

**Board of Mgrs. of Lido Beach Towers Condominium
v Berenger**

2010 NY Slip Op 30729(U)

March 25, 2010

Supreme Court, Nassau County

Docket Number: 015216/09

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**THE BOARD OF MANAGERS OF LIDO BEACH
TOWERS CONDOMINIUM, suing on behalf of
the unit owners,**

TRIAL TERM PART: 45

Plaintiffs,

-against-

INDEX NO.: 015216/09

**MOTION DATE: 11-27-09
SUBMIT DATE: 2-11-10
SEQ. NUMBER - 001**

KENNETH A. BERENGER, JR.,

Defendant.

**MOTION DATE: 1-11-10
SUBMIT DATE: 2-11-10
SEQ. NUMBER - 002**

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 10-22-09.....1**
- Affidavit in Support, (Shari Morse), dated 9-30-09.....2**
- Affidavit in Support, (Tara A. Tighe, Esq.), undated.....3**
- Notice of Cross Motion, dated 12-15-09.....4**
- Affirmation in Opposition, dated 1-27-10.....5**

This motion by plaintiff pursuant to CPLR 3212 for summary judgment against defendant for the relief demanded in the complaint is denied.

That branch of the cross motion by defendant made pursuant to CPLR 602 to consolidate the instant action with an action pending before the Hon. Bruce Cozzens, entitled *The Glasser Family Limited Partnership II v The Board of Managers of the Lido Beach Towers Condominium*, bearing index number 6358/09, is granted. That branch of the cross motion that is for leave pursuant to CPLR 3025(b) to amend defendant's answer

is granted to the extent that the defendant is granted leave to serve an amended answer in the form annexed to the cross motion, excepting the second, sixth and tenth counterclaims, which are deemed stricken therefrom. The amended pleading shall be deemed properly served with the cross motion as of the date of this decision and order, and plaintiff shall respond to the counterclaims within 30 days of such date.

Since June 22, 2004, defendant has been the owner of unit 2Y in the Lido Beach Towers Condominium located at 2 Richmond Road, Lido Beach, New York. In this action, plaintiff Board of Managers of Lido Beach Towers Condominium (the Board) seeks to recover defendant's pro-rata share of unpaid common charges and prior assessments, together with expenses incurred in connection with the collection of same, in the aggregate amount of \$123,679.31, predicated on theories of breach of contract, unjust enrichment and account stated as alleged in the first through third causes of action of the complaint. In the fourth cause of action, plaintiff Board seeks recovery of legal fees.

In opposition to plaintiff's motion for summary judgment, defendant has cross-moved to consolidate this action with an action pending before Justice Cozzens, bearing index number 6358/09, and titled:

The Glasser Family Limited Partnership II
v
The Board of Managers of the
Lido Beach Towers Condominium

and for leave to interpose an amended answer. In the proposed amended answer, defendant asserts ten counterclaims which mirror the claims asserted in the second

amended complaint in the Glasser Family ¹ lawsuit. Both pleadings challenge the propriety of the assessment levied against unit owners for restoration/renovation projects at the Condominium.

Pursuant to the order of the Hon. Antonio I. Brandveen, the Article 78 proceeding brought by The Glasser Family Limited Partnership II against The Board of Managers of the Lido Beach Towers Condominium was dismissed ² and a declaration entered in favor of the Board of Managers whose actions concerning the contested 2009 assessment were found to have been "authorized, taken in good faith, and in furtherance of the legitimate interests of the . . . condominium." The second amended complaint in the second action brought by the Glasser Family (index number 6358/09) challenges both the 2007 and the 2009 assessments and seeks injunctive relief based on claims sounding, *inter alia*, in fraud, illegal recording of a lien, harassment and breach of the Lido Beach Towers' by-laws.

In support of his cross motion, defendant in this present matter does not deny the existence of unpaid common charges/assessments but avers that, in imposing the 2007 and 2009 assessments on unit owners, the Board violated New York State law and the rules and procedures required by the by-laws of the Condominium association. He further

¹ The Glasser Family Limited Partnership II commenced two separate matters in Nassau County: an article 78 proceeding bearing index number 6259/09 challenged the 2009 assessment and an action [index number 6358/09 challenged both the 2007 and 2009 assessments.

² The petition specifically challenged the \$2,600,000 assessment approved by the unit owners on August 16, 2009 to complete repair work to the roof and facade of the Lido Beach Towers Condominium.

[* 4]

contends that factual issues exist as to the legitimacy of the actions taken by the Board in imposing the challenged assessments.

