

Getting Awarded Legal Fees in Landlord and Tenant (or Other Types of) Litigation

Sometimes the Tail Wags the Dog

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Getting Awarded Legal Fees in Landlord and Tenant (or Other Types of) Litigation – Sometimes the Tail Wags the Dog

I. SO YOU WANT THE OTHER SIDE TO PAY YOUR ATTORNEYS' FEES?

So you wish that your legal fees were not so high for your latest landlord and tenant proceeding and you would very much like to make the other side (be it landlord or tenant) pay them on your behalf. After all, you say – *“I shouldn’t have been subjected to this litigation in the first place.”* Maybe you are a landlord who just spent the better part of \$10,000.00 to collect \$10,000.00. Maybe you are a tenant who just fended off a frivolous attempt by your landlord to get you out so he could raise the rent. It doesn’t seem fair.

This article examines the best practices for recovering the attorneys’ fees that you spent on prevailing in your landlord and tenant case. It is a tricky little area and I don’t see any articles like this out there at this time.



II. QUESTION: AM I ENTITLED, PURSUANT TO MY LEASE AND AS PER APPLICABLE STATUTES, TO AN AWARD OF ATTORNEYS’ FEES?

The first question you need to ask yourself is – *Am I entitled, pursuant to my lease and as per applicable statutes, to an award of attorneys’ fees?*

A. You Need a Lease Provision that Supports an Award of Attorneys’ Fees

Unlike many other areas of law, attorneys’ fees can often be awarded to the prevailing party in a landlord and tenant case. Generally, a litigant in New York State is not entitled to recover attorneys’ fees in the absence of a statute that establishes such entitlement, or a contract wherein the parties have agreed as such.[1] Leases often do, however, call for awards of attorneys’ fees under certain circumstances.

The Real Estate Board of New York (“REBNY”) Standard Form of Store Lease typically allows landlord – but not tenant – to recover attorneys’ fees and costs if Landlord is the prevailing party in the litigation.[2] This lease provision can, of course, be modified during the initial lease negotiation.

B. Residential Context and the Reciprocal Covenant

In the *residential* context, a reciprocal right to recover attorneys’ fees is implied by law in favor of tenant even if it is not explicitly provided for in the lease. Real Property Law (“RPL”) § 234 provides that:

[w]henever a lease of residential property shall provide in any action or summary proceeding that the landlord may recover attorney’s fees and/or expenses incurred as the result of the failure to perform any covenant or agreement contained in such lease, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorney’s fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease, or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease[.]

This is, obviously, a very powerful statute. Unsuspecting residential landlords and their attorneys might think, if they take a one-sided lease at face value without considering RPL § 234, that a vigorous litigation position held against a tenant has no downsides beyond the landlord’s legal fees to prosecute the case. Such litigants can end up not only having to pay their own fees, but, if they lose, the tenant’s as well.

C. Rent Stabilization – Legal Fees Available but Never “Possessory”

The Rent Stabilization Law makes it unlawful to charge any “rent” in excess of the legal regulated rent.[3] Thus, lease clauses deeming legal and late fees to be additional rent have been held unenforceable against Rent Stabilized tenants for the purposes of obtaining a possessory judgment.[4] Note that landlord may sue a Rent Stabilized tenant for attorneys’ fees, but a landlord may only obtain a money judgment against a tenant for such amounts, not a possessory judgment.[5]

For example, if Landlord is suing for \$1,500.00 in rent and \$500.00 in attorneys’ fees and proves her case with respect to both those items, Landlord will get a money judgment for \$2,000.00, but only \$1,500.00 worth of that judgment will be possessory. This means that if tenant pays \$1,500.00, even though \$500.00 is still owed, tenant may not be evicted for failure to pay the remaining \$500.00. Tenant still owes the \$500.00, however, and Landlord may collect it, i.e., by executing against tenant’s bank account or wages.

III. QUESTION: WAS I THE PREVAILING PARTY?

As we see from above, if attorneys’ fees are a legally available remedy in a landlord and tenant litigation (you checked the lease and the relevant statutes), the big question then becomes – *Who is the prevailing party?* It wouldn’t be fair for the loser to get legal fees! This is an oft-litigated issue and not as straightforward as you think at first blush.

