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Tenant Is Granted Attorney's Fees Based on the Lease

Warren A. Estis and William J. Robbins

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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. Residential leases—invariably drafted by the landlord—frequently contain a provision for the tenant to pay the landlord's attorney's fees. Of course, a corollary provision allowing the tenant to collect attorney's fees from the landlord is not a part of most residential leases.

Real Property Law (RPL) §234 was enacted to address that imbalance resulting from an inequality of bargaining power and to achieve parity between residential tenants and landlords. It provides in relevant part that:

Whenever 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, 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 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. (Emphasis added).

By its express language (highlighted above), this statute includes two kinds of lease provisions which will trigger the implied covenant in favor of the tenant. Many leases, however, contain provisions for the landlord recovering attorney's fees from the tenant that do not expressly track the statutory language. The issue then becomes whether the particular lease clause is the kind covered by RPL §234.

Implied Covenant

In a recent decision by the Appellate Division, Second Department in *Casamento v. Juaregui*,[1] the court addressed that issue with respect to a lease it described as "consist[ing] of a preprinted form which is generally in use throughout New York." Paragraph 16 of that lease contained detailed provisions regarding the landlord's remedies in the event of the tenant's default. The specific reference to attorney's fees was in subparagraph 16(D)(3), which provided that:

Any rent received by Landlord for the re-renting [of the apartment after cancellation of the lease for tenant's failure to cure a default after notice] 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 Appellate Division held that "the particular language of paragraph 16 [in its entirety]…was sufficient to trigger the implied covenant in the tenant's favor pursuant to section 234." The opinion was written by Justice Daniel D. Angiolillo, with Justices Joseph Covello, Thomas A. Dickerson and Sheri S. Roman concurring. We examine here the court's reasoning, and some of the authorities it cited.

In *Casamento*, the tenant, Luis Juaregui, leased an apartment in Queens. Paragraph 7 of the lease provided that the tenant could make alterations only after obtaining the landlord's prior written consent. Under paragraph 10 of the lease, the tenant was liable for damages sustained and expenses incurred by the landlord "relating to any claim arising from any act or neglect of" the tenant.

The landlord served a notice to cure alleging that the tenant had violated those paragraphs of the lease "by physically assaulting landlord and making alterations to the bathroom and kitchen without the landlord's prior written consent." The notice also asserted that the tenant was responsible, per the lease, for the landlord's legal fees in connection with the notice to cure "and any and all work done prior to and subsequently thereto, based upon your default under the lease." Thereafter, the landlord served a notice of termination and commenced a holdover proceeding.

The Civil Court (Ann Katz, J.) dismissed the landlord's petition, finding that the tenant "had conditions in his apartment in 2001 that the landlord failed and refused to repair and, over the passage of time, the conditions became so bad the tenant had no choice but to do the repairs himself." (The court deemed the issue of assault not within its jurisdiction.) Nine months after the court issued its decision, the tenant filed a motion seeking an award of attorney's fees based on RPL §234.

The court (Gilbert Badillo, J.) denied the tenant's motion. It held that the language of paragraph 16(D)(3) of the lease "is triggered by the vacatur of the apartment and the expenses involved in a reletting" and that "the lease does not contain any language for legal fees for broad breach circumstances."

Judge Badillo was thereafter unanimously affirmed by the Appellate Term.[3] (The justices on the Appellate Term panel were Justices Michael L. Pesce, Michelle Weston and Jaime A. Rios.) It characterized paragraph 16(D) of the lease as "provid[ing] that the landlord may deduct his costs of getting possession and re-renting the apartment, including attorney's fees, from the rents received upon a reletting following a cancellation of the lease," and held that such a clause "is not the type of provision covered by Real Property Law §234." After granting the tenant's motion for leave to appeal, the Appellate Division reversed and remitted the matter to Civil Court for a hearing to determine the amount of the attorney's fees to be awarded to the tenant.

The Appellate Division stated that it "discern[ed] the meaning of paragraph 16 by reading all clauses of this provision together and in context with the lease as a whole to determine its purpose and intent." The court pointed out that subparagraph 16(A)(5) provided that if the tenant failed timely to cure the default, then the landlord could cancel the lease and the tenant "continues to be responsible as stated in this Lease."

The court also pointed to subparagraph 16(C)(1)(b), providing that if the lease were cancelled, the landlord could "use eviction or other lawsuit method to take back the Apartment," and to subparagraph 16(D)(1), providing that if the landlord took back the apartment, then "[r]ent and added rent for the unexpired term becomes due and payable." The court noted that, pursuant to paragraph three of the lease, the term "added rent" was defined as "other charges to Landlord under the terms of this Lease" which the tenant "may be required to pay."

