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### Who Is the 'Prevailing Party'?

Determining which litigant is entitled to attorney fees in commercial lease disputes

BY JASON T. SHAFRON

A well-drafted and negotiated commercial lease typically includes a provision entitling the prevailing party in litigation to an award of attorney fees. In many complex lease interpretation cases, the issue of prevailing-party attorney fees is a driving force in the settlement of disputes, or an important issue to be determined by the court after the trial.

New Jersey case law currently provides the analytical framework for a court to determine if a party has prevailed on its claims and is therefore entitled to attorney fees. The courts, however, have not addressed which party, if any, is entitled to attorney fees where there is a mutual prevailing-party provision and each party has prevailed on some of their claims. A mutual prevailing-party provision is one which states that the prevailing party is entitled to an award of attorney fees, as opposed to a one-sided provision usually favoring the party with an attorney or in the stronger position when the lease was negotiated.

*Shafron is a partner of Archer & Greiner PC in Hackensack, and a member of the firm's litigation department, where he represents real estate developers, builders, brokers and commercial real estate owners and tenants, among others.*

One approach to making such a determination under the current framework would be to allow both to be prevailing parties and awarding net fees based on the relief obtained in comparison to the relief sought by each party.

The issue arises in many different scenarios. For example, a commercial tenant may dispute the landlord's methodology in charging tenants for common area maintenance, electricity or insurance. Such amounts are typically defined as "additional rent" in the lease. As a result of the dispute, the tenant may continue to pay its "base rent," but refuse to pay more than it believes it owes for such "additional rent." The landlord can file a landlord/tenant possession action, which can be transferred to the Law Division, or either party may file an action in the Law Division, for money damages as well as a declaratory judgment seeking an interpretation of the disputed clauses in the lease.

After a trial in the Law Division, there are a myriad of possible results that can make a "prevailing party" determination very difficult. For example, one result could be that the tenant prevailed on the declaratory judgment regarding the interpretation of the common area maintenance charges, which would benefit the tenant in the amount of \$400,000 over the course of the remaining lease

term, and the landlord prevailed as to the interpretation of the electricity and insurance charges, which would benefit the landlord in the amount of \$200,000 over the same period. As to money damages for amounts due or overpaid, any number of judgments could be entered depending on the determination of the lease interpretation issue as well as the actual amount already paid by the tenant. The question for the court would be whether either party prevailed and, if so, the amount of attorney fees that should be awarded. While, in general, New Jersey disfavors the shifting of attorney fees, a prevailing party can recover its fees if they are provided for in the lease. *Litton Industries v. IMO Industries*, 200 N.J. 372, 385 (2009). Such contractual provisions are strictly construed by the court.

A two-pronged test governs the determination of whether a party has prevailed for purposes of awarding attorney fees under a contractual prevailing-party fee-shifting lease provision. The party must demonstrate that its claim was causally related to securing the relief obtained and that such party's efforts were a necessary and important factor in obtaining the relief. *North Bergen Rex Transport v. TLC*, 158 N.J. 561, 570 (1999); *Kellam Associates v. Angel Projects*, 357 N.J. Super. 132, 139 (App. Div. 2003).

The first prong requires a factual causal nexus between the pleading and the result ultimately obtained. The second prong requires the party to demonstrate that the relief it obtained had some basis in law. The party seeking attorney fees is not required to obtain all of the

relief sought. Instead, the party seeking attorney fees must have affected the behavior of the party asked to pay attorney fees.

Therefore, a party is not required to prevail on all claims. If the claims are found to be meritorious and necessary, a party can be the prevailing party if it prevails on some of its claims. *North Bergen*, 158 N.J. at 571. If a party is determined to be a prevailing party, but did not prevail on all of the claims, the merits of the other party's position is a factor considered in determining the amount of the award of attorney fees. If a prevailing party has obtained only some relief in comparison to all relief sought, the court must determine whether all of the attorney's time on the entire litigation was reasonable in relation to the actual relief obtained and, if not, reduce the award proportionally. "[I]f . . . a [party] has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Rendine v. Pantzer*, 141 N.J. 292, 336 (1995), quoting *Hensley v. Eckhardt*, 461 U.S. 424, 436 (1983).

In *North Bergen* and *Kellam*, only one party was seeking attorney fees based on one-sided attorney-fee lease provisions. The provision in the commercial real estate lease in *Kellam* provided that "Landlord shall be entitled to recover reasonable attorney fees and costs actually incurred in connection with any effort to collect past-due rent or enforce any other term of this Lease breached by the Tenant." The provision in the trucking lease in *North Bergen* provided that:

Lessee shall pay and discharge

or promptly reimburse Lessor for all costs, expenses and reasonable attorney fees, which shall be incurred and expended by Lessor in enforcing the covenants and agreements of this [Lease] whether by the institution of litigation or by the taking of advice of counsel or otherwise.

When reviewing these one-sided provisions, it is obvious that a fairer approach would have been to state that the prevailing party is entitled to attorney fees. Interestingly, in the residential real estate context in New York, statutory law provides that if a lease allows only the landlord to recover attorneys' fees in a lawsuit, the tenant is also entitled to such fees if it defeats the landlord's claim or prevails in its counterclaim. RPL § 234. No such statute exists in New Jersey.

In *Kellam*, the court applied the existing prevailing party analysis to determine whether the plaintiff landlord was a prevailing party entitled to attorney fees where it did not win all that it sought. *Kellam* sought and obtained a judgment for past due rent. It also obtained a declaratory judgment that rent be calculated and paid over a 35-year period based on a formula higher than what the defendant claimed was proper. The verdict resulted in a declining margin of victory in each year of the lease. Over the entire term of the lease, the Appellate Division found that in the aggregate, *Kellam* won 75 percent of the amount sought. Thus, the court held that the plaintiff had prevailed and that the defendant's position was merely a factor to be considered in determining the amount of attorney fees to be assessed against it.

In *North Bergen*, the Supreme

Court noted that TLC's counterclaim sought past due lease payments totaling \$220,000. At trial, TLC's claims were reduced to \$154,432.10, which was approximately 70 percent of the amount sought. Based on its determination that TLC was a prevailing party, the trial court awarded TLC 100 percent of its attorney fees, which was affirmed by the Appellate Division. Even though it agreed that TLC was the prevailing party, the Supreme Court disagreed that TLC was entitled to all of its fees. In reviewing the amount of fees awarded, as opposed to whether TLC was entitled to fees at all as a prevailing party, the Court looked at the total success at trial compared with the relief sought and what had been resolved before trial. It held that although it was not establishing a per se requirement that there be a close relationship between the recovery and an award of attorney fees, when a substantial portion of the relief sought is ultimately rejected, that circumstance should be considered along with other factors, including those contained in RPC 1.5(a) (reasonableness of fees), to determine a reasonable award of attorney fees to a prevailing party.

Based on the foregoing, where a lease agreement contains a mutual prevailing-party attorney-fee provision, the existing two-prong test to determine whether a party has prevailed can be utilized by a court to determine if one or both of the parties have prevailed. If both parties have prevailed on different claims, each party can submit an affidavit of attorney fees, and the court can perform an analysis of the reasonableness of each party's fees in light of the relief sought and the results obtained. The court can then award one party a net amount of attorney fees based on the difference between the attorney fees of each prevailing party. ■