

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : PART 52BU/68

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174 MOTT GROUP, LLC,

Petitioner,

-against-

L&T Index No. 085184/07

Hearing: 2/14/08

DECISION AND ORDER

LUCKY 168 REST. CORP.,
370 Broome Street
New York, NY 10012
A Restaurant known as "Jazzi Wok"
Running 24 Feet along Broome Street
and 30 feet along Mott Street
and the basement thereat

Respondent.

-----X
BARBARA JAFFE, J.:

For petitioner:

Carolyn Z. Rualo, Esq.
Adam Leitman Bailey, PC
26 Broadway, 21st Fl.
New York, NY 10004
212-825-0365

For respondent:

Edward Joseph Filemyr IV, Esq.
11 Park Place Suite 1212
New York, NY 10007
212-233-4069

Following a bench trial held in this commercial nonpayment summary proceeding, I granted petitioner a final judgment of possession and a money judgment in the amount of \$92,459.22, plus costs and disbursements, and dismissed respondent's counterclaim and ordered a hearing as to petitioner's reasonable attorney fees. (Decision dated Jan. 15, 2008). The hearing was held before me on February 14, 2008.

I. PERTINENT PROCEDURAL HISTORY

Petitioner commenced this proceeding on or about September 5, 2007. In its answer, respondent denied the allegations set forth in the petition and interposed five affirmative defenses (inaccurate description of the subject premises contained in the pleadings, improper service of the predicate demand, no additional rent owed as to the basement premises, petitioner's failure to present it with bills for the real estate taxes, and constructive eviction) and a counterclaim for constructive eviction, seeking \$250,000.

The record reflects that respondent's motion for an order dismissing the proceeding was

denied by another judge of this court in a decision and order dated December 5, 2007.

Trial commenced on January 2, 2008 and ended January 7, 2008. Petitioner called one witness on its direct case and one witness on rebuttal. Respondent called one witness.

Admitted in evidence at the trial were the parties' pertinent leases, paragraphs 66 and 63 of which provide that "[i]n the event the landlord successfully brings an action or special proceeding . . . [it] will pay to the landlord, as a consequence of such action or proceeding, the reasonable attorney's fees incurred by the landlord, but in no event less than \$600.00 for each action or special proceeding."

Following the rendering of my January 14 decision and order dated January 14, 2008, respondent moved by Order to Show Cause dated January 29, 2008, for an order setting aside the verdict, now submitted for decision.

II. FACTUAL FINDINGS

There being no issue that petitioner successfully brought the instant special proceeding against respondent, petitioner is entitled to reasonable attorney fees.

Adam Leitman Bailey, petitioner's trial attorney and, since 2000, principal of his own firm and before that an associate at two other Manhattan landlord/tenant firms, credibly described his firm's billing procedures and detailed the work performed by him and others on the instant matter.

Based on Bailey's testimony and the documents admitted in evidence (Pet. Exhs. 1, 2), I find that the fees sought, including \$2,920 for fees incurred in opposing respondent's motion for an order setting aside the verdict and seeking the instant fees, are reasonably related to the work performed, except for the following: (1) \$35 of the \$70 charge for what could not have taken more than six minutes in leaving a message for respondent's counsel on September 24, 2007; (2) \$20 for duplicate billing of the preparation of a stipulation of adjournment on September 28, 2007; (3) \$900 of \$1,050 charged for merely studying respondent's order to show cause on October 23 and 30, 2007; and (4) \$400 of \$630 charged for drafting a notice to admit on December 28, 2007. (Pet. Exh. 2). I also observe that while the invoice dated September 1, 2007 reflects a total of \$2,835, the only charges appearing thereon total \$242.50.


Properly included here are paralegal fees, the fee in connection with a witness subpoena, and copying fees. (*See Cioffi v New York Community Bank*, 465 F Supp 2d 202, 217 [EDNY 2006], relying on *LeBlanc-Sternberg v Fletcher*, 143 F 3d 748, 763 [2d Cir1998] ["attorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients."]).

III. CONCLUSION

For all of the foregoing reasons, \$20,643 is awarded to petitioner as reasonable attorney

fees, with statutory interest from January 15, 2008. The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.



Barbara Jaffe, JCC

HON. BARBARA JAFFE

DATED: February 27, 2008
New York, New York

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COUNTY OF NEW YORK : PART 52BU/68

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Papers considered in review of motion to set aside verdict:

Papers

Notice of Motion, Affirmation, Exhibit
Affirmation in Opposition, Exhibit
Reply Affirmation

Numbered

1
2
3

Respondent moves pursuant to CPLR 4404(b) for an order granting it a new trial on the ground that the dismissal of its affirmative defense and counterclaim for constructive eviction is irreconcilable with the factual findings set forth in the January 15, 2008 decision rendered after trial of this commercial nonpayment proceeding, and is otherwise against the weight of the evidence. (Affirmation of Edward Filemyr, Esq., dated Jan. 29, 2008). Specifically, respondent argues that as it ceased using the basement portion of the premises in August 2006, it abandoned it and was thus constructively evicted therefrom. It also maintains that insufficient weight was given to testimony that the use of the building had changed since the inception of respondent's occupancy, resulting in an exacerbation of sewage backup, which was petitioner's responsibility.

While respondent may have ceased its use of the basement for private parties, it offered

no evidence that it had ceased using it for storage and, in any event, offered no evidence as to the proportionate amount of damages it sustained as a result.

Absent any expert evidence concerning the building's plumbing, a conclusion that an alleged increase in the building's population and/or that the use of certain pipe joints obliged respondent to curb its water usage and alter its business would require an inordinate amount of speculation. That petitioner attempted to ameliorate specific problems when called upon by respondent does not prove that it committed wrongful acts which substantially and materially deprived respondent of the beneficial use and enjoyment of the premises. Consequently, respondent has failed to offer a sufficient basis upon which to set aside the verdict.

Accordingly, respondent's motion is denied. This constitutes the decision and order of the court.

Barbara Jaffe, JCC

DATED: February 27, 2008
New York, New York