LANDLORD-TENANT

Attorney's Fees May Be Awarded Without a Holding on the Merits

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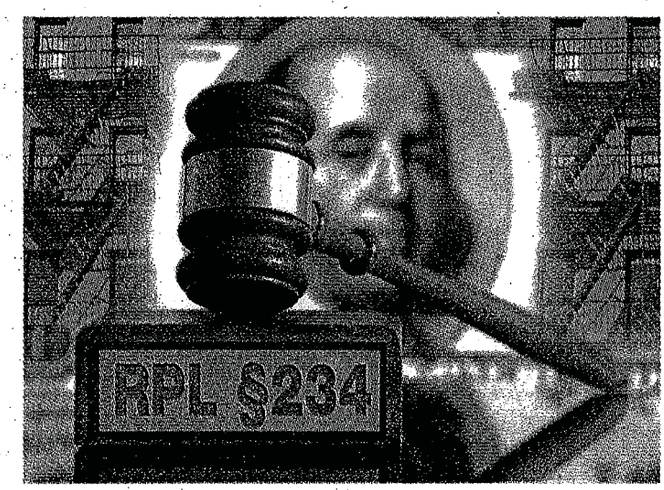
Under New York Law, attorney's fees cannot be collected by a prevailing party unless they are authorized by an agreement between the parties or by statute. The issue of attorney's fees permeates landlord/tenant litigation, in part because of Real Property Law §234, which provides in relevant part that:

> 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 tenants 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.

Residential leases—invariably drafted by the landlord—frequently contain a provision requiring a tenant to pay the landlord 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 a part of most residential leases. The statute was enacted to address that imbalance resulting from an inequality of bargaining power and to achieve parity between residential tenants and landlords.

Focusing on a decision by Nassau County District Court Judge Scott Fairgrieve in *Tinker Limited Partnership v. Berg*,[1] this article addresses the issue of whether, when a proceeding is disposed of without the court reaching the merits of the case, there is a prevailing party for purposes of awarding attorney's fees under RPL §234. Looking at a decision by New York County Civil Court Judge Eardell J. Rashford in *Miller v. Gaess*,[2] this article also discusses attorney's fees being awarded without regard to RPL §234, namely, as a condition imposed on granting a voluntary discontinuance under CPLR 3217(b). (In landlord-tenant litigation, petitioners, from time to time, for various reasons, seek to discontinue a particular proceeding.)



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In *Tinker Limited Partnership*, the petitioner brought a summary non-payment proceeding, withdrew its petition and notice of petition and then commenced a second such proceeding. The respondent moved in the initial proceeding for an order awarding attorney's fees pursuant to RPL §234. The court denied the motion.

Citing *Elkins v. Cinera Realty Inc.*[3] and *Centennial Restorations Co. v. Wyatt*,[4] the court stated that a landlord or tenant is entitled to attorney's fees "only when it can be said that the landlord or tenant is the 'prevailing party' in a 'controversy' which reaches an 'ultimate outcome.'" The court continued:

> A controversy reaches an "ultimate outcome" when a court disposes of an action on the merits, or when it becomes clear that an action although not disposed of on the merits, cannot or will not be commenced again on the same grounds.[5]

Centennial Restorations Co. v. Wyatt is an example of the latter situation, where the court concluded the case could not be commenced again. There, the landlord had commenced a non-primary residence holdover proceeding against a rent-controlled tenant. Ultimately, the case was marked off the calendar at the landlord's request. Almost a year later, the landlord successfully moved to restore the case to the calendar. However, on the day it was scheduled for trial, at the landlord's request, it was marked off a second time.

22 NYCRR 208.14(d) provides in relevant part that:

> [I]f a restored case is not ready when reached, it shall forthwith be dismissed or an inquest or judgment ordered as provided in paragraph (b).

In reliance on that provision, the tenant moved to dismiss the proceeding and for attorney's fees. Reversing the Civil Court and the Appellate Term, the Appellate Division, First Department, held that the case should have been dismissed since the language of 22 NYCRR 208.14(d) is unambiguous and mandatory.

As to the issue of attorney's fees, the Appellate Division stated:

> Since 22 NYCRR 208.14(d) does not permit this case [in the future] to be restored [its having been marked off more than once], and in fact mandates dismissal, the "ultimate outcome" has been reached. Wyatt [the tenant], as the prevailing party, is entitled to attorney's fees in an amount to be determined on remand.[6]

Another example cited by the court in *Tinker Limited Partnership* of a situation where courts have held a tenant entitled to attorney's fees where the court disposed of the case without reaching the merits is the Appellate Term, First Department decision in *Park South Associates v. Essebag*.[7] There, the Appellate Term concluded that, as a practical matter, the petitioner would not bring the proceeding again.

