



To Pay, or Not to Pay, the Co-op's Attorneys' Fees; That Is the Question

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On January 28, 2025, the New York Appellate Division, First Department refused to enforce a contractual provision that required a tenant-shareholder to pay a co-op's attorneys' fees in all lawsuits that the tenant-shareholder might bring against the co-op. In *Kasowitz, Benson, Torres & Friedman, LLP v. JPMorgan Chase Bank, N.A.*, the court held that the attorneys' fee award provision in the proprietary lease was unconscionable and unenforceable because it could apply to any claims brought by the tenant-shareholder, regardless of the co-op's default or the merit of the lawsuit.

The tenant-shareholder had acquired an apartment unit in a residential cooperative corporation. At the time of purchase, the tenant-shareholder and the co-op entered into a proprietary lease. Under this lease, the co-op was entitled to attorneys' fees (1) if the tenant-shareholder was at any time in default under the lease, and the co-op took any action based upon such default, or (2) if the co-op defended any action or proceeding (or claim therein) originated by the tenant-shareholder. Some years later, the tenant-shareholder sued the co-op for alleged racial discrimination, among other things. The co-op responded with a counterclaim invoking the attorneys' fee award provision in their proprietary lease and requested that its attorneys' fees be paid by the tenant-shareholder.

The court strictly interpreted the attorneys' fee provision. Since the tenant-shareholder was not in default at the time of the initial claim, prong (1) in the provision was not in question. In analyzing prong (2), the court held that this provision was unconscionable and unenforceable. The court reasoned that this provision could deter tenant-shareholders from pursuing legal action because it imposed financial penalties even when a co-op was in the wrong or if the claim had merit. The court clarified that its conclusion was not altered by the requirement in the lease that the fees be "reasonable" in amount.

The law regarding attorneys' fees in New York State is the "American Rule," wherein each litigant (even a prevailing litigant) bares the costs of its own attorneys' fees. Courts may, however, allow attorneys' fee-shifting provisions where authorized by statute, a court ruling or a contract. It is very typical for sophisticated parties to negotiate attorneys' fees provisions in contracts. The primary objection of the court here was that the lease expressly provided for attorneys' fees whenever the tenant-shareholder filed a lawsuit against the co-op for a default of the co-op. The moral of the story is that parties to a lease may contract for attorneys' fees, so long as such fees are not in the nature of a penalty for pursuing legal action.