

<b>Bank Bldg. v Mehling</b>
2016 NY Slip Op 31912(U)
October 6, 2016
Supreme Court, New York County
Docket Number: 159971/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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THE BANK BUILDING, BY ITS BOARD OF MANAGERS,

Plaintiff,

-against-

Index No. 159971/14

Motion seq. no. 003

**DECISION AND ORDER**

BRIAN MEHLING, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for HOME 123 CORPORATION, UNITED STATES INTERNAL REVENUE SERVICE, NEW YORK STATE DEPARTMENT OF TAXATION, SEVEN OAKS PARTNERS LP, ASTORIA FEDERAL SAVINGS & LOAN ASSOCIATION, NYC PARKING VIOLATIONS BUREAU, and "John Doe" and "Jane Doe," the true name of said defendant being unknown to plaintiff, the party intended to be the entity having or claiming an interest in the premises described in the complaint by virtue of being a tenant or occupant in all or part of said premises,

Defendants.

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BARBARA JAFFE, J.:

**For plaintiff:**  
Maria I. Beltrani, Esq.  
Schwartz Sladkus *et al.*  
270 Madison Ave.  
New York, NY 10016  
212-743-7000

**For Mehling:**  
Danielle N. Grzan, Esq.  
Blodnick, Fazio, & Assoc., PC  
1325 Franklin Ave., Ste. 555  
Garden City, NY 11530  
516-280-7105

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment on its claim of foreclosure on a common charge lien, a money judgment, and attorney fees as against defendant Brian Mehling, an order severing Mehling's counterclaim from this action, an order discontinuing the action as against the John and Jane Doe defendants, and pursuant to CPLR 3215 for an order granting it a default judgment as against the remaining defendants. Mehling opposes.

## I. BACKGROUND

Plaintiff, a condominium association located in Manhattan, seeks to foreclose upon a lien for common charges allegedly owed by defendant Mehling, owner of a unit therein. (NYSCEF 74). The condominium's bylaws authorize plaintiff to assess and collect common charges from unit owners, and in the event of an owner's default, he or she "shall be obligated to pay interest at 4% per month (but in no event more than the legal rate) on such Common Charges or assessments from the date due thereof, together with a 'late charge' of \$.04 for each dollar of such amounts as remain unpaid . . . and all expenses, including attorneys' fees . . . ." The bylaws also obligate plaintiff to maintain and repair the general common elements and roof of the condominium. (NYSCEF 73).

On June 17, 2014, plaintiff filed a notice of continuing lien for unpaid common charges in the amount of \$46,535.56. (NYSCEF 76). Plaintiff thereafter commenced this action, asserting claims seeking: (1) a judgment of foreclosure; (2) a judgment for the overdue amounts; and (3) attorney fees. (NYSCEF 29). Mehling did not serve an answer within the time prescribed.

On September 3, 2015, plaintiff acknowledged receipt of a check from Mehling representing a "partial payment" of unpaid common charges and expenses, bringing his balance to \$65,642.65. (NYSCEF 90). Following my order directing a traverse hearing on the issue of service of process (NYSCEF 63), on November 6, 2015, Mehling and plaintiff entered into a stipulation whereby plaintiff accepted service of his answer and counterclaim, and Mehling "concede[d] to the Court's jurisdiction over his person and waive[d] any objections to the service of the summons and complaint upon him[.]" (NYSCEF 66). In his counterclaim, Mehling asserts

that plaintiff failed to both “make keys available” to him and repair his gutters and roof, resulting in damages exceeding \$100,000. (NYSCEF 22).

Condominium account records reflect that as of February 8, 2016, Mehling has an unpaid balance of common charges, interest, late fees, and attorney fees in the amount of \$67,128.91. (NYSCEF 75).

