



COOPERATIVES AND CONDOMINIUMS

Expert Analysis

Legal Fee Recovery When Disputes Arise With Apartment Owners

When disputes arise between co-ops or condominiums and their respective shareholders or unit owners, an important concern for boards and managers is obtaining reimbursement of legal fees from apartment owners. Boards, in consultation with building managers, annually set a building's cash requirements for anticipated expenses for the coming year, upon which apartment owner's maintenance (rent) or common charges are based.

However, it is difficult to anticipate and budget for legal fees resulting from disputes with apartment owners. When such expenses eventuate, boards must look to payment sources such as insurance, assessments, loans, reserve funds or maintenance/common charge increases.

Recovering legal fees from an apartment owner can be problematic, even where the board prevails. New York courts generally do not award attorneys' fees to the prevailing party in a litigation; each party must pay its own fees.¹ An exception is made where the parties agree to pay legal fees or a statute so provides,² but courts strictly construe such provisions.

In addition, co-op/condominium disputes with apartment owners are frequently resolved without formal litigation, but nonetheless generate legal fees. Recovery of such fees can present difficulty for boards and managers.

It is therefore critical that proprietary leases, other shareholder agreements and condominium by-laws clearly state whether and when a co-op or condominium can recover legal fees from apartment owners. This column discusses co-op and condominium legal fee provisions, statutory rights to recover fees and current case law, and makes recommendations to boards and managers regarding best practices for recovering legal fees.

Co-ops and shareholders, as signatories to a proprietary lease, have a "landlord-tenant" relationship, the co-op as lessor and the shareholder as lessee, and courts strictly construe the terms of proprietary leases.³



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Proprietary Leases

Many proprietary leases provide for reasonable legal fees to be paid by the lessee to the lessor as "additional rent" if the lessee is in default and the lessor incurs expenses in: (a) instituting an action or proceeding; or (b) defending or asserting a counterclaim in an action or proceeding brought by the lessee. Where the lease requires such a lessee default, if a co-op/shareholder lawsuit eventuates without the lessee

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being in default, the co-op will not recover legal fees, even if it is the prevailing party.⁴

Further, a lessee "default" may require more than just a lease violation. In *Horwitz v. 1025 Fifth Avenue Inc.*,⁵ the proprietary lease provided for recovery of legal fees only if the shareholder was in default and the co-op's lawsuit was based upon such default. Because the co-op's lawsuit, in which it prevailed, sought a declaratory judgment and was not based on the shareholder's default, the court denied the co-op recovery of its legal fees.⁶

However, some proprietary leases do not require that the shareholder be in "default" in order for the co-op to recover legal fees, making it easier for a co-op to do so.⁷

Alteration Agreements

Other agreements between co-ops and condominiums and apartment owners also provide

for payment by and recovery of legal fees from the apartment owner.

For example, apartment alteration agreements typically hold apartment owners responsible for legal fees incurred by the board in connection with a proposed alteration, whether such fees are incurred in connection with an alteration-related dispute or the breach or anticipated breach of the alteration agreement. And such provisions should be enforceable.⁸

Prevailing Party Requirement

In some cases construing legal fee recovery clauses, New York courts expect a party to generally "prevail" in order to receive an award of legal fees. The court first determines the scope of the dispute. A "prevailing party" must then win on the central claims advanced within that scope⁹ and receive substantial relief.¹⁰

However, a prevailing party does not have to win on all claims asserted. In *Senfeld v. I.S.T.A. Holding Co. Inc.*,¹¹ the court reasoned that in a lawsuit consisting of several claims, a plaintiff who has won substantial relief should recover legal fees, although the court did not rule in plaintiff's favor on every contention raised.

In order to recover legal fees, a board need not actually pay them. Where the co-op prevails, a shareholder must pay legal fees incurred even if the co-op's fees are paid by its insurance carrier.¹² Alternatively, where the shareholder prevails, the co-op must pay the shareholder's legal fees even if the shareholder's counsel is working on a contingency fee basis, or is a non-profit legal services provider.¹³ A legal fee award should be made at the end of the case; otherwise, the award may be deemed premature.¹⁴

The Appellate Division, First Department recently held that one can be a prevailing party without a court determination, based solely on a stipulation settling the action.

In *Sykes v. RFP Third Ave. I Assoc., LLC*,¹⁵ plaintiffs purchased an apartment from the defendant, only to find deficiencies during the pre-closing walk-through. Defendant agreed to cure the defects and placed \$75,000 in escrow to secure completion of the repair work.

The escrow agreement stipulated that in the event of legal proceedings regarding the escrowed funds, the prevailing party would recover legal fees. Plaintiffs demanded release of the escrowed monies because defendant failed to perform the promised work, and litigation ensued when defendant refused to release the funds.

