

**Board of Directors of Country Pointe at Melville  
Homeowners Assn., Inc. v Bathija**

2009 NY Slip Op 32314(U)

September 30, 2009

Supreme Court, Suffolk County

Docket Number: 7750/2005

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 7750/2005

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

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THE BOARD OF DIRECTORS OF  
 COUNTRY POINTE AT MELVILLE  
 HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

-against-

MEENA D. BATHIJA, RICKY BATHIJA,  
 MATT BATHIJA and "JOHN DOE #2" through  
 "JOHN DOE 10", the last nine (9) names being  
 fictitious and unknown to plaintiff, the persons or  
 parties intended being the persons or parties, if  
 any, having or claiming an interest in or lien upon  
 the premises described in the complaint,

Defendants.

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ORIG. RETURN DATE: OCTOBER 24, 2005  
 FINAL SUBMISSION DATE: MARCH 19, 2009  
 MTN. SEQ. #: 001  
 MOTION: MOT D

ORIG. RETURN DATE: NOVEMBER 10, 2005  
 FINAL SUBMISSION DATE: MARCH 19, 2009  
 MTN. SEQ. #: 002  
 MOTION: MD

ORIG. RETURN DATE: OCTOBER 24, 2005  
 FINAL SUBMISSION DATE: MARCH 19, 2009  
 MTN. SEQ. #: 003  
 CROSS-MOTION: XMD

ORIG. RETURN DATE: APRIL 23, 2007  
 FINAL SUBMISSION DATE: MARCH 19, 2009  
 MTN. SEQ. #: 004  
 MOTION: MD

ORIG. RETURN DATE: OCTOBER 2, 2008  
 FINAL SUBMISSION DATE: MARCH 19, 2009  
 MTN. SEQ. #: 005  
 MOTION: MG

**PLTF'S/PET'S ATTORNEY:**  
 MARC H. SCHNEIDER, P.C.  
 666 OLD COUNTRY ROAD - SUITE 412  
 GARDEN CITY, NEW YORK 11530  
 516-393-5555

**DEFT'S/RESP ATTORNEY:**  
 MADHUREEMA GUPTA, ESQ.  
 37-52 72 STREET  
 JACKSON HEIGHTS, NEW YORK 11372  
 917-842-2246

**REFEREE:**  
 JOSEPH J. SNELLENBURG, II, ESQ.  
 55000 MAIN ROAD  
 P.O. BOX 576  
 SOUTHOLD, NEW YORK 11971  
 631-765-1271

Upon the following papers numbered 1 to 23 read on these motions FOR A DEFAULT JUDGMENT, APPOINTMENT OF A REFEREE, A STAY, TO REJECT REFEREE'S REPORT, AND TO AMEND PLEADINGS.

Notice of Motion and supporting papers 1-3; Order to Show Cause and supporting papers 4-6; Notice of Cross-Motion and supporting papers 7-9; Affirmation in Opposition to Order to Show Cause and Cross-Motion and supporting papers 10, 11; Replying Affirmation and supporting papers 12, 13; Notice of Motion and supporting papers 14-16; Notice of Motion and supporting papers 17-19; Affirmations in Opposition and supporting papers 20, 21; Replying Affirmation and supporting papers 22, 23; it is,

**ORDERED** that this motion by plaintiff (seq. #001) for an Order, pursuant to CPLR 3215, directing the entry of a default judgment in favor of plaintiff, and pursuant to RPAPL 1321, for the appointment of a referee to compute and report the amount due to plaintiff, is hereby determined as provided hereinafter; and it is further

**ORDERED** that this motion by the self-represented defendants MEENA D. BATHIJA and RICKY BATHIJA ("defendants") (seq. #002) by Order to Show Cause dated October 31, 2005, and this cross-motion by defendants (seq. #003) for an Order staying the prohibition issued by plaintiff to defendants to refrain from using any or all of the common elements and/or areas of the Home Owner Association, and compelling plaintiffs to provide a Verified Bill of Particulars supporting allegations contained and the amounts claimed as due and owing in the verified complaint, and for related relief, are both **DENIED** as moot; and it is further

**ORDERED** that this motion by defendants (seq. #004) for an Order, pursuant to CPLR 4403, rejecting and setting aside the report of the referee herein dated March 19, 2007, is hereby **DENIED** as moot; and it is further

**ORDERED** that this motion by plaintiff (seq. #005) for an Order, pursuant to CPLR 3025, granting plaintiff leave to amend its complaint dated March 18, 2005, is hereby **GRANTED** for the reasons set forth hereinafter.

