

M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
 COUNTY OF QUEENS - IAS PART 16

FOREST HILLS GARDENS CORPORATION,

Plaintiff,

- against -

HERMAN A. KAMP,

Defendant.

BY: KELLY, J

DATED: APRIL 1, 2008

INDEX
 NUMBER: 18000/07

MOTION
 DATE: JANUARY 8, 2008

MOT. SEQ.
 NUMBER 1

Plaintiff Forest Hills Gardens Corporation (FHGC) has moved for summary judgment on its complaint and for summary judgment dismissing the counterclaims asserted against it.

Forest Hills Gardens is, in essence, a private residential community located in the County of Queens, and defendant Herman Kamp owns property known as 88 Continental Avenue which is located in Forest Hills Gardens. The Sage Foundation Homes Company, which developed the community, imposed certain covenants and restrictions on all real estate in the community pursuant to a declaration dated April 18, 1913 (Declaration No. 3) which was recorded in the Queens County Clerk's Office. The twelfth paragraph of Declaration No. 3 provides in relevant part that "[a]ll of the land shown on said map. . .shall be subject to an annual charge or assessment. . .to be paid by the owners of property subject thereto." The twelfth paragraph further provides that unpaid maintenance charges "on the first day of January in each and every year shall become a lien upon the land, and so continue until fully paid." In 1923, the Sage Foundation

Homes Company assigned to plaintiff FHGC (then known as "Gardens Corporation") all of its rights under Declaration No. 3.

Plaintiff FHGC is a not-for-profit corporation and a private homeowners' association, and, pursuant to Article II of its by-laws, all persons who are record owners of property in the community are members of the corporation. Plaintiff FHGC prepares a budget for the community and uses the charges assessed against property to maintain the roads, sidewalks, and sewers. Article III, Section 6, of FHGC's by-laws requires the Board of Directors to "prepare and adopt by majority vote a proposed budget which shall describe the projected sources of income, the anticipated expenditures and provisions for reserve requirements for the next fiscal year." Plaintiff FHGC has sent to defendant Kamp an annual notice of the amount of assessment due from him in each year from 1983 to 2007. Defendant Kamp has allegedly failed to pay the assessments and allegedly owes the plaintiff \$77,878.31 as of July 1, 2007.

In 1994, FHGC began an action in the Civil Court of the City of New York against Herman Kamp to recover sums due for unpaid assessments (Forest Hills Gardens Corporation v Kamp, Index No. 35715/94). Pursuant to the fifth cause of action asserted in the Civil Court complaint, FHGC sought to recover for assessments that would accrue until the day of judgment. On or about October 28, 1998, the Appellate Term for the Second and Eleventh Districts modified an order denying defendant Kamp's motion to dismiss by conditioning the denial on FHGC's providing him with a copy of its original by-laws and modified an order denying defendant Kamp's motion to preclude by conditioning the denial on the plaintiff's furnishing of a bill of particulars. By decision and order dated August 9, 2000,

Civil Court dismissed the complaint brought by FHGC upon a finding that the plaintiff "failed to comply with the Appellate Term order dated October 28, 1998."

On or about July 19, 2007, FHGC began the instant action against Herman Kamp, who is acting pro se, seeking, inter alia, to recover unpaid maintenance charges for the years beginning in 1983. The first cause of action is based on Declaration No. 3, the second cause of action is for quantum meruit, the third cause of action is for unjust enrichment, the fourth cause of action is for recovery of unpaid assessments to the date of judgment, and the fifth cause of action is for the recovery of attorney's fees, costs, and disbursements as provided in FHGC's by-laws.

