2023-04-10

23-35 BRIDGE STREET LLC v. EXCEL AUTOMOTIVE TECH CENTER, INC.

At an IAS Term, Part 92 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, on the 10th day of April, 2023

P R E S E N T:

HON. KATHERINE A. LEVINE,
Justice.

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23-35 BRIDGE STREET LLC,

Plaintiff,

- against -

Index No. 11088/2003

EXCEL AUTOMOTIVE TECH CENTER, INC.,

Defendant.

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The following papers numbered 1 to 8 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4 5-7
Opposing Affidavits (Affirmations)	6-7
Reply Affidavits (Affirmations)	8

These motions arise from a decision rendered by this court on a declaratory judgment action in *25-35 Bridge St. LLC v Excel Auto Tech Ctr Inc.*, 63 Misc. 3d 269 (Sup. Ct., Kings Co. 2018) . Plaintiff 23-35 Bridge Street LLC ("Plaintiff" or "Bridge Street") now moves for a money judgment to reimburse it for: (1) its costs, disbursements and attorney's fees, as provided for under the parties' lease, and (2) "the loss of market rents from the time the lease expired [on April 29, 2005] to the present (during which Defendant was in possession of the Premises paying only below-market

rents) . . ."

Defendant Excel Automotive Tech Center, Inc. ("Excel") cross-moves for an order: (1) vacating the court's October 29, 2018 trial decision and order, pursuant to CPLR 5015 (a) (3) and in the interest of justice, "on the grounds that Bridge Street is now regarding Excel's late written exercise of the purchase option afforded Excel under its lease with Bridge Street (the 'Lease') as a default under the Lease rather than . . . a forfeiture of Excel's option rights[,]" and (2) sanctioning Bridge Street and its attorneys for making the instant motion and awarding Excel costs, disbursements and attorney's fees, pursuant to 22 NYCRR § 130-1.1 (Part 130).

History of Declaratory Judgment Action

The underlying action arises from a disputed option to purchase contained in a commercial lease which defendant Excel admittedly failed to exercise in a timely manner. On March 26, 2003, plaintiff the owner of the commercial real property at 27-35 Bridge Street in Brooklyn (Property), commenced this action against its tenant Excel, seeking a declaration that a disputed purchase option in a commercial lease entered into between Joseph Vitarelli ("Vitarelli"), the plaintiff's deceased predecessor in interest, and Excel, was unenforceable on the ground that the option clause had been stricken or, in the alternative, that Excel had failed to timely exercise as required by the lease. In its answer Excel asserted counterclaims seeking an order: (1) declaring that Excel may enforce the Option to purchase the Property, although it admittedly failed to timely exercise the

Option, and (2) permanently enjoining plaintiff from selling the Property or otherwise interfering with Excel's occupancy of the Property.

In 2004, the parties filed their respective motion and cross motion for summary judgment, and each of the parties requested attorney's fees. By decision and order dated April 14, 2005, the court (Garson, J.) denied that branch of plaintiff's motion seeking a declaration that Excel had failed to exercise its Option to purchase the Property, and that branch of Excel's cross motion seeking a declaration that it validly exercised the Option. The court held that "a question of fact exists regarding whether Excel would suffer a forfeiture were it not allowed to exercise the option" and whether Excel had "recouped and/or depreciated [the value of its expenditures] during the term of the lease." However, the court granted that branch of Bridge Street's motion dismissing Excel's second counterclaim for an injunction. The court denied those branches of the parties' motion and cross motion seeking attorney's fees, and held that:

> "In the instant case, section 20 of the lease provides for attorneys' fees in plaintiff's favor only if Excel was in default for the rent due pursuant to the lease. Thus, it does not facially appear that an award of attorney fees would be warranted in this case. Moreover, as there has been no decision rendered granting either party the relief requested, any award of attorneys' fees would be premature. Accordingly, those branches of the motion and cross motion requesting attorneys' fees are denied."

Under the Lease, Bridge Street's predecessor-in-interest rented the Property to Excel for $7,000.00 per month for a six-year term, which commenced on March 1, 1999,

and terminated (during the pendency of this action) on April 29, 2005. In May 2005, at the conclusion of the Lease term, Excel remained in possession of the Property as a month-to-month tenant, with a monthly rent of $7,000.00. Notably, Bridge Street accepted the $7,000.00 monthly rent from Excel without reserving its right to seek additional rent.

