

OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2003-1014

To: Andrew Scherer
Executive Director and President
Legal Services for New York City
350 Broadway
New York, New York 10013-9998

Date: October 27, 2003

Subject: Permissibility of Attorneys' Fees Pursuant to Lease

You requested an Opinion from this Office regarding the permissibility of seeking attorneys' fees pursuant to the terms of a lease containing a reciprocal attorneys' fees provision.

Brief Answer

A recipient may, under 45 CFR Part 1642 and LSC's appropriation law, claim, or collect and retain attorneys' fees resulting from a lease containing a reciprocal attorneys' fee provision.

Background

As we understand the facts, the most common form lease between landlords and tenants in New York City (the "Blumberg lease") provides that "the successful party in a legal action or proceeding between landlord and tenant for nonpayment of rent or recovery of possession of the apartment may recover reasonable legal fees and costs from the other party." Blumberg Lease, Clause 27. Nothing in New York state law requires leases to contain clauses providing for the provision of attorneys' fees. Nor does anything in New York law provide for the insertion of reciprocity language into leases, although New York Real Property Law does provide that there shall be implied in any lease containing a provision that the tenant pay the landlord's attorney's fees incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, a reciprocal obligation on the part of the landlord if the landlord fails to perform any covenant or agreement or in the successful defense of any action commenced by the landlord against the tenant arising out of the lease. N.Y. Real Property Law § 234 (Consol. 2003).

Section 504(a)(13) of the FY 1996 Appropriations Act provides that none of the funds appropriated in the Act may be used to provide financial assistance to an entity "that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant

to any Federal or State law permitting or requiring the awarding of such fees.” This restriction has been carried forward in each subsequent appropriations measure and is incorporated by reference in the current appropriations act. Pub. L. 108-7. LSC has implemented the statutory attorneys’ fees restriction in 45 C.F.R. Part 1642. Specifically, § 1642.3 provides that, generally “no recipient or employee of a recipient may claim, or collect and retain attorneys’ fees in any case undertaken on behalf of a client of the recipient.”¹ The regulation defines attorneys’ fees as “an award to compensate an attorney of the prevailing party made pursuant to common law or Federal or State law permitting or requiring the awarding of such fees . . .” 45 C.F.R. § 1642.2.

You asked whether an LSC recipient, consistent with section 504(a)(13) and Part 1642, may seek attorneys’ fees in landlord-tenant court pursuant to the Blumberg lease.

Analysis

The permissibility of seeking attorneys’ fees pursuant to a contract is not addressed specifically in either the LSC Appropriations Act or the relevant regulatory provisions. The restriction originated in a 1992 proposal by Representatives Bill McCollum (R-FL) and Charles Stenholm (D-TX) to significantly reform the LSC Act. The bill included an absolute prohibition on claiming or collecting attorneys’ fees from non-governmental parties. While the 1992 McCollum-Stenholm bill was never passed, the core elements of the McCollum-Stenholm bill survived and were enacted as part of the LSC FY 1996 Appropriation Act. However, the language of the prohibition on claiming or collecting attorneys’ fees that was eventually adopted in the appropriations measure was changed somewhat from the language in the original McCollum-Stenholm version. Specifically, the reference to non-governmental parties was eliminated and the phrase “pursuant to any Federal or State law permitting or requiring the awarding of such fees” was inserted. Pub. L. 104-134.

The purpose of the attorneys’ fees restriction in section 504(a)(13) is to alleviate the unfairness of forcing defendants to, in effect, pay for attorneys’ fees twice as recipients are already receiving attorneys’ fees at the expense of the defendant via the funding of the recipients’ activities through the Federal tax system. S. Rep. 104-392. Although the legislative history of the provision does not affirmatively indicate that contractual fees were intended to be excluded, a construction of the statutory language prohibiting the awarding of attorney’s fees pursuant to a private contract does not serve the articulated legislative purpose. When an order of award of attorneys’ fees is made pursuant to a Federal or State law requiring or permitting payment of attorneys’ fees the non-LSC party has no choice but to submit to the order and pay the attorney’s fees, notwithstanding that the defendant has already paid taxes which support recipient funding.. It is true that in the private contract situation, if the non-LSC party does end up paying attorneys fees pursuant to the contract, that party is still “paying twice.” The