## II. CONTENTIONS

By the affidavit of its managing agent, plaintiff contends that it is undisputed that Mehling is the record owner of the subject condominium unit, that he first defaulted in paying common charges in 2013, that it filed a notice of lien on the unit which continues to accrue unpaid charges to date and has priority over all other existing liens, and that pursuant to the condominium’s bylaws, it is entitled to late fees, attorney fees, and interest at 24 percent per annum. It asserts that Mehling raises no defenses beyond his conclusory denial of liability. (NYSCEF 70-71).

In response, Mehling alleges that he has paid the outstanding balance of common charges, leaving only unpaid attorney fees and late fees, the latter of which was inconsistently applied to his outstanding account. He argues that the monthly interest rate of four percent is usurious, as evidenced by plaintiff’s offer here to apply a non-usurious rate of 24 percent per annum. Moreover, should plaintiff be entitled to summary judgment, Mehling contends, any judgment should be stayed pending a decision on his counterclaim, and plaintiff should be required to post a \$100,000 undertaking, as he seeks damages in an amount greater than what plaintiff seeks, and in any event, plaintiff’s asserted ground for dismissal of his counterclaim is conclusory and unspecific. (NYSCEF 85).

Mehling also alleges that he was improperly served with the pleadings, as the process server unsuccessfully attempted to serve him in his unit, even though he had moved out in 2013, that he only became aware of the action after checking his mailbox, that he promptly efiled an answer, which was rejected, and after ensuing motion practice, plaintiff accepted his answer. He argues that the foregoing constitutes an abuse of process, as plaintiff attempts to use litigation to harass and coerce him into paying excessive late and legal fees. (*Id.*).

In reply, plaintiff acknowledges Mehling's partial payment of the common charges, but argues that such payment constitutes an admission to the late and legal fees still owing, and to the extent that there is any dispute, it relates only to the amount owed which may be determined by a referee. Plaintiff also denies that the interest charged is usurious, as usury laws apply only to loans and not defaulted obligations, and pursuant to the bylaws, the interest rate may not exceed the "legal rate," resulting in its lawful imposition of the monthly 24 percent. Plaintiff also relies on Mehling's explicit waiver of his right to contest service pursuant to their November 2015 stipulation, and asserts that Mehling's abuse of process defense is without merit. (NYSCEF 89).

Plaintiff argues that a stay of enforcement is inappropriate, absent any risk that the condominium will become insolvent while Mehling's counterclaim is pending, and that the counterclaim must be severed as it is unrelated to and independent of its claim of foreclosure and unpaid common charges and fees, and in any event, its alleged failure to repair Mehling's unit in a timely fashion does not relieve him of his obligation to pay common charges. Moreover, it maintains that, in the event of a stay, Mehling, not it, must post an undertaking. (*Id.*).

### III. ANALYSIS

To prevail on a motion for summary judgment dismissing a cause of action, the proponent

must establish, *prima facie*, its entitlement to summary judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 135 AD3d 211, 217 [1<sup>st</sup> Dept 2015]). If the moving party meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as “mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]; *McGinley v Mystic W. Realty Corp.*, 117 AD3d 504, 505 [1<sup>st</sup> Dept 2014]).

#### A. Claim of foreclosure

Pursuant to Real Property Law § 339-aa, a condominium board which has served a notice of lien for unpaid common charges may commence an action to foreclose the lien “in like manner as a mortgage of real property,” and its right to do so is not impaired by maintaining an action to recover money damages for same. To establish *prima facie* entitlement to judgment as a matter of law on a claim of foreclosure, the board must present evidence of its authority to assess common charges and fees and proof that the defendant failed to pay them. (*Bd. of Mgrs. of Brightwater Towers Condominium v Cheskiy*, 109 AD3d 944, 945 [2d Dept 2013]).

Here, it is undisputed that plaintiff was authorized pursuant to the bylaws to collect common charges and associated fees and interest, that Mehling failed to pay the outstanding balance, and that he failed to raise any affirmative defense in his answer. As the interest rate was triggered only upon Mehling’s default, it is not usurious. (*See Bd. of Mgrs. of Cent. Park Place Condominium v Potoschnig*, 111 AD3d 586, 586 [1<sup>st</sup> Dept 2013] [“Defendant has not raised an

inference that the late fees and interest, which, in accordance with the bylaws, were imposed only upon default, were usurious.”]; *see also Kraus v Mendelsohn*, 97 AD3d 641, 641 [2d Dept 2012] [“defense of usury does not apply where . . . the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only after default or maturity”]). Consequently, Mehling fails to raise a triable issue. In any event, the actual interest rate charged by plaintiff is below the proscribed limit. (*See eg*, Penal Law § 190.42 [person guilty of criminal usury in first degree when charging interest rate exceeding 25 percent per annum]).

Nor does Mehling’s allegation that plaintiff failed to maintain and repair Mehling’s apartment raise a triable issue. (*See cases cited infra*, III.B.).

#### B. Stay of execution of judgment

The court, in its discretion, may direct “that the entry of summary judgment . . . be held in abeyance pending the determination of any remaining cause of action.” (CPLR 3212[e]). Staying the entry or execution of judgment pending remaining claims is appropriate where prejudice may inure to the party against whom partial summary judgment is granted should he or she prevail on the undecided claims. (*Robert Stigwood Org. v Devon Co.*, 44 NY2d 922, 923 [1978]; *Lapidus v 1050 Tenants Corp.*, 138 AD3d 783, 785 [2d Dept 2016]; *Inner City Telecom. Network, Inc. v Sheridan Broadcasting Network, Inc.*, 260 AD2d 257, 258 [1<sup>st</sup> Dept 1999]).

Conversely, the court may deny a stay of execution where the remaining claims are not “inextricably intertwined with or inseparable from the issues” raised in the claim for which partial summary judgment is granted (*Somoza v Pechnik*, 3 AD3d 394, 394 [1<sup>st</sup> Dept 2004]; *Banco do Estado de Sao Paulo S.A. v Mendes Jr. Intl. Co.*, 249 AD2d 137, 138 [1<sup>st</sup> Dept 1998]; *P.S. Griswold Co., Inc. v Cortland Glass Co.*, 138 AD2d 869, 870 [3d Dept 1988]), or where the

plaintiff is “plainly solvent” such that the defendant “is assured of payment of any judgment that may be warranted on the counterclaim” (Siegel, NY Prac § 285 [5<sup>th</sup> ed], citing *Pease & Elliman, Inc. v 926 Park Ave. Corp.*, 23 AD2d 361 [1<sup>st</sup> Dept 1965], *affd* 17 NY2d 890 [1966]).

Mehling articulates no prejudice occasioned by executing a judgment should he prevail on his counterclaim nor does his counterclaim relate to plaintiff’s claim of foreclosure and enforcement of its bylaws, as Mehling’s obligation to pay common charges is independent of plaintiff’s obligation to make repairs to his unit. (*See Bd. of Mgrs. of Dickerson Pond Condominium I v Jagwani*, 250 AD2d 717, 717-718 [2d Dept 1998] [notwithstanding counterclaim alleging board’s failure to maintain and repair common elements of condominium, court properly refused to stay entry and enforcement of judgment of foreclosure of common charge lien pending outcome of counterclaim]).

Moreover, absent any indication that plaintiff is or may become insolvent during the pendency of Mehling’s counterclaim, a stay is unwarranted. (*See Boro Lbr. Co., Inc. v S&S Corrugated Paper Mach. Co., Inc.*, 85 AD2d 675, 676 [2d Dept 1981] [stay precluded notwithstanding that counterclaim sought amount greater than plaintiff’s claim, as no evidence in record “that plaintiff would be unable to respond in damages should defendant’s counterclaim be sustained”]).

### C. Other defenses

Having waived the defense of ineffective service, Mehling is precluded from raising it here. His remaining defenses are without merit.

