

Whitney Condominium v Tempesta
2008 NY Slip Op 33767(U)
July 30, 2008
Civil Court of the City of New York, New York County
Docket Number: Index No. 401564/09
Judge: Jose A. Padilla, Jr.
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK PART 63

-----X
WHITNEY CONDOMINIUM, BY ITS BOARD
OF MANAGERS

Plaintiff

against

RICHARD TEMPESTA and EDWARD
TEMPESTA, individually and as the Personal
Representative of the ESTATE OF ANTHONY
TEMPESTA

Defendants
-----X

201564/09
Index # ~~030896707~~
Submitted July 11, 2008

FILED
AUG 07 2008
NEW YORK COUNTY
CIVIL COURT

Recitation, as required by CPLR§ 2219(a), of the papers considered in the review of this motion
for summary judgment

Notice of Motion.....	1
Opposition.....	2
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Upon a review of the instant papers and oral argument, plaintiff's motion for summary judgment is granted as to liability only. Plaintiff condominium Board of Managers established *prima facie* entitlement to summary judgment, as a matter of law, on the issue of liability only, against defendant owners.¹ Defendants are not entitled to withhold common charges and fees on their condominium unit (see, Bd. of Mgrs. of Madison Med. Bldg. Condo. v Rama, 249 AD2d 140 [1st Dept 1998]; Bd. of Mgrs. of the 200 W. 109 Condo. v Baker, 244 AD2d 229 [1st Dept 1997]; Bd. of Mgrs. of Greentree at Murray Hill v Golub, 17 Misc3d 128(a)[AT 1st Dept 2007]). In addition, plaintiff also proved *prima facie* entitlement to the repair fees that it incurred for the subject unit and defendants failed to raise any material issues of fact on the issue of liability.

¹ Pursuant to a unit deed, 5/23/84, Edward Tempesta, Richard Tempesta and Anthony Tempesta are the "grantees" of unit 14C at the subject premises (see, Exh A, opp papers). Pursuant to Letters of Administration recorded on 7/17/97, Edward Tempesta is the personal representative of the estate of Anthony Tempesta(see, Exh A, reply papers).

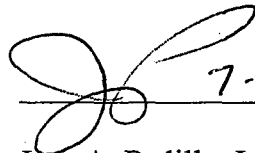
Here, plaintiff condominium's Board of Managers incurred repair costs which arose from the rupture of a gas pipe in defendants' unit, 14C located at 311 East 38th Street, attributable to drilling in the wall by defendant Edward Tempesta's son. The building's maintenance man averred to: defendant's son's admission; the fire department's arrival on the scene; discovery that a hole in the wall went through one of the condominium's main risers; and, Con Edison's turning off three building gas lines as a precautionary measure. Moreover, plaintiff's property manager's affidavit detailed each charge assessed against defendants, which they failed to object to other than in a conclusory and unsubstantiated manner (see, Gilbert Frank Corp. v Fed. Ins Co. 70 NY2d 966 [1988]), which they are obligated to pay under the terms and conditions of the condominium by-laws (see, Bd. of Mgrs. of 200 W 109 Condo. v Baker, supra; see also Bd. of Mgrs. of Greentree at Murray Hill v Golub, supra) . Accordingly, plaintiff established defendants' liability for common charges , fees and repair costs for unit 14C of the subject condominium complex.

Plaintiff's request for money damages however is denied as it failed to establish entitlement to a judgment, as a matter of law, to a certain amount with reasonable certainty. The court notes that the summons and complaint's single cause of action, dated June 4, 2007 seeks: \$2,230.20 in common charges; \$895.44 in capital assessments; \$1126.29 in sublet fees; \$650.00 in late fees, and a repair fee in the sum of \$17,648.55, exclusive of legal fees due through June 2007, totaling \$22,550.48 with interest from June 1, 2005.² The prayer of relief contained in the affidavit of the managing agent seeks: \$7,771.11 in common charges and fees; \$18,631.34 for repairs, and \$6,368.57 in legal fees for a total of \$32,770.91. Meanwhile, plaintiff counsel's affidavit seeks \$17,817.07 in common charges and fees; \$18,310.29 in repairs; \$6,368.57 in legal fees for prior counsel, and \$8,112.00 for attorney fees on the instant motion for a grand sum of \$50,607.93. In the absence of a formal motion to amend the *ad damnum* clause, damages must be limited to the amount sought in the complaint (Reid v Weir-Metro Ambulance Serv., Inc., 191 AD2d 309 [1st Dept 1993]). Furthermore, the varying amounts sought on the instant summary judgment motion both surpass this Court's subject matter jurisdictional limit of

²The invoice ledger shows the outstanding condominium fees balance through June 2007 to be \$23,412.72 exclusive of legal fees.

\$25,000.00(NYCCA§ 201). Under these circumstances, any award on damages, as limited by the complaint, must await a trial for an assessment of a monetary award, if any, upon plaintiff's filing of a notice of trial and payment of any and all appropriate fees.³ Plaintiff is directed to serve a copy of this Decision with notice of entry upon defendants *via* certified mail return requested.

This constitutes the Decision and Order of this Court.



Jose A. Padilla, Jr.
Judge of the Civil Court

³The court notes there is a companion case entitled Whitney Condominium by its Board of Managers v Richard Tempesta and Edward Tempesta, individually and as the personal representative of the Estate of Anthony Tempesta, Index # 30897/07. There, plaintiff is seeking common charges/ fees, and legal fees from the same parties who also own condo unit 15C, at the same premises (see, decision/order decided herewith).