

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART H

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245 OWNER LLC,

Petitioner,

Index No. 87414/2014

- against -

JOSHUA YAGHOUBIAN,

**DECISION/ORDER**

Respondent.

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Present: Hon. Jack Stoller  
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Supplemental Affirmation Annexed.....	1, 2
Notice of Cross Motion and Supplemental Affirmation Annexed	3, 4
Affirmation in Reply and In Opposition to the Cross Motion	5
Affirmation In Reply	6

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

245 Owner LLC, the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Joshua Yaghoubian, the respondent in this proceeding (“Respondent”), seeking possession of 245 West 25<sup>th</sup> Street, Apt. 4B, New York, New York (“the subject premises”) on the ground of termination of a month-to-month tenancy pursuant to RPL §232-a, alleging that the subject premises is not subject to rent regulation. Petitioner moved for summary judgment and to amend the petition to include a cause of action sounding in attorneys’ fees. The Court granted the motion, awarding Petitioner a final judgment of possession, but did not address the issue of attorneys’ fees. Petitioner now moves again to amend the petition to include a cause of action for attorneys’ fees and for a judgment sounding in

attorneys' fees. Respondent cross-moves to reargue the Court's prior decision and for a stay pursuant to CPLR §5519(a)(6). The Court consolidates both motions for resolution herein.

The Court first considers Respondent's cross-motion to reargue, as such a cross-motion is potentially determinative of all the other relief the parties seek in this motion practice. The Court does not find that Respondent has demonstrated that the Court overlooked or misapprehended any matter of fact or law in the Court's award of a final judgment to Petitioner. While Respondent makes reasonable arguments about the interpretation of legal authority the Court considered in rendering its prior decision, the Court respectfully disagrees with such arguments, as the Court finds that the legal authority the Court relied upon compelled the conclusion that the Court reached given the record on the prior motion practice. Accordingly, the Court denies Respondent's motion to reargue.

The Court next considers Petitioner's motion to amend the petition to include a cause of action sounding in attorneys' fees. The Court erroneously overlooked that part of Petitioner's prior motion that sought this relief. Accordingly, the Court considers Petitioner's motion on the merits.<sup>1</sup>

Leave to amend pleadings should be freely given, and denied only if there is prejudice or

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<sup>1</sup> The Court does not find that Petitioner's current motion is barred by law of the case. The law of the case doctrine is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned. RPG Consulting, Inc. v. Zormati, 82 A.D.3d 739, 740 (2<sup>nd</sup> Dept. 2011). The doctrine applies only to legal determinations resolved on the merits. Thompson v. Cooper, 24 A.D.3d 203 (1<sup>st</sup> Dept. 2005). Accordingly, law of the case does not bar a subsequent determination when a prior decision was not a ruling on the merits. 546-552 W. 146th St. LLC v. Arfa, 99 A.D.3d 117 (1<sup>st</sup> Dept. 2012).

surprise resulting directly from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law. McGhee v. Odell, 96 A.D.3d 449, 450 (1<sup>st</sup> Dept 2012), MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499 (1<sup>st</sup> Dept. 2010). A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment. McGhee, supra, 96 A.D.3d at 450. Motions to amend pleadings to include a cause of action sounding in attorneys' fees have routinely been treated the same way as any other motion to amend a pleading. See, e.g., Lui v. Town of E. Hampton, 117 A.D.3d 689, 690 (2<sup>nd</sup> Dept. 2014), Board of Mgrs. of Park Regent Condominium v. Park Regent Assoc., 71 A.D.3d 1070, 1071 (2<sup>nd</sup> Dept. 2010), AD 1619 Co. v. VB Mgmt., Inc., 259 A.D.2d 382 (1<sup>st</sup> Dept. 1999), Hermann v. Bahrami, 236 A.D.2d 516 (2<sup>nd</sup> Dept. 1997), Fugazy Travel Bureau, Inc. v. Ernst & Ernst, 31 A.D.2d 924, 925 (1<sup>st</sup> Dept. 1969).

