SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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TRUMP VILLAGE SECTION 4, INC., Index No. 504000/12

Plaintiff,

MEMORANDUM OF LAW IN OPPOSITION

-against-

MARK J. SILVERMETZ,

Defendant.

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Defendant Mark J. Silvermetz, through undersigned counsel, submits this memorandum of law in opposition to plaintiff's motion for an order permitting plaintiff to discontinue this proceeding with prejudice but without costs or attorneys' fees being awarded to either party. The question is whether a cooperative can capriciously initiate a meritless suit against any co-op owner it does not like, forcing him to rack up significant legal fees in self-defense, and then just voluntarily discontinue without any deleterious consequence to itself. Administrative Rule 130 and this state's jurisprudence involving leases with attorney fee provisions require that malicious and frivolous lawsuits meant to intimidate should be deterred through an award of fees to the wrongfully-sued individual.

I. BACKGROUND

The Court is respectfully referred to the accompanying affidavit of Bruce Levinson for a full recitation of the relevant facts. Principally, Mark Silvermetz, a disabled resident of Trump Village since 1988, received succession rights to his residence from his grandparents. Though these rights were called into question by the Department of Housing and Community Renewal ("DHCR") in 2004, defendant's

entitlement to his own occupancy agreement was recognized in an Article 78 proceeding brought by him against the DHCR, as indicated by a November 29, 2004 stipulation. By virtue of that stipulation, Mr. Silvermetz was recognized as a "primary resident of the Premises" and plaintiff subsequently issued him a stock certificate. This action was commenced eight years later, and seeks to void defendant's occupancy agreement and evict him.

In the time leading up to his being sued, Mr. Silvermetz has been an outspoken critic of Igor Oberman, plaintiff's current board president, who according to news reports, likes to rule the co-op with an iron fist and treats it as a Soviet-style gulag. Plaintiff belatedly concedes it has no case, and that the 2004 stipulation resolved all issues in dispositive fashion. Yet it refuses to reimburse Mr. Silvermetz for his legal fees in having to defend a case that never should have been commenced, and seems to have been designed to force him to spend money and silence his criticism of Igor Oberman. Mr. Silvermetz' occupancy agreement has a legal fee provision.

II. STANDARD OF REVIEW

Though courts are loathe to force parties to litigate against their will, Tucker v Tucker, 55 NY2d 378, 383 [1982], CPLR 3217(b) expressly permits the court to condition discontinuance on appropriate terms to serve the ends of justice. Courts have awarded costs and attorneys' fees under myriad circumstances (*See e.g. Beigel v Cohen, 158 AD2d 339 [1st Dept 1990]; McCarty v Alegre-Levine, 177 AD2d 753, 754 [3d Dept 1991]).* Fees can be awarded if defendant is the prevailing party under the reciprocity provisions of New York Real Property Law § 234. Fees can also be awarded when the original complaint is frivolous as defined by Administrative Rule 130. The

instant case warrants conditioning voluntary discontinuance on payment of defendant's costs and attorneys' fees under both rationales.

III. PREVAILING PARTY IN ACTION REGARDING RESIDENTIAL LEASE IS ENTITLED TO LEGAL FEES AND COSTS

> *"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 ... there shall be implied in such 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 successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease."* Real Property Law § 234

Paragraph 7(c) of the parties' occupancy agreement provides for defendant reimbursing plaintiff for costs and attorneys' fees occasioned by plaintiff prevailing in a proceeding against defendant. By operation of Real Property Law § 234, that same prevailing party right to such costs extends to defendant. *See, e.g.* Greco v GSL Enterprises, Inc., 137 Misc 2d 714, 718 [Civ Ct 1987]; 111 on 11 Realty Corp. v Norton, 191 Misc 2d 483, 486 [Civ Ct 2002]; *Emily Towers Owners Corp. v Carleton Emily Towers, L.P.*, 175 Misc 2d 283, 284 [App Term 1997]. Given such language in the occupancy agreement, the award of legal fees and costs to the prevailing party is mandatory and not subject to discretion of the court. Coll. Properties, Inc. v Bruce, 122 Misc 2d 766, 768 [App Term 1984].

Plaintiff either knew or should have known this case lacked merit when it was commenced. The December 20, 2004 stipulation plaintiff annexed to its complaint explicitly refers to the prior stipulation plaintiff belatedly conceded renders its entire

argument moot. The merest modicum of a reasonable search of their own and public files in good faith would have certainly discovered the November 29, 2004 stipulation.

Plaintiff rashly initiated the instant case and the absolute nature of defendant's defense is uncontested. As such, defendant is the prevailing party on the merits and entitled to costs and attorneys' fees.

IV. RULE 130 DEMANDS THE PAYMENT OF DEFENDANT'S COSTS AND ATTORNEYS' FEES TO DETER PRECISIELY THIS SORT OF LAWSUIT

Rule 130 permits courts to award costs, reasonable attorneys' fees, and even sanctions when costs and fees were caused by frivolous conduct, defined by the rule as follows:

> *(c) For purposes of this Part, conduct is frivolous if:*
> *(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;*
> *(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or*
> *(3) it asserts material factual statements that are false.*
> *... In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.* 22 NYCRR 130-1.1

Plaintiff's complaint qualifies as frivolous and sanctionable under all three of the available statutory definitions because: (1) there is no merit in law to the allegation that eight years after (a) the DHCR acknowledged Mr. Silvermetz' entitlement to a proprietary lease in a written stipulation filed with this Court, and (b) plaintiff issued an occupancy agreement to defendant pursuant to that stipulation, an act they codified six years ago by issuing an updated version, Mr. Silvermetz suddenly has no right to

possession and should be evicted from his home; (2) the fact that plaintiff's complaint was initiated 8 years after final adjudication of the issues it raises, and only on the heels of Mr. Silvermetz' criticism of how the board president is managing the building, suggests this case was brought solely to harass defendant and silence him; and, (3) the complaint, in asserting that defendant has "no legal right to the subject premises," asserts one among many material factual statements that are false, running afoul of the third definition of frivolous conduct. Furthermore, the failure of the complaint to acknowledge the November 29, 2004 stipulation from the dispositive Article 78 proceeding in this Court is an indefensible omission of the most material fact in the matter.

Plaintiff's factual and legal arguments are utterly unavailing. The lame excuse that they could not find the exculpatory November 29, 2004 stipulation when it is expressly referenced in the stipulation they annexed to their complaint is implausible. The document is also in this Court's file from the 2004 Article 78 proceeding and the DHCR's file, both of which are available to the public. In addition, plaintiff itself should have retained a copy of the stipulation in their files since it issued defendant an occupancy agreement in reliance thereon. Either plaintiff has the November 29, 2004 stipulation and ignored it in bad faith, or deliberately chose not to locate the document knowing its contents were antithetical to the claims in this malicious litigation.

Plaintiff's reliance on Rose v Montt Assets, Inc., 187 Misc 2d 497, 498 [App Term 2000] and Wells v E. 10th St. Assoc., 205 AD2d 431 [1st Dept 1994] is plainly inapposite as, in both cases, prevailing party legal fees were denied because the action was properly commenced under existing law but subsequently dismissed when the

applicable law changed. Neither the applicable law nor salient facts in this case have changed in the last eight years. Filed stipulations in Supreme Court, Kings County actions are just as valid now as they were in 2004. Defendant should be made whole both as a prevailing party and as the victim of frivolous conduct under Rule 130.

"[P]laintiffs' continued pursuit of this baseless litigation—on the basis of previously rejected claims...constitutes a clear case of frivolous conduct."William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 32 [1st Dept 1992]. The "lack of colorable merit" in a claim entitles the other side to costs and attorneys' fees under Rule 130. Entertainment Partners Group, Inc. v Davis, 155 Misc 2d 894, 897 [Sup Ct 1992] affd, 198 AD2d 63, 603 NYS2d 439 [1st Dept 1993]. In extreme cases of "deliberate strategy designed to harass" an opposing party, courts have even levied hefty pecuniary sanctions against the attorneys themselves. Jalor Color Graphics, Inc. v Universal Advertising Sys., Inc., 193 Misc 2d 76, 77 [App Term 2002] affd, 2 AD3d 165, 767 NYS2d 615 [1st Dept 2003].

The comprehensive and wanton frivolousness of plaintiff's complaint, belied by documentary evidence and attempting to raise issues totally resolved in a prior action, entitles defendant to costs and attorneys' fees. Mr. Silvermetz has a contractual right to such a recovery under his occupancy agreement, and a statutory right to that relief under Rule 130.

V. CONCLUSION

Plaintiff is correct to move the Court for an order discontinuing its complaint and forever barring re-litigation of the purported issue on which it is premised. Where it is mistaken is in the quantum of prejudice it has so avoidably caused defendant. Conditioning voluntary discontinuance with prejudice on payment of defendant's costs

and attorneys' fees is necessitated by law when, as here, plaintiff's complaint is frivolous under all 3 of the 3 available definitions of frivolous conduct in Rule 130, and legal fees/costs reciprocity under section 234 of the Real Property Law entitles the prevailing party to reimbursement. The cost of initiating a meritless action should be borne entirely by the party commencing it.

Dated: New York, New York
April 15, 2013

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