

90 E. End Ave. Condominium v Becker

2010 NY Slip Op 31660(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 111779/2009

Judge: Paul Wooten

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

E
7-10

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

90 EAST END AVENUE CONDOMINIUM,
BY ITS BOARD OF MANAGERS,

- against -

JANICE M. BECKER,

Defendant.

FILED
JUL 02 2010
CLERK, NEW YORK
COUNTY CLERK'S OFFICE

INDEX NO. 111779/2009

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment, and cross-motion by defendant for *pendente lite* relief.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

This is an action by plaintiff 90 East End Avenue Condominium, by its Board of Managers ("plaintiff" or "the Condominium"), to recover unpaid condominium common charges and related fees from defendant Janice M. Becker ("defendant") for the period May 2009 through the present. Plaintiff has revoked defendant's right to use the Condominium's gymnasium facilities for failure to pay common charges. Discovery has not been completed and the Note of Issue has not been filed. Plaintiff now moves for summary judgment, pursuant to CPLR 3212, awarding judgment against defendant in the sum of \$85,478.64; granting a hearing to compute additional attorney's fees; and striking the defenses and counterclaim set forth in defendant's answer. Defendant, appearing *pro se*, opposes the motion and cross-moves for an order directing plaintiff to restore her right to use the Condominium's gymnasium facilities *pendente lite*.

BACKGROUND

In support of its motion, plaintiff submits, *inter alla*, an affidavit of Edith Schickedanz; the Condominium's By-Laws ("the By-Laws"); defendant's account history; and a prior Judgment of this Court dated April 23, 2009. Defendant submits, *inter alla*, her own affidavit; an analysis of the charges; and correspondence between Stuart Becker and Schickedanz, Gumley Haft and plaintiff's counsel. The following facts are undisputed.

Plaintiff is a condominium located at 90 East End Avenue, New York, New York. Defendant is the record owner of Unit 8A at the Condominium. Pursuant to its By-Laws, the affairs of the Condominium are governed by a Board of Managers ("the Board"). Schickedanz is the Assistant Secretary of the Board, and also serves as an Account Executive for the Condominium's managing agent, Gumley Haft. Schickedanz is responsible for supervising the collection of monthly common charges, repair charges, storage fees and late charges for the Condominium.

Pursuant to section 6.4-1 of the By-Laws, all unit owners at the Condominium are required to pay monthly common charges as assessed by the Board on the first day of each month (see Schickedanz affidavit, exhibit A). Section 6.6 of the By-Laws imposes a late charge, interest and incurred attorney's fees on any unit owner who fails to pay his or her common charges, as follows:

"Unit Owner shall be obligated to pay (a) a 'late charge' of \$.04 for each dollar of such amounts which remain unpaid for more than ten days from their due date . . . and (b) interest at the rate of 2% per month (but in no event in excess of the maximum rate permitted by law) on such unpaid amounts (less any 'late charges' theretofore collected on such amounts) computed from the due date thereof, together with all expenses, including, without limitation, attorneys' fees paid or incurred by either the Board or by any Managing Agent in any proceeding brought to collect such unpaid Common Charges. . . ." (*id.*).

Section 6.6 of the By-Laws also provides that "[a]ll such 'late charges', interest and

expenses shall be added to and shall constitute Common Charges payable by such . . . Unit Owner" (*id.*). Further, section 6.7 of the By-Laws authorizes the Board to commence a lawsuit to recover a money judgment for unpaid common charges without foreclosing or waiving the lien securing such charges (*id.*).

In 2008, defendant fell in arrears in the payment of her common charges. Plaintiff commenced an action to recover the charges, and on April 23, 2009, this Court entered a Judgment against defendant in the sum of \$63,534.06, which covered common charges due through April 1, 2009.¹ Defendant satisfied the Judgment in June 2009. Defendant has not, however, made any payments for charges that have accrued since May 2009. In August 2009, the Board revoked defendant's right to use the Condominium's gymnasium facilities for failure to pay common charges.

In the present action, plaintiff seeks to recover unpaid common charges and related fees for the period May 1, 2009 through the present. In support of its summary judgment motion, it submits an affidavit by Schickedanz alleging that defendant's balance for May 2009 through December 2009 is \$72,200.80, consisting of:

Base Monthly Common Charges	\$28,485.04
Legal Charges:	\$25,745.82
Storage Fees:	\$1,800.00
Interest:	\$2,405.15
<u>Late Fees:</u>	<u>\$13,764.79</u>
Total:	\$72,200.80

Plaintiff also claims that there are \$8,000 in legal fees that have not yet been posted to defendant's account. Plaintiff requests that interest be included in any judgment at the rate of 24% per annum as authorized by section 6.6 of the By-Laws.