Petitioner's cause of action sounding in attorneys' fees is meritorious. There is no controversy that a lease between the parties has an attorneys' fees clause. Indeed, Respondent's answer cites the lease in support of his counterclaim for attorneys' fees. Nor does Respondent demonstrate actionable prejudice to an amendment of the petition. Prejudice to warrant denial of leave to amend requires some indication that opposing parties have been hindered in the preparation of their case or have been prevented from taking some measure in support of their position. Whalen v. Kawasaki Motors Corp., U.S.A., 92 N.Y.2d 288, 293 (1998), Loomis v. Civetta Corinno Constr. Corp., 54 N.Y.2d 18, 23 (1981), McGhee, supra, 96 A.D.3d at 450, Anoun v. City of New York, 85 A.D.3d 694 (1<sup>st</sup> Dept. 2011), Valdes v. Marbrose Realty Inc., 289 A.D.2d 28, 29 (1<sup>st</sup> Dept. 2001). The Court notes that Petitioner moved for this relief

contemporaneous with its motion for summary judgment previously in this proceeding, thus reducing any surprise there might be to this claim. Accordingly, the Court grants Petitioner's motion and deems the proposed amended petition annexed as Exhibit P to Petitioner's notice of motion to be the amended petition in this proceeding.

As this is a holdover proceeding, the central relief sought was possession of the subject premises. As the Court has awarded Petitioner a final judgment of possession, Petitioner is the prevailing party in this proceeding. Cassorla v. Foster, 2 Misc.3d 65, 67 (App. Term 1<sup>st</sup> Dept.), *appeal denied*, 2004 N.Y. App. Div. LEXIS 8905 (1<sup>st</sup> Dept. 2004), MEP Realty Ltd. v. Herman, 2008 N.Y. Misc.LEXIS 7406, 19-20 (Civ. Ct. N.Y. Co. 2008), *citing* Nestor v. McDowell, 81 N.Y.2d 410, 415-16 (1993). Accordingly, Petitioner is entitled to a hearing the an amount of reasonable attorneys' fees.

Respondent moves for a stay pursuant to CPLR §5519(a)(6), which applies to summary proceedings. Andrada Owners Corp. v DiGrazia, 38 Misc.3d 1219(A) (Civ. Ct. N.Y. Co. 2013). In order to be entitled to a stay, however, Respondent must pay an undertaking. The purpose of the undertaking is to prevent the landlord from suffering further loss pending appeal. Id. The Court had previously calendared this matter for a hearing on fair market use and occupancy subject to the Third Affirmative Defense in Respondent's answer, that the appropriate certificate of occupancy had not been obtained such as to entitle Petitioner to use and occupancy. The Court will again calendar this matter for a hearing on the amount of use and occupancy.

At this point in time, the Court does not yet credit Petitioner's argument that posting of a potential award of attorneys' fees as a condition of the stay is an appropriate undertaking. While

Andrada, supra, offers some support for Petitioner's position on this point, the facts of Andrada, supra, concerned litigation much more protracted and extensive than that in the instant case, incurring a larger amount of attorneys' fees than in this matter.<sup>2</sup> Insofar as the purpose of the undertaking is to prevent waste, it is possible that use and occupancy may serve that purpose without a requirement that attorneys' fees be posted as well. Accordingly, the Court stays the hearing on attorneys' fees pending the outcome of a hearing on the appropriate amount of use and occupancy to be set as an undertaking. The Court calendars such a hearing on June 22, 2015 at 9:30 a.m. in part H, Room 523 of the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York  
May 20, 2015



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HON. JACK STOLLER  
J.H.C.

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<sup>2</sup> According to Petitioner's motion, the amount of attorneys' fees they seek is less than the amount set as an undertaking in Andrada, supra.