### D. Claim for money judgment and attorney fees

While plaintiff need not elect between maintaining an action for damages and foreclosing

its common charge lien (*see* Real Property Law § 339-aa), having established its right to foreclosure and to a referee's determination of the amount owed, a judgment on the amount owed is premature.

As the bylaws authorize plaintiff to collect attorney fees incurred in prosecuting this action (*see Granada Condominium I v Morris*, 225 AD2d 520, 521 [2d Dept 1996] [bylaws specifically provided that condominium was entitled to collect attorney fees in connection with foreclosure of common charge lien]), an award of reasonable attorney fees is warranted.

#### IV. MOTION FOR A DEFAULT JUDGMENT

Plaintiff provides proof that remaining defendants were served and of the facts constituting its claim, and that defendants failed to answer or appear, notwithstanding that some served limited notices of appearance. (*See HSBC Bank USA, Natl. Assn. v Traore*, 139 AD3d 1009, 1011 [2d Dept 2016] [although one defendant served notice of appearance, plaintiff entitled to default judgment on foreclosure claim by otherwise complying with CPLR 3215(f)]). Thus, plaintiff is entitled to a default judgment as against the remaining defendants.

#### V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order appointing a referee to compute the amount due plaintiff in this action is granted in its entirety; it is further

ORDERED, that the defendants sued herein as "John Doe" and "Jane Doe" are dismissed as party defendants in this action and deleted from the caption, which is amended all without prejudice to the proceedings heretofore had herein, with the caption to herein read as follows:

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THE BANK BUILDING, BY ITS BOARD OF MANAGERS

Plaintiff,

-against-

BRIAN MEHLING, MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., as nominee for HOME 123  
CORPORATION, UNITED STATES INTERNAL REVENUE  
SERVICE, NEW YORK STATE DEPARTMENT OF  
TAXATION, SEVEN OAKS PARTNERS LP, ASTORIA  
FEDERAL SAVINGS & LOAN ASSOCIATION, and NYC  
PARKING VIOLATIONS BUREAU,

Defendants.

-----X

; it is further

ORDERED, that plaintiff is entitled to judgment for the relief demanded in its complaint  
upon confirming of the Referee's Report; it is further

ORDERED, that Summertfield Mason Baldwin, Esq. with  
an address of 75 Maiden Ln, Ste. 327 NY, NY 10038, Tel: 212-402-6827

is hereby appointed Referee to ascertain and compute the amount due except for attorney fees  
upon the lien being foreclosed in this action, and to determine whether the liened premises can be  
sold in parcels, and the Referee is to report to the court with all convenient speed; it is further

ORDERED, that, if required, the Referee take testimony pursuant to RPAPL § 1321; it is  
further

ORDERED, that by accepting this appointment, the Referee certifies that he/she is in  
compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not

limited to section 36.2(c) (“Disqualifications from appointment”) and section 36.2(d) (“Limitations on appointments based upon compensation”); it is further

ORDERED, that the Referee’s hearing shall be held in the County of New York; it is further

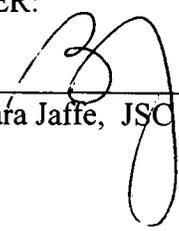
ORDERED, that the Referee is prohibited from accepting or retaining any funds for him/herself or paying him/herself without compliance with Part 36 of the Rules of the Chief Judge; it is further

ORDERED, that plaintiff’s counsel serve a conformed copy of this order upon the County Clerk and the Trial Support Office for amendment of their records; it is further

ORDERED, that defendants Mortgage Electronic Registration Systems, Inc., as nominee for Home 123 Corporation, United States Internal Revenue Service, New York State Department of Taxation, Seven Oaks Partners LP, Astoria Federal Savings & Loan Association, and NYC Parking Violations Bureau, are held in default; and it is further

ORDERED, that defendant Brian Mehling’s request for a stay of execution of the judgment to which plaintiff is entitled upon confirming the Referee’s Report is denied, and his counterclaim is hereby severed and shall continue.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED:       October 6, 2016  
                  New York, New York