In *Park South Associates*, the Civil Court held that a notice to cure was fatally defective and dismissed a holdover petition. On the issue of attorney's fees, the Civil Court held that an award of attorney's fees to the tenant under RPL §234 was not yet warranted because it could not be determined whether the landlord would commence a new holdover proceeding. As stated in the Appellate Term decision, the Civil Court nonetheless "proceeded to award counsel fees by applying the 'bad faith' exception to the 'American' rule which generally requires that litigants bear the cost of their own legal expenses," viewing the prosecution of the summary proceeding based on the defective notice as being "bad faith" per se.

The Appellate Term disagreed on the issue of bad faith. However, it concluded that the award for attorney's fees was sustainable under RPL §234, reasoning as follows:

> It is now over two years since the dismissal of the

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holdover proceeding. Landlord did not serve a proper notice to cure or commence new proceedings to determine the merits of what is now a stale claim, i.e., tenant's usage of the premises [approximately three years ago]. The only reasonable conclusion is that landlord abandoned that proceeding and no longer contemplates suit on the underlying merits of that claim. In this context, tenant is entitled to her reasonable attorney's fees...for the landlord should not be permitted to postpone indefinitely the "ultimate outcome" of the lawsuit, effectively denying tenant's statutory attorney's fees in the situation where the petition is dismissed on motion and the merits are not addressed.[8]

The *Elkins* case, also cited by Judge Fairgrieve in *Tinker Limited Partnership*, stands in contrast to *Park South Associates*. The Appellate Division, Second Department expressly stated in *Elkins* that there could be an ultimate outcome so as to justify attorney's fees under RPL §234 without a determination on the merits:

...[I]t is clear that the Legislature intended such an award [of attorney's fees under RPL §234] to be based on the ultimate outcome of the controversy, *whether or not such outcome is on the merits* [emphasis added].[9]

However, on the facts before it, the *Elkins* court found there was no ultimate outcome. There, the landlord had commenced a total of three summary proceedings against the tenant. The first two were dismissed without prejudice —the first because of the landlord's non-appearance and the second because of the defective verification of the petition. Since a third proceeding had been commenced, the court reasoned as follows:

If the landlord is ultimately successful in recovering the rent due under the lease, it would be unjust to allow the plaintiff-tenant to recover his reasonable attorney's fees based on the outcome of each separate stage of what is clearly one controversy.[10]

The court in *Tinker Limited Partnership* viewed the situation before it, where the petitioner had withdrawn his petition and notice of petition but commenced a second summary nonpayment proceeding, as analogous to *Elkins*. In denying the tenant's motion for attorney's fees, the court stated:

Thus, as in the holding of *Elkins*, if the petitioner is successful in recovering the rent due under the lease in the present matter, it would be unjust to allow the tenant to recover his reasonable attorney's fees, at this stage, based upon the outcome of what is clearly one controversy...[11]

In all the cases discussed so far, whether or not the court awarded attorney's fees, the court considered RPL §234 and whether there was an ultimate outcome and prevailing party. The decision by Judge Rashford in *Miller v. Gaess*[12] points to a procedural situation in which attorney's fees might be awarded without regard to RPL §234 and thus without necessarily addressing these issues.

That case was a holdover proceeding based on the respondent-tenant's alleged unauthorized subletting or assignment of his occupancy rights. After the respondents answered, the landlord moved pursuant to CPLR 3217(b) to discontinue the proceeding. The respondents cross-moved to condition the discontinuance on petitioner's payment of respondents' costs and attorney's fees incurred in defending the matter.

CPLR 3217(b) deals with voluntary discontinuance by court order. As the court pointed out in *Miller*, CPLR 3217(b) comes into play when the time period for discontinuing by mere notice under CPLR 3217(a) has expired and where a stipulation of discontinuance cannot be obtained. Significantly, CPLR 3217(b) provides that discontinuance by court order is "upon terms and conditions, as the court deems proper." As the court noted in *Miller*, this statutory provision means that:

The court may exercise broad discretion and impose reasonable terms, including costs and attorney's fees to prevent any inequities or inconvenience resulting from the granting of the discontinuance...[13]

In arguing for attorney's fees, the respondents in *Miller* alleged that they were prejudiced by the lawsuit because they had incurred legal fees in excess of $5,000 in litigating the proceeding. As summarized in the decision, they also asserted that they had been irreparably harmed by the mere filing of the proceeding "since they are now 'blacklisted' in light of the Office of Court Administration's practice of selling New York City Housing Court data to companies known as 'tenant screening bureaus' who in turn prepare reports they sell to landlords."

