

**Board of Mgrs. of the Gateway Condominium v
Leonard**

2010 NY Slip Op 31597(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 115146/2008

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHÉ

PART 10

PRESENT

Index Number : 115146/2008

BOARD OF MANAGERS

vs

LEONARD, LAVERNE M.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 28 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUN 21 2010

[Signature]
HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
The Board of Managers of the
Gateway Condominium,
Plaintiff (s),

DECISION/ ORDER
Index No.: 115146-2008
Seq. No.: 002

-against-

PRESENT:
Hon. Judith J. Gische
J.S.C.

Laverne M. Leonard
Defendant (s).

-----X
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Pltff (PSJ-atty fees) w/CM, LR affds, exhs	1
Def x/m (PSJ-atty fees) w/SEW affirm	2
Pltff reply and further support w/CM affirm	3
Def opp and further support w/SEW affirm	4

FILED

JUN. 28 2010

NEW YORK
COUNTY CLERKS OFFICE

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This action involves a dispute between the board of managers of the Gateway Condominium ("board") and defendant Laverne M. Leonard, the owner of Units 3F and 3G in the condominium ("Leonard"). The parties settled their dispute by entering into a written settlement agreement dated February 4, 2010 ("settlement agreement"). The only unresolved dispute is whether Leonard has to pay the board's legal fees in connection with its commencement and prosecution of this action. Thus, Gateway has moved and Leonard has cross moved for partial summary judgment on the board's 4th cause of action for legal fees. Since issue was joined and these motions are brought

pre-note of issue, summary judgment relief is available (CPLR 3212 [a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept 2001]).

The court's decision and order on this motion and cross motion is as follows:

Legal Arguments

The board commenced this action for, among other things, a permanent injunction against Leonard using her two condominium units as short term hotel rooms for tourists. In the settlement agreement, Leonard stated the following:

"[Leonard], by executing this Agreement, hereby admits liability under the Amended Complaint insofar as she has allowed the Units to be rented for transient purposes, and for periods less than 30 days, in violation of the Condominium's By-laws and Rules and Regulations. Defendant further admits that Plaintiff has prevailed on its claims that Defendant has allowed the Units to be rented for transient purposes and for periods less than 30 days, in violation of the Condominium's By-laws and Rules and Regulations. This Agreement will be admissible to establish Defendant's liability under the Condominium By-laws and Rules and Regulations in connection with the Court's consideration of Plaintiff's summary judgment motion as to Plaintiff's Fourth Cause of Action . . ."

Both sides agree that the only issue for the court to decide is whether plaintiff is entitled to recover its legal fees from defendant and that this is purely an issue of law because the facts are otherwise undisputed or have been resolved by their settlement agreement.

The board contends that under Article VII section 5 of the bylaws plaintiff is entitled to recover its legal fees from defendant. Article VII pertains to "defaults," and section 5 provides as follows:

"Section 5. Abatement and Enjoinment of Violations by Unit Owners: Imposition of Fines.

The violation of any rule or regulation adopted by the Board of Managers, or the breach of any By-Law contained herein, or the breach of provision of the Declaration, shall give the Board of Managers the right, in addition to any other rights set forth in these By-Laws: (a) to enter the unit in which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Unit Owner, any structure, thing or condition that may exist therein contrary to the intent and meaning of the provisions hereof . . . or (b) enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity the continuance of any such breach. All costs of enforcement shall be deemed Common Charges. In addition, the Board of Managers may impose fines on Unit Owners violating the Declaration, By-Laws, or Rules and Regulations, in its reasonable discretion."

(emphasis added)

The term "all costs of enforcement" has been interpreted differently by each party. The board argues that reference to "all costs" includes attorneys' fees, in accordance with the First Department's decision in Board of Managers of Amherst Condominium v. CC Ming (USA) Ltd. (17 AD3d 183 [1st Dept 2005]) ("Amherst"). In Amherst, the First Department determined that the board was entitled to its legal fees based on the following language in its condominium by-laws:

"All sums of money expended, and all costs and expenses incurred, by . . . the Condominium Board in connection with the abatement, enjoinment, removal, or cure of any violation, breach, or default committed by a Unit Owner [as authorized by other by-law provisions] . . . shall be immediately payable by . . . Unit Owner to the Condominium Board . . . All sums payable by a Unit Owner to the Condominium Board pursuant to the terms of this [section] shall, for purposes hereunder, constitute Common Charges payable by such Unit Owner. . ."

