

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY -- PART 57

PATRICIA BERMAN and
HARVEY SINGER,

Plaintiff(s),

against

Index No.: 115402/05

DECISION/ORDER

DOMINION MANAGEMENT COMPANY,
DOMINION PROPERTY GROUP LLC, et al.,
Defendant(s).

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiffs, rent-stabilized tenants, sue for remediation of a mold condition in their apartment, for damages for personal injury allegedly resulting from the condition and for damages for breach of the warranty of habitability. Plaintiffs now move for summary judgment as to liability against all defendants and for a hearing to determine the amount of legal fees and costs to which they claim they are entitled. Defendants cross-move for summary judgment dismissing the complaint.

The instant complaint alleges 12 causes of action. The first four causes of action generally seek remediation of the mold condition and relocation of plaintiffs during the remediation. The fifth cause of action seeks costs and expenses incurred as a result of the mold condition, including "professional fees for environmental consultants, legal fees, and loss of work time." The sixth through eighth causes of action seek damages for personal injury and punitive damages. The ninth through twelfth causes of action, asserted only against defendant Dominion Property Group LLC ("Dominion Property"), seek damages for breach of the warranty of habitability, breach of contract, constructive eviction, and legal fees.

It is undisputed that, by stipulation dated March 17, 2006, the claims with respect to remediating the mold condition and relocating plaintiffs were resolved. Plaintiffs acknowledge in their moving papers that the work provided for under the stipulation has been substantially completed and plaintiffs have returned to their apartment. (Albin Aff. in Support of Motion, ¶¶ 35, 44.) It is also undisputed that, by stipulation dated September 13, 2006, plaintiffs discontinued the sixth, seventh and eighth causes of action for personal injuries and punitive damages. (*Id.*, ¶¶ 36, 45.) Further, while plaintiffs request summary judgment on their ninth through twelfth causes of action, they do not seek damages – namely, an abatement of rent – that would typically be awarded for a breach of the warranty of habitability or constructive eviction. (*Id.*, ¶ 46.) Rather, by plaintiffs' own acknowledgment, all claims in this case have been resolved except their claims for professional fees and legal fees. (*Id.*, ¶¶ 4, 48.) Thus, to the extent that plaintiffs seek summary judgment as to liability on the first through fourth and ninth through eleventh causes of action, their motion is denied as moot. (See Paragon Cable Manhattan v P & S 95th St. Assocs., 240 AD2d 255 [1st Dept 1997]; Stratis v Kingsbrook Jewish Med. Ctr., 14 Misc 3d 1202 [Sup Ct, Kings County 2006], citing SOS Oil Corp. v Norstar Bank of Long Is., 152 AD2d 223, 228 [2d Dept 1989], affd 76 NY2d 561 [1990].)

With respect to the remaining claims for legal fees and expenses, plaintiffs seek reasonable legal fees and costs pursuant to their lease with defendants Dominion Management Company (“Dominion Management”) and WSC West End Avenue Owners LLC (“WSC”). As to the twelfth cause of action for legal fees as against Dominion Property, it is undisputed that Dominion Property, the management company for the subject building, did not enter into a lease or have a contractual relationship with plaintiffs. As plaintiffs fail otherwise to show any legal

basis for their claim for legal fees as against Dominion Property, the branch of plaintiffs' motion which seeks fees as against Dominion Property is denied. (See U.S. Underwriters Ins. Co. v City Club Hotel, LLC, 3 NY3d 592 [2004]; Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487 [1989].)

As to the claim for fees and costs against Dominion Management and WSC, in order to be entitled to fees under Real Property Law § 234, plaintiffs must demonstrate that they are the prevailing parties in this litigation. (See Blaylock & Partners, L.P. v 609 Fifth Ave. Partners L.L.C., 29 AD3d 476 [1st Dept 2006]; Excelsior 57th Corp. v Winters, 227 AD2d 146 [1st Dept 1996].) In determining whether a party is "prevailing" for purposes of awarding attorneys' fees, the court must consider "the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope." (Excelsior 57th Corp., 227 AD2d at 147.) "To be considered a 'prevailing party,' one must simply prevail on the central claims advanced, and receive substantial relief in consequence thereof." (Sykes v RFD Third Ave. I Assocs., 39 AD3d 279 [1st Dept 2007][internal citation omitted].)

Here, plaintiffs are moving for summary judgment apparently as a means of obtaining a determination that they are entitled to legal fees and expenses. However, as plaintiffs' claims are now moot, the court must examine the claims that were put in issue in this litigation, and the results previously achieved, in order to determine whether plaintiffs are entitled to legal fees.

While plaintiffs do not address the merits of whether they are the prevailing party, defendants put plaintiffs' prevailing party status squarely in issue. Defendants argue that plaintiffs cannot be considered the prevailing party because the issues are mooted by the stipulations in this case. This argument ignores the well-settled authority that a party securing

the "central relief sought" in the case by means of a stipulated settlement still may be accorded the status of prevailing party. (See Sykes v RFD Third Ave. I Assocs., 39 AD3d 279, supra; Rosario v 288 St. Nicholas Realty, Inc., 177 Misc 2d 78 [AT 1st Dept 1998]. See also Thomasel v Perales, 78 NY2d 561 [1991].) Nor is defendants' conclusory assertion that litigation was not necessary to resolve the issues of remediation and relocation sufficient to demonstrate that plaintiffs cannot be considered the prevailing party.

However, even if plaintiffs can be deemed to have prevailed on their remediation and relocation claims by virtue of the stipulation awarding them their requested injunctive relief, plaintiffs have not prevailed on their damage claims. As discussed above, plaintiffs discontinued their personal injury claims after discovery was conducted, and they have abandoned their claims based on alleged breach of the lease. Under these circumstances, plaintiffs have achieved a mixed result in this litigation. The court accordingly finds that neither party should be regarded as the prevailing party. (See Mosesson v 288/98 West End Tenants Corp., 294 AD2d 283, 284 [1st Dept 2002]; J.J. & P. Corp. v Dune Deck Owners Corp., 10 Misc3d 129A [AT 1st Dept 2005].)

Accordingly, it is ORDERED that the motion is denied and the cross-motions are granted to the extent that the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
July 5, 2007



Marcy Friedman, J.S.C.