The court will turn first to those causes of action which seek the recovery of maintenance charges. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . ." (Alvarez v Prospect Hospital, 68 NY2d 320, 324). Plaintiff FHGC successfully carried this burden on that part of its complaint which seeks to recover maintenance charges (See, Forest Hills Gardens Corp. v West Side Tennis Club, 23 AD3d 338; Douglas Manor Assn., Inc. v Alimaras, 215 AD2d 522). Declaration No. 3 is a recorded document whose contents the law presumes defendant Kamp knew (See, Fairmont Funding, Ltd. v Stefansky, 301 AD2d 562). The plaintiff, as the successor in interest to the declarant of the subject covenant, has the authority to enforce it (See, Forest Hills Gardens Corp. v Evan, 12 AD3d 563). The restrictive covenants stated in Declaration No. 3 are enforceable "when the intention of the parties is clear and the limitation

is reasonable and not offensive to public policy' . . ." (Forest Hills Gardens Corp. v Evan, *supra*, 564, quoting Chambers v Old Stone Hill Rd. Assoc., 1 NY3d 424, 431).

The twelfth paragraph of Declaration No. 3 which provides in relevant part that "[a]ll of the land shown on said map. . . shall be subject to an annual charge or assessment. . . to be paid by the owners of property subject thereto" is a covenant which runs with the land and which is enforceable by the homeowner's association against a property owner (See, Neponsit Property Owners' Assn. v Emigrant Industrial Sav. Bank, 278 NY 248; Riverton Community Assn., Inc. v Myers, 184 AD2d 1063; Riverton Community Assn. v Myers, 142 AD2d 984; Lincolnshire Civic Assn., Inc. v Beach, 46 AD2d 596).

The burden on this motion therefore shifted to defendant Kamp to produce evidence showing that there is an issue of fact which must be tried (See, Alvarez v Prospect Hospital, *supra*) or to demonstrate the existence of a defense warranting the denial of summary judgment (See, Plantamura v Penske Truck Leasing, Inc., 246 AD2d 347).

Defendant Kamp successfully carried this burden in regard to maintenance charges for the years 1983-2000. The dismissal of the prior Civil Court action on the basis of a failure to make disclosure and on the basis of a preclusion order has a res judicata effect on the instant action (See, Strange v Montefiore Hosp. and Medical Center, 59 NY2d 737 ["where plaintiff commenced medical malpractice action against defendant hospital, and hospital was granted summary judgment based upon preclusion order which had been obtained against plaintiff for failure to serve a bill of particulars, plaintiff's subsequent malpractice action, identical to the

first, was properly dismissed on ground of res judicata"]; Yates v Roco Co., ___ AD3d ___, 851 NYS2d 356; Kalinka v Saint Francis Hosp., 34 AD3d 742).

Moreover, an action for the breach of a covenant in a deed is subject to a six-year statute of limitations (See, CPLR §213[1]; Rivemont Farms, LLC v Northeast Solite Corp., 46 AD3d 1170), and causes of action which sound in contract or quasi contract are also subject to a six-year statute of limitations (See, CPLR §213[2]; Gold Sun Shipping Ltd. v Ionian Transport Inc., 245 AD2d 420; Catlin v Manilow, 170 AD2d 357; Douglas Manor Assn., Inc. v Popovich , 167 AD2d 499). The court notes in this connection that "[b]y-laws constitute a contract between the members and the corporation, and the members among themselves." (Procopio v Fisher, 83 AD2d 757, 758; ALH Properties Ten, Inc. v 306-100th Street Owners Corp., 191 AD2d 1). The plaintiff did not show that a longer statute of limitations pertaining to the enforcement of a lien, applies to this action. Upon "searching the record" (See, CPLR §3212[b]; Merritt Hill Vineyards, Inc. v Windy Heights Vineyard Inc., 61 NY2d 106; Carr v Jacob Perl Associates, 201 AD2d 296), the court finds that defendant Kamp is entitled to summary judgment dismissing those parts of the first four causes of action which seek to recover maintenance charges for the years 1983-2000.