In addition, the court noted that, according to subparagraph 16 (D)(2), if the lease was cancelled, the landlord could relet the apartment and the tenant "stays liable and is not released except as provided by law."

The Appellate Division stated:

We interpret this remedial scheme to permit the landlord to recoup any attorney's fee he incurs in an eviction proceeding against a defaulting tenant under circumstances in which the premises are relet prior to the defaulting tenant's satisfaction of outstanding rent and added rent. The landlord's entitlement to an attorney's fee in the eviction proceeding falls within the definition of 'added rent' in such circumstances because it is a

charge which the tenant "may be required to pay," albeit indirectly.[4]

The court continued:

While paragraph 16 is not an all-inclusive attorney's fee provision, it does permit the landlord, under the circumstances described, to recover an attorney's fee incurred in litigation occasioned by the tenant's failure to perform an obligation set forth in a covenant of the lease. Paragraph 16, thus, literally fits within the language of the first prong of section 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."[5]

The Appellate Division found support for its conclusion in the spirit and purpose of RPL §234. It stated that the "implication of a covenant in favor of the tenant here is consistent with the Legislature's remedial purpose of effecting mutuality in landlord-tenant litigation and helping to deter frivolous and harassing litigation by landlords who wish to evict tenants." The court noted that unless a landlord faced the prospect of being responsible for a prevailing tenant's attorney's fees, a landlord had nothing to lose in instituting an eviction proceeding with a merely frivolous factual basis where there was a prospect of re-renting for a higher amount and the lease contained a provision for landlord's recovery of attorney's fees like that in paragraph 16.

Caselaw Precedent

The Appellate Division in *Casamento* also sought to substantiate its holding in light of caselaw precedent. It began its analysis by stating that in 1992, in *Bunny Realty v. Miller*,[6] "the Appellate Division, First Department, construed a similarly worded lease provision to give rise to the implied covenant" for tenant's recovery of attorney's fees pursuant to RPL §234. The court acknowledged, however, that "[m]ore recently, the [Appellate Division,] First Department issued decisions in two cases"—*Oxford Towers Co, LLC v. Wagner*[7] and *Madison-68 Corp. v. Malpass*[8]—which "some courts have interpreted as being at odds with the holding in *Bunny Realty*."

Indeed, as the court noted, the Appellate Term itself in *Casamento* had cited *Oxford Towers* and *Madison-68* for the proposition that paragraph 16 was "not the type of provision covered by Real Property Law §234." Similarly, citing those same two cases, the Appellate Term, First Department, in *303 E. 37th Sponsors Corp. v. Goldstein*[9] held that an attorney's fees provision did not trigger RPL §234 and stated that "[t]o the extent *Bunny Realty*…suggests a contrary conclusion, we decline to apply it."

By contrast, the *Casamento* court pointed to a decision in *Stephen LLC v. Zucchiatti*[10] where the Civil Court, New York County, stated that "[w]ithout a clear signal from the Appellate Division, First Department, that it has decided to undo 17 years of precedent and one of its more prominent decisions regarding attorneys' fees, this court will continue to follow *Bunny*." That, too, in part, was the approach of the *Casamento* court to *Oxford Towers* and *Madison-68.* It pointed out that those cases "did not expressly overrule *Bunny Realty*, nor even cite it."

The Appellate Division in *Casamento* also sought to distinguish *Oxford Towers*. It pointed out that in that case the Appellate Division, First Department, expressly held that RPL §234 was not applicable because the lawsuit arose out of a 1995 agreement that the landlord sought to rescind rather than out of the lease between the landlord and the tenant. (RPL §234 provides for a tenant's recovery of attorney's fees incurred in the successful defense of an action or proceeding "arising out of the lease.")

The *Casamento* court concluded that "the statement in *Oxford Towers*…that the lease provision at issue was 'not the type of provision covered by [RPL] §234' cannot be construed literally to hold that any provision containing the language quoted in *Oxford Towers* is, as a matter of law, insufficient to trigger" RPL §234. "To the extent that the phrase can be so interpreted," the court continued, "it constitutes dicta which we decline to follow."