This is an action commenced by plaintiff THE BOARD OF DIRECTORS OF COUNTY POINTE AT MELVILLE HOMEOWNERS ASSOCIATION, INC. ("plaintiff") to recover unpaid common charges alleged to be due and owing pursuant to the By-Laws of the Homeowners Association from the defendant unit owners. Since the inception of this litigation, the parties have

sharply contested the amounts due and owing for common charges in this matter, and presented the Court with various computations and conflicting allegations regarding attempts to determine the appropriate amounts due. Plaintiff argues, among other things, that the self-represented defendants, who are now represented by counsel, have not answered the complaint and are in default.

The first three motions at bar (seq. #001-003) were previously submitted to the Court and decided by Order dated May 26, 2006 (Werner, J.) to the extent that a referee was appointed in this matter to ascertain and compute the amounts due plaintiff and to report to the Court. The Court adjourned the three motions to July 6, 2006, pending the report of the referee. The referee issued his report, dated March 19, 2007, wherein he indicated that as of February 1, 2007, the amount due plaintiff for unpaid assessments and related costs was \$35,247.41. The aforementioned amount encompassed principal and interest due, together with other sums secured by the condominium common charge lien filed against the premises. Thereafter, the self-represented defendants filed a motion (seq. #004) to reject the referee's report.

On or about November 8, 2006, prior to the issuance of the referee's report, a separate foreclosure action was commenced by Midwest First Financial LP, IV ("Midwest"), the holder of the first mortgage on the subject premises. On December 4, 2007, a Judgment of Foreclosure and Sale (Jones, J.) was granted in that action, and the premises was sold to Midwest at a foreclosure sale in May of 2008 for the upset price. As such, the lien plaintiff seeks to enforce herein was extinguished and its foreclosure cause of action was rendered moot. Accordingly, plaintiff then filed a motion (seq. #005) for leave to amend its complaint to assert causes of action for a money judgment in the amount of \$46,962.58 representing the current amounts due plaintiff for unpaid assessments, for breach of contract, and for reasonable attorneys' fees in the amount of \$5,000.00 pursuant to the terms of the By-Laws. All five motions were adjourned numerous times by the parties on consent in an attempt to amicably resolve this matter, but to no avail. The Court has now consolidated these five applications for the purpose of rendering the within decision and Order.

Plaintiff's initial motion sought a default judgment in favor of plaintiff and against defendants, and the appointment of a referee. As discussed hereinabove, by Order dated May 26, 2006 (Werner, J.), the motion was granted solely to the extent that a referee was appointed to ascertain and compute the amounts due plaintiff. As such, this Court must address that branch of plaintiff's

application for a default judgment based upon defendants' non-appearance. Plaintiff alleges that defendants failed to appear or respond to the summons and verified complaint, and the time to do so has since expired. In support of the application, plaintiff has submitted, among other things, the within summons and verified complaint, and an affidavit of the president of plaintiff detailing the amount due plaintiff at that time. Further, plaintiff has submitted proof of compliance with the additional notice requirement of CPLR 3215 (g) (3) (i). Although defendants filed two motions thereafter (seq. #002 and #003) seeking a myriad of affirmative relief, they failed to address and/or oppose plaintiff's application for a default judgment. Defendants annex an unsigned "answer" to their moving papers, but plaintiff alleges that defendants never served such answer upon plaintiff, timely or otherwise, and that defendants failed to file such answer or proof of service thereof with the Court. Defendants do not refute plaintiff's allegations with respect to the default. In view of the foregoing, the Court finds that defendants are in default in answering plaintiff's complaint. However, as will be discussed more fully *infra*, plaintiff now seeks leave to serve an amended complaint upon defendants.

