

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

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DAVID J. MURRAY and MELISSA AMEDEN,

Petitioners,

Index No. HP 6284/2013

- against -

**DECISION/ORDER**

92 YORKVILLE HOUSING CORP., et al.,

Respondents.

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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 these motions.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Supplemental Affidavits Annexed.....	1
Notice Of Cross-Motion and Supplement Affidavits Annexed	2
Reply Affirmation In Further Support and in Opposition to the Cross-Motion	3

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

David Murray and Melissa Ameden, the petitioners in this proceeding (“Petitioners”), commenced this Housing Part Action against 92 Yorkville Housing Corp., Nick Vargas, Adam Jernow, Wayfinderpm, the Department of Housing Preservation and Development of the City of New York, and the Department of Buildings of the City of New York, the respondents in this proceeding, seeking relief pursuant to New York City Civil Court Act §110 on an allegation that there are Housing Maintenance Code violations at 331-333 East 92<sup>nd</sup> Street, Apt. 1A, New York, New York (“the subject premises”), seeking an order to correct violations and civil penalties.

The Court held a trial of the action over the course of several dates.

Before Petitioners rested, Petitioners made an application to discontinue this action pursuant to CPLR §3217, apparently because repairs were being effectuated. The Court granted the application to discontinue this proceeding, without prejudice to the cause of action for either party sounding in of recovery legal fees.

Petitioners now move to amend the petition to include a cause of action sounding in attorneys' fees as against respondent 92 Yorkville Corp. ("Respondent") and for a money judgment against Respondent sounding in attorneys' fees. Respondent, Nick Vargas, Adam Jernow, and Wayfinderpm cross-move for a judgment sounding in attorneys' fees. The Court consolidates both motions for resolution herein.

At the outset, each side in litigation in New York State bears its own litigation costs in the absence of a statute or an agreement to the contrary. Flemming v. Barnwell Nursing Home & Health Facilities, Inc., 15 N.Y.3d 375, 379 (2010). While Petitioners attach to their motion a proprietary lease they have with Respondent with an attorneys' fees clause, there is no such agreement between Petitioner and Nick Vargas, Adam Jernow, and Wayfinderpm. Accordingly, there is no basis upon which to grant the cross-motion of Nick Vargas, Adam Jernow, and Wayfinderpm for a judgment sounding in attorneys' fees and the Court denies so much of the cross-motion as the relief is sought by Nick Vargas, Adam Jernow, and Wayfinderpm and only considers the matter of attorneys' fees as between Petitioners and Respondent.

Petitioner's discontinuance of this proceeding complicates a potential finding that one side or the other is the prevailing party, See Sacchetti v. John S. Rogers & World City Found., 2003 N.Y. Misc. LEXIS 1177 (App. Term 1<sup>st</sup> Dept. 2003), although it is still possible to find that

Petitioners are the prevailing party if they can prove that they had to resort to legal proceedings and incur legal costs in order to compel Respondent's compliance with its obligations under the Housing Maintenance Code. Rosario by Rosario v. 288 St. Nicholas Realty, 177 Misc.2d 78, 79 (App. Term 1<sup>st</sup> Dept.1998). The difficulty Petitioners have is that the factual record is not developed to a degree that the Court can make a determination that Petitioners were forced to commence this proceeding in order to obtain relief. Petitioners had not rested by the time that they discontinued this case. Moreover, without hearing Respondent's evidence, the Court cannot fairly determine whether Petitioners can prove that they had to resort to legal proceedings in order to obtain relief. Nor can the Court, on this record, fairly evaluate Respondent's position at trial that Petitioners denied Respondent access to the subject premises, although this reasoning applies as well to Respondent's cause of action for attorneys' fees as well. See Solow Mgmt. Corp. v. Lowe, 1 A.D.3d 135, 135-136 (1<sup>st</sup> Dept. 2003) (where a party mooted out its adversary's cause of action by engaging in some conduct, such that the petitioner in the case discontinued it, it was proper for the Court to exercise its discretion in determining that plaintiff was not entitled to attorneys' fees), See Also Treiman v. 13-19 Duke Ellington Blvd. Hous. Dev. Fund Corp., 2012 N.Y. Misc. LEXIS 74 (S. Ct. N.Y. Co. 2012)(where a proceeding is discontinued, no judgment was obtained by either party, the legal relationship between plaintiff and defendant was not affected by the resolution of the action, and the status quo was not altered, there was not a sufficient predicate upon which to make a finding of a prevailing party).

Given this record, it is not necessary for the Court to reach the issue as to whether Petitioners can amend their pleading, as the lack of availability of the remedy they seek as

determined above moots out that motion.

Accordingly, the Court denies both the motion and the cross-motion.

This constitutes the decision and order of this Court.

Dated: New York, New York  
November 26, 2014



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HON. JACK STOLLER  
J.H.C.