However, defendant Kamp failed to demonstrate that the plaintiff is not otherwise entitled to summary judgment on the causes of action which seek to recover maintenance charges. Defendant Kamp's contention that he has no liability for the assessments because he is not a member of FHGC and not subject to its by-laws has no merit. As an owner of real estate within

the community who receives the benefits provided by FHGC, defendant Kamp is bound by an implied contract and is under a duty to pay his proportionate share of the costs for community services despite his failure to exercise the right to join FHGC (See, Seaview Assn. of Fire Island, N.Y., Inc. v Williams, 69 NY2d 987; Fieldston Property Owners Assn., Inc. v Decorative Trends Inc., 83 Misc 2d 685 [AT 1st], affd 56 AD2d 525). Under circumstances similar to those in the case at bar, "courts have found an implied contract, requiring residents to support the local community association." (Douglas Manor Assn., Inc. v Alimaras, supra, 523, quoting Douglas Manor Assn. v Popovich, 167 AD2d 499, 500; see, Seaview Assn. of Fire Island, N.Y., Inc. v Williams, supra). Finally, the plaintiff's motion for summary judgment is not premature despite the defendant's discovery requests.

Accordingly, those branches of the motion by plaintiff FHGC which are for summary judgment on the first four causes of action are granted on the issue of liability insofar as the years from 2001 to the date of judgment are concerned. Defendant Kamp is granted summary judgment dismissing those parts of the first four causes of action which concern the years 1983-2000.

Turning to the fifth cause of action, which seeks to recover attorney's fees, costs, and disbursements, a party may recover attorney's fees where an award is authorized by agreement, statute, or court rule (See, Matter of A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1; Dupuis v 424 East 77th Owners Corp., 32 AD3d 720). In the case at bar, Article III, Section 8 of FHGC's by-laws provides in relevant part: "Said land and the improvements thereon shall be subject to a lien for such assessments and any interest thereon as well as the reasonable costs of collection thereof

(including, without limitation, reasonable attorney's fees, costs, and disbursements), if a member fails to pay any assessments when due." "By-laws constitute a contract between the members and the corporation, and the members among themselves." (Procopio v Fisher, supra; ALH Properties Ten, Inc. v 306-100th Street Owners Corp., supra). Article II of FHGC's by-laws provides in relevant part: "All persons or corporations who or which are record owners of real estate in Forest Hills Gardens. . .are ipso facto members of the Corporation."

Defendant Kamp consented to become a member of FHGC by purchasing land in the community, and he is thus contractually bound by the corporate by-laws, including the provision for the payment of attorney's fees, costs, and disbursements. Alternatively, defendant Kamp, as a member of the community who receives its benefits, is under implied contractual duties toward it (See, Seaview Assn. of Fire Island, N.Y., Inc. v Williams, supra), including the payment of attorney's fees to collect annual assessments. The court also notes that pursuant to 22 NYCRR 130-1.1 it may award "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." (See, Bernadette Panzella, P.C. v De Santis, 36 AD3d 734).

While plaintiff has demonstrated its right to this relief, no proof has been submitted as to the amount of damages it claims it is entitled to. Accordingly, that branch of the motion which is for summary judgment on the fifth cause of action is granted on the issue of liability only.

The counterclaims asserted by the defendant have no merit. Despite the cap on assessments placed by Declaration No. 3, drawn almost a century

ago, defendant Kamp is bound by an implied contract and is under a duty to pay his proportionate share of the costs for community services (See, Seaview Assn. of Fire Island, N.Y., Inc. v Williams, supra). The defendant did not adequately plead fraud against FHGC (see, Lama Holding Co. v Smith Barney, 88 NY2d 413; New York Univ. v Continental Ins. Co., 87 NY2d 308; Watson v Pascal, 27 AD3d 459), and General Business Law § 349 (incorrectly cited by the defendant as GBL § 348), a consumer protection statute (See, Stutman v Chemical Bank , 95 NY2d 24; Friedler v Palyompis, 44 AD3d 611), has no relevance to the case at bar.

Accordingly, that branch of the motion which is for summary judgment dismissing the defendant's counterclaims is granted.

That branch of the motion which concerns a trial on damages is granted to the extent that the plaintiff may file a note of issue and a certificate of readiness, upon completion of all discovery and a trial date shall be assigned.

Short form order signed simultaneously herewith.

Peter J. Kelly, J.S.C.