By interim order dated September 14, 2011, the court (Schmidt, J.) directed, in relevant part, that "Excel shall remain in possession of the property as a month-to-month tenant of the LLC, subject to the provisions of the expired lease . . . through the final determination of this Supreme Court action." Thus, Justice Schmidt ordered, and the parties agreed, that Excel would remain in possession of the Property as a month-to-month tenant until the conclusion of this action, with monthly rent of $7,000.00. Once again, Bridge Street failed to object or reserve its right to seek additional rent. As will be set forth below, Justice Schmidt's decision on the rent constitutes the law of the case.

Decision and Order After Trial

Eventually, this court presided over a bench trial in this action, and thereafter issued a comprehensive and lengthy decision which analyzed all the factual and legal issues presented by the parties. See *25-35 Bridge St. LLC; supra.* More than half of the trial, and much of the 2018 decision addressed various motions in limine, which predominantly concerned whether CPLR 4519 (the Dead Man's Statute) precluded the admission of certain evidence due to the death of the principal of petitioner Joseph

Vitarelli, and whether the defendant's principal Han, who was an interested party, could testify about the lease.

In sum and substance, this court found that the Dead Mans Statute did not preclude the introduction into evidence of the lease that Vitarelli signed since the lease was authenticated by a source other than Han concerning a transaction or communication with the deceased. Furthermore, the Statute was never intended to completely foreclose a party from putting on a defense but rather was created to insure an equal playing field. Vitarelli, while alive, initiated a lawsuit and submitted affidavits averring that the original version of the lease redacted the purchase option, annexed a copy of said lease to the complaint, and then died leaving defendant without the ability to mount a defense. Therefore, Bridge Street could not assert the Statute as a blanket sword against defendant by contending that the purchase option had been removed while arguing that defendant could not mount a defense by presenting its version of the lease into evidence. 63 Misc. 3d at 277- 281. Nor did CPLR 4519 bar limited testimony from Han authenticating defendant's proffered version of a commercial lease entered into between Excel and the decedent where the parties disputed whether the version of the lease they executed contained a purchase option or whether the option was stricken. The Statute, did, however, preclude the principal from testifying about any conversations he had with decedent concerning the contents or meaning of the lease. *Id.* at 281- 83. Finally, the court held that the real estate broker was not an interested party and thus could authenticate Vitarelli's signature and

offer other testimony about the lease. Id at 281-282 See generally, Id at 283-88.

The remainder of the 2018 decision (63 Misc. 3d at 288-299) addressed the ultimate issue of whether equity should allow Excel to exercise the expired option to purchase the Property, despite its 11 month delay in notifying plaintiff about its desire to exercise the option. Under the seminal case of *J.N.A. Realty Corp. v Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392 (1977) (*"J.N.A"*), the Court of Appeals held that a commercial tenant's failure to timely exercise an option to purchase or renew a lease may be excused where (1) such failure was the result of "inadvertence," "negligence" or "honest mistake"; (2) the nonrenewal would result in a "forfeiture" by the tenant due to his substantial improvements on the property; and (3) the landlord would not be prejudiced by the tenant's failure to send, or its delay in sending, the renewal notice. *See*, *Baygold Assoc., Inc. v Congregation Yetev Lev of Monsey, Inc.*, 19 N.Y.3d 223, 225 (2012), citing to J.N.A supra, 42 N.Y. 2d at 397-98. *See also*, *Waterfalls Italian Cuisine, Inc. v Tamarin*, 149 A.D.3d 1141, 1142 (2nd Dept. 2017). All three prongs must be satisfied for equitable relief to be granted; if any of the criterion are not met then relief must be denied. *Baygold Assoc., Inc. v Congregation Yetev Lev of Monsey, Inc.*, 2010 N.Y. Slip Op 50525[U], 27 Misc. 3d 1202[A] *5 (Sup. Ct., Rockland Co. 2010) *aff'd* 81 A.D. 3d 763 (2d Dept. 2011) aff'd 19 N.Y.3d 223 (2012). In short, equity will intervene to relieve a tenant who, due to inadvertence or neglect, failed to timely exercise an option in the lease if it would cause the tenant to suffer a substantial forfeiture and the landlord/seller is

not prejudiced. *J.N.A., supra*, 42 N.Y. 2d at 397-398.

This court initially found that Excel's oral notice that it intended to exercise the option was ineffective given the lease's specific requirement that a written notice was necessary. 63 Misc. 3d at 289-90. Applying this three prong JNA test to the evidence, this court determined that Excel "has failed to meet its burden of proving that it is entitled to the equitable relief of avoiding the consequences of its untimely attempt to exercise the option and the forfeiture of its investments." 63 Misc. 3d at 273. First, "Excel's 11 month delay in providing the landlord with written notice of its intent to exercise the option in writing far exceeds the outer limit of reasonable delay, particularly since Excel was put on notice that the option deadline had passed and . . . waited another seven months before submitting its written notice." *Id.* at 291-92. Thus, "Excel's delay constitutes inexcusable gross negligence and does not warrant the granting of equitable relief." *Id.* at 295. As to the second prong, this court held that Excel failed to prove a forfeiture because it did not demonstrate that it had made significant or valuable improvements to the property with the intention of exercising the Option. *Id.* at 297-99. The court found it was unclear how much Excel actually expended at its Bridge Street site, as opposed to its Fulton Street location, as the expense related documents were vague and there was financial commingling between the two sites. Finally "many of the of expenditures ...were for removable trade fixtures that did not affect the value of the premises" and would not count towards a forfeiture. *Id.* at 298. Since Excel never even raised the alternative basis

upon which to find a forfeiture - that the business location itself was a valuable asset and that it would lose customer good will associated with this location - the court did not consider this basis.

Having found that Excel failed to meet the first two J.N.A, criteria, this court found that it was unnecessary to rule upon the third prong - that there was a lack of prejudice to Bridge Street. The court therefore granted Bridge Street's request for a declaratory judgment and issued a "final judgment of possession" to Bridge Street; and decreed that eviction against Excel be issued forthwith. 63 Misc. 3d at 298

Bridge Street's Post-Trial Motion

After appealing this decision, Bridge Street moved for a money judgment of more than $1 million to reimburse it for: (1) its attorney's fees over the course of this 17-year litigation, pursuant to paragraphs 20 and 38 of the Lease, plus costs and disbursement; and (2) "the loss of market rents from the time the lease expired [on April 29, 2005] to the present (during which Defendant was in possession of the Premises paying only below-market rents) . . ."

Bridge Street contends that it is entitled to a money judgment to reimburse it for its legal fees, totaling more than $969,535.30, pursuant to the plain terms of the Lease: Paragraph 20 provides:

> "If the Tenant shall at any time be in default hereunder, **and if the Landlord shall institute an action or summary proceeding against the Tenant based upon such default, then the Tenant will reimburse the Landlord for the**

> **expense of attorney's fees and disbursements thereby incurred by the Landlord**, so far as the same are reasonable in amount. Also so long as the Tenant shall be a tenant hereunder the amount of such expenses shall be deemed to be 'additional rent' hereunder and shall be due from the Tenant to the Landlord on the first day of the month following the incurring of such respective expenses.

Paragraph 38 provides;

> "In the event that the Landlord shall have to bring any proceeding or action for the recovery of money damages or for possession of the premises **by reason of breach of the within agreement by the Tenant** and the Landlord shall incur costs and expenses by reason thereof, and the Landlord shall prevail in such proceeding, such reasonable charges, including legal fees, shall be due and payable from the Tenant as additional rent, and shall be due five (5) days after rendering a statement therefor to the Tenant by the Landlord"

Bridge Street also contends that it is entitled to recover more than $660,000.00 from Excel in use and occupancy damages for "lost rents and other amounts" for taxes and insurance, as a matter of equity. Bridge Street argues that "[w]ith increasing ownership costs, such as increased property tax and insurance payments, [it] has, throughout this litigation, suffered significant financial hardship from Defendant's well below market rental rate, compounded by its habitually late rent payments." It asserts that the fair market rental value of the Property has increased by no less than 36% to $11,000.00, based on the trial testimony of Neil Dolgin, a real estate professional. Bridge Street contends that it is entitled to recover "the fair market value for the monthly rental during the entire time [Excel] remained in possession of the Premises after the expiration

of the Lease on April 29, 2005."