The court granted the petitioner's motion only to the extent of discontinuing the underlying proceeding without prejudice on the condition that the petitioner pay respondents' reasonable attorney's fees. It granted the respondents' cross-motion only to the extent of directing a hearing to determine the amount of attorney's fees and costs to be awarded to respondents.

The following are additional points to consider in reviewing the reasoning of the cases discussed above:

In *Tinker Limited Partnership* the court denied the motion for attorney's fees because a third proceeding had actually been commenced and the court viewed that proceeding, together with the two prior proceedings that had been dismissed without prejudice, as part of a single controversy. The decision, however, includes the following statement:

A controversy does not reach an "ultimate outcome" sufficient to entitle a litigant to the award of attorney's fees, however, when an action is dismissed on procedural grounds or is otherwise discontinued and there is some indication that the action *may be recommenced at a later time*... [emphasis added].[14]

That "may be recommenced" language effectively means a standard under which attorney's fees would be denied on the grounds of no ultimate outcome when a new proceeding has not actually been brought, as long as it could be brought. Presumably, that is subject to the qualification, emphasized in *Park South Associates*, of not postponing indefinitely the ultimate outcome. Thus, the ultimate outcome standard would appear, in some circumstances, not to be a bright line standard.

Non-primary residence litigation is an area where applicable law has been held to bar immediate commencement of a new proceeding where there was a dismissal without prejudice of a non-primary residence holdover proceeding. This has to do with the requirement of serving a notice (commonly referred to as a *Golub* notice) of intention not to renew the tenant's lease within a certain "window" period. (The intricacies of the body of law in that area are beyond the scope of this article.) The result, as relevant here, is that courts have held there is an ultimate outcome so as to support an award of attorney's fees under RPL §234 where there has been a dismissal without reaching the merits of whether a respondent is a non-primary resident. See, for example, the decision of New York County Civil Court Judge Joseph E. Capella in *204 W. 55th St. LLC v. Barria*.[15]

Clearly, attorney's fees pursuant to CPLR 3217(b) can be awarded in situations where attorney's fees pursuant to RPL §234 might not be available. For example, attorney's fees under RPL §234 are contingent on, inter alia, there being an attorney's fees clause in the parties' lease. Attorney's fees under CPLR 3217(b), however, are rooted only in statute, not in contract. As another example, attorney's fees under RPL §234, as shown above, are awarded only where there is an ultimate outcome and a prevailing party. Those are not necessary factors, however, as to attorney's fees under CPLR 3217(b).

Finally, what all these cases (both under RPL §234 and CPLR 3217[b]) underscore, in the context of awards of attorney's fees, is something that practitioners quickly learn as a general matter. Even in the absence of settlement, obtaining a favorable outcome for a client can often occur without a determination that the client is correct as to the merits of the dispute.

1. 26 Misc.3d 1216(A) (Dist. Ct. Nassau Co. 2010), NYLJ, Feb. 8, 2010, p. 20, col. 1.
2. NYLJ, Oct. 23, 2009, p. 26, col. 1 (Civ. Ct. N.Y. Co.).
3. 61 AD 2d 828, 402 N.Y.S.2d 432 (2d Dept. 1978).
4. 248 AD 2d 193, 669 N.Y.S.2d 585 (1st Dept. 1998).
5. NYLJ, Feb. 8, 2010, p. 20 at col. 2.
6. 248 AD 2d at 197, 669 N.Y.S.2d at 588.
7. 126 Misc. 2d 994, 487 N.Y.S.2d 252 (A.T. 1st Dep't 1984).
8. 126 Misc.2d at 995, 487 N.Y.S.2d at 253-254.
9. 61 A.D.2d at 828, 402 N.Y.S.2d at 433.
10. Id.
11. NYLJ, Feb. 8, 2010, p. 20 at col. 2.
12. See, supra, at footnote 2.
13. NYLJ, Oct. 23, 2009, p.26, at col. 4.
14. NYLJ, Feb. 8, 2010, p. 20, at col. 2.
15. NYLJ, Dec. 16, 2009, p. 26, col. 3 (Civ. Ct. N.Y. Co.).

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