The determination of which party should be accorded the status of “prevailing party,” thereby allowing recovery of attorneys’ fees, requires a two-step analysis: (1) an initial consideration of the true scope of the dispute litigated, followed by, (2) a comparison of what was achieved within that scope.[6]

It is not necessary that a party prevail on every contention to be determined a prevailing party.[7] For example, in the Glorious 84 Realty Co. case[8], the landlord was found to be the prevailing party notwithstanding the fact that the tenant proved a warranty of habitability claim. In the Excelsior 57th Corp. case[9], the landlord was found to be the prevailing party when it was awarded 49.5 months of the 54 months of rent it sought. In the Peachy case[10], the court found that the landlord had obtained the status of prevailing party after ten days of trial during which time the tenant had imposed thirteen affirmative defenses and all but one of those defenses had been defeated. In Peachy the tenant’s only successful affirmative defense was for breach of the warranty of habitability which resulted in an abatement of \$4,800.00, which was deducted against a \$62,000.00 judgment for the landlord.[11]

If you want legal fees, you need to be prepared to explain why you won most of what you sued for, and/or defeated most of the claims you were sued for.

IV. QUESTION: WHEN SHOULD I GO AFTER MY ATTORNEYS’ FEES?

So, you believe yourself to be legally entitled to attorneys’ fees and you think yourself to be the prevailing party. The next question you need to ask is this – *Is it time to pursue my legal fees?* If an action or proceeding is already underway, then the answer is almost always “yes”.

If a proceeding or action has been filed, then the time to go after attorneys’ fees is in that proceeding or action. You can’t wait, or you run afoul of cause-of-action-splitting. In 930 Fifth Corporation v. King[12] (this case came through the First Department, i.e. Manhattan), the Court of Appeals observed that:

In a prior summary proceeding the defendant was found to have willfully violated a house rule restricting the harboring of pets on the premises....No claim for attorney's fees was raised in that proceeding. By this separate action the plaintiff now seeks to recover reasonable attorney's fees incurred in that summary proceeding pursuant to the above lease provision.

*The clauses of the lease are interdependent. The lessee covenants to obey the house rules. The right to re-enter and to remove the tenant arises on default of any covenant; and default by the lessee renders him liable for reasonable attorney's fees on demand. All these facets of the lease are interrelated and constitute but separate integral parts of the whole. The lease entails a single obligation, which thus requires the plaintiff to assert its entire claim in one action. **Failure to make a claim for attorney's fees in the initial summary proceeding results in the splitting of a cause of action, which is prohibited.***

[Emphasis supplied.]

I occasionally see the following. A landlord-client goes after a tenant for rent. We file a proceeding and recover the rent. The landlord does not want to pursue the legal fees at that time, she wants the case to be over. Six months later the tenant falls behind again and the landlord goes after the tenant a second time. This time, the landlord is angry and wants me to pursue ALL her legal fees – the fees for the second proceeding and the fees for the first proceeding. In order to get the fees from the first

proceeding, I need to make a motion within the context of the first proceeding. I cannot sue for the first proceeding's legal fees as part of the second proceeding.

Landlords need to understand that the time to pursue attorneys' fees is when they are in court. A claim for attorneys' fees is not something you can hold in reserve for a later day.

V. QUESTION: WAIT A MINUTE! SHOULD I BOTHER GOING AFTER MY ATTORNEYS' FEES?

This question probably should have been asked FIRST. But no one ever does. So I locate this item here, at the point in the process where most of my clients are most willing to really look at the question – and the question is this – *Is it WORTH going after attorneys' fees? Is it possible to collect from the opposing party? Or is the opposing party judgment-proof?*

It does not pay to seek fees from a defunct corporation or an individual receiving public assistance. If you have a judgment for rent arrears that you cannot collect, you should not bother seeking a judgment for legal fees. Unless you think that the opposing party has assets from which the award of attorneys' can be recovered, now is the time to stop the analysis, because things are about to get labor intensive!

VI. QUESTION: DID MY ATTORNEY BILL ME CORRECTLY?

The next question - *Did my attorney bill me correctly?* - also belongs chronologically much earlier in the process we are exploring. Again, however, until one actually needs to make a motion for attorneys' fees, one isn't yet looking closely at this aspect of an attorneys' fee application.