Plaintiff's opposition to defendant's cross motion is predicated on the grounds that the assessment amounts owed by defendant Berenger, and billed to him in March, June, and November of 2008 and in May and July of 2009, were approved by the unit owners, after proper notice, at meetings held on July 22, 2007 and February 23, 2009 respectively. Moreover, plaintiff invokes the doctrine of collateral estoppel and urges the undersigned to give preclusive effect to Justice Brandveen's finding that the 2009 assessment was a legitimate exercise of the Board's power.

New York Real Property Law Article 9-B governs the formation and obligations of condominiums and the unit owners. Once created, the administration of a condominium's affairs is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners regarding the manner in which the condominium will operate and which sets forth the respective rights and obligations of unit owners with respect to their own units and the common elements of the condominium. Neither party has provided the Court with a complete copy of the Condominium by-laws.

By purchasing a unit in a condominium, each unit owner, by contract and by statute, enters into a fiduciary relationship with every other unit owner. One of the elements of that relationship is the obligation to pay common charges irrespective of any disputes that the individual unit owner has with another unit owner, the board of

managers or third parties acting on behalf of the board. Real Property Law §339-e(2) defines common charges as each unit's proportionate share of the common expenses in accordance with the common interest. Common expenses are defined as (a) expenses of operation of the property and (b) all sums designated common expenses by or pursuant to statute, the declaration or by-laws. Real Property Law §339-e(4).

The statutory scheme requires that all unit owners comply with the by-laws, rules, regulations, resolutions and decisions adopted pursuant thereto. Real Property Law §339-j. Pursuant to §4 and §5 of the Lido Beach Towers Condominium by-laws, all units owners are obligated to pay common charges assessed by the board of managers as well as additional common charges or special assessments. In the event of default, unit owners are obligated under § 6 to pay interest, attorneys' fees and expenses incurred by the board in collecting such charges.

The obligations of a unit owner to pay common charges and special assessments cannot be avoided (Real Property Law §339-x), and are, for the most part, absolute. *Board of Mangers of First Ave. Condominium v Shandel*, 143 Misc 2d 1084, 1087 (N.Y. City Civ. Ct. 1989). When a unit owner challenges an action by a condominium board of managers, the court will apply the business judgment rule. *Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 539 (1990); *Helmer v Comito*, 61AD3d 635, 636 (2d Dept. 2009); *Acevedo v Town ' N Country Condominium, Section I, Bd. of Managers*, 51 AD3d 603, 604 (2d Dept. 2008). Under the business judgment rule, the inquiry is limited to whether the board acted within the scope of its authority under the by-laws (a necessary

threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. *Perlbinder v Board of Mangers of 411 East 53rd Street Condominium*, 65 AD3d 985, 989 (1st Dept. 2009). Absent a showing of fraud, self-dealing or unconscionability, the court therefore will conduct only this narrow review, and will not inquire as to the wisdom or soundness of the business judgment. *Schoninger v Yardarm Beach Homeowners Ass'n, Inc.* 134 AD2d 1, 10 (2nd Dept. 1987). Stated somewhat differently, unless a resident challenging a board's actions is able to demonstrate a breach of the board's duty to act in good faith within the scope of its authority, judicial review of the board's actions is not available. *Renauto v Board of Directors of Valimar Homeowners Ass'n, Inc.*, 5 Misc 3d 247, 258 (N.Y. Sup. 2004), affirmed 23 AD3d 564 (2d Dept. 2005).

Accordingly, the deferential standard that is the hallmark of the business judgment rule (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 154-155 [2003]), requires courts to exercise restraint and to defer to good faith decisions made by boards of directors in business settings. *Id.*, at 153; *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 8 (1st Dept. 2006). To trigger further judicial scrutiny, an aggrieved unit owner must show that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith. *40 W. 67th St. Corp. v Pullman*, *supra* at p. 155.

A unit owner cannot withhold payment of common charges and assessments in derogation of the condominium by-laws based on defective conditions in his unit or in the common areas, or because of a disagreement with actions lawfully taken by the board of

managers. *Frisch v Bellmarc Management, Inc.*, 190 AD2d 383, 389 (1st Dept. 1993).

Here, however, defendant is alleging that the 2007 and 2009 assessments were not properly authorized/approved, and that the conduct of the plaintiff Board with respect to those assessments was tainted by misrepresentation, self-dealing and illegality in breach of the Board's fiduciary duty to unit owners.

Although the plaintiff has made its *prima facie* showing that it is entitled to collect the common charges and assessments owed, the defendant's proposed verified amended answer and his affidavit, which on this motion for summary judgment must be given the benefit of every favorable inference (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept. 2003]; *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept. 1995]) raise issues of fact as to whether the business judgment rule can be overcome. The counterclaims cannot readily be severed from main action, as they raise questions as to whether the increase in common charges and assessments by the Board were properly authorized, made in good faith, and imposed in compliance with the Condominium's by-laws and Real Property Law § 339-d *et seq.* Cf., *Board of Mgrs. of Executive Plaza Condominium v Jones*, 251 AD2d 89 (1st Dept. 1998).

