

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 our February 2014 column in this publication, we wrote about the January 2014 decision by the Appellate Division, First Department in *Graham Court Owner's Corp. v. Taylor (Graham)*.¹ In *Graham*, 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

The Court of Appeals in 'Graham,' agreeing with the Appellate Division, First Department, has given an expansive view of RPL §234 in finding that the reciprocal mandate of the statute was triggered by the subject lease clause.

Relying in part on the First Department's 1992 ruling in *Bunny Realty v. Miller*,³ the three-judge majority in *Graham* 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 Corp. 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*.

The two-judge dissent stated that the subject lease provision did not invoke RPL §234, in that, inter alia, "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."

Not surprisingly (given the two-judge dissenting opinion), the Appellate Division granted leave to appeal to the Court of Appeals. In *Graham Court Owner's Corp. v. Taylor*, 2015 WL 685732 (Feb. 19, 2015), the Court of Appeals affirmed and held that RPL §234 applied to the subject lease and that the tenant was entitled to attorney fees as the prevailing party.

'Graham' Background

The facts as recited by the Appellate Division and the Court of Appeals 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. The Supreme Court thereafter dismissed the landlord's Article 78 petition challenging DHCR's ruling, and the Appellate Division affirmed.

Thereafter, the landlord accused the 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, the Civil Court dismissed the holdover proceeding, finding that the landlord's agents had specifically authorized the tenant to make the alterations. The court further found that the landlord's principal had "lied repeatedly and obviously" at trial.⁷ The court also 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.

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

Court of Appeals

The Court of Appeals affirmed. First, the court rejected the landlord's argument that the fees permitted under paragraph 15(D)(3) "constitute costs for reletting of the premises and not for litigating the tenant's breach." The court stated that the issue was "not whether the attorney fees are available in the landlord's underlying proceeding against the tenant for breach of the lease" as there is "no such limitation found in the text of Real Property Law §234." Rather, the court found that the issue was "whether the lease provides that 'in any action or summary proceeding' the landlord may recover attorney fees incurred as a result of the tenant's breach of a leasehold covenant or agreement." The court found that that is precisely what the lease at issue provided, "by permitting recovery of attorney fees for getting possession and reletting only when the tenant breaches the lease."

Second, the court, citing to its decision in *Duell v. Condon*⁹ observed that it was "mindful that Real Property Law §234 is a remedial statute intended to 'equalize the power of landlords and tenants.'" The court also noted that, as it stated in *Duell*, "an additional purpose of Section 234 [is] 'to discourage landlords from engaging in frivolous litigation' intended to 'harass tenants, particularly tenants without the resources to resist legal action, into terminating legal occupancy.'" The court stated that "with this understanding, the court broadly interpreted Real Property Law §234, giving expansive meaning to the definition of tenants and the types of landlord actions covered under the statute, and applying the statute retroactively to preexisting leases to extend the reach of the statute."

The Court of Appeals further observed that an acceptance of the landlord's interpretation of RPL §234 and paragraph 15(D)(3) of the lease required the court to approve an interpretation:

whereby the landlord is allowed to recover attorney fees that result from the tenant's breach, while at the same time denying the tenant a similar right of recovery, merely because the landlord will recoup the fees by reletting the premises. This construction of the statute and the lease agreement would once again favor the landlord, in contravention of the legislative intent to place the parties on an equal footing

Finally, the Court of Appeals rejected the landlord's reliance on a rule of statutory construction that limits judicial construction of a remedial statute to the "fairly expressed provisions of the act:"

As the court held in *Duell*, Section 234 requires the landlord and tenant be placed on equal footing, a task made easier in this case by the simple fact that paragraph 15(D)(3) explicitly provides for attorneys' fees. Moreover, this rule of construction is inapplicable here where the parties themselves have adopted a provision allowing for attorney fees. Having agreed to this provision, the landlord cannot now complain that Real Property Law §234 imposes an unwelcome displacement of the common law rule.

Conclusion

The Court of Appeals in *Graham*, agreeing with the Appellate Division, First Department, has given an expansive view of RPL §234 in finding that the reciprocal mandate of the statute was triggered by the subject lease clause. In so holding, the court placed great emphasis on the legislative intent of RPL §234 to place the landlord and tenant on "equal footing." Thus, landlords should now be aware that the same or a similar provision in a residential lease to the one at issue in *Graham* will be found to entitle the prevailing tenant to recover his or her attorney fees.

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 1. 115 A.D.3d 50 (1st Dept. 2014).
 2. *Id.* at 53.
 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. 115 A.D.3d at 54.
 7. *Id.*
 8. *Id.* at 56.
 9. 84 N.Y.2d 773 (1995).