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Recovery of Attorneys' Fees Under a Proprietary Lease: Can You, or Can You Not?

Recent court rulings question whether co-ops can recover attorneys' fees from shareholders if the lease provisions allow fee recovery regardless of who wins. Courts are increasingly scrutinizing overly broad or outcome-blind fee clauses, with some invalidating them. Proper drafting is now crucial to ensure enforceability.

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For decades, the right of a cooperative housing corporation to recover its attorneys' fees incurred in connection with addressing a shareholder's default under the shareholder's proprietary lease was an afterthought.

Two decisions from the Appellate Division, First Department, one in 2018 and another in 2025, cast that notion into question, followed by two additional cases decided by the court on the same topic earlier this year.

This article will explore the history of attorney-fee provisions in proprietary leases, discuss the findings of the four cases, and attempt to harmonize them.

The History

Co-op proprietary leases dating back to the first half of the 20th century have contained provisions frequently titled "Attorneys' Fees" that are typically worded as follows:

Lessor for the expense of attorneys' fees and disbursements thereby incurred by the Lessor, and the Lessor shall have the right to collect the same as additional rent." (Upper East Side Proprietary Lease dated July 1, 1953).

These and similarly worded provisions, by their express terms, were triggered upon a "default," not upon the adjudication or final determination of a default, i.e., the satisfaction of maintenance arrears before the commencement of a plenary action or summary proceeding. As such, it has historically been common for attorneys' fees to be tacked onto a shareholder's account following a default, regardless of the outcome.

Likewise, it has been common for attorneys' fees to be paid, if not immediately, at some point before a transfer of the stock and lease.

Where there was a question about whether there was an actual underlying default, co-ops would either remove the fees from the shareholder's account or negotiate them, as there was ample precedent that the provision was conditioned on the co-op being the prevailing party in litigation (See, e.g., *Great Neck Terrace Owners Corp., v. McCabe*, 101 A.D.3d 944 (2d Dep't 2012)).

For decades, co-op boards have relied on these provisions as a hopeful backstop to deter vexatious litigation by disgruntled shareholders who act with "obduracy…to economically force the co-op to its knees," (See *1050 Tenants Corp. v. Lapidus,* 12 Misc.3d 1196(A), *1, 824 N.Y.S.2d 769 (Sup. Ct., NY Cnty.2006) (quoting *1050 Tenants Corp. v. Lapidus,* Index No. 93096/1992, at 7 (Civ. Ct., N.Y. Cnty, Oct. 3, 1996) (Shulman, J.)) and, more frequently, to make the co-op whole for attorneys' fees incurred for garden-variety breaches of the proprietary lease or the building's house rules.

The Shifting Winds

A 2018 decision from the Appellate Division, First Department, put a chink in the co-op's armor when it held in *Krodel v. Amalgamated Dwellings, Inc.,* that the attorney-fee provision in the co-op's proprietary lease was unenforceable as a matter of law because it permitted the landlord to recover attorneys' fees when the tenant brings an action against the landlord, even when the landlord is in default.

For reasons unknown, the decision in *Krodel* largely went unnoticed within the co-op/condominium bar. That changed last year when the seemingly never-ending skein of litigation between Alphonse Fletcher, Jr., and the famous co-op, the Dakota, gave rise to *Matter of Kasowitz, Benson, Torres & Friedman, LLP, v. JPMorgan Chase Bank,* N.A. (*Matter of Kasowitz, Benson,* While the central issue in *Kasowitz* was whether the co-op's superior lien on the stock and the proprietary lease appurtenant to Fletcher's apartment were valid, not whether the co-op was the prevailing party (it was), the court, when examining the attorneys' fee provision in the Dakota's proprietary lease, followed the precedent established in *Krodel* and found that "[b]ecause the lease provides for attorneys' fees regardless of default or merit, in a dispute between a residential co-op and a shareholder tenant, we find this provision to be unenforceable as unconscionable."

Whereas Krodel was decided in connection with an interlocutory appeal from the denial of the co-op's motion for summary judgment on its counterclaim for attorneys' fees, leaving open the question of whether Krodel or Amalgamated would ultimately be the "prevailing party," the Dakota had prevailed in its epic legal battle with Fletcher.

However, that wasn't enough to change the unfortunate outcome for the co-op, as the court refused to "rewrite the parties' agreement simply because the Dakota prevailed in the underlying litigation," finding that "[t]o enforce such a provision would produce an unjust result because it would dissuade aggrieved parties from pursuing litigation and preclude tenant-shareholders from making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default." (Quoting *Krodel,* 166 A.D.3d at 414).

The Reaction

Following the issuance of *Kasowitz,* the co-op universe took notice of what was perceived as a direct threat to the widely held sacrosanct right of co-ops to recover attorneys' fees from defaulting shareholders. (See Robert J. Braverman, How the *Kasowitz* Decision Puts Attorney Fee Provisions in Proprietary Leases on Shaky Ground, ALM Law.com (April 30, 2025), See also, William D. McCracken, "Bill's Condo-Coop Corner", NYSBA N.Y. Real Property Law Journal, 2025, vol, 53 No. 2).

Co-op practitioners quickly advised their clients to review and consider amending their leases to ensure they were protected by the holdings in *Krodel* and *Kasowitz.* Many boards engaged in "mid-stream" litigation were forced to rethink their strategy, which was at least partly based on the notion that the shareholder "on the other side of the 'v'" would weigh the potential downside of reimbursing the co-op for its attorneys' fees.

