear that *East Egg v. Diraffaele*...is the proper precedent to apply to the case at bar." However, in applying that case, the court continued, it was "constrained to deny Respondents' motion for an award of attorney fees," whereas in *East Egg* the court had upheld the tenant's claim for attorney's fees.

The different outcome was attributable to the fact that the allegation about a lease with a provision for attorney's fees was made on information and belief in *Schwartz*, but was not so qualified in *East Egg*. In finding that the petitioner was bound by his statements in the petition regarding a lease provision for legal fees, the court in *East Egg* had stated that:

> Petitioner did not...qualify his allegations by stating them to be made 'on information and belief.' Had he done so, the allegations would not be treated as a formal judicial admission. Allegations based on 'information and belief' may not be received in evidence as formal or informal judicial admissions.[9]

In *Schwartz*, Judge Jackman-Brown quoted that passage, and then pointed out the different situation in the case before her, where the verified petition began with the statement: "The following allegations are made upon information and belief." The court continued:

> As the entire petition was drafted 'upon information and belief' none of its clauses [including the final one seeking legal fees] may be viewed as judicial admissions. Therefore, Respondents have not sustained their burden of proof of entitlement to legal fees.[10]

Accordingly, the court in *Schwartz* denied the tenants' motion, and denied as moot the landlord's cross-motion for leave to amend the pleadings to withdraw the claim for legal fees.

In short, as these cases demonstrate, how a landlord frames its pleadings with respect to a lease basis for attorney's fees can be of determinative significance in whether a prevailing tenant will be able to trigger the reciprocal provisions of RPL §234. Just as much care and attention should be focused on that aspect of the pleadings as on the elements of the substantive claim being made.

1. New York Law Journal, Jan. 24, 2008, p. 26, col. 1 (Civ. Ct. N.Y.Co.).
2. 158 Misc.2d 364, 600 N.Y.S.2d 999 (Civ. Ct. N.Y.Co. 1993), aff'd 160 Misc.2d 667, 614 N.Y.S. 2d 102 (App. T. 1st Dep't 1994).
3. 158 Misc.2d at 367, 600 N.Y.S.2d at 1001.
4. 270 A.D.2d 192, 707 N.Y.S.2d 11 (1st Dep't 2000).
5. 2 Misc.3d 139(A), 784 N.Y.S.2d 290 (App. T. 1st Dep't 2004).
6. 12 Misc.3d 13, 816 N.Y.S.2d 817 (App. T. 2nd and 11th Judicial Districts 2006).
7. 186 Misc.2d 445, 717 N.Y.S.2d 827 (App. T. 1st Dep't 2000).
8. NYLJ, Jan. 24, 2008, p. 26 at col. 4.
9. 158 Misc.2d at 366-367, 600 N.Y.S.2d at 1001.
10. NYLJ, Jan. 24, 2008, p. 26 at col. 4.