Think about what you are asking the court to do here. You are asking the court to award you "reasonable legal fees". It makes sense, therefore, that the burden is upon you to demonstrate to the court what those "reasonable" attorneys' fees are. The foundational evidence of what the attorneys' fees amounted to is the legal bills. Let us talk about the legal bills.

A. Proper Invoicing

It is vital here to note that attorneys are required to maintain contemporaneous time entries. It is not acceptable for attorneys or support staff to go back and "recreate" time spent on a case after the day on which the task took place. Civil Practice Laws and Rules ("CPLR") 4518(a) states:

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

Accordingly, for billing records to be admissible in an attorneys' fee hearing, they must be made contemporaneously.[13]

B. No Block Billing

“Block Billing” is the practice of assigning a one-time charge to multiple tasks. An example looks like this:

June 10, 2008: Telephone conferences with client, retained expert; legal research; meeting with expert and associate = 4.00 hours.

Block Billing is a frowned upon practice and legal bills submitted into evidence containing Block Billing often result in a diminution of a legal fee award if one is achieved. The reason for this is that Block Billing entries impede the court’s efforts to evaluate the reasonableness of any of the listed activities.[14]

C. Audience of an Invoice

The lesson to be derived from this section is mainly for counsel, and it is simply this – the AUDIENCE for legal bills is eclectic, and includes not only the client and the client’s close advisers, but also possibly a court and opposing counsel. Therefore, an attorney should be extra careful when preparing invoices to be clear, dignified, and sensitive to issues of attorney and client privilege. What I mean by “clear” should be fairly obvious – no one reading the bill should have to struggle to figure out what task was being billed, by whom, when it was performed, or how much was charged. By “dignified”, I mean that invoices should refer to parties by their appropriate names. Opposing counsel should not be “Smith”, but rather “Mr. Smith”, or better yet “Mr. Smith, Respondent’s Counsel”, which is more descriptive. Finally, it is best never to include any information that would be protected by the attorney and client privilege in legal bills. If you do so, the substance of such entries should be redacted from all invoices before the invoices are used in an attorneys’ fee hearing.



VII. QUESTION: HOW DO I MAKE A MOTION FOR ATTORNEYS' FEES?

Going after attorneys’ fees is a lot of work. It is arguably easier to prove your cause of action for rent arrears damages than your cause of action for legal fees damages.

The following are some suggestions for winning fees if you decide to make an attorneys’ fees motion:

A. Cite the Lease and the Relevant Statute

Begin an attorneys' fees motion by citing to the lease provision that calls for such fees, as discussed above. If in the residential context you are representing a tenant and the provision only calls for attorneys' fees for the landlord, cite RPL § 234 stating that such covenant is reciprocal.

B. Explain Why Your Fees Are Reasonable

Next, explain to the court why the fees sought are reasonable. What constitutes "reasonable" attorneys' fees is a discretionary determination by the court.[15] Courts should be guided by, among other things, the hours reasonably expended, and a reasonable hourly rate.[16]

Present the biographies of the attorneys in the firm (including information such as bar admissions, years spent practicing in the relevant area, education, teaching posts, professional associations, press, published writing) as well as the general accomplishments of the firm. Perhaps include a list of noteworthy institutional clients or mention particularly noteworthy victories. Then list the rates charged for each attorney and support staff person in the firm and inform the court that the rates charged are the same as those charged by the firm in the ordinary course of business.

C. Defending Your Bills and Understanding the Story of the Case

Annex the invoices reflecting the time that you spent litigating the case from its inception right through to the preparation of the attorneys' fees motion.

The attorney litigating the motion must understand the story of what happened in the case and be able to tell it logically and consistently. Sometimes, the attorney preparing the motion for attorneys' fees and conducting the hearing thereon is not the attorney in the firm in charge of billing. Even if the attorney litigating the attorneys' fee application reviewed the bills in question, that does not mean he is automatically familiar with those bills, especially if they are many months or years old. Therefore, before annexing the invoices to a legal fee motion, the attorney should study the supporting invoices. She should read every line critically, as opposing counsel and the court will at the hearing.

Also, perform this analysis on the expense section. If opposing counsel at the legal fee hearing asks, "What were these 300 photocopies for?", then your attorney should be able to say, "Those were for the brief which we needed to file six copies of with the court."