Excel, in opposition, argues that "Bridge Street is seeking attorneys' fees under lease provisions that have no application here, as those provisions were dependent on there being a default (or breach) by Excel under the Lease." Excel notes that the complaint – by which Bridge Street only sought declaratory relief – does not allege any default under the Lease, and was never amended to add claims for breach of contract, monetary damages or attorney's fees: "Having prevailed in this action by asserting that Excel's late exercise of the purchase option forfeited its option rights, Bridge Street is now estopped from taking a contrary and inconsistent position on the instant motion." Excel also argues that such new claims are time-barred under the six-year statute of limitations applicable to contract actions.

As to Bridge Street's claim for lost market rents, Excel argues that such claim is specifically precluded by Justice Schmidt's September 14, 2011 order, which permitted Excel to occupy the Property as a month-to-month tenant "subject to the provisions of the expired lease . . . through the final determination of this Supreme Court action." Bridge Street's counsel stipulated to the terms of the September 14, 2011 order, and Bridge Street thereafter accepted $7,000.00 per month from Excel without objection or any reservation of rights.

DISCUSSION

Lost Market Rents

In considering Bridge Street's second motion first, it is clear that from the expiration of the Lease on April 29, 2005 until the court's decision in 2018, Bridge Street continued to accept $7,000.00 in monthly rent from Excel, without objection or any reservation of rights. In 2011, the parties stipulated and agreed, and Justice Schmidt ordered, that Excel remain in possession of the Property as a month-to-month tenant under the same terms as the expired Lease (with monthly rent of $7,000.00) through the final determination of this Supreme Court action. Bridge Street has offered no basis to retroactively alter the this decision

Judge Schmidt's decision constitutes the "law of the case," wherein a judicial decision concerning an issue of law made at one stage of the litigation becomes the "law of the case," i.e., "binding precedent, to be followed in subsequent stages of the same litigation." *Firestone v Berrios*, 42 F Supp 3d 403, 411 [ED NY 2013], *citing Scottish Air Intl., Inc. v British Caledonian Group, PLC.,* 152 F.R.D. 18, 24 (S.D.N.Y. 1993). *See, Collins v Indart-Etienne*, 59 Misc. 3d 1026, 1043-44 (Kings Co. 2018). Despite colloquial meanings given to this doctrine over the years, it is now recognized as a "concept regulating pre-judgment rulings made by courts of coordinate jurisdiction in a single litigation." *Collins, supra,* 59 Misc. 3d at 1043, citing to *People v Evans,* 94 NY2d 499, 503 (2000); 10-5011 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 5011.09.

As distinguished from issue preclusion and claim preclusion, the law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment *(see Mtr. of McGrath v Gold*, 36 NY2d 406, 413 (1975). *See, People v Evans*, 94 NY2d 499, 502 (2000) (res judicata and collateral estoppel "generally deal with preclusion after judgment," i.e., after a claim or issue has been adjudicated "in a prior action"). Under the doctrine, parties or their privies are "preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179 (2007).

As compared to res judicata (claim preclusion) and collateral estoppel (issue preclusion), which generally deal with preclusion after judgment, the law of the case addresses the potentially preclusive effect of judicial decisions made in the course of single litigation "before final judgment." *Id citing to People v Evans, supra*, 94 N.Y.2d at 502. *See,* 18 Wright, Miller & Cooper, Federal Practice & Procedure § 4478 at 788 [1981].) The underpinning of this doctrine is to maintain consistency, foster respect for decisions of coordinate courts, and protect against repeated reconsideration of settled issues. *Devilla v Schriver,* 245 F3d 192, 197 (2d Cir 2001]; *Collins, supra, 59 Misc 3d at 1043.*

Application of the law of the case is discretionary. *See, Brentwood Pain & Rehabilitation Servs., P.C. v Allstate Ins. Co.,* 508 F Supp 2d 278, 288 (S.D.N.Y. 2007);