The Court cannot find, as a matter of law, that none of the counterclaims – a number of which also constitute affirmative defenses – are meritorious. Of course, all affirmative defenses must be shown to lack any merit and must be stricken before summary judgment can be granted. See, *Bankers Trust Co. of California, N.A. v Sciarpettetti*, 28 AD3d 408 (2d Dept. 2006). Indeed, the bulk of plaintiff's response to the facts asserted by the defendant comes from plaintiff's attorney, but is not stated to be

made on personal knowledge, and thus lacks any probative value. *See, JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 (2005); *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455(2d Dept. 2006). The affidavit of Shari Morse, general manager of the Condominium, offered in opposition to the cross motion and in further support of the plaintiff's motion, contains one paragraph directly related to the present action. It concerns only the procedural validity of the votes taken in imposing the 2007 and 2009 assessments, and does not serve to negate all of the factual allegations asserted by the defendant in opposition to the motion for summary judgment as a matter of law. This bars granting the relief sought by the plaintiff.

Further, Justice Brandveen's determination does not have conclusive effect in this litigation as this defendant was not a party to, or in privity with the defendant in, that action. Collateral estoppel or issue preclusion bars the re-litigation of all issues (as distinguished from an action or claim) which were actually and necessarily previously decided in a prior proceeding. *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455 (1985). To invoke the issue preclusion doctrine the following elements must be established: (1) an identity of an issue which was necessarily decided in a prior action; and (2) a free and fair opportunity by the party against whom collateral estoppel is being invoked to have been heard on that issue.

The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate. *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 (1990). That has been accomplished here, because, as noted, defendant was not a party to, nor in privity with a party in, the

action before Justice Brandveen, and thus did not have a full and fair opportunity to litigate the contested issues. He is not, therefore, bound by the decision in that case. The plaintiff's motion for summary judgment is therefore denied.

The Court now turns to the branch of the cross motion seeking leave to serve an amended complaint. Notwithstanding the determination of the plaintiff's motion, certain of the counterclaims alleged are plainly insufficient. While it is true that generally a motion for leave to amend a pleading is to be liberally granted in the absence of prejudice or surprise, it is equally true that the court should examine the merits of the proposed amendment when considering the motion. CPLR 3025(b); *Ingrami v Rovner* 45 AD3d 806, 808 (2nd Dept. 2007). The movant must make some evidentiary showing that his proposed amendment has some merit and a proposed amendment that plainly lacks merit will not be permitted. *Monteiro v R.D. Werner Co., Inc.*, 301 AD2d 636 (2nd Dept. 2003). Certain of the counterclaims fail the test.

The second counterclaim seeks damages arising from an alleged illegal recording of a lien against unit 2Y. This flies in the face of §339-z of the Real Property Law which provides that:

"[t]he board of managers, on behalf of all unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon . . ."

Both the Condominium's by-laws and Real Property Law §339-z make clear that owners must pay common charges and the Board has the right to file notices of lien for non-payment of common charges. This is not subject to dispute. Even assuming that

defendant prevails, he has acknowledged non-payment of this disputed charges, and the lien was thus properly asserted. The remedy would be having the lien vacated if it is found that the charges were improperly assessed, but the lien is a matter of statute and thus cannot lead to a claim for damages.

The counterclaim for violation of the tenant harassment law cannot be permitted "as condominium unit ownership is a form of fee ownership of property and not a household interest involving a landlord tenant relationship". *Frisch v Bellmarc Management, Inc., supra* at p. 385. The sixth counterclaim is, therefore, untenable.

Finally, the proposed tenth counterclaim, which seeks to recover attorneys' fees pursuant to §234 of the Real Property Law is not viable as defendant is not involved in a summary proceeding with his landlord regarding a lease which provides for the recovery of such fees.

Accordingly, that branch of the cross motion that is to interpose an amended answer is granted, with the exception of the second, sixth, and tenth counterclaims, which shall be deemed stricken therefrom. The new pleading shall be deemed served with the cross motion as of the date of this order, and the plaintiff shall have 30 days from such date to respond to the remaining counterclaims.

Finally, as there appear to be common questions of law and fact the branch of the cross motion for consolidation is granted to the extent that this matter shall be consolidated for purposes of joint trial and discovery with *The Glasser Family Limited Partnership II v The Board of Managers of the Lido Beach Towers Condominium*, bearing index number 6358/09, and is respectfully referred to Justice Cozzens. Counsel


are directed to contact Justice Cozzens' part and to appear as directed.

Accordingly, the plaintiff's motion for summary judgment is denied, and the cross motion is granted to the extent indicated.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 25, 2010


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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