As the subject premises has now been sold at a foreclosure sale, defendants' motions (#002 and #003) for an Order staying the prohibition issued by plaintiff to defendants to refrain from using any or all of the common elements and/or areas of the Home Owner Association and other relief, as well as defendants' motion (seq. #004) for an Order rejecting and setting aside the referee's report, are all **DENIED** as moot. Moreover, the Court finds that these motions seeking affirmative relief are procedurally defective in light of defendants' default in answering the complaint. In any event, with respect to defendants' motion to reject the referee's report, the gist of defendants' argument is that the two percent per month late fee and interest charged on the unpaid assessments are usurious, and the attorneys' fee sought based upon that amount is therefore excessive. As such, defendants argue that the amount reflected in the referee's report is illegal and unconscionable. However, the Court finds that the By-Laws provide for the imposition of late fees and interest on unpaid assessments, and that reasonable attorneys' fees are chargeable to any homeowner in the association. The Court rejects defendants' contention that the late fee and interest charged by plaintiff were usurious. The late fee and interest were not in connection with a loan or the forbearance of money and thus the usury statute does not apply (see General Obligations Law § 5-501 [2]; *F. K. Gailey Co. v. Wahl*, 262 AD2d 985 [1999]; *Waterbury v City of Oswego*, 251 AD2d 1060 [1998]).

Turning to plaintiff's motion to amend its complaint, plaintiff seeks leave to amend its complaint to assert three causes of action, to wit: (1) for a money judgment in the amount of \$46,962.58 representing the amounts due plaintiff for unpaid assessments; (2) for breach of contract (breach of the By-Laws); and (3) for reasonable attorneys' fees in the amount of \$5,000.00 pursuant to the terms of the By-Laws. The first two causes of action are sought to be asserted in lieu of plaintiff's initial cause of action for a judgment of foreclosure and sale.

In opposition, defendants argue that they will be prejudiced by the amendment as plaintiff now seeks a money judgment against them personally, as opposed to seeking the relief against the collateral property. Further, defendants allege that plaintiff's amendment is barred by the doctrine of laches, as plaintiff's original complaint was served in or about March of 2005.

CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" absent surprise or prejudice resulting from the delay (CPLR 3025 [b]). Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (CPLR 3025 [b]; *Pergament v Roach*, 41 AD3d 569 [2007]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 41 AD3d 554 [2007]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

Here, the Court finds that defendants cannot claim surprise or prejudice from the delay. Initially, defendants are in default in responding to plaintiff's original complaint. Notwithstanding the foregoing, defendants have been aware of this action since its inception and have repeatedly contested the charges claimed by plaintiff. Plaintiff's amended complaint is based upon the same set of facts and circumstances giving rise to this action. In addition, the Court notes that plaintiff's initial complaint gave defendants notice that a deficiency judgment would be sought against them personally for any debts secured by the assessment lien which was not satisfied by the proceeds of the foreclosure sale. Moreover, it cannot be said that the three proposed causes of action are clearly insufficient or patently lack merit given the terms and provisions of the By-Laws of the Homeowners Association (see e.g. *Sample v Levada*, 8 AD3d 465 [2004]). Finally, the Court finds unavailing defendants' laches argument, as the property was only sold at foreclosure sale in May of 2008, and plaintiff filed this application four months later on September 11, 2008.

Accordingly, plaintiff's motion for leave to amend is **GRANTED** to the extent that plaintiff's proposed amended complaint, as annexed to the instant moving papers, shall be deemed served upon defendants as of the date of service of the within Order upon defendants with notice of entry. Defendants then may serve responsive pleadings in accordance with CPLR 3025 (d).

The foregoing constitutes the decision and Order of the Court.

Dated: September 30, 2009

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court