D. Exhibits for Attorneys' Fees Hearing

A strategy for the attorneys' fee hearing that my office considers essential is to arrive at the hearing with multiple copies of pre-marked exhibits for each piece of important paperwork in the case, i.e., the pleadings, the motion practice, the memos, the briefs, even transcripts. By using these exhibits when testifying it is possible to demonstrate to the court how much work you did.

E. Use Charts to Help the Judge

A day without a colorful chart is a day without sunshine, as far as I am concerned. I recently was involved in a complex legal fee hearing wherein my client was awarded legal fees for an approximately five-year period.

We submitted 33 invoices in the matter, which contained 1,083 time entries. That is a lot of data. Opposing counsel criticized my bills mightily – but NOT specifically or scientifically. I, on the other hand, dealt with the 1,083 entries as data that needed marshaling and analysis. And it paid off.

I transferred all 1,083 entries into an excel chart, and then categorized each entry by the part of the case it related to, creating ten categories. An example of a category was “Motion for Summary Judgment”; another was “Mediation”. I also added a column for Type of Biller – to wit – paralegal, associate, or partner. Therefore, I was able to sort the data in many ways and answer for the court – definitely – questions such as “How many paralegal hours were spent on the motion for summary judgment?” I believe that the judge appreciated my efforts. The results were very positive for the client.

F. You Will Need a Post-Hearing Brief

You will almost always need a post-legal-fee-hearing brief. Legal fee hearings are detail oriented and require a judge or a judicial hearing officer to do a lot of math. It is important to organize all of that for the fact finder at the conclusion of testimony.

G. The “JHO” and Motions to Hear and Report

If you get a decision entitling you to legal fees in a Supreme Court case, as opposed to Civil Court, the Supreme Court Justice will almost always send the matter out to a Judicial Hearing Officer (“JHO”) to “hear and report” on the exact amount of fees to be awarded (i.e. Order of Reference). This adds a whole other layer of work to the process.

Our advice here is to be very careful to make sure that the Order of Reference defines exactly what legal fees are being awarded for. If the JHO is confused about that issue, then you may up re-litigating your entitlement to fees.

Moreover, when a JHO renders a decision, the parties still need to make a motion back to the original Justice to confirm or reject or grant other relief after reference, pursuant to CPLR § 4403. The fun never ends.

So yes – in the situation where a legal fee hearing is sent out to a JHO, an application for legal fees can literally take a year and look like this:

- Initial motion seeking entitlement to fees, assuming such was not obtained at trial or as part of earlier motion practice.
- Preparation for hearing; conducting hearing; post-hearing briefing.
- Motion practice back at the original judge to reject or confirm the JHO’s decision.

VIII. QUESTION: MAYBE I SHOULD HAVE JUST ASKED FOR ATTORNEYS’ FEES FROM THE OTHER SIDE? (AND BE CAREFUL WITH STIPULATIONS OF SETTLEMENT).

When representing landlords, especially commercial landlords, I often demand that tenants pay landlords’ attorneys’ fees as part of a settlement agreement. This works most of the time, as well it

should. So, yes, before you even consider Question 1 (Are you entitled to legal fees?) you can always try just demanding them from the other side. It doesn't hurt to ask.

If you are entering into a stipulation of settlement, the stipulation should explicitly mention the deal between the parties regarding attorneys' fees. If the intention is that no party should pay the other party's attorneys' fees, then both parties should explicitly waive any right to such fees through the date of the stipulation.

IX. CONCLUSION: THE TAIL WAGGING THE DOG

Sometimes an amount in controversy can be eclipsed by the attorneys' fees expended to recover that amount in controversy. The tail is wagging the dog, not the other way around. The dog is the case; the attorneys' fees are the tail.



While in other areas of the law, attorneys' fees can become the largest damage item in a case, thus making litigation not worth it, landlord and tenant litigation is a little different. For one thing, if a tenant stops paying rent and will not resume paying rent until sued, then what choice does landlord have but to sue? For another thing, recovery of attorneys' fees is often available in landlord and tenant cases, as discussed in this article.

The key in this area, as in all other aspects of property management and real estate litigation, is to be proactive and well prepared.

My next to last remark will be that I often write from the point of view of landlords, but I represent plenty of tenants, and everything in this article is equally as useful for them.

