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## COMMERCIAL LEASING LAW & STRATEGY

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# Fees on Fees

By Joseph I. Farca

Does your New York commercial lease form expressly provide that the landlord may recover the legal fees it incurs to recover legal fees from its tenant? If not, then the landlord may be out of luck trying to recover such “fees on fees,” as they are known. But it wasn’t always this way.

New York law provides that a prevailing party in litigation may recover attorneys’ fees from the losing party only where such recovery is authorized by an agreement between the parties, by statute or by court rule. See, *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 NY2d 487, 491 (1989), followed by *TAG 380, LLC v. ComMet 380, Inc.*, 10 NY3d 507, 515-16 (2008); *A.G. Ship Maint. Corp. v. Lezak*, 69 NY2d 1, 5 (1986). To be entitled to recover legal fees, the party seeking such fees must be the prevailing party with respect to the central relief it sought in such action or proceeding. See, *Nestor v. McDowell*, 81 NY2d 410, 415-16 (1993), and *25 East 83 Corp. v. 83<sup>rd</sup> Street Assocs.*, 213 AD2d 269 (1<sup>st</sup> Dept. 1995), both followed by *Vanchiro v. Powells Cove Owners Corp.*, 135 AD3d 851, 852-53 (2<sup>nd</sup> Dept. 2016).

One benefit to the landlord-client of employing widely-used preprinted commercial lease forms is that the landlord’s right to recover legal fees under the provisions of such lease forms have been litigated so frequently that courts can and do cite to the applicable lease articles by rote. See, e.g., *Bergman v. Kleinfeld Bridal Corp.*, 14 Misc3d 1229(A), 836 NYS2d 491 (Sup. Ct. Kings Co. 2007) (citing the Real Estate Board of New York’s (REBNY) “standard form store lease provisions” simply by reference to their article numbers and header titles).

For example, Article 19 of REBNY’s preprinted commercial lease forms provide, with minor variation, as follows:

If Tenant 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, after notice if required, and upon expiration of any applicable grace period, if any, (except in an emergency), then, unless otherwise provided elsewhere in this lease, Owner may immediately, or at any time thereafter, and without notice, perform the obligation of Tenant thereunder, 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 attorneys’ 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 and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) of rendition of any bill or statement to Tenant therefor, and if Tenant’s lease term shall have expired at the time of

making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages.

Another benefit of using a preprinted lease form is that the attorney need not worry about committing malpractice by accidentally giving a commercial tenant the right to recover its own legal fees. Whether a landlord should ever agree to a commercial tenant's negotiated request for same is another matter, but unless the lease provides for it, statutory reciprocity of legal fee lease provisions in New York only applies to residential tenants (see, Real Property Law §234). Yet another benefit of using preprinted lease forms is to save the client money, both for having to draft virtually identical provisions in a typed lease (or, as often, in a duplicative rider), and then if there is litigation, for having to convince the court that your costly lease should be interpreted just like the preprinted lease form.

But what about recovering "fees on fees" which have not historically been covered by preprinted forms? It used to be that they were recoverable as a matter of course, along with the underlying legal fees. See, *Senfeld v. I.S.T.A. Holding Co., Inc.*, 235 AD2d 345 (1<sup>st</sup> Dept. 1997); *Troy v. Oberlander*, 181 AD2d 557 (1<sup>st</sup> Dept. 1992). This apparently liberal attitude in construing legal fee provisions correlated broadly with other New York appellate court rulings holding that fees incurred in settlement negotiations are also recoverable. See, *Tige Real Estate Dev. Co. v. Rankin-Smith*, 233 AD2d 227, 228 (1<sup>st</sup> Dept. 1996), citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hartel*, 782 F.Supp. 22, 25 (SDNY 1992), *aff'd sub nom. Nat'l Union Fire v. Carlie*, 972 F2d 1328 (2d Cir. 1992).

More recently, however, New York courts have required that an award of such fees on fees must themselves "be based upon a specific contractual provision or statute." See, *IG Second Generation Partners, L.P. v. Kaygreen Realty Co.*, 114 AD3d 641, 643 (2<sup>nd</sup> Dept. 2014) (absent "unmistakably clear intent regarding the recovery of fees on fees, a right to recover those fees should not be implied); *546-552 W. 146th St. LLC v. Arfa*, 99 AD3d 117, 120 (1<sup>st</sup> Dept. 2012) ("In New York, "an award of fees on fees must be based on a statute or on an agreement").

New York appellate courts have generally hewn to that holding. See, *Mulholland v. Moret*, 161 AD3d 883, 885 (2<sup>nd</sup> Dept. 2018), and *Batsidis v. Wallack Mgmt. Co.*, 126 AD3d 551, 553 (1<sup>st</sup> Dept. 2015); but see, *Katz Park Ave. Corp. v. Jagger*, 98 AD3d 921, 922 (1<sup>st</sup> Dept. 2012), citing *1050 Tenants Corp. v. Lapidus*, 52 AD3d 248 (1<sup>st</sup> Dept. 2008), citing *Senfeld, supra*, in which the First Department, comprising Manhattan and the Bronx, sometimes continues to uphold awards of fees on fees. Given this fact, the time has come to update the preprinted forms to expressly include the recovery of fees on fees. While the amount in controversy for fees on fees may often pale in comparison to the sum of the underlying fees, the specter of having to pay fees on fees could discourage a losing party from challenging the underlying fee application in the hopes of gaining leverage to negotiate a lower fee award.

What can we learn from these cases? That leasing lawyers need to keep up with the case law as it evolves, sometimes rapidly, and that even preprinted forms can often use some lawyering to ensure that the client is made whole.

## Conclusion

Until "fees on fees" are added to the preprinted forms, this is one area where the practitioner would be wise to add an express lease clause — either as an insert to the preprinted form or in a separate lease rider — which provides that recovery of legal fees and expenses shall include the recovery of "fees on fees." Language for such preprinted form insert or lease rider may include words to the effect that: "Supplementing Article XX of the lease, whenever this lease provides that the Owner may recover from the Tenant fees and expenses including attorneys' fees, it is expressly understood and agreed that such fees and expenses shall include also the fees and expenses incurred by the Owner

to recover such fees and expenses from the Tenant, including ‘fees on fees’ which are attorneys’ fees incurred to recover attorneys’ fees.”

For good measure, consider adding also provision for fees incurred for work short of litigation, such as for arbitrating, mediating and/or negotiating disputes by the parties under the lease. And if you feel the need to give the tenant a “bene” on legal fees, this could be where you do it. Instead of making legal fees reciprocal, which can eviscerate the landlord’s advantage, counsel can negotiate a scaled-back recovery for landlord by “intentionally omitting” legal fees to landlord for arbitration, mediation and/or negotiation of lease disputes.

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