

**Estates of Hallet's Cove Homeowners Assoc. Inc.
v Fakir**

2016 NY Slip Op 32083(U)

July 22, 2016

Supreme Court, Queens County

Docket Number: 10962/2014

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

THE ESTATES OF HALLET'S COVE
HOMEOWNERS ASSOCIATION INC.,

Index No. 10962/2014

Plaintiff

Motion Date: 5/5/15

-against-

Motion Seq. No.: 2

MOSHAROF FAKIR, MAZEDA HOSSAIN,
HSBC BANK USA, and MERS as nominee for
GREENPOINT MORTGAGE FUNDING INC.,
and
"JOHN DOE # 1 THROUGH "JOHN DOE #10",
The last ten names being fictitious and unknown
to the Plaintiff, the person or parties intended
being the persons or parties, if any, having or
claiming an interest in or lien upon the mortgaged
premises described in the Verified Complaint,

Defendants

The following papers read on this motion by plaintiff pursuant to CPLR 3212 for leave to renew its prior motion for summary judgment against defendants Mosharof Fakir and Mazed a Hossain, and leave to appoint a referee pursuant to RPAPL 1321 to ascertain and compute the sums due and owing plaintiff and to examine and report whether the mortgaged premises can be sold in parcels, and to strike the affirmative defenses asserted by defendants Fakir and Hossain, and upon renewal, for summary judgment against defendants Fakir and Hossain, leave to appoint a referee to ascertain and compute the sums due and owing plaintiff and to examine and report whether the mortgaged premises can be sold in parcels and to strike the remaining affirmative defenses asserted by defendants Fakir and Hossain.

Papers
Numbered

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Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Estates of Hallet’s Cove Homeowners Association Inc. commenced this action on July 21, 2014, alleging that the real property of defendants Fakir and Hossain known as 13-08 33rd Avenue, Long Island City, New York (Block 521, Lot 97) (the subject property), is located within a residential community which plaintiff manages allegedly under the terms of certain declarations (“Declaration of Covenants Restrictions, Easements, Charges and Liens” recorded at liber/reel 4354, page 354, on June 4, 1996) [the Declaration], “Declaration of Covenants, Restrictions and Agreement of Record,” recorded at reel 5135, page 778, and “Amended Declaration” recorded on September 6, 2007 [CRFN #2007000458983] [the Amended Declaration]), easements (recorded at liber/reel 4535, page 1048), and by-laws. In the complaint, plaintiff alleged that defendants Fakir and Hossain acquired title to the subject property by deed dated November 7, 2005 and recorded on December 28, 2005, and that deed contains a recitation that title to the property is subject to the “Declaration and By-Laws.” Plaintiff also alleged that pursuant to the Declaration, all unpaid sums assessed by it, together with interest thereon, are chargeable to the “unit owner” in the homeowner association, and constitute a lien against the owner’s “unit.” Plaintiff further alleged that defendants Fakir and Hossain failed to pay certain assessments fixed by its Board of Directors (Board) against the subject property when due, and therefore on May 6, 2014, it filed a notice of lien dated March 6, 2014. It is alleged that the subject lien is a continuing lien, and that plaintiff has elected to foreclose it. In the complaint, plaintiff sets forth causes of action for foreclosure, to recover unpaid assessments, legal fees, interest and other charges, including pursuant to Real Property Law §§ 339-AD2d, and 339-z, breach of contract, and to recover reasonable attorneys’ fees, including those incurred by plaintiff in connection with a separate (Civil Court) action against defendants Fakir and Hossain for a money judgment to recover the unpaid assessments, late charges, interest and other charges.

Defendants Fakir and Hossain, each appearing in a self-represented capacity, served answers, asserting various affirmative defenses, including ones based upon standing, failure to file a Request for Judicial Intervention pursuant to 22 NYCRR 202.12-a(b) and an attorneys’ affirmation pursuant to Administrative Order of the Chief Administrative Judge

(AO/431/11), and payment. They claim that in September 2012 (prior to the commencement of the action), they entered into an oral repayment agreement with plaintiff's managing agent whereby they agreed to payoff all maintenance arrears at \$100.00 per month, in addition to paying \$100.00 per month as current maintenance fees. They also claimed that plaintiff acted in bad faith by bringing this action insofar as they were not in default under such repayment agreement. Defendant Fakir also asserted an affirmative defense based upon lack of personal jurisdiction due to improper service of process, and the filing of a defective notice of pendency. Defendants Fakir and Hossain each asserted a counterclaim for an award of attorneys' fees.

Defendants HSBC Bank USA (HSBC Bank) served an answer, claiming priority of its mortgage lien over plaintiff's lien. Counsel for defendant MERS as nominee for Greenpoint Mortgage Funding Inc. (MERS) made an informal appearance on behalf of defendant MERS by virtue of his execution of a stipulation dated June 4, 2015 as counsel for both HSBC Bank and MERS.

Plaintiff previously moved for, among other things, to strike the answers of defendants Fakir and Hossain, to strike the counterclaim asserted by defendant Hossain, for summary judgment against defendants Fakir and Hossain with respect to its foreclosure claim, and for leave to amend the caption, enter a default judgment against those defendants who were in default in answering or appearing, to appoint a referee to ascertain and compute the sums due and owing plaintiff and to examine and report whether the subject premises can be sold in parcels, and to file an amended notice of pendency. In its motion papers, plaintiff variously characterized its lien as a "condominium lien," and as a lien based upon unpaid homeowner association assessments.

By order dated September 30, 2015, the motion by plaintiff was granted only to the extent of granting plaintiff leave to file an amended notice of pendency and to amend the caption deleting reference to defendants "John Doe #1" through "John Doe #10," and dismissing those affirmative defenses asserted by defendant Fakir based upon improper service of process and the filing of an alleged defective notice of pendency, and the counterclaim asserted by defendant Hossain. The court determined plaintiff had failed to establish prima facie that it had standing to foreclose the subject lien either as a condominium established pursuant to the Condominium Act, or as a homeowners' association organized pursuant to a declaration and by-laws. The court found that to the extent plaintiff relied upon the Amended Declaration, such amended declaration made no reference to plaintiff being a condominium. The court also found that to the extent the Amended Declaration referred to the establishment of plaintiff as a homeowners' association by means of such amended declaration, it was recorded after defendants Fakir and Hossain took title pursuant to the November 7, 2005 deed. The court noted that plaintiff had failed to provide the court with

a copy of its by-laws, or the declaration referred to in the deed dated April 4, 1997, which appears in the chain of title of defendants Fakir and Hossain immediately preceding the November 7, 2015 deed. The court noted that it was unclear whether the Civil Court money judgment obtained by plaintiff against defendants Fakir and Hossain was predicated upon the same claimed unpaid assessments, etc. as formed the basis for plaintiff's lien.

Plaintiff moves pursuant to CPLR 2221(e) for leave to renew its prior motion and upon renewal, for summary judgment against defendants Fakir and Hossain, to strike the remaining affirmative defenses of defendants Fakir and Hossain, for leave to appoint a referee pursuant to RPAPL 1321 to determine the amount due and owing plaintiff and whether the subject property can be sold in parcels, and to deem all non-appearing and non-answering defendants to be in default in the action. In support of the instant motion, plaintiff submits its original notice of motion and supporting papers, along with a copy of the Declaration, constituting the "new" evidence not previously submitted. Defendants Fakir and Hossain oppose the motion.