The parties ultimately stipulated to release the

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funds to plaintiffs and the matter was sent to a special referee for determination of legal fees and expenses. The special referee determined that the stipulation failed to establish that any party had prevailed and therefore made no award of legal fees. The First Department disagreed, holding that although plaintiffs received the escrowed funds through a stipulation and not a judicial determination, they sufficiently prevailed on their claim and were entitled to recoup their legal fees pursuant to the escrow agreement.

In certain circumstances, a tenant who has breached the lease can be the "prevailing party." In *350 East 62nd St. Associates v. Vecilla*,¹⁶ the landlord commenced a holdover proceeding against a rental tenant, alleging that the tenant breached a substantial lease obligation by making apartment alterations without the landlord's consent. Evidence showed, however, that the landlord had waived the right to object to the alterations.

The landlord nonetheless sought to recover possession of the apartment, thereby forcing the tenant to incur legal fees to avoid eviction. After dismissal of the holdover proceeding, the tenant sought an award of legal fees and prevailed, even though the tenant had in fact breached the lease.

Real Property Law

A co-op landlord can recover legal fees under a lease provision, but what about a tenant-shareholder?

Section 234 of the Real Property Law, which is applicable to co-ops (but not condominiums), states that if a residential lease provides that the landlord may recover legal fees incurred in any action or proceeding arising out of the lease, the tenant is also entitled to recover legal fees and/or expenses if such tenant successfully defends or prosecutes an action arising out of the lease.¹⁷

The overriding purpose of §234 is to level the playing field between landlords and tenants, creating a mutual obligation that provides an incentive to resolve disputes expeditiously and without undue expense. The statute effectively grants the tenant the same benefit that the lease imposes in favor of the landlord, as well as discourages landlords from engaging in frivolous litigation.

The reciprocal effect of §234 is triggered by a lease provision entitling the landlord to recover legal fees. The statute "imply[es] in such a 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 failure of the landlord to perform...or in the successful defense of a [landlord-initiated proceeding]."¹⁸

Although this process is triggered by a lease provision entitling a landlord to legal fees, §234 does not simply apply to the tenant the same legal fee provision that is included in the lease. Rather, it accords the tenant an independent statutory right. Thus, even if a legal fee provision in a lease is void or unenforceable, a successful tenant is still entitled to a statutory award of legal fees.

Condominiums

Recovery of legal fees by condominiums is governed by the entity's by-laws. There is no landlord/tenant relationship and thus Real Property Law §234 does not apply.¹⁹

Condominium unit owners are required by statute to "comply strictly with the bylaws and

with rules, regulations and decisions" adopted by the condominium.²⁰ Thus, by-laws will state when and whether a party is entitled to legal fees.²¹

By-laws frequently provide that a condominium may recoup legal fees in the event of a unit owner's monetary default. Very few, however, give reciprocal rights to unit owners. Modern by-laws generally permit condominium boards to recover legal fees for non-monetary unit owner defaults. Again, unit owners are generally not given a reciprocal right.

Fees Must Be Reasonable

The party seeking legal fees must prove their reasonable value.²² Courts use the "lodestar" method to determine the amount of an award: the time reasonably spent by counsel, multiplied by a reasonable hourly rate.²³

Factors considered when determining reasonableness of legal fees include the nature of the services rendered, the complexity and novelty of the issues, the attorney's professional reputation and experience, the level of skill involved in handling the case, as well as the result obtained and the average legal fee rate in the community for comparable services.²⁴ The recovery of a "fee on fee," i.e. a fee for legal services performed in

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order to recover a legal fee, is discretionary.²⁵

If a party entitled to recover legal fees fails to satisfy the burden of proving the reasonable value of such services, the fees incurred are not recoverable. In *30-40 Fleetwood Avenue Corp. v. Debellis*,²⁶ the prevailing party was the co-op. The court, however, found that the co-op's invoices for legal services did not sufficiently document the work that was done. The court was not willing to make assumptions of facts that were not in evidence regarding such work and determined that an award of legal fees to the co-op was not warranted.

Recommendations

If the proprietary lease's legal fee provision includes a shareholder default requirement, and the shareholder defaults, the co-op should promptly serve a formal notice of default. Boards should be mindful of not creating a waiver of such default, thereby possibly losing the right to recover legal fees when and if the matter is ultimately litigated.

Courts generally construe legal fee clauses narrowly. When drafting or amending a proprietary lease or condominium by-laws, counsel should include clear legal fee provisions that set forth the conditions for recovery of fees. Where appropriate, a legal fee provision should provide for fees to be recoverable from the time an apartment owner default occurs, without regard to whether litigation subsequently ensues.

Boards may also wish to consider providing for a prevailing party to recover legal fees in lawsuits between an apartment owner and a co-op or

condominium, even in the absence of a default. In condominiums, by-laws should specify both monetary and non-monetary defaults as a basis for legal fee recovery from unit owners.