Defendant raises five affirmative defenses in her answer: first, that plaintiff fails to state a cause of action upon which relief can be granted; second, that the claims are barred because

¹Interest was assessed at the rate of 9.0% per annum.

plaintiff did not adhere to the By-Laws; third, that the doctrines of unclean hands, laches, waiver, estoppel and/or ratification bar plaintiff's claims; fourth, that plaintiff has suffered no damages; and fifth, that any damages were due to plaintiff's own conduct. Defendant also brings a counterclaim for breach of the covenant of good faith and fair dealing on the grounds that the late charges and interest are unenforceable penalties.

In her opposition, defendant concedes that she has defaulted in payment of her common charges, but she disputes the amount that is owed. She claims that her husband Stuart Becker, a licensed CPA, prepared an analysis of the charges and discovered a double billing of a \$3,500 legal bill which plaintiff acknowledged, and another erroneous billing of \$2,700 in legal fees that plaintiff refused to acknowledge. She also claims that Becker's preliminary review of the Condominium's records revealed that the prior Judgment included \$5,000 in legal fees that she did not incur, and charges for interest of 24% per annum and a late fee of 4% per month that was charged to her and no other unit owner. She believes that further review of the records during discovery will reveal other errors. She cross-moves to restore her gymnasium privileges *pendente lite*, arguing that she is required to exercise several times a week due to a prior injury.

In its reply papers, plaintiff admits that defendant's account history contained an improper legal charge of \$3,781.25. Plaintiff credited this amount in September 2009, and has submitted an updated account history showing a credit for late fees and interest that were inadvertently imposed against the improper charge. Plaintiff, however, disputes the alleged erroneous billing of another \$2,700 in legal fees, and maintains that defendant's account history contains no other improper charges. Plaintiff also denies any efforts to hide accounting errors or that interest and late charges have only been charged to plaintiff. Plaintiff claims that as of February 25, 2010, the total amount owed to the Condominium is \$85,478.64, and that it is entitled to judgment in that amount.

DISCUSSION

Plaintiff argues that it is entitled to judgment as a matter of law in the sum of \$85,478.64, since defendant has admitted her default and the By-Laws provide for late charges, attorney's fees and interest at the rate of 24% per annum in the event of default. Plaintiff also moves to strike defendant's affirmative defenses and counterclaim. As to the first defense, plaintiff argues that the complaint properly sets forth a cause of action to recover unpaid common charges. Regarding the second defense, plaintiff cites to the sections of the By-Laws authorizing the charges. Plaintiff argues as to the third defense that this action is not barred by the doctrines of unclean hands, laches, waiver, estoppel and/or ratification, since the By-Laws authorize this lawsuit and it was commenced shortly after the default became apparent. Plaintiff asserts that the fourth defense lacks merit because the default has financially impacted the Condominium's ability to operate and caused it to expend resources to collect payment. With regard to the fifth defense, plaintiff argues that it engaged in no conduct that prevented payment from defendant. Plaintiff further argues that defendant's counterclaim should be dismissed since the By-Laws specifically allow for late charges, interest and penalties upon a default. At a minimum, plaintiff requests judgment in its favor on the issue of liability and a hearing to determine damages. Plaintiff also argues that defendant's cross-motion should be denied because it was within its rights under the By-Laws to deny defendant access to the gymnasium for failure to pay common charges.

Defendant argues that summary judgment should be denied because discovery is incomplete and there are genuine issues of material fact concerning the amount owed. She asserts that her preliminary review has revealed billing errors, and that the late fee and interest authorized by the By-Laws constitute unenforceable penalties and violate usury laws. She argues that her cross-motion should be granted because her inability to use the gymnasium creates a burden for her.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

The Court finds that plaintiff has demonstrated its entitlement to judgment as a matter of law as to liability only. Plaintiff has submitted an affidavit from its manager and a detailed account history demonstrating defendant's failure to pay common charges as required by the By-Laws. Defendant concedes her default and challenges only the amount owed. The obligation of a condominium unit owner to pay common charges is, for the most part, absolute and cannot be avoided (*see Board of Mgrs. of Lido Beach Towers Condominium v Gartenlaub*,

2010 WL 1664879, *2 [Sup Ct Nassau County 2010]; *Board of Mgrs. of the First Ave. Condominium v Shandel*, 143 Misc 2d 1084, 1087 [NY City Civ Ct 1989]; Real Property Law § 339-x). Therefore, absent a valid defense, plaintiff is entitled to judgment in its favor on the issue of liability as a matter of law (see *Board of Mgrs. of Garden Terrace Condominium v Chiang*, 247 AD2d 237, 237 [1st Dept 1998]; *Mill Pond Condominium v Landau*, 216 AD2d 372, 373 [2d Dept 1995]; *Shandel*, 143 Misc 2d at 1086).