"Although a motion for leave to renew generally must be based on newly-discovered facts, this requirement is a flexible one, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided that the movant offers a reasonable justification for the failure to submit the additional facts on the original motion (*Matter of Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 AD3d 727, 728 [2d Dept 2009]; *see Calle v Zimmerman*, 133 AD3d 809 [2d Dept 2015]; *Smith v State of New York*, 71 AD3d 866, 867–868 [2d Dept 2010]). "Law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion" (*Nwauwa v Mamos*, 53 AD3d 646, 649 [2d Dept 2008]; *see* CPLR 2005; *Calle v Zimmerman*, 133 AD3d 809).

The inadvertent mistake by plaintiff's prior counsel to submit the Declaration is tantamount to an excuse of law office failure and, under the circumstances, is a reasonable justification for plaintiff's failure to submit a copy of the Declaration in support of its original motion (*see Calle v Zimmerman*, 133 AD3d 809; *Matter of Beren v Beren*, 92 AD3d 676, 677 [2d Dept 2012]; *Vita v Alstom Signaling*, 308 AD2d 582, 583 [2d Dept 2003]). That branch of the motion by plaintiff for leave to renew its prior motion is granted.

With respect to the branch of the motion for summary judgment against defendants Fakir and Hossain, it is well established that the 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 Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Where standing is put into issue by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see Deer Park Associates v Town of Babylon*,

121 AD3d 738 [2d Dept 2014]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *see also Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). A plaintiff also bears the burden of demonstrating that an affirmative defense is without merit as a matter of law when seeking its dismissal (*see Butler v Catinella*, 58 AD3d 145, 157-148 [2d Dept 2008]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]).

Based upon plaintiff's submissions in support of the instant motion, plaintiff has established that it had standing to bring this action as a homeowner's association seeking to foreclose a lien from unpaid assessments which arise from its governing Amended Declaration (*see Board of Directors of Hunt Club at Coram Homeowners Assn., Inc. v Hebb*, 72 AD3d 997 [2d Dept 2010]). The Amended Declaration authorizes the Board to levy and collect assessments to be paid by the owners of the homes within the residential community. It provides that upon an assessment becoming delinquent, the assessment, together with interest thereon and the cost of collection thereof, shall become a continuing lien against the owner's home, and authorizes plaintiff to bring an action at law and may foreclose the lien. The Amended Declaration includes a covenant that provided the covenants, restrictions, easements, charges and liens "shall be binding on all parties having any right, title or interest in the described property or any part thereof "their heirs, successors and assigns and shall inure to the benefit of each owner thereof. The Amended Declaration provides that the covenants and restrictions of the Declaration "shall run with and bind the land." The Amended Declaration also provides that it amends the Declaration to include "all blocks and lots listed in the [amended declaration]" and otherwise is identical in its provisions to the Declaration. The Declaration permits amendments, and requires any amendment to be properly recorded to be effective.

Contrary to the statement of Anne Carpenter, the vice president of the Board, in her affidavit dated February 25, 2015, the November 7, 2005 deed of defendants Fakir and Hossain contains no recitation that title to the subject property was subject to the Declaration and by-laws. Nevertheless, it is undisputed that the "described property" as defined in the Declaration, included the lot designated as Block 521, Lot 97, i.e. the subject property. Pursuant to the Declaration, the owners of the homes in the community, whether or not expressed in their deed or other conveyance, were deemed to covenant and agree to pay to plaintiff such assessments as were fixed by the Board. It has been held that a requirement that owners of homes pay assessments levied by a board of directors of a homeowners' association is a covenant which runs with the land (*see Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank*, 278 NY 248 [1938]). Furthermore, a property owners' association, formed as a means by which property owners can advance their common interest, may enforce a covenant running with the land in its capacity as the representative of the

property owners (*see id.*; *see also Westmoreland Assn. v West Cutter Estates*, 174 AD2d 144 [2d Dept 1992]).

To the extent defendants Fakir and Hossain claim that the Declaration was never recorded against their property, they admit that Fakir originally took title to the subject property by deed dated April 4, 1997 from Briarwood Avenel Bell Associates. Briarwood Avenel Bell Associates was a sponsor and a joint venturer, along with the NYC Partnership Housing Development Fund Co., Inc., the owner and common grantor of the property forming the community. The April 4, 1997 deed specifically referenced the Declaration “as the same may be amended from time to time,” and provided that the provisions of the Declaration, together with any amendments thereto, constituted covenants running with the land. Therefore, because the April 4, 1997 deed appears in their chain of title, defendants Fakir and Hossain clearly were on notice of the covenants, restrictions, etc. imposed by the Declaration, and were bound thereby. Defendants Fakir and Hossain have made no showing that their lot is no longer burdened by the covenants found originally in the recorded Declaration, and as carried forward in the Amended Declaration, including the covenant and agreement to be subject to assessments fixed by the Board and assessed to the members, and the liens created for delinquent assessments. Therefore, that branch of the motion by plaintiff to dismiss the affirmative defenses raised by defendants Fakir and Hossain based upon lack of standing is granted.

Plaintiff, however, has failed to establish *prima facie* that the subject lien is valid insofar as the notice of lien filed against the subject property includes “late fees” and “attorney charges.” Plaintiff has failed to demonstrate that the Board is entitled to impose late fees when assessments are not paid when due. The Amended Declaration makes no reference to late fees and plaintiff has not provided a copy of any by-laws to show it is authorized to impose them on home owners, including defendants Fakir and Hossain. Plaintiff has also failed to demonstrate that the Amended Declaration provides that unpaid late fees or attorneys’ fees may be included in an assessment, or as a charge which forms a lien or part thereof. The Amended Declaration provides that the “cost of collection” of a delinquent assessment shall be a continuing lien, but does not expressly provide that counsel fees, as a cost of collection, may form a lien. To the extent the Amended Declaration also provides that the expense of enforcement by plaintiff shall be chargeable to the [o]wner of the [h]ome violating the covenants, and shall constitute a lien on the [ho]me...,” such language also does not expressly include attorneys’ fees as an expense of enforcement which may form a lien (*see e.g., City of Buffalo v Clement Co.*, 28 NY2d 241, 262–263 [1971]; *Equitable Lbr. Corp. v IPA Land Development Corp.*, 38 NY2d 516 [1976]). Rather, the Amended Declaration permits the inclusion of attorneys’ fees as part of the judgment.

In addition, defendants Fakir and Hossain have raised a triable issue of fact as to whether there was an oral agreement with Barbara DeSantis, a representative of plaintiff's managing agent, in August 2012 following plaintiff's obtaining a money judgment against them, whereby they were to repay the outstanding maintenance arrears over time, with the understanding that plaintiff would forbear from bringing a foreclosure action. There is also a question of fact whether plaintiff accepted such payments in accordance with the oral agreement and defendants Fakir and Hossain have now satisfied that portion of the lien which was predicated upon the delinquent assessments.

Under such circumstances, summary judgment against defendants Fakir and Hossain is inappropriate. That branch of the motion by plaintiff for summary judgment against defendants Fakir and Hossain and to dismiss the affirmative defense asserted by defendants Fakir and Hossain based upon payment pursuant to an oral agreement is denied.

That branch of the motion by plaintiff to dismiss the affirmative defense asserted by defendants Fakir and Hossain based upon non-compliance with 22 NYCRR 202.12-a(b) and the Administrative Order (AO/431/11) is granted. The instant action does not involve the foreclosure of a residential mortgage involving a home loan, and therefore the court rule and the Administrative Order are inapplicable.

Those branches of the motion by plaintiff for leave to appoint a referee and for leave to enter a default judgment against defendant MES are denied. With respect to that branch of the motion by plaintiff for leave to enter a default judgment against defendant HSBC Bank, the court notes that HSBC Bank is not in default having appeared by service of an answer and plaintiff, in its proposed order of reference, acknowledges that HSBC Bank's mortgage lien is superior to the subject lien.

Dated: July 22, 2016

J.S.C.