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### Zekhtser v. Harway Terrace, Inc.

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[\*1]

<b>Zekhtser v Harway Terrace, Inc.</b>
2022 NY Slip Op 50540(U)
Decided on June 9, 2022
Supreme Court, Kings County
Rivera, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on June 9, 2022

Supreme Court, Kings County

**Larry Zekhtser in his capacity as TRUSTEE of MZTZ FAMILY  
IRREVOCABLE TRUST, Plaintiff,**

**against**

**Harway Terrace, Inc., Defendant.**

Index No. 516552/2021

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Francois A. Rivera, J.

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of

motion of defendant Harway Terrace, Inc. (hereinafter HTI), filed on January 4, 2022, under motion sequence number three for an order:

- 1) pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint of the plaintiff Larry Zekhtser in his capacity as Trustee of MZTZ Family Irrevocable Trust (hereinafter Zekhtser or plaintiff);
- 2) pursuant to CPLR 3001 and/or 3017(b), as to HTI's first counterclaim, declaring that: [1] New York City Administrative Code § 27-2009.1 does not prevent Harway from enforcing its entire Pet Policy against Zekhtser; [2] fines were properly assessed against Zekhtser for his violation of the Pet Policy due to Zekhtser failure to obtain HTI's consent prior to purchasing his pet; [3] additional maintenance was and is properly assessed at \$25.00 per month, per pet, for as long as Zekhtser is in possession of the pet that is the subject of this action; and [4] such other and further declaration as the Court deems just and proper; and
- 3) pursuant to CPLR 3212 granting summary judgment in its favor as to HTI's third counterclaim and awarding costs and attorney's fees pursuant to the terms of the Proprietary Lease.

-Motion

-Affirmation in Support

-Affirmation of Attorney Fees

-Affidavit in Support

-Statement of Material Facts

-Memorandum of Law in Support

-Exhibits A-I

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross motion of Zekhtser filed on January 5, 2022, under motion sequence number four, for an order: [1] denying HTI's motion; [2] pursuant to CPLR 3212 granting summary judgment in plaintiff's favor and dismissing HTI's counter claims with prejudice; [3] pursuant to CPLR 3001 and/or CPLR 3017(b), declaring HTI's fines and any attempt by HTI to terminate plaintiff's leasehold or remove the Pet to be unenforceable; [4] enjoining HTI from taking any steps to terminate the plaintiff's leasehold or impose any fines upon plaintiff based upon the claim that plaintiff is in violation of the Building's Pet Policy; and [5] awarding costs and attorney's fees.

-Cross Motion

-Affirmation in Support

- Affidavit in Support
- Statement of Material Facts
- Memorandum of law in support
- Exhibits A-B

## **BACKGROUND**

On July 6, 2021, Zekhtser commenced the instant action for, inter alia, declaratory and injunctive relief by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On August 3, 2021, HTI filed an answer and three counterclaims with the KCCO. On August 18, 2021, Zekhtser filed a reply to HTI's counterclaim with the KCCO.

The verified complaint alleges thirty-four allegations of fact in support of three causes of action. The first cause of action seeks a declaratory judgment. The second cause of action seeks injunctive relief. The third cause of action is for legal fees.

HTI's first counterclaim seeks a declaratory judgment. The second counterclaim is for monetary damages. The third counterclaim is for legal fees.

The verified complaint alleges the following salient facts. Zekhtser is the Trustee of the MZTZ Family Irrevocable Trust and resides in a building located at 2483 West 16th Street, Brooklyn, New York (hereinafter the "Building"). HTI (hereinafter the "Cooperative") is the lawful owner of the Building and operates it as a cooperative house. On or about February 11, 2019, the MZTZ Family Irrevocable Trust became the shareholder of the Cooperative's stock and the proprietary lessee of apartment 8E, located on the 8th floor of the building (hereinafter the "Apartment"). Zekhtser commenced the instant action in his capacity as Trustee of the MZTZ Family Irrevocable Trust.

On February 11, 2021, Zekhtser purchased a seven-month-old English Bulldog (hereinafter the "Pet"). The Pet has resided with Zekhtser in the Apartment at all times. Since February 11, 2021, Zekhtser has walked the Pet twice per day, in the morning and in the afternoon. On multiple occasions since February 11, 2021, members of the Building's maintenance crew and security personnel saw and interacted with Zekhtser and the Pet.

The Cooperative has not commenced or initiated any action or summary proceeding to evict Zekhtser from the Apartment. Despite the Cooperative's undisputed knowledge that Zekhtser was openly and notoriously harboring a pet, and despite the Cooperative's failure to

initiate any action or proceeding to evict Zekhtser or remove the pet, on or about May 29, 2021, the Cooperative asserted that Zekhtser was in violation of the Building's House Rules' Pet Policy. The Pet Policy states that, inter alia,

"Dogs are not allowed in the building at any time unless expressly permitted in writing by the Board of Directors. Violation of this will result in a One Thousand Five Hundred [\*2]Dollars (\$1,500.00) administrative charge the first month and a continual \$250.00 administrative charge each month until the violation has been corrected."

According to the House Rules, a violation of any of the rules, " constitutes a default under the proprietary lease." Pursuant to the Cooperative's improper assertion that Zekhtser is in violation of the Pet Policy, the Cooperative has unlawfully fined plaintiff the amount of \$1,500.00.

## **LAW AND APPLICATION**

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

"Pursuant to CPLR 3212 (b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit" (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

CPLR 3001 provides that the supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed ([see \*Peters v Smolian\*, 154 AD3d 980](#), 983 [2nd Dept 2017] citing CPLR 3001). To constitute a justiciable

controversy, there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect ([see Cong. Machon Chana v Machon Chana Women's Inst., Inc., 162 AD3d 635](#) [2nd Dept 2018], quoting [Chanos v MADAC, LLC, 74 AD3d 1007](#), 1008 [2nd Dept 2010]).

Both the plaintiff and the defendant seek summary judgment on their respective declaratory judgment actions. The following facts are undisputed. Zekhtser is the Trustee of the MZTZ Family Irrevocable Trust and resides in the Building located at 2483 West 16th Street, Brooklyn, New York. HTI is the lawful owner of the Building and operates it as a cooperative house. On or about February 11, 2019, the MZTZ Family Irrevocable Trust became the shareholder of cooperative's stock and the proprietary lessee of the apartment 8E, located on the 8th floor of the building. Zekhtser commenced the instant action in his capacity as Trustee of the MZTZ Family Irrevocable Trust.

HTI's statement of material facts asserts, inter alia, the following facts. Zekhster came into the ownership of a certain English bulldog in or about February 2021. Zekhster failed to obtain the permission of the defendant's Board of Directors prior to obtaining the Pet. Due to plaintiff's failure to obtain such permission, he was assessed a \$1,500.00 fee accordingly for his violation, as well as additional monthly maintenance of \$250.00 per month. These amounts remain outstanding.

Based on HTI's statement of material facts, it may be argued that HTI has been aware of Zekhster's open possession of a pet dog since at least February of 2021. There is no question, however, that HTI was aware of same since at least June of 2021. This is clear from the ledger HTI annexed as exhibit G to its motion. The ledger reflects HTI's imposition of \$1500.00 administrative fee for apartment 8E for an unauthorized dog violation. HTI annexed Zekhster's proprietary lease for the apartment as exhibit D and the House Rule as exhibit E. Paragraph 13 of the proprietary lease provides in pertinent part that HTI has adopted the appended House Rules and that the lease shall be in all respects subject to such House Rules. It further provides that breach of a House Rule shall be default under this lease.

The House Rules makes the following statements pertaining to pets:

"Pets are not permitted except where they are grandfathered in and approval can be revoked for any abuse at the discretion of the Corporation. Authorized pets must be leashed all carried in the building.

A monthly dog fee of \$25 will it be added to every shareholders maintenance per dog target. If a new dog is obtained, the management office must be notified

immediately and provided with a new registration from NYC.

Dogs are not allowed in the building at anytime unless expressly permitted in writing by the Board of Directors. Violations of this will result in a One Thousand five hundred dollars (\$1500.00) administratively charged the first month and a continual \$250 administrative charge each month until the violation has been corrected."

There is no dispute that HTI has not commenced an eviction proceeding against Zekhster for possessing a dog without notifying and obtaining the express written permission of HTI. There is also no dispute that at least four months have passed since HTI has been aware of Zekhster possession of the dog.

HTI contends that N.Y.C. Admin. Code § 27-2009.1 is inapplicable to its imposition of a \$1,500.00 administrative fee and \$25.00 continual monthly charge because its proprietary lease does not have a no pet policy and because it is not seeking to evict Zekhster or eject his pet. Zekhster contends HTI has a no Pet Policy and that pursuant to N.Y.C. Admin. Code § 27-2009.1, HTI has waived its right to enforce it.

In 1983, the New York City Council, responding to widespread abuses by landlords who sought to evict tenants who harbored pets for an extended period of time, despite no-pet lease [\*3] clauses, and without prior complaints by the landlord, enacted an ordinance [New York City Local Law 52 of 1983] which became Administrative Code § 27—2009.1. (*Seward Park Hous. Corp. v Cohen*, 287 AD2d 157, 161 [1st Dept 2001]). Its purpose, set forth in § 27—2009.1 [a] in sum, is twofold: (1) to protect pet owners from retaliatory eviction; and (2) to safeguard the health, safety and welfare of tenants who harbor pets (*id*). The ordinance sought to balance the rights of a landlord who acted promptly to evict a tenant upon learning the tenant harbored the pet, against the rights of a tenant who harbored such pet with the knowledge of the landlord, for an extended period of time (three months), without action being initiated by the landlord (*id*).

The no-pet waiver rule was intended to require that landlords enforce a no-pet clause promptly or be deemed to have waived that breach of the lease (*Id.*, citing *Megalopolis Property Association v Buvron*, 110 AD2d 232, 235—236 [2nd Dept 1985]).

While HTI correctly asserts that the proprietary lease, standing alone, does not contain a no pet clause, the proprietary lease incorporates the House Rules and renders a breach of a House Rule to be a default under the proprietary lease. That raises the question whether the House Rules contains a no pet provision.

Indeed, it does. The House Rules state: "Pets are not permitted except where they are grandfathered in and approval can be revoked for any abuse at the discretion of the Corporation." The House Rule does not explain the meaning of the phrase "grandfathered in." However, neither HTI nor Zekhster are claiming that Zekhster's possession of a dog was permitted as being grandfathered in. Therefore, what remains is HTI's statement in its House Rule that pets, including Zekhster's dog, are not permitted.

HTI's House rule which imposes a \$1,500.00 administrative charge the first month and a continual \$250 administrative charge each month until the violation has been corrected is a part of HTI's no pet policy.

The undisputed evidence establishes that HTI has been aware of Zekhster's open and notorious possession of a pet since at least June of 2021 and has not initiated an eviction action on that basis to date. Consequently, Zekhster has made a prima face showing that in accordance with Administrative Code § 27—2009.1., HTI's has waived its no pet policy as against Zekhster. HTI's motion papers has not raised a triable issue of fact.

Consequently, HTI's motion for summary judgment dismissing Zekhster's complaint as asserted against it is denied. HTI's motion for summary judgment in its favor on its first counterclaim, seeking a declaration: (1) that the New York City Administrative Code § 27-2009.1 does not prevent HTI from enforcing its entire Pet Policy against Zekhtser; (2) that the fines were properly assessed against Zekhster for his violation of the Pet Policy due to Zekhtser failure to obtain HTI's consent prior to purchasing his pet; and (3) that additional maintenance was and is properly assessed at \$25.00 per month, per pet, for as long as Zekhtser is in possession of the pet that is the subject of this action, are all denied in the entirety. HTI's motion pursuant to CPLR 3212 granting summary judgment in its favor as to HTI's third counterclaim and awarding costs and attorney's fees pursuant to the terms of the Proprietary Lease is also necessarily denied.

The motion by Larry Zekhtser in his capacity as Trustee of MZTZ Family Irrevocable [\*4]Trust for an order denying HTI's motion is granted. His motion pursuant to CPLR 3212 granting summary judgment in his favor and dismissing HTI's counter claims with prejudice is granted. His motion pursuant to CPLR 3001 declaring HTI's fines and any attempt by HTI to terminate plaintiff's leasehold or remove the Pet to be unenforceable based on his failure to seek permission from HTI to have the pet is granted. His motion seeking an order enjoining HTI from taking any steps to terminate the Plaintiff's leasehold or impose any fines upon Plaintiff based upon the claim that Plaintiff is in violation of the Building's Pet Policy is



granted.

The motion by plaintiff for an award of attorney's fees, however, is denied in an exercise of discretion. Zekhster knowingly and blatantly disregarded HTI's no pet House Rule by bringing a pet to his unit without seeking prior, written permission from the Board. It was Zekhster's actual violation which precipitated the instant litigation and despite his successful prosecution, he should not be rewarded with attorney's fees ([\*see Gold Queens, LLC v. Cohen, 42 Misc 3d 15\*](#) [App. Term 2013]; [\*see also Beach Haven Apartments No. 1 Inc. v Cheseborough, 2 Misc 3d 33\*](#), 34—35[App. Term 2003]).

## **CONCLUSION**

The motion by Harway Terrace, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint of the plaintiff Larry Zekhtser in his capacity as Trustee of MZTZ Family Irrevocable Trust is denied.

The motion by Harway Terrace, Inc. for an order pursuant to CPLR 3001 and/or 3017(b), as to HTI's First Counterclaim, declaring that 1) New York City Administrative Code § 27-2009. does not prevent Harway from enforcing its entire Pet Policy against Zekhtser 2) fines were properly assessed against Zekhster for his violation of the Pet Policy due to Zekhtser failure to obtain HTI's consent prior to purchasing his pet; 3) additional maintenance was and is properly assessed at \$25.00 per month, per pet, for as long as Zekhtser is in possession of the pet that is the subject of this action is denied in its entirety.

The motion by Harway Terrace, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor as to HTI's Third Counterclaim and awarding costs and attorney's fees pursuant to the terms of the Proprietary Lease is denied.

The motion by Larry Zekhtser in his capacity as Trustee of MZTZ Family Irrevocable Trust for an order denying HTI's motion is granted.

The motion by Larry Zekhtser for an order pursuant to CPLR 3212 granting summary judgment in his favor and dismissing HTI's counter claims with prejudice is granted.

The motion by Larry Zekhtser for an order pursuant to CPLR 3001 declaring HTI's fines and any attempt by HTI to terminate plaintiff's leasehold or remove the Pet to be unenforceable based on his failure to seek permission from HTI to have the pet is granted.

The motion by Larry Zekhtser for an order enjoining HTI from taking any steps to terminate the Plaintiff's leasehold or impose any fines upon Plaintiff based upon the claim that Plaintiff is in violation of the Building's Pet Policy is granted.

The motion by plaintiff for an award of attorney's fees is denied

The foregoing constitutes the decision, order, and judgment of this Court.

ENTER:

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J.S.C.

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