

**Board of Mgrs. of 310 W. 52nd St. Condominium v  
EI-AD 52 LLC**

2009 NY Slip Op 32578(U)

October 29, 2009

Supreme Court, New York County

Docket Number: 105762/08

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN  
*Justice*

PART 11

The Board of Managers of 310  
W 52nd St. Condominium  
Plaintiffs,

- v -

EZ-AD 52 LLC, et al  
Defendants.

INDEX NO. : 105762/08  
MOTION DATE:  
MOTION SEQ. NO.  
MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is determined  
in accordance with the annexed decision and order.

**FILED**  
NOV 05 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: October 29, 2009

J.S.C.

Check one: [ ] FINAL DISPOSITION

[X] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
THE BOARD OF MANAGERS OF 310 W.52ND ST.  
CONDOMINIUM,

Plaintiff,

-against-

EL-AD 52 LLC, ANGELINE THOMAS,  
YOEL SHARGIAN and ALBERTA NICOLSI,

Defendants.  
-----X

JOAN A. MADDEN, J.:

Plaintiff The Board of Managers of 310 W.52nd St. Condominium (the "Board") moves for an order pursuant to CPLR 3212 granting partial summary judgment on its first and second causes of action for breach of contract against defendant El-AD 52 LLC ("El-Ad" or the "Sponsor"), seeking damages consisting of unpaid common charges, late fees, interest in the total amount of \$677,536.96, and attorney's fees. Defendant El-Ad opposes the motion.

The following facts are not disputed unless otherwise noted. Defendant El-Ad is the Sponsor of a newly constructed condominium building located at 310 West 52<sup>nd</sup> Street in Manhattan, which contains 215 residential apartment units and 209 storage units. Pursuant to the Offering Plan, the Sponsor maintained exclusive control of the condominium's Board of Managers from the first closing of residential units until December 6, 2007, when the residential unit owners elected a majority of the Board members.

The President of the Board, Brian McGrath, submits an affidavit that in "early 2008, we [the Board] became aware of the Sponsor's common charge arrears" and that the prior Board,

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which had been controlled by the Sponsor, “neglected to impose or collect late fees and interest on unpaid, partially paid or belatedly paid common charges on units owned by the Sponsor.” As a result McGrath explains that at the January 13, 2008 board meeting, “the Board resolved to impose late fees and interest on late common charge payments, pursuant to the Condominium’s by-laws,” but also resolved “to provide for an ‘amnesty period’ during which unit owners (including the Sponsor) could pay the amount outstanding on their account and in incur late fees or interest.”

By letter dated February 11, 2008, the Board (through its managing agent, Cooper Square Realty, Inc.) informed El-Ad that “a review of your accounts show that El-Ad 52 LLC is in arrears of common charges to the 310 West 52<sup>nd</sup> Street Condominium in the amount of \$129,705.26, excluding late fees and interest charges.” The Board advised that pursuant to the by-laws, it was implementing “late fee of \$150.00 per month [per unit] for any common charge which remains unpaid for fifteen (15) days” and that the “by-laws mandate that interest at the rate of 2.08% per month be assessed on any delinquents common charges.” The Board further advised that El-Ad owed a total of \$555,846.53 in common charges, late fees and interest, and enclosed a summary of El-Ad’s retroactively recalculated account history from January 2007 through January 2008. The Board stated that it would agree to waive all late fees and interest charges, if El-AD paid the \$129,705.26 in common charges alone, by February 21, 2008.

On April 23, 2008, the Board commenced the instant action against El-Ad, and the three individual members of the “initial Sponsor-Controlled Board.” The complaint asserts three causes of for breach of contract action against El-Ad, seeking damages in the amount of \$677,536.96 for unpaid common charges, late fees and interest through April 2008 (First Cause

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of Action), attorney fees (Second Cause of Action), damages in the amount of \$61,425 for costs related to security personnel (Sixth Cause of Action). As to the individual defendants, the complaint asserts three causes of action for breach of fiduciary duty (Third, Fourth and Fifth Causes of Action).

Defendants answered asserting thirteen affirmative defenses and one counterclaim, including estoppel, waiver, unclean hands, payment, improper retroactive application of late fees and improper billing. Specifically, the Seventh Affirmative Defense alleges that defendants “are not liable for any of claims . . . because the Sponsor paid bills and expenses on behalf of the Plaintiff, and the Sponsor is entitled to a set-off for those payments against amounts allegedly owed to the plaintiff by defendant El-Ad 52 LLC.” The Thirteenth Affirmative Defense and First Offset and First Counterclaim allege that El-Ad “made payments for utilities and to vendors on behalf of the Condominium,” and that plaintiff failed to properly credit El-Ad for those payments and improperly billed El-Ad for common and other charges. Plaintiff is now moving for partial summary judgment against defendant El-Ad on the breach of contract claims for unpaid common charges, late fees, interest and attorneys’ fees.

As the proponent of a motion for summary judgment, plaintiff bears the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form establishing the existence of a material issue of fact requiring a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). Moreover, “[w]here a viable counterclaim arises

from the same underlying transaction as is involved in the main action and is inseparable from or inextricably intertwined with that transaction, summary judgment should be denied.” Yoi-Lee Realty Corp. v. 177<sup>th</sup> Street Realty Assocs, 208 AD2d 185, 189 (1<sup>st</sup> Dept 1995); see also Pronti v. Grigoriou, 49 AD3d 1135 (3<sup>rd</sup> Dept 2008).

In support of its motion for summary judgment, plaintiff submits several affidavits and numerous documents, including the pleadings, the by-laws, invoices and correspondence. According to Marc Kotler, a vice president of Cooper Square Realty, as of October 2008, El-Ad owed \$143,349.98 in common charges and storage unit fees, and with the addition of late fees billed at \$150 per unit, per month, and interest billed at 2.08% per month, El-Ad owed a total of \$852,956.63.

In opposing summary judgment, El-Ad submits an affidavit of its project manager, Yoel Shargian, denying that the Sponsor owes common charges for February 2007, and asserting that it is entitled to a credit or offset for the payments it made to Con Edison for steam charges, in the amount of \$156,171.06. Citing to the by-laws, El-Ad argues that steam consumption is a common expense of the condominium and therefore the its steam payments “would offset the common charges that plaintiff contends were not paid.” El-Ad also argues it is entitled to discovery to “explore whether Cooper Square, the plaintiff’s agent, effectively waived any conceivable penalty that the Board could levy,” and issues of fact exist as to whether “plaintiff is entitled to retroactive late fees that were not in effect at the time of the alleged missed payment.” Ed-Ad asserts that plaintiff is seeking a “draconian amount of interest and penalties in connection with a late fee policy imposed by plaintiff retroactively,” and the claim for \$709,000 in late fees is “unreasonable and confiscatory in nature,” “unenforceable,” “disproportionately excessive and

cannot be imposed retroactively, especially where there is a legitimate dispute as to whether the Sponsor even owes any common charges.” El-Ad further argues that plaintiff’s claim for attorneys’ fees is premature, since the litigation is still ongoing and neither party has yet to prevail.

Plaintiff is not entitled to summary judgment on its claim for common charges, in view of El-Ad’s defense of payment and counterclaim for an offset or credit, based on the steam charge payments it made on behalf of plaintiff. While the by-laws clearly and unequivocally impose an obligation on unit owners to pay common charges, and authorize the imposition of late fees and interest upon a default in payment of common charges, the by-laws likewise impose a clear and unequivocal obligation on the part of the condominium to pay for steam service charges as a “common expense” of the condominium. El-Ad’s counterclaim is related to plaintiff’s main action, as they are both based on financial obligations created under the by-laws. Ordinarily if the amount of the main claim is in excess of the counterclaim, summary judgment can be awarded to plaintiff and the counterclaim is severed. Here, though, issues of fact exist as to whether plaintiff is entitled to late fees and interest as computed in the amount of more than \$700,000, on the principal sum of \$143,349.98, and plaintiff does not deny that El-Ad paid for steam charges on behalf of the condominium in the amount of \$156,171.06.

Specifically, El-Ad asserts defenses of waiver and estoppel, and objects to plaintiff’s retroactive application of its late fee policy, imposing a late fee of \$150 per month, per unit. Since waiver involves a voluntary and intentional relinquishment of a known right and is essentially a matter of intention, it is generally a matter for the jury. See Ess & Vee Acoustical & Lathing Contractors, Inc. v. Prato Verde, Inc., 268 AD2d 332 (1<sup>st</sup> Dept 2000); Infotech

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Management Inc. v. Morse, 150 AD2d 638 (2<sup>nd</sup> Dept 1989).

The undisputed record shows that in February 2008, plaintiff first began charging El-Ad late fees and interest on common charges purportedly owed going back one year to February 2007. The record also shows that these retroactive late fees and interest charges were arrived at by recalculating defendant's balance over the year, and reattributing each month's payment to what plaintiff believed was the oldest outstanding balance, which resulted in an outstanding balance for every month, to which late fees of \$150 per unit and interest of 2.08% were added each month. As a result of plaintiff's retroactive recalculations, it determined that El-Ad owed through April 2008, common charges in the amount of \$143,349.98, and together with late fees and interest the total amount owed is \$852,956.63.

The record also shows that just before plaintiff's managing agent, Cooper Square, sent the January 18, 2008 letter advising Ed-Ad for the first time that it owed \$129,705.26 in common charges and \$555,846.53 in common charges, late fees and interest, Cooper Square was engaged in efforts to reconcile the Sponsor's unpaid common charges with the payments the Sponsor had made to Con Edison for steam charges on behalf of the condominium. Ed-Ad submits January 30 and February 1, 2008 e-mails from Cooper Square to El-Ad, enclosing the "Sponsor Common Charge and Steam Reconciliation for you review." El-Ad's project manager states in his affidavit that Cooper Square was reconciling the steam payments against the common charges, "until it was apparently told not to do so by the newly elected Board of Manager," and the fact that managing agent was reconciling the account suggests that the managing agent had concluded that El-Ad Sponsor was entitled to a credit for the steam payments.

Under these circumstances, where the main claim and the counterclaim are related, and

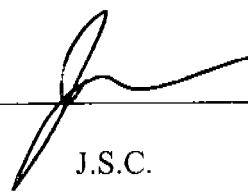
issues of material fact exist as to the main claim, plaintiff is not entitled to summary judgment. .

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied.

DATED: October 29, 2009

ENTER:

  
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J.S.C.

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