Many co-op boards looked to *Kasowitz* as the tipping point for overhauling their antiquated leases, adopting measures such as the novel practice of sending notices electronically, eliminating

It most commonly refers to early 19th-century precursors to the modern bicycle"), and including "*Kasowitz*-proof" attorney fee provisions that clarified the provision's reciprocal nature (as codified in §234 of the Real Property Law (RPL)) and limited its application to a "prevailing party." The revisions also clarified the ability to recover fees for issuing legal letters and formal notices, as well as for engaging other consultants and professionals.

However, with other fixed-cost budgetary items, such as labor and insurance, increasing dramatically year over year, and with co-ops trading at lower per-square-foot values than condos, coupled with the challenges of obtaining the requisite supermajority of shareholders necessary to amend the proprietary lease, many boards were reluctant to incur the expense, and others tried but were unsuccessful, largely due to shareholder apathy. In these cases, boards adopted a "cross your fingers and hope for the best" outlook.

Not So Fast

Just as the co-op industry was settling into a "Post-*Kasowitz* World," two recent decisions have seemingly narrowed the holdings in *Krodel* and *Kasowitz*.

In *Hubshman v. 1010 Tenants Corp.* (*Hubshman v. 1010 Tenants Corp.,* 249 A.D.3d 608, 2026 WL 1463652, N.Y. Slip Op. 03267 (1st Dep't 2026)) and *Southgate Owners Corp. v. Esposito* (*Southgate Owners Corp., v. Esposito,* 247 A.D.3d 553, 255 N.Y.S. 3d 25 (1st Dep't 2026)), decided within 70 days of each other, the Appellate Division, First Department, without citing *Krodel* or *Kasowitz,* found the attorneys' fees provisions in each of the two proprietary leases at issue to be enforceable, even though both contained clauses similar to the Amalgamated and Dakota leases, namely language entitling the co-op to recover its attorneys' fees in connection with defending or in asserting a counterclaim or in any action or proceeding brought by the Lessee.

In *Hubshman,* a prolific co-op litigation along the lines of *Pullman* (*40 West 67th Street v. Pullman,* 100 N.Y.2d 147 (2003)), 1050 Tenants Corp. (1050 Tenants Corp., 12 Misc.3d 1196(A), 824 N.Y.S.2d 769), and *Fletcher* (*Fletcher v. Dakota*, 99 A.D.3d 43, 948 N.Y.S.2d 263 (1st Dep't 2012)), the court reinstated the plaintiff/shareholder's cause of action for breach of the proprietary lease and, concomitantly, her cause of action for attorneys' fees, based on the notion that "Paragraph 28 of the proprietary lease expressly provides that the lessor can recover from a lessee for a default under the lease.

Accordingly, plaintiff may be entitled to reciprocal legal fees pursuant to [RPL] §234 if she prevails on her breach of contract claim." (*Hubshman,* 249 A.D.3d at 610 (internal citations omitted).

found that because the portion of the attorney fee provision in Southgate's proprietary lease allowing the co-op to recover its attorneys' fees and expenses "in defending, or in asserting a counterclaim in an action or proceeding" against the lessee was reciprocal pursuant to RPL §234, "the motion court properly awarded defendant her attorneys' fees..." (*Southgate*, 247 A.D.3d 553, at 555).

In the midst of this, Queens Civil Court Judge Ibrahim Shorab, in *Kennedy House Owners, Inc. v. Crawford Kennedy House Owners, Inc., v. Crawford,* 88 Misc.3d 1244(A), 252 N.Y.S.3d 915 (Civ. Ct., Queens Cnty., March 30, 2026)), followed *Kasowitz* and struck down a lease provision virtually identical to the one in 1010 Tenant Corp. and Southbridge's proprietary leases, holding that "this court is bound by the First Department's holdings in *Kordel* and *Kasowitz*."

So Where Does That Leave Things?

At first glance, it appears that this is a situation where what's good for the goose isn't necessarily good for the gander.

Whereas the Amalgamated and Dakota proprietary leases were viewed under the lens of determining the co-op's entitlement to recover attorneys' fees with a portion of the attorney fee provisions being "outcome-blind", the 1010 Tenants Corp. and Southgate leases were being considered in the context of the shareholder's reciprocal right to recover fees under RPL §234.

However, if the lease provisions in *Kordel* and *Kasowitz* would be unenforceable as a matter of law, one would expect the *Hubshman* and *Esposito* courts to have followed *Kordel* and *Kasowitz* by striking the attorney fee provisions in those leases, and not even reach the "234 question."

Perhaps future decisions will address this question; however, for now, it appears that, like a fine wine, the 1950s-vintage proprietary lease provision, such as the one cited above, will be safe from judicial evisceration, whereas co-op proprietary leases with attorney-fee provisions that, by their terms, could impose fee liability on a shareholder regardless of outcome have turned to vinegar and should be modified.

Author's Note

I clearly remember the day in late 1993 when I arrived at the office to find a dog-eared copy of the Law Journal on my computer-less desk, accompanied by a note from my late father that read, "Make sure you always read the Siegler column." While I diligently followed that sage advice, I could hardly have imagined that thirty-three years later I would have the privilege of reviving Richard Siegler and Eva Talel's "Cooperatives and Condos" column.

practicing in this or a related practice area, a word of advice: "Make sure you read the Braverman Column."

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