Collins, supra. Absent "cogent" or "compelling reasons, a court should continue to adhere to previously made decisions in the same case. *United States v Uccio*, 940 F2d 753, 758 ([2d Cir 1991); *Bedasie v Mr. Z Towing Inc.*, 2017 US Dist LEXIS 43973, *44 (E.D.N.Y. 2017). Compelling or cogent reasons include an "intervening change of controlling law, the availability of new evidence or the need to correct a clear error or prevent manifest injustice." *DiLaura v Power Auth. of State of N.Y.*, 982 F2d 73, 76 [2d Cir 1992]; *Bedasie, supra; Collins v Indart-Etienne*, 59 Misc. 3d 1026, 1043-1044(Sup. Ct., Kings Co. 2018).

There are no"cogent" or "compelling reasons" presented for this court to disturb the Judge Schmidt's previous decision. Under these circumstances, there are no legal or equitable grounds to award Bridge Street a money judgment for "lost market rent." Accordingly, that branch of Bridge Street's motion seeking a money judgment for lost market rents is denied.

Attorney Fees

Bridge Street is only entitled to an award of attorney fees under the plain language of paragraph 20 of the Lease when it commences "an action or summary proceeding against the Tenant *based upon [Tenant's] default*" under the Lease (emphasis added). The lease does not describe what constitutes a default. Similarly, paragraph 38 of the Lease limits reimbursement of attorney's fees to "any proceeding or action for the recovery of money damages or for possession of the premises by reason of *breach of the within*

agreement by the tenant" (emphasis added).

While this court awarded Bridge Street possession of the Property at the conclusion of the action,[1] the court was not asked to, and did not address an alleged breach of or default under the Lease. The principle issue at trial was whether Excel was entitled to exercise the Option in paragraph 61 of the Lease. The 2003 complaint, which has never been amended, only seeks declaratory relief regarding Excel's failure to timely exercise its Option in paragraph 61 of the Lease to purchase the Property, plus costs and disbursements, and did not assert a cause of action against Excel for breach of the Lease or for attorney's fees.[2]

Paragraph 61 of the Lease provides that:

> "tenant or its designee shall have the option to purchase the leased premises for the sum of . . . $950,000 after the completion of the fourth (4) year of this lease provided the tenant gives notice to the landlord . . . ninety (90) days prior to the expiration of the fourth (4) year of this lease."

It does not say that the tenant's failure to timely exercise the Option to purchase the Property is a default or a breach under the Lease

The very definition of an Option precludes a finding that Excel defaulted or

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[1] The Lease had expired during the pendency of the action, and the stipulated and so ordered month-to-month tenancy ended at the conclusion of the action.

[2] Plaintiff's request for costs and disbursements in the "Wherefore" clause in the complaint is not the equivalent of an express demand for attorney's fees.

breached the contract by attempting to exercise the option in an untimely fashion. Since the exercise of an option is, by its terms discretionary, not mandatory, Excel was never obliged under the lease to exercise the Option in the first place.

An option is variously described in Blacks Law Dictionary as: 1) "The right or power to choose; something that may be chosen...; 2. An offer that is included in a formal or informal contract; esp., a contractual obligation to keep an offer open for a specified period, so that the offeror cannot revoke the offer during that period;.."; 4) " A contract by which a property owner agrees with another party **that the latter may buy the property** at a fixed price within a specified time; the right or privilege to buy property **at the election of** the purchaser;." 5. "The right (but not the obligation) to buy or sell a given quantity of securities, commodities, or other assets at a fixed price within a specified time." Black's Law Dictionary (11th ed. 2019). Black's also defines an **"Option to Purchase real property"** (1912) as " A contractual provision by which an owner of realty enters an agreement with another allowing the latter to buy the property at a specified price within a specified time, or within a reasonable time in the future, **but without imposing an obligation to purchase on the person to whom it is given."**