¹ The regulation permits two specified exceptions to the general prohibition. Neither exception is pertinent to this situation. 45 C.F.R. § 1642.4 (2003).

difference in the private contract situation, however, is that under a private contract, the non-LSC party has chosen to expose itself to the possibility of paying for attorneys' fees through the exercise of its choice to enter into a contract that provides for attorneys' fees. Allowing the awarding of attorneys' fees pursuant to a private contract does not force the non-LSC party to pay attorneys' fees twice in the same way that an award of fees pursuant to a Federal or State law does.

Moreover, a literal reading of the language of 504(a)(13) supports a construction allowing attorney's fees awarded pursuant to a private contract. The McCollum-Stenholm version of the attorneys' fees restriction language did not contain the "pursuant to Federal or State law" clause and it is reasonable to believe that Congress meant something by the addition of this language. Further, it is an established principle of statutory construction that a "statute should, upon the whole, be construed so that, if possible, no clause, sentence or word is rendered superfluous, void or insignificant." TRWC, Inc. v. Andrews, 534 U.S. 19, 34 (2001). A construction prohibiting the claiming of attorneys' fees pursuant to a private contractual provision would render the phrase "pursuant to Federal or State law" superfluous. A construction allowing attorney's fees pursuant to a private contract, while prohibiting attorneys' fees pursuant to Federal or State law, on the other hand, would not render any part of the restriction superfluous. The latter construction, then, is to be preferred.

In sum, a reading of § 504(a)(13) as allowing attorneys' fees awarded pursuant to a private contract is both consistent with a literal reading of the language of the provision and not in conflict with the underlying purpose of the restriction. Accordingly, it is the opinion of this office that § 504(a)(13) and its implementing regulation, 45 C.F.R. Part 1642, permits recipients to claim or collect and retain attorneys' fees pursuant to private contractual provisions for the award of such fees.

In your case, if LSNY represented a tenant living in an apartment governed by the Blumberg lease and the client prevailed in an action between the client and the landlord for non-payment of rent or recovery of possession of the apartment, LSNY would be permitted to claim, or collect and retain attorneys' fees in connection with that action without violating section 504(a)(13) or 45 C.F.R. Part 1642.² This is because the claim for attorneys' fees would be made solely pursuant to Clause 27 of the Blumberg lease.³

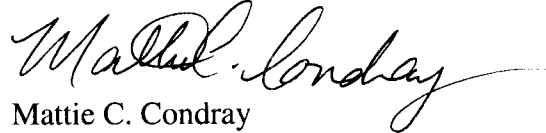
² It is important to note the limits of the permissibility of seeking attorneys' fees under the Blumberg lease in a New York court. Clause 27 of the Blumberg lease provides for attorney's fees in proceedings involving only non-payment of rent or recovery of possession. LSNY would, accordingly, be limited to seeking attorneys' fees only for claims involving non-payment of rent and recovery of possession and not for claims arising out of other lease provisions.

³ The claim is solely based in the contract because if the Blumberg lease contained no attorneys' fees provision, a tenant would have no legal basis for a claim to attorneys' fees because the New York real property law does not require landlord-tenant leases to contain a provision providing for an awarding of attorneys' fees to the successful party. On the other hand, if the Blumberg lease provided only for the landlord's right to claim attorney's fees, since the reciprocity law would read a reciprocal right into the lease, the tenant would have a claim for attorneys fees based on the statutorily required reciprocal reading

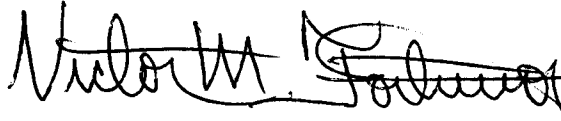
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Very truly yours,



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of the statute. In such a case, the tenant's claim for fees would be made pursuant to New York's reciprocity law, not the contract. If LSNY represented a tenant in this situation, LSNY would be prohibited under § 504(a)(13) and Part 1642 from claiming or collecting attorneys' fees in a successful landlord-tenant action arising under the terms of the lease. See OLA External Opinion 2003-1010.