

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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WOODHAVEN ASSOCIATES, INC.,

Plaintiff,

-against-

MICHELE M. WOODARD,
J.S.C.
TRIAL/IAS Part 24
Index No.:10004/05
Motion Seq. Nos.:01
DECISION & ORDER

WOODHAVEN BLVD. REST., INC., MICHAEL
BRESLIN, ANDREW BRESLIN, JOHN BRESLIN,
JOHN CREGAN, ATLANTIC-HEYDT CORPORA-
TION, ATLANTIC RENTAL CORPORATION,
GARDNER BAY CORP. and GRAND AVENUE
ASSOCIATES CORPORATION,

Defendants,

-----X

Papers Read on this Motion:

Defendant's Notice of Motion & Memorandum of Law	01
Plaintiff's Opposition & Memorandum of Law	xx
Defendant's Reply Memorandum of Law	xx

The defendants WOODHAVEN BOULEVARD RESTAURANT, INC., MICHAEL BRESLIN, ANDREW BRESLIN, JOHN BRESLIN, JOHN CREGAN, ATLANTIC-HEYDT CORPORATION, ATLANTIC RENTAL CORPORATION, GARDNER BAY CORP., and GRAND AVENUE ASSOCIATES CORPORATION, (hereafter referred to as "Restaurant"), move for an order pursuant to CPLR §3211 (a)(1) and (7) dismissing the plaintiff's Verified Complaint against the defendants.

The plaintiffs, WOODHAVEN ASSOCIATES, INC., (hereinafter referred to as "the Landlord"), seek to recover from defendants, as "additional rent", the attorney's fees it allegedly incurred in prosecuting a summary proceeding it previously brought against the defendants based on the Restaurant's alleged failure to obtain a public assembly permit. The summary holdover

proceeding was commenced on or about February 23, 2005.

After the proceeding was commenced and after service of the holdover on all of the named defendants, herein, the Restaurant obtained the permit. Based on the Restaurant having obtained the permit, the plaintiff discontinued the holdover proceeding. The defendant argues that the plaintiff is now precluded from bringing this claim for attorney's fees, as a matter of law, on the ground that the action was "settled" and that the Landlord failed to include attorney's fees in the "settlement".

The Restaurant also argues, in the alternative, that the plaintiff should not recover attorney's fees based on the fact that the plaintiff was not a prevailing party in its holdover proceeding against the Restaurant, citing, to the following provision of Paragraph 19 of the Lease which provided:

"If Tenant [the Restaurant] shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease., and if Owner, in connection therewith or in connection with any default by tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding **and prevails in any such action or proceeding**, such sums so paid or obligations incurred with interest with interest and costs **shall be deemed to be additional rent** hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant thereunder....."

The Restaurant further moves to dismiss the Second and Third Causes of Action against ATLANTIC-HEYDT CORPORATION, ATLANTIC RENTAL CORPORATION, GARDNER BAY CORP., GRAND AVENUE ASSOCIATES CORPORATION, MICHAEL BRESLIN and JOHN BRESLIN in that there is no legal basis for plaintiff to assert a claim for attorney's fees against them. The Restaurant argues that the guarantors only guaranteed the Restaurant's performance of the Lease and completion of the Restaurant's renovations on the premises, not attorney's fees incurred as a result of the holdover proceeding. The Restaurant also argues that the Landlords' Causes of Action against the guarantors are also barred under New York Law.

The Landlord opposes the motion to dismiss and establishes by documentary evidence that shortly after the Lease was executed, the Restaurant sought the Landlord's permission to perform extensive renovations to the premises. The Landlord consented to the renovations but with specific terms and conditions which were set forth in a letter that both parties signed (consent letter) on January 7, 2004.

The consent letter required that the defendant's: ATLANTIC-HEYDT CORPORATION, ATLANTIC RENTAL CORPORATION, GARDNER BAY CORP., GRAND AVENUE ASSOCIATES CORPORATION, MICHAEL BRESLIN (also a Lease Guarantor) and JOHN BRESLIN (hereinafter referred to as (Renovation Guarantors"), guaranty the performance of all obligations of the Restaurant in connection with the renovations.

A guaranty was signed by the aforementioned parties on January 13, 2004. Section 3 of the guaranty provided:

3. Performance Guaranty - In the event that the Tenant fails to perform, satisfy or complete the Renovations, the Guarantor will promptly and fully perform, satisfy and observe the obligation or obligations in the place of the Tenant. The Guarantor shall pay, reimburse and indemnify the Landlord for any and all damages, costs, expenses, including legal fees, losses and other liabilities arising or resulting from the failure of the Tenant to perform, satisfy or observe any of the terms and conditions of Paragraph 1 above or arising or resulting from the failure of the Guarantor to observe the obligations set forth in this Guaranty.

Contrary to the Restaurant's arguments, the Landlord is a prevailing party because the holdover was brought based upon the Restaurant's failure to obtain the appropriate permits. Since the permit requirements were not obtained until after commencement of the holdover proceeding, the relief sought by the Landlord was achieved as a result of the proceeding. Hence, the Landlord can be said to have prevailed under the Lease.

Based upon the aforementioned lease provision and the letters of guaranty and consent for

said to have prevailed under the Lease.

Based upon the aforementioned lease provision and the letters of guaranty and consent for the subject renovations, the guarantors are also responsible for the attorney's fees in the first instance.

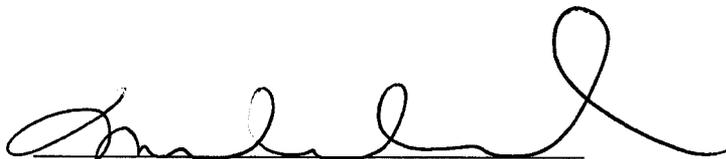
Therefore, the motion to dismiss is **denied**.

Ordered, that the parties are directed to appear for a Preliminary Conference in DCM on January 5, 2006 at 9:30 a.m.

This constitutes the **Decision** and **Order** of the Court.

DATED: December 5, 2005
Mineola, N.Y

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

DEC 15 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE