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Court Awards Tenant Attorney Fees Despite Breach

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Pursuant to Real Property Law Section 234, where a residential lease provides for the landlord to recover attorney fees in an action involving the tenant's breach, the tenant is entitled to a reciprocal award of attorney fees in an action involving the landlord's breach. A party, however, may only recover such fees if that party "prevails" with respect to the central relief sought.[1] The Appellate Division, First Department has repeatedly held that in order for a party to have "prevailed," the judgment must be "substantially favorable" to that party.[2] This "requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope."[3]

The appellate courts have held that where the controversy has a "mixed outcome" that was not substantially favorable to either party, neither party should be awarded attorney fees as the prevailing party.[4] Moreover, the courts have discretion to deny attorney fees to a party based on equitable considerations and fairness.[5]

In a recent decision that could very well end up before the Court of Appeals,[6] a three-judge majority of the Appellate Division, First Department in *433 Sutton Corp. v. Broder*,[7] in reversing the Supreme Court (Eileen A. Rakower, J.), held that notwithstanding the Supreme Court's finding that both the landlord and the tenant violated portions of the lease, the tenant was entitled to attorney fees as the prevailing party.

'Broder' Background

The facts in *Broder* as recited by the Supreme Court and Appellate Division are as follows: The plaintiff, 433 Sutton Corp. (the corporation) is the owner of the cooperative apartment building located at 433 E. 56th St. in Manhattan. The defendant Robert Broder is the tenant-shareholder of a cooperative apartment on the third floor of the building. On Aug. 18, 2011, neighboring tenants on the third floor began complaining of an overwhelming "stench" that had started a week prior and became progressively worse during the course of that week. The Supreme Court found that "[t]he stench had so permeated the hallway…that it was evident through the hallway" and that "[a]partment owners on the hallway had placed towels under the doorway to the door to Broder's apartment in an attempt to stop the stench."[8] The apartment owners on the hallway "had actually thought that there were human remains in the apartment at the time."[9] The tenants also reported that they had not seen Broder around the building for weeks.

On Aug. 25, 2011, after having obtained no response from inside Broder's apartment and fearing he had died inside, the corporation's president authorized a locksmith's services to obtain entry to the apartment, as Broder had not given the corporation the correct key as required by the proprietary lease. The corporation's representatives, in the presence of a police officer, entered the apartment and encountered an overwhelming "gag-inducing stench." They discovered that Broder was not inside, but that a house cat was living there, and "feces, food and filth were the source of the stench."[10] Apart from the cat waste, the corporation's representatives found mouse droppings on the floor and piles of garbage, papers, clothing and food, leaving only narrow pathways in between.

The following day, the corporation's president spoke with Broder on the phone, after locating him upstate. In the early hours of the next morning, Broder returned to the apartment and removed the cat and some garbage, and then returned upstate.

Thereafter, the corporation commenced an action for injunctive relief, alleging that the odor had not been eliminated and that the apartment remained an imminent health hazard. The corporation also moved by order to show cause for a temporary and preliminary injunction authorizing it to remove "junk and filth" from the apartment. The corporation alleged that Broder had violated several provisions of the proprietary lease and the house rules, including the provision that required him to keep the apartment "in good repair and good condition" and the building's "no-pet" rule. Notably, at the time the corporation applied for interim relief, it did not advise the court that

the cat had already been removed from the apartment.

Following the Supreme Court's grant of interim relief to the corporation (on which application Broder did not appear or oppose), the corporation's representatives entered the apartment to clean it and remove all noxious material.

The Supreme Court thereafter held a hearing on the preliminary injunction motion at which time testimony and other evidence was presented. The court (Rakower, J.) denied the motion, finding no evidence of continuing harm because plaintiff had removed the odor-producing material and Broder had not returned the cat to the apartment.

Fees Award Denied

Broder then moved the Supreme Court for attorney fees arguing that he was the prevailing party. The court denied the motion, finding that the denial of the injunction at the conclusion of the hearing did not render Broder the "prevailing party."

In denying attorney fees to Broder, the Supreme Court observed that the courts have found it "appropriate to deny counsel fees where tenants breached the lease, even where the landlord's action has been dismissed" and that in "these cases neither the tenants nor the landlords were found to have prevailing party status."[11] The court noted that it was "clear" from the testimony and evidence adduced at the hearing that the tenant violated provisions of the lease and the house rules, including the "no-pet" clause and the requirement that the tenant maintain the apartment in "a good state of preservation and cleanliness."

The court observed that the corporation's removal of feces and other filth, after the interim relief was granted, was captured on a video played for the court at the hearing. The court found that the denial of the preliminary injunction "was not a finding that Mr. Broder was in compliance with house rules and the proprietary lease, but that there was no demonstrated continuing harm."

