

ABH

At a term of the Appellate Term of the Supreme Court  
of the State of New York for the 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Judicial Districts

MAR 31 2010

MICHAEL L. PESCE, P.J.  
MICHELLE WESTON  
MARSHA L. STEINHARDT, JJ.

FEBRUARY 18, 2010 TERM  
2007-00486 K C

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KURA, LLC,

Appellant,

-against-

Lower Court #  
91710/06

DIANA PRASCHNIK-BUCHMAN,

Respondent.

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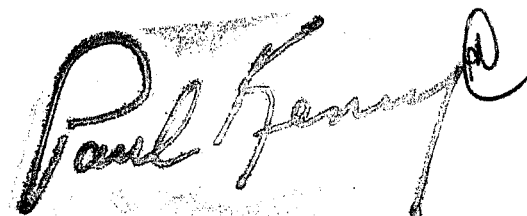
The above named appellant having appealed to this court from an **ORDER** of the **CIVIL COURT, CITY OF NEW YORK, KINGS COUNTY** dated and entered on **NOVEMBER 30, 2006** and the said appeal having been **submitted** by **DENISE M. MAY, ESQ.** counsel for the appellant and **NO BRIEF SUBMITTED** for the respondent and due deliberation having been had thereon; it is hereby,

**ORDERED AND ADJUDGED** that the order is reversed without costs and the landlord's motion to restore the matter to the calendar for an assessment of the amount of legal fees to be awarded to the landlord is granted.

Pesce, P.J., Weston and Steinhardt, JJ., concur.

DENISE M. MAY, ESQ.  
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ENTER:



PAUL KENNY  
CHIEF CLERK  
APPELLATE TERM

DIANA PRASCHNIK-BUCHMAN  
14 BUTLER PL., APT. 85  
BROOKLYN, N.Y. 11238

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE TERM : 2nd, 11th and 13th JUDICIAL DISTRICTS

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PRESENT : PESCE, P.J., WESTON and STEINHARDT, JJ.

-----X

KURA, LLC,

Appellant,

-against-

**MAR 31 2010**

NO. 2007-486 K C

DECIDED

DIANA PRASCHNIK-BUCHMAN,

Respondent.

-----X

Appeal from an order of the Civil Court of the City of New York, Kings County (Thomas M. Fitzpatrick, J.), dated November 30, 2006. The order denied landlord's motion to restore the matter to the calendar for an assessment of the amount of legal fees to be awarded to landlord.

ORDERED that the order is reversed without costs and landlord's motion to restore the matter to the calendar for an assessment of the amount of legal fees to be awarded landlord is granted.

Landlord commenced this nonpayment proceeding by notice of petition and petition dated September 5, 2006, seeking possession and the sum of \$3,991.48 for two months' past due rent at a monthly rate of \$1,995.74. Tenant answered and

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asserted, among other things, a defense based upon an alleged breach of the warranty of habitability. After a nonjury trial, the Civil Court found that the rental arrears totaled \$6,088 through October 2006 but that tenant was entitled to a \$25 monthly rent abatement as of March 2006, for a total abatement of \$200. Accordingly, the court awarded landlord possession and the sum of \$5,888.

Landlord subsequently moved to recover the legal fees it incurred in connection with the instant nonpayment proceeding pursuant to the parties' lease agreement, which provided for attorney's fees to be awarded to the successful party "in a legal action or proceeding between Landlord and Tenant for non-payment of rent or recovery of possession of the Apartment." The court denied landlord's motion, noting that tenant had proven her entitlement to a rental abatement based on her warranty-of-habitability claim.

We reverse. The \$25 per month abatement awarded in this case constituted slightly more than 1% of tenant's monthly rental rate. Given the minimal abatement awarded, "it is clear that the landlord should be accorded the status of 'prevailing party' and entitled to attorneys' fees pursuant to the lease" (Excelsior 57th Corp. v Winters, 227 AD2d 146, 147 [1996]; see also e.g. Sussex Apts., LLC v Choi, 2003 NY Slip Op 51126[U] [App Term, 2d & 11th Jud Dists 2003]).

Consequently, we find that landlord is the prevailing party and is entitled to its reasonable attorney's fees in this matter pursuant to the parties' lease agreement.

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However, we note that landlord should not be allowed to recover for any fees or costs that it incurred in connection with tenant's October 31, 2006 order to show cause seeking to compel landlord to accept tenant's timely tender of the judgment amount, on which tenant prevailed (see e.g. Binaku Realty Co. v Penepede, 2 Misc 3d 140[A], 2004 NY Slip Op 50292[U] [App Term, 1st Dept 2004]; Dara Realty Assoc. v Schachter, 2003 NY Slip Op 51150[U] [App Term, 2d & 11th Jud Dists 2003]). Accordingly, landlord's motion is granted and the matter is remitted to the Civil Court for a hearing to determine the amount of fees to which landlord is entitled.

Pesce, P.J., Weston and Steinhardt, JJ., concur.