The court in *Casamento* also cited the following four cases: *Morris v. Flaig*,[11] *Cross v. Zyburo*,[12] *Fragiacomo v. Pugliese*[13] and *Bender v. Niebel*.[14] It characterized these cases as ones which, not expressly citing *Bunny Realty*, had held that "lease provisions permitting the landlord to recover an attorney's fee as an expense of reletting an apartment are not subject to the implied covenant of section 234." It distinguished the attorney's fees provisions in those cases from lease paragraph 16 in the case before it. In those cases, said the court,

the fees provisions were all limited to fees incurred in reletting only, while paragraph 16 "includes an attorney's fee incurred in obtaining possession by legal process."

The Appellate Division in *Casamento* also addressed the fact that, "further complicat[ing] matters," the Appellate Term in *Casamento* had relied on the Appellate Division, Second Department decision in *Gannett Suburban Newspapers v. El-Kam Realty Co.*[15] to support its conclusion that RPL §234 did not govern lease provisions like paragraph 16. The Appellate Division emphasized that *Gannett* involved a commercial lease, to which RPL §234 does not apply. It also "caution[ed] that all of the relevant provisions in the commercial lease at issue in that case were not quoted or paraphrased in the reported decision," so it was not clear if the provision was limited (like that in *Morris v. Flaig*) or more expansive like paragraph 16. Accordingly, stated the court, the Appellate Term in *Casamento* "applied our [the Appellate Division, Second Department] holding in *Gannett Suburban* too broadly, and should no longer rely upon it in determining a motion pursuant to section 234 for an award of an attorney's fee."

Finally, citing *Halle v. Adbuljaami*[16] and *490 Owners Corp. v. Israel*,[17] the *Casamento* court pointed out that the Appellate Terms in both the First and Second departments had "permitted a landlord to recover an attorney's fee in a holdover proceeding pursuant to a lease provision which was similar to paragraph 16." The court contrasted those cases with *303 E. 37th Sponsors Corp*. and *Hamilton v. Menalon Realty, LLC*,[18] where, according to the Appellate Division in *Casamento*, as to such lease provisions, those Appellate Terms had "not allowed tenants to invoke the implied covenant pursuant to section 234." That "incongruous result," stated the court, was "contrary to the legislative intent of section 234 to level the playing field."

In short, the *Casamento* decision underscores once again how significant, given RPL §234, the issue of attorney's fees is in landlord-tenant litigation. In the Second Department, that decision is controlling as to a tenant's right to recover attorney's fees in leases with similar language to lease paragraph 16 in *Casamento*. Hopefully, the Appellate Division, First Department, will have an opportunity soon to state definitively its position as to such fee clauses in light of *Bunny Realty*, *Oxford Towers*, *Madison-68*, and the *Casamento* court's reading of these cases.

Warren A. Estis *is a founding partner at Rosenberg & Estis.* **William J. Robbins** *is a partner at the firm.*

Endnotes:

1. 2011 WL 4090175 (2d Dept. 2011).

2. 2011 WL 4090175 at *2.

3. 26 Misc.3d 136(A), 907 N.Y.S.2d 99 (A.T. 2d, 11th and 13th Judicial Districts 2010).

4. 2011 WL 4090175 at *6.

5. Id.

6. 180 A.D.2d 460, 579 N.Y.S.2d 952 (1st Dept. 1992).

7. 58 A.D.3d 422, 872 N.Y.S.2d 431 (1st Dept. 2009).

8. 65 A.D.3d 445, 884 N.Y.S.2d 401 (1st Dept. 2009)

9. 29 Misc.3d 131(A), 918 N.Y.S.2d 400 (A.T. 1st Dept. 2010).

10. 24 Misc.3d 1203(A), 890 N.Y.S.2d 371 (Civ. Ct. N.Y. Co. 2009).

11. 511 F.Supp.2d 282 (E.D.N.Y. 2007).

12. 185 A.D.2d 967, 587 N.Y.S.2d 670 (2d Dept. 1992).

13. 11 Misc.3d 96, 816 N.Y.S.2d 826 (A.T. 9th and 10th Judicial Districts 2006).

14. 11 Misc.3d 136(A), 816 N.Y.S.2d 693 (A.T. 2d and 11th Judicial Districts 2006).

15. 306 A.D.2d 312, 760 N.Y.S.2d 553 (2d Dept. 2003).

16. 24 Misc.3d 143(A), 901 N.Y.S.2d 899 (1st Dept. 2009).

17. 189 Misc.2d 34, 729 N.Y.S.2d 819 (A.T. 2d Dept. 2001).

18. 14 Misc.3d 13, 829 N.Y.S.2d 400 (A.T. 2d Dept. 2006).

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