Although defendant sets forth several affirmative defenses in her answer, defendant has failed to raise an issue of fact requiring a trial on the issue of liability. The defenses are largely boilerplate and lack merit. The Court notes in particular that the defense of unclean hands, an equitable defense, cannot be utilized in an action at law that, as here, is strictly for money damages (see *Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]). Nor does the defense of laches, an equitable defense based on a plaintiff's delay in asserting rights, apply to an action brought within the applicable statute of limitations (see *Republic Ins. Co. v Real Dev. Co.*, 161 AD2d 189, 190 [1st Dept 1990]). Further, the defense of usury is inapplicable since this case does not concern the borrowing and lending of money (see *Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991]), and involves defaulted obligations (see *Miller Planning Corp. With Delta Funding Corp. v Wells*, 253 AD2d 859, 860 [2d Dept 1998]).

There remain issues of fact, however, regarding the amount that is owed to plaintiff. As the parties have proffered disparate views on the amount due, a hearing is required to establish the amount of damages. Pursuant to the By-Laws, plaintiff is also entitled to an award of attorneys fees and interest (see *Board of Mgrs. of Bedford Mews Condominium v Nasr*, 37 AD3d 506, 507-08 [2d Dept 2007]). Accordingly, this matter will be referred to a Special Referee to hear and report with recommendations the amount of plaintiff's damages as of May 2009, which shall include unpaid common charges, storage fees, late charges, reasonable attorney's fees, interest and costs (see CPLR 4317). Interest shall be awarded at the same rate as awarded in

the prior Judgment.

Defendant's cross-motion to restore her gymnasium privileges *pendente lite* is denied. Absent a showing of fraud, self-dealing or a violation of the By-Laws, the courts will not interfere with the business judgment of the Board regarding its management or maintenance of the building (see *Schoninger v Yardarm Beach Homeowners Assn.*, 134 AD2d 1, 9 [2d Dept 1987]; *Shandel*, 143 Misc. 2d at 1087). Defendant has not submitted evidence demonstrating that the Board acted outside of the scope of its authority or in bad faith in revoking her gymnasium privileges.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment is granted on the issue of liability only; and it is further,

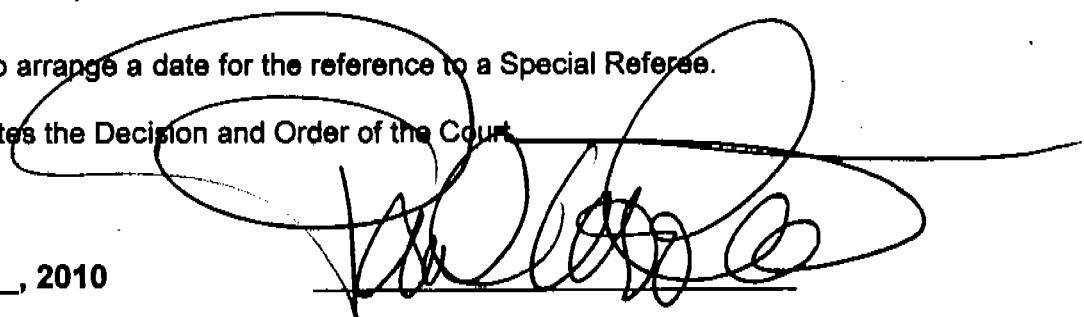
ORDERED that defendant's cross-motion to restore her gymnasium privileges *pendente lite* is denied; and it is further,

ORDERED that the issue of plaintiff's damages as of May 2009, which shall include unpaid common charges, storage fees, late charges, attorney's fees, interest and costs, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the damages issue; and it is further,

ORDERED that not later than July 12, 2010, plaintiff shall serve a copy of this Order with Notice of Entry on the Special Referee Clerk in the Motion Support Office at 60 Centre

Street, Room 119, to arrange a date for the reference to a Special Referee.

This constitutes the Decision and Order of the Court



Dated: June 29, 2010

Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
JUL 02 2010
NEW YORK
COUNTY CLERK'S OFFICE