Leonard contends that the term "all costs" is undefined and, in any event, does not include legal fees. Leonard argues that interpretation is in accord with decisions of the Civil Court of the City of New York (Harlan v. Weiner, 80 Misc2d 723 [Civ Ct. NY Co. 1974]; Watertown Savings Bank v. Delaney, 23 Misc3d [Sup Ct Jeff Co. 2009]) and the Appellate Term (Royal Discount Bank v. Luxor Motor Sales, 9 Misc2d 307 [AT 1st Dept 1957]). Leonard argues further that the board could easily have provided for the collection of legal fees, as it did in section 2 of Article VIII which pertains to monetary defaults. Section 2 provides for the recovery of "the expenses of the proceeding, including attorneys' fees . . ." when an action to recover unpaid common charges and assessment is brought against the unit owner and that such charges, including legal fees, "shall be payable within five (5) days after demand . . ." Thus, according to Leonard, the term "all costs" pertains to the expense of repairs and maintenance of the premises, not legal fees because section 5 of Article VIII allows the board to enter an owner's unit to abate, fix, etc., a structure, thing or condition.

Discussion

The issue of whether a written contract is ambiguous or subject to interpretation is an issue of law (Janos v. Peck, 21 A.D.2d 969 [1st Dept 1964]) and when an issue of law is raised in connection with a motion for summary judgment, it should be decided (Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]). Having examined the section of the by-laws controlling the parties' dispute and considered the arguments presented by each side, the court finds that there is no ambiguity in section 5 of Article VIII of the by-laws, nor is the section subject to the interpretation advanced

by the condominium board. For the reasons that follow, Leonard has proved that "all costs" in section 5 means the cost of repairing, abating or otherwise addressing a condition or breach of the condominium by-laws, but does not include legal fees.

Unless otherwise provided by statute or in a contract, each party to a litigation is required to pay its own legal fees (Chapel v. Mitchell, 84 N.Y.2d 345 [1994]; AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 [1986]). Sections 2 and 5 of the by-laws each address expenditures that the board is entitled to recover from the unit owner if s/he defaults under or breaches the by-laws or any rule or regulation. Under section 2, the board can recover the "fees and expenses of collection or enforcement . . . (including attorney's fees) . . ." However, section 5 allows the board to enter a unit, if necessary and "abate and remove, at the expense of the defaulting Unit Owner, any structure, thing or condition that may exist . . ." In those circumstances, "[all] costs of enforcement shall be deemed Common Charges . . ." Whereas section 2 attorneys fees specifically categorizes and identifies legal fees as a "fee" or "expense" the board can recover, in section 5 the term "expense" refers only to the cost of "abate[ment]" "enjoinment" and remov[al]" of a violation or condition.

The decision in Amherst does not support the board's legal position, that it can collect legal fees from Leonard because of her admitted violation of the by-laws, etc. The provision in the Amherst by-laws are far broader than those found in the by-laws at bar, allowing the board to recover "all sums of money expended, and all costs and expenses incurred by the Condominium Board in connection with the abatement, enjoinderment, removal or cure of any violation, breach or default committed by a Unit

Owner . . .” Thus, the use of the terms “costs” and “expenses” in the Amherst by-laws was held to include legal fees. In light of our public policy, requiring that parties bear their respective legal expenses, the provision in the by-laws requiring the unit owner to pay “all costs of enforcement . . .” must be construed strictly so as to not recast the parties’ agreement which does unambiguously require the defaulting unit owner pay the board’s legal fees (Gottlieb v. Such, 293 A.D.2d 267 [1st Dept 2002]). Therefore, the board’s motion for summary judgment on its 4th cause of action for legal fees is denied and Leonard’s cross motion for summary judgment dismissing the 4th cause of action is granted.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by the board for summary judgment on its 4th cause of action is denied; and it is further

ORDERED that defendant’s cross motion for summary judgment dismissing the 4th cause of action is granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendant Laverne M. Leonard, against plaintiff the Board of Managers of the Gateway Condominium dismissing the 4th cause of action and, since this is the last remaining cause of action, this action is dismissed with costs and disbursements to defendant Laverne M. Leonard as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that any relief requested not expressly addressed is hereby denied;
and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 21, 2010

So Ordered:



Hon. Judith J. Gische, JSC

FILED
JUN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE