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2022-08-12

### Peros v. Jurac

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[\*1]

<b>Peros v Jurac</b>
2022 NY Slip Op 50819(U)
Decided on August 12, 2022
Civil Court Of The City Of New York, Queens County
Guthrie, 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This opinion is uncorrected and will not be published in the printed Official Reports.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 August 12, 2022

Civil Court of the City of New York, Queens County

**Mladen Peros, MIKE PEROS, Petitioners,**

**against**

**Sonja Jurac, JOHN DOE, JANE DOE, Respondents.**

Index No. L&T 74696/18

Scott D. Gross, Esq.  
400 Post Avenue, Suite 400B  
Westbury, NY 11590  
Attorney for Petitioners

Jessica R. Goldberg, Esq.  
Gina Park, Esq.  
Goldberg & Lindenberg, P.C.  
6 East 45th Street, 14th Floor  
New York, NY 10017  
Attorneys for Respondent

Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion for a judgment for attorney's fees and other relief:

<b>Papers</b>	<b>Numbered</b>
Amended Notice of Motion & Affirmation/Affidavit/Exhibits Annexed 1	
Affirmation in Opposition & Exhibits Annexed 2 (NYSCEF No 5)	
Reply Affirmation 3	

Upon the foregoing cited papers, the decision and order on respondent's motion is as follows.

### PROCEDURAL HISTORY

This holdover proceeding based on a notice of non-renewal was commenced in 2018. After motion practice, Judge Sergio Jimenez set the matter down for a traverse hearing by Decision/Order dated March 26, 2019. On May 23, 2019, the proceeding was sent out to Part X for traverse and trial. After additional adjournments in this trial part, the proceeding was discontinued without prejudice on July 30, 2019, as noted on the file jacket. [\[FN1\]](#) Subsequently, in December 2019, respondent made the instant motion for a judgment for attorney's fees. Following additional adjournments and the intervention of the COVID-19 public health emergency, the motion was fully briefed and this court heard argument on August 11, 2022. [\[FN2\]](#)

### DISCUSSION & CONCLUSION

Respondent seeks attorney's fees upon an argument that her lease included an attorney's fees provision and that as the alleged prevailing party, she is entitled to reasonable fees pursuant to Real Property Law (RPL) § 234. Annexed to the motion are the lease and a breakdown of respondent's attorneys' hours spent litigating this proceeding. Petitioners oppose the motion, arguing that an ultimate outcome was never reached in the proceeding and that there was no prevailing party to whom fees should be awarded.

While respondent argues that petitioners withdrew this proceeding after offering a renewal lease, the renewal lease annexed as an exhibit to the motion (Exhibit D) is dated July 31, 2019 (and was executed in August 2019), and the discontinuance occurred prior thereto,

on July 30, 2019. Additionally, the discontinuance "without prejudice" effectively reserved the right to maintain a subsequent proceeding and manifested the lack of an ultimate outcome. [See \*J.P. & Assoc. Props. Corp. v. Krautter\*, 38 Misc 3d 60](#), 62 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013], [affd sub. nom. \*Matter of J.P. & Assoc. Props. Corp. v. Krautter\*, 128 AD3d 963](#) [2d Dept 2015]. In the absence of an ultimate outcome, an award of attorney's fees pursuant to RPL § 234 is unwarranted. *See Elkins v. Cinera Realty, Inc.*, 61 AD2d 828 [2d Dept 1978]. Moreover, to the extent that an "ultimate outcome" may have been reached thereafter by the execution of the renewal lease (*cf. Isaly-Liceaga v. Pickarski*, 199 AD3d 413, 414 [1st Dept 2021]), respondent's claim for fees in this proceeding has nonetheless been waived by her failure to expressly reserve the right to seek fees when the proceeding was discontinued. [See \*Tapper v. Jedrusiejko\*, 74 Misc 3d 132](#) [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022]; [Beka Realty, LLC v. Gold](#), 65 Misc 3d 156[A], 2019 NY Slip Op 51953[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019].

Accordingly, respondent's motion for a judgment for attorney's fees and other relief is denied. This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: August 12, 2022  
Queens, New York

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HON. CLINTON J. GUTHRIE, J.H.C.

### Footnotes

**Footnote 1:** The court has listened to the FTR audio recording from July 30, 2019 and was not able to discern any appearance on the record for this proceeding on that date.

**Footnote 2:** The court notes that petitioner filed supplemental opposition papers to NYSCEF in early August 2022. Respondent's attorney objected to the court considering the supplemental opposition papers at argument. Upon the objection, the court does not consider the supplemental opposition papers, as they were filed without leave of court and respondent did not have the opportunity to address the arguments made therein.

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