Appellate Court Reverses

Broder appealed to the Appellate Division, First Department. A three-judge majority (Luis A. Gonzalez, P.J., Dianne T. Renwick and Sallie Manzanet-Daniels, JJ.) reversed the Supreme Court and held that Broder was the prevailing party entitled to attorney fees for his "successful defense against the coop's action and application for a preliminary injunction."[12]

The majority found that the tenant was "unquestionably the 'prevailing party' under the relevant case law" in that the "court sua sponte dismissed the action upon a finding that plaintiff was not entitled to a preliminary injunction and had in fact breached the lease by failing to give defendant the requisite notice and opportunity to cure before resorting to self-help."[13]

The majority also found that even assuming arguendo that Broder breached the proprietary lease and/or the house rules (as the Supreme Court had found), the corporation's "remedy in the event of breach, as set forth in the lease, was to give 10 days' written notice and an opportunity to cure prior to entering the premises and resorting to self-help."[14] The court therefore concluded that because the corporation failed to give such notice, "any alleged nuisance in the apartment had not ripened into a breach of the lease."[15]

Notwithstanding the Supreme Court's findings concerning the "feces," "food" and "filth" that the corporation encountered when it entered Broder's apartment, the majority found that the corporation acted "improperly" by failing to give notice and an opportunity to cure and resorting to self-help. The majority also found that because the corporation did not disclose the fact that Broder had already removed the cat at the time the corporation made its application for a temporary restraining order, Broder "was required to retain counsel and incur costs in defending the action and opposing plaintiff's motion for a preliminary injunction."[16]

Thus, the majority concluded that "[s]ince the court not only denied plaintiff's action for injunctive relief, but dismissed the action, the ultimate outcome was in defendant's favor and de-fendant is entitled to an award of attorney fees."[17]

The Dissent

Justice Karla Moskowitz wrote a dissenting opinion, which was joined by Justice Angela M. Mazzarelli. The dissent found that Broder did not "prevail" in the action.

The dissent observed that a court's determination of whom to accord the status of 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.'"[18] The dissent also cited to several prior decisions of the First Department which held that no party is entitled to attorney fees where there is a "mixed outcome" that is not "substantially favorable" to either party.[19] The dissent further observed that it is within the motion court's discretion to deny attorney fees to a party "based on equitable considerations and fairness."

In the dissent's view, "the mo-tion court properly exercised its discretion" in denying Broder's application for attorney fees. The dissent wrote:

> as the [Supreme] court noted, plaintiff received essentially the relief it requested in its application—namely, "permission to enter the apartment and remove the noxious producing organic matter." Thus, on this basis, it is reasonable to conclude that plaintiff substantially prevailed, notwithstanding the court's

> ultimate dismissal of the action.

The dissent also took issue with the majority's reliance on the corporation's alleged violation of the notice and cure provisions of the proprietary lease, given the "emergency situation" that the corporation was faced with:

> although [the corporation] failed to follow the notice and cure procedures before initially entering defendant's apartment, plaintiff was faced with an emergency situation that defendant himself brought about with his own violations of the lease. As the motion court explained, "plaintiff was forced to take action to protect complaining neighbors from what was described as this stench that had started a week prior and had grown progressively worse during the course of that week." Indeed, not only was the odor emanating from defendant's apartment because he had left the cat, but also because of the presence of the odor-producing organic matter throughout the apartment, as illustrated in photographs and a video recording in the record.[20]

Finally, the dissent was careful to point out that the majority erred in asserting that the Supreme Court had denied the preliminary injunction because the corporation had violated the notice and cure provisions of the lease:

> contrary to the majority's assertion that the motion court denied the preliminary injunction because plaintiff breached the notice and cure provisions of the lease, the court actually denied that relief, as it restated in its February 28, 2012 order, because plaintiff had removed the "noxious causing matter" and "there was no demonstrated continuing harm."

Thus, the dissent concluded that "under the circumstances of this case, I see no reason to overturn the motion court's sound decision based on equitable considerations."[21]

Conclusion

Given the circumstances that the cooperative corporation was faced with at the time it exercised self-help to obtain access to the tenant's apartment, including the tenant's obvious violations of the lease and the house rules, the majority's decision to overturn the Supreme Court's exercise of discretion in denying attorney fees to the tenant was indeed surprising. Given the two-judge dissent, this case may come before the Court of Appeals.

In any event, this case instructs that landlords should exercise caution before utilizing self-help to remedy a tenant's breach of the lease, without first providing the tenant with notice and an opportunity to cure. Otherwise, even though the tenant may have been in breach of the lease, the landlord may very well end up paying the tenant's attorney fees.

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Endnotes:

1. *Nestor v. McDowell*, 81 N.Y.2d 410, 415-16, 599 N.Y.S.2d 507 (1993).

2. See e.g., *Walentas v. Johnes*, 257 A.D.2d 352, 354, 683 N.Y.S.2d 56 (1st Dept. 1999).

3. *Excelsior v. Winters*, 227 A.D.2d 146, 147, 641 N.Y.S.2d 675 (1st Dept. 1996).

4. See, *Walentas v. Johnes*, supra; *Pelli v. Connors*, 7 A.D.3d 464, 777 N.Y.S.2d 805 (1st Dept. 2004); *Perovski v. Sadoff*, 1 Misc. 3d 137(A), 781 N.Y.S.2d 627 (App. Term 1st Dept. 2004).

5. See *Kralik v. 239 E. 79th St. Owners Corp.*, 93 A.D.3d 569, 570, 940 N.Y.S.2d 488 (1st Dept. 2012).

6. CPLR Section 5601 provides that an appeal may be taken as of right to the Court of Appeals in an action originating in the Supreme Court "from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal."

7. 107 A.D.3d 623, 968 N.Y.S.2d 71, 2013 N.Y. Slip Op. 04894 (1st Dept. 2013).

8. *433 Sutton Corp. v. Broder*, Sup. Ct. N.Y. Co., Index No. 110071/10, Feb. 24, 2012, p. 2.

9. Id.

10. Id. at p. 1.

11. Id. at p. 2.

12. 2013 N.Y. Slip. Op. 04894 at *1.

13. Id. at *2.

14. Id.

15. Id.

16. Id. at *3.

17. Id.

18. Id. at *4.

19. Id.

20. Id. at *4-5.

21. Id.