Similarly, case law provides that an option is "a continuing offer, binding for the time specified the one who makes it, but not the one to whom it is made, unless he accepts, when it becomes binding on both. **It neither transfers nor agrees to transfer title to property, but confers the bare right** to accept an offer within the time limited and upon

the terms provided." *Benedict v Pincus*, 191 NY 377, 382 (1908). See *Stern Family Ltd. Partnership v Rollin Dairy Corp.*, 2014 N.Y. Misc. LEXIS 46, *11-13, 2014 NY Slip Op 30022(U),5 (Sup Ct Suffolk Co 2014). "An option contract is an agreement to hold an offer open; it confers upon the optionee, for consideration paid, **the right to purchase at a later date.**" *Kaplan v Lippman*, 75 NY2d 320, 324-25 (1990); *Omar v Rozen*, 2007 N.Y. Misc. LEXIS 9227 (Sup Ct. Suffolk Co. 2007). The holder of an option has an unconditional and irrevocable right to exercise the option **to purchase at the holder's sole discretion**, whether the owner is willing to part with ownership or not. *Omra, supra,* citing *Metropolitan Transp. Auth. v Bruken Rlty. Corp.,* 67 N.Y.2d 156, 163 (1986). "It is of the very essence of an option that the party owning it may in his sole discretion elect to exercise it, independently of the will of another; and while an option may undoubtedly be made conditional, conditions should not be implied without reason, and never when they annul the purpose of the agreement itself." *Dowdle v. Richards*, 2 A.D.2d 486, 492 (1956).

Additionally, above and beyond the definition of an option, Article 47 of the Lease, entitled " Default Clause," provides that the tenant shall not be deemed to be in default under the terms of the lease if, within 10 days after receipt of written notice of any default, the tenant has cured or commence to cure same." Curiously, this paragraph does not apply to the payment of rent under the lease. Excel correctly asserts that any lease violation and hence default would require the landlord to serve the tenant with a notice to cure and allow

him to cure within 10 days. No such notice was ever served and hence default cannot be found.

The Second Department has denied the prevailing landlord attorney's fees in cases involving similar attorney's fee lease provisions, where the declaratory judgment action did not involve a breach of or default by the tenant. When a lease is unambiguous, the court only looks to the language in the agreement to determine its meaning an the effect of a default by the tenant. *Bennies Buddies, Inc. V. Lazarian Society for Animals, 40 A.D. 3d 1330* (2d Dept. 2007).

New York public policy disfavors any award of attorney fees to the prevailing party, and unless authorized by statute, court rule or written agreement by the parties are not recoverable. *Adams v. Washginton Group, LLC, 49 A.D. 3 786,787* (2d Dept. 2008); *Horwitz v. 1025 Fifth Ave, Inc*, 34 A.D. 3d 248, 249 (1st Dept. 2006); *Maliner -Colvin v. 85-10 34th Ave* 284 A.D. 2d 434 (2d Dept. 2001). Therefore, a provision in a lease allowing the recovery of attorney fees as incidents of litigation should be strictly construed. *Horwitz, supra* at 249; *Sokolow v. Neumann-Wwerth*, 62 Misc. 3d 1 (App. Term, 2d Dept. 2018) (no attorney fees awarded since holdover proceeding was based on termination of month to month tenancy which prompted cancellation of lease and not any default by tenants); *Brighton First Road Apts. Corp. V Henderson*, 51 Misc 3d 1 (App. Term, 2d Dept. 2015) (no attorney fees awarded to landlord in action commenced by undertenant to secure his purported interest in lease where lease limited landlord's right to

recover attorney fees to "instituting any action or proceeding based on tenant's default). *See, Jackson v. Westminster House Owners, Inc.*, 52 A.D. 3d 404 (1st Dept 2008) (No award of attorney fees for defendant coop board since plaintiff, who sued coop for breach of warranty of habitability, was not in default of her lease obligations); *Maliner-Colvin, supra*, (no attorney fees because action not commenced as a result of the plaintiff's default, and similar to the instant matter, the defendant landlord "in any event... failed to give plaintiff the required 30 days notice of alleged default as required in the lease); *Spinale v. 10 West 66th St. Corp.*, 193 A.D. 3d 431(1st Dept. 1991) (award of attorney fees improper since plaintiff did not default in performance of lease but merely sought declaration of rights under the lease involving installation of submeters).