The payment of legal fees in connection with apartment owner disputes can be costly and disruptive to the co-op or condominium entity. Adopting appropriate fee recovery provisions can help alleviate these burdens.

1. See *Aleyska Pipeline Servo Co. v. Wilderness Socy.*, 421 U.S. 240 (1975).

2. See *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1 (1986); *Siamos v. 36-02 35th Ave. Dev., LLC*, 54 A.D.3d 842 (2d Dept. 2008).

3. See *Vinokur v. Penny Lane Owners Corp.*, 269 A.D.2d 226 (1st Dept. 2000).

4. *Rubenstein v. 242 Apartment Corp.*, 189 A.D.2d 685 (1st Dept. 1993).

5. 34 A.D.3d 248 (1st Dept. 2006).

6. See also *Dunn v. Prospect Owners Corp.*, NYLJ, Oct. 17, 1997, p. 28, col. 1 (Sup. Ct., N.Y. County), where the court rejected the co-op board's argument that the lease authorized imposition of legal fees on the lessee because she was in default of her maintenance payments and the co-op incurred legal fees defending itself in lessee's action challenging the imposition of such fees and the lessee presumptively prevailed. The court held that the legal fees the board sought to recoup resulted from its own default in improperly seeking to impose legal fees which were not the result of the lessee's default.

7. *O'Neill v. 225 East 73 Owners Corp.*, 298 A.D.2d 239 (1st Dept. 2002).

8. See *Silverman v. 875 Tenant Corp.*, No. 601205/2003 (Sup. Ct. N.Y. County April 21, 2006).

9. See *Excelsior 57th Corp. v. Winters*, 227 A.D.2d 146 (1st Dept. 1996); see also *Sykes v. RFD Third Ave. I Assoc., LLC*, 39 A.D.3d 279 (1st Dept. 1999).

10. *Sykes*, 39 A.D. 3d 279.

11. NYLJ, Aug. 16, 1995, p. 21, col. 5 (Sup. Ct. N.Y. County), aff'd and remanded, 235 A.D.2d 345 (1st Dept. 1997).

12. See *O'Neill*, 298 A.D.2d 239; see also *Isaacs v. Jefferson Tenants Corp.*, 270 A.D. 2d 95 (1st Dept. 2000).

13. *313 West 100th Street Tenants Ass'n v. Kepasi Realty Corp.*, 139 Misc.2d 57 (N.Y. City Civ. Ct. 1988), aff'd as mod. on other grounds, 143 Misc.2d 566 (N.Y. Sup. App. Term 1989); *Maplewood Mgmt. Inc. v. Best*, 143 A.D.2d 978 (2d Dept. 1998).

14. *Siamos*, 54 A.D. 2d 226.

15. *Sykes*, 39 A.D. 3d 279.

16. 696 N.Y.S.2d 792 (Civ. Ct. N.Y. County 1999).

17. N.Y. Real Prop. §234 (McKinney 2006).

18. *Jocar Realty Co. v. Galas*, 176 Misc.2d 534, 537 (Civ. Ct. N. Y. County 1998).

19. See *Bay Club Condominium v. Rubenstein*, NYLJ, Feb. 8, 1993, p. 30, col. 1 (Sup. Ct. N.Y. County) ("Condominiums, unlike apartments and cooperatives, do not have leases.").

20. N.Y. Real Prop. §339-j (McKinney 2006).

21. See *Board of Mgrs. of 55 Walker St. Condominium*, 6 A.D.3d 279, 280 (1st Dept. 2004) ("The condominium bylaws provided for recovery of attorneys' fees for litigation in connection with a unit owner's default in payments."); see also *Board of Mgrs. of Stewart Place Condominium v. Bragato*, 54 A.D.3d 791, 792 (2d Dept. 2008) ("The applicable provision of the bylaws limited the right to recover attorney's fee to that incurred in actions or proceedings brought to recover damages, for injunctive relief, or for the levy of a fine.").

22. See *30-40 Fleetwood Avenue Corp. v. Debellis*, NYLJ July 12, 1995, p. 32, col. 3 (Mt. Vernon City Ct. Westchester County).

23. See *Solow v. Wellner*, 150 Misc.2d 642, 645 (Civ.Ct., N.Y. County 1991), mod. on other grounds, 86 N.Y.2d 582 (1995).

24. See *Ross v. Congregation B'Nai Abraham Mordechai*, 12 Misc.3d 559 (Civ. Ct. N.Y. County 2006).

25. See *Senfeld*, 235 A.D. 2d 345; see also *360 Owners Corp. v. Diacou*, NYLJ, Feb. 23, 1994 p. 22, col. 3 (Sup. Ct. N.Y. County) (the referee declined to award counsel fees incurred by the co-op in order to collect previously awarded legal fees).

26. See *30-40 Fleetwood Avenue Corp.*, NYLJ, July 12, 1995, p. 32, col. 3.