I leave you with a checklist. Checklists are good.

CHECKLIST FOR SEEKING RECOVERY OF ATTORNEYS' FEES

1. If a tenant pays the rent late and you have to serve a Rent Demand and a Petition, ask/demand that tenant pay attorneys' fees before settling the case.
2. Think about whether the party you are considering seeking attorneys' fees from is judgment proof.

3. Make sure that your attorneys are sending you appropriate and clear bills without Block Billing categories.
4. Make sure your leases entitle you to legal fees. Don't forget about RPL § 234 and the reciprocal covenant in residential leases.
5. As a litigation progresses, consider whether or not you are "prevailing".
6. Pursue fees at the conclusion of a case, don't wait or you will split your cause of action impermissibly.
7. If you are going to make an application to recover attorneys' fees:
 - a. Cite the lease and any relevant statute.
 - b. Explain why the fees were reasonable.
 - c. Know the story of the case and the invoices.
 - d. Bring exhibits.
 - e. Use charts to help the judge.
 - f. Do a post-hearing brief.
 - g. Manage a case with a JHO carefully.

ENDNOTES

[1] See e.g. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 NY3d 592, 597 (2004) ("It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule.")

[2] See REBNY Standard Form Lease, Article 19; see also *Nestor v. McDowell*, 81 N.Y.2d 410, 415-416 (1993) (prevailing party entitled to fees and costs); *Peachy v. Rosenzweig*, 215 A.D.2d 301, 302 (1st Dept. 1995).

[3] See RSL § 26-512 (a); RSC 9 NYCRR 2525.1.

[4] *Brusco v. Miller*, 167 Misc.2d 54 (AT 1st Dept. 1995).

[5] See *Silber v. Schwartzman*, 150 Misc.2d 1 (AT 1st Dept. 1991) ("[I]n a proceeding such as this brought under RPAPL § 711(2) for nonpayment of rent by the landlord of residential, rent-stabilized premises, attorneys' fees may not be considered 'rent' or be awarded as 'additional rent' in order to enable the landlord to obtain a possessory judgment, and a lease clause to that effect is unenforceable[.]"); *Crystal World Realty Corp. v. Sze*, 01-328, 2001 WL 1635430 (AT 1st Dept. 2001).

[6] *Excelsior 57th Corp. v. Winters*, 227 A.D.2d 146 (1st Dept. 1996); *Solow v. Wellner*, 205 A.D.2d 339 (1st Dept. 1994), *aff'd*, 86 N.Y.2d 582 (1995).

[7] *Botwinick v. Duck Corp.*, 267 A.D.2d 115, 117 (1st Dept. 1999); *Senfeld v. I.S.T.A.*, 235 A.D.2d 345 (1st Dept. (1997)); See also, *Glorious 84 Realty Co. v. Daly*, 3/7/01 N.Y.L.J. 18 (col. 1) (AT 1st Dept. 2001).

[8] *Glorious 84 Realty Co.*, supra at 18.

[9] *Excelsior*, supra, 227 A.D.2d at 146.

[10] *Peachy*, supra, 215 A.D.2d at 302.

[11] *Id. But see, Bldg. Management Co. v. Antollino*, 2002 NY Slip Op. 50282, (App. Term 1st Dept. 2002) (standing for the proposition that when both parties succeed in part and fail in part, neither should obtain legal fees).

[12] *930 Fifth Corporation v. King*, 42 N.Y.2d 886, 887-88 (1977).

[13] *See, e.g. Shaw, Licitra, Eisenberg, Esernio and Schwartz, P.C. v. Gelb*, 221 A.D.2d 331, 331-32 (2nd Dept. 1995), *leave to appeal denied* 87 N.Y.2d 810 (1996).

[14] *Silverstein v. Goodman*, 113 A.D.3d 539 (1st Dept. 2014); *Community Counseling & Mediation Services v Chera*, 115 AD3d 589 (1st Dept 2014). Both cases upheld a Ten Percent (10%) reduction in fees due to Block Billing.

[15] *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879, 881 (1987); *Lefkowitz v. Van Ess*, 166 A.D.2d 556 (2nd Dept. 1990).

[16] *Rahmey v. Blum*, 95 A.D.2d 294 (1st Dept. 1983).