Finally, the courts have uniformly denied attorney fees where a tenant failed to exercise an option, **unless the tenant also defaulted per the terms of another provision of the lease**; which leads to the ineluctable conclusion that the failure to exercise an option, in and of itself, did not constitute a default. *See,* M*aliner-Colvin v 85-10 34th Avenue Apartment Corp.*, 284 A.D. 2d 434 (2d dept 2001) (defendant cooperative was not entitled to an award of attorney's fees under the lease where the plaintiff brought an action seeking a declaration that it was the holder of unsold shares in the defendant's cooperative apartment housing corporation, since the plaintiff was not in default and, like the instant matter, the defendant failed to give the tenant plaintiff the required 30 days notice of alleged default as required in the lease); *St. George Tower& Grillo Owners Corp. v Honig*,

232 A. D. 2d 475 (2d Dept 1996) (provision of the lease allowing for recovery of attorney's fees applied only to actions arising from tenant's default, and could not be invoked by lessee against the sublessor who brought two unsuccessful declaratory judgment actions challenging the landlord's refusal to consent to continue the tenant's sublet). Finally, in *Singh v Atakhanian*, 31 A. D. 3d 425, 427 (2d dept. 2006), a tenant sought performance of an option contract for the sale of real property pursuant to a lease provision which stated that the "[t]enant shall have the option to purchase the demised premises, provided that Tenant is not in default under the Lease." The Second Department first upheld the Supreme Court's finding that since the plaintiffs were in default at the time they attempted to exercise the option, the option was void and ruled in favor of the defendants. *Singh*, 31 A.D.3d at 427. However, the Appellate Division then found that the Supreme Court erred in dismissing defendant's counterclaim for an award of attorney's fees since the lease provided that "the prevailing party shall be entitled to payment by the other party of all court costs..., reasonable attorney[']s fees,...." *Id.*

Based upon the aforestated precedent, the definition of an option and the narrow language of paragraphs 20 and 38 of the Lease, Bridge Street is not entitled to reimbursement of its attorney's fees. Bridge Street, however, is entitled to an award of costs and disbursements, which it specifically sought in its complaint.

Excel's Cross Motion

In essence, Excel seeks to vacate the 2018 Trial Order, "in the interest of justice and equity," if Bridge Street's motion for attorney's fees based on Excel's alleged default

under the Lease is granted. Excel also contends that the imposition of sanctions on Bridge Street and an award of costs, disbursements and attorney's fees is warranted, pursuant to Part 130, because Bridge Street's motion is a frivolous attempt to harass and maliciously injure Excel.

Bridge Street, in reply and in opposition to the cross motion, asserts that paragraph 38 of the Lease "does not contain an alleged prerequisite that Plaintiff assert a count for 'default' [to obtain an award of attorney's fees] and expressly applies whenever [it] is forced to bring an action to regain possession of the premises for any reason." Bridge Street claims that its complaint encompasses such relief, since the "Wherefore" clause in the complaint seeks a declaratory judgment, "together with such other and further relief as the Court may deem just and proper, plus the costs and disbursements of this action."

Since Excel seeks to vacate this court's 2018 Trial Order *only if* this court grants Bridge Street's motion for an award of attorney's fees, based on Excel's "default" under the Lease, and since, as previously discussed, there was no alleged default or breach under the Lease, that branch of Excel's cross motion seeking to vacate the 2018 Trial Order is denied as moot. Regardless, Excel has failed to establish any legal or equitable grounds upon which to vacate the 2018 Trial Order. Nor has it demonstrated that Bridge Street's motion was frivolous or that its conduct warrants the imposition of Part 130 sanctions. Accordingly, it is

ORDERED that the branch of Bridge Street's motion seeking a money judgment

awarding it costs, disbursements and attorney's fees, pursuant to the terms of the lease, is granted only to the extent that Bridge Street is awarded costs and disbursements, and the motion is otherwise denied; and it is further

ORDERED that the branch of Bridge Street's motion seeking a money judgment awarding it the loss of market rents from April 29, 2005, the time the lease expired, to the present is denied; and it is further

ORDERED that the branch of Excel's cross motion to vacate the court's October 29, 2018 decision and order, pursuant to CPLR 5015 (a) (3) and in the interest of justice, is denied as moot; and that the branch of Excel's cross motion for the imposition of sanctions against Bridge Street and an award of costs, disbursements and attorney's fees, pursuant to Part 130, is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. KATHERINE A. LEVINE
JUSTICE SUPREME COURT

Appearances

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