

**Bd. of Mgrs. of the Bay Club v Kaplan**

2011 NY Slip Op 30458(U)

February 28, 2011

Supreme Court, Queens County

Docket Number: 21120/04

Judge: Allan B. Weiss

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**M E M O R A N D U M**

SUPREME COURT QUEENS COUNTY  
CIVIL TERM PART 2

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BOARD OF MANAGERS OF THE BAY CLUB

Plaintiff,

-against-

JULIAN KAPLAN, UNITED STATES OF AMERICA,  
NEW YORK STATE DEPARTMENT OF TAXATION &  
FINANCE, NEW YORK CITY DEPARTMENT  
OF FINANCE, INTERNAL REVENUE SERVICE,  
NEW YORK CITY PARKING VIOLATION  
BUREAU, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, PEOPLE OF THE STATE  
OF NEW YORK, NEW YORK CITY BUREAU OF  
CITY COLLECTIONS, FAREIDA KHAN,  
JOSEPH R. AIEVOLI, JR., BRAD SCHEINER,  
ROBIN SCHEINER, JKT SERVICE CORP.,  
ARTHUR LOFRESE, "JOHN DOE" and "JANE  
DOE," the identity of those individuals  
being unknown to the plaintiff, but  
intended to identify all persons  
occupying the premises,  
Defendants.

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**HON. ALLAN B. WEISS**

Index No.: 21120/04

Motion Cal. No: 7 & 8

Motion Seq. No.: 6 & 7

Motions bearing calendar numbers 7 and 8 are combined for disposition.

Plaintiff commenced this action to foreclose on a lien on a condominium unit known as Unit 5Z-E (a/k/a 5Z), 2 Bay Club Drive, Bayside, New York, a/k/a 209-90 23rd Avenue, Bayside, New York (Block 5893, Lot 1613). In its complaint, plaintiff alleged that defendant Kaplan failed to pay common charges dating back to November 1995, and that a schedule annexed to the complaint as

"Exhibit A" set forth more fully the amount of the default. Plaintiff also alleged that a notice of lien for unpaid common charges was filed with the City Register on July 5, 2004, and defendant Kaplan allegedly failed to pay the charges in response to the notice. Plaintiff further alleged that subsequent to the filing of the lien for unpaid common charges, additional common charges became due. Plaintiff asserts it is entitled under the terms of the condominium's bylaws, to foreclose upon the lien.

The defendant, Kaplan, defaulted in answering the complaint and his motion to dismiss this action or, in the alternative, to vacate his default was denied by Order dated November 29, 2007.

By order dated January 3, 2008, the Referee was appointed to ascertain and compute the amount due and owing plaintiff pursuant to its bylaws and to examine and report whether the subject premises can be sold in parcels.

The Referee issued his report of computation dated March 5, 2008, and the plaintiff moved to confirm the report and for a judgment of foreclosure and sale which Kaplan opposed. By order dated October 28, 2008, the court ordered, inter alia, that a further hearing to be held, on notice to defendant Kaplan and all other parties who appeared or demanded notice of the reference, and to file such amended report following the further hearing.

Kaplan again moved to dismiss the complaint against him

on the grounds he previously asserted, or in the alternative, to "clarify" the October 28, 2008 order, regarding the scope and parameters of the hearing to be conducted by the Referee, or to direct a new hearing. By order dated May 15, 2009, that branch of the motion to dismiss the complaint was denied, and the alternative branch was granted to the extent of directing the Referee to recalculate the amount due and owing pursuant to the lien and prepare an amended report following a further hearing, on notice to, inter alia, Kaplan. The court indicated that the hearing would involve a de novo computation by the Referee of the amount due and owing and the Referee's amended report would reflect new figures which were calculated based upon admissible evidence offered at the new hearing, and that the balance sheet previously provided by the plaintiff may be used by the Referee.

The Referee conducted a hearing on July 22, 2009 and plaintiff's counsel, Eugene Gardner for the plaintiff, defense counsel and defendant Julian Kaplan appeared. The sole witness to testify at the hearing was Eugene Gardner, the on-site manager for the Bay Club Condominium and an employee of John B. Lovett & Associates, Ltd. At the conclusion of the hearing, the Referee permitted counsels to submit post-trial briefs, including making reference to documents previously submitted. The Referee issued a report, dated November 29, 2009, annexed to which was a "Schedule C" showing the details of his computation.

According to Schedule C, the Referee computed the amounts due and owing plaintiff as follows:

1) unpaid condominium common charges for the period June 1, 1998 through May 31, 2004	\$23,897.01
2) assessments for the same period	\$ 3,537.40
3) electric charges for the same period	\$ 7,106.47
4) fines for the same period	\$ 450.00
5) late fees	\$ 0.00
6) legal fees	<u>\$ 0.00</u>
Amount due as of May 31, 2004.	\$34,991.68
Less: Payments received .....	\$ -936.21
Less: .....	\$11,310.88

representing Common charges (\$7,843.47), assessments (\$1,120.46), fines (\$450.00) and electric charges (\$1,896.95) included in the money judgment obtained by plaintiff against Julian Kaplan in an action in Civil Court, Queens County (Index No. 57976/2000).

The Referee did not indicate in his report what evidence he considered, the basis for considering or rejecting the evidence offered nor explain in any way the basis of his calculations. The only explanation the Referee gave for his findings is contained in the footnotes to Schedule C. The footnotes state that plaintiff did not offer any testimony to establish that late fees were authorized, that legal services had been provided to plaintiff, or that legal fees had been paid by plaintiff and,

thus, no amount for late fees and attorney's fees was due to the plaintiff.

Based upon these calculations and conclusions the Referee reported that \$22,744.59 was the amount due to the plaintiff on its lien and that the subject property should be sold in one parcel inasmuch as it consists of a "plot" which has been assessed as one tax lot.

Plaintiff now moves (1) to confirm the report of the Referee dated November 25, 2009, only to the extent that the report indicates the subject premises should be sold in a single parcel, (2) to disaffirm the remainder of the report, (3) for the court to ascertain and determine the amount due to the plaintiff to be \$182,036.59 as of January 31, 2010, without any additional hearing, and (4) for a judgment of foreclosure and sale as proposed. Plaintiff asserts that the Referee erred in his calculations insofar as he computed the amounts of common charges, assessments, electric charges (basic charges) and fines due for the period June 1, 1998 through May 31, 2004 only, and did not include amounts accruing after May 31, 2004. Plaintiff also asserts that the Referee improperly failed to include in his calculations an award for late charges, legal fees, and erroneously credited plaintiff with \$11,310.88, representing basic charges and fines, by reason of the previously entered Civil Court judgment.

Kaplan opposes the plaintiff's motion and separately moves to confirm the Referee report.

In support of their respective motions, Kaplan and plaintiff have submitted, among other things, a copy of the transcript of the hearing, various documents admitted into evidence at the hearing and memoranda of law. In addition, the Referee submitted an affidavit of the services he performed in relation to this matter.

The court shall determine the motions together as follows:

In the first instance, insofar as defendant opposes on the grounds, inter alia, that the notice of lien is defective, that the plaintiff failed to establish its standing, defendant has previously raised these defenses (at least twice in prior motions) the Court rejected these arguments in the Order dated May 15, 2009, stating that "... Kaplan defaulted in answering the complaint, he may not be heard relative to the merits of any such defenses..." (see CPLR § 3018[b]; CPLR 3211 [e]; cf U.S. Bank Nat. Ass'n v. Eaddy, 79 AD3d 1022 [2010]; Countrywide Home Loans Servicing, LP v. Albert, 78 AD3d 983 [2010]).

The Referee's decision not to include in his computations, those amounts accruing after May 31, 2004 was improper. Contrary to the Referee's conclusion, there was sufficient evidence submitted to enable the Referee to calculate the amounts through and including January, 2020. In this regard, the Referee accepted

the "tenant profile" with "Tenant Detail History" (Plaintiff's Exhibit No. 5) into evidence, which included information regarding billings made to defendant Kaplan through December 2008. While the tenant profile, an apparent compilation of the "Tenant's Detail History", reflects that defendant Kaplan was billed for the amounts of \$413,871.00 in June 2004, \$455,841.00 in July 2004, \$505,424.16 in August 2004, \$990,568.00 in March 2005, \$702,000.00.00 in August 2005 and \$198,000.00 in October 2005, the annexed "Tenant Detail History" clearly and unambiguously sets forth the amount of the common charges, electric charges and assessments which were billed to and due and owing from the defendant, Julian Kaplan, each month from January, 1995 through and including December, 2008 as well as amount billed as "late charges".

In addition to the evidence submitted at the hearing, the Court in the prior Order dated October 28, 2008, authorized the Referee to use the "Balance Sheet" plaintiff submitted in its reply papers (Exhibit A) in the prior motion to confirm the Referee's report which clearly set forth the amount of the basic charges applicable to Kaplan's unit after May 2004. However, it is apparent that he did not make use of the Balance Sheet in his determination.

The plaintiff's counsel asserts that, prior to the hearing, the Referee stated that he would not make any computation for the

amount due after May, 2004. Although the transcript of the hearing does not contain anything to indicate that the Referee made such representation or limited the plaintiff's offer of evidence, the Referee has not denied plaintiff's claim and his failure to use the "Balance Sheet" previously submitted indicates tends to support plaintiff's claim. Thus, the Referee improperly concluded that there was no admissible evidence of the amount of the basic charges which accrued after May 31, 2004.

The court is the ultimate arbiter of the dispute regarding the sums due plaintiff (see CPLR 4403; see generally Stein v American Mtge. Banking, Ltd., 216 AD2d 458 [1995]). Thus, in those instances where a party was not given a proper opportunity to offer evidence regarding the sums due on the plaintiff's lien directly to the referee, the court may reject the referee's report, entertain such evidence in relation to a motion to confirm or disaffirm a referee's report of computation and make new findings (see CPLR 4403; Stein v American Mtge. Banking, Ltd., 216 AD2d 458 [1995], *supra*; Shultis v Woodstock Land Dev. Assoc., 195 AD2d 677 [1993]).

Under the circumstances, the court grants the plaintiff's request to make further findings as to the amount owed to the plaintiff based upon the Referee's report, the transcript of the hearing, the evidence submitted at the hearing and the additional evidence and arguments of the parties submitted on the motions.

The defendant will not be prejudiced by the court considering the additional evidence, inter alia, the "updated" Balance Sheet, insofar as the updated Balance Sheet contains the amounts claimed to be due for common charges, electric charges, assessments (basic charges) and fines (cf. Stein v American Mtge. Banking, Ltd., 216 AD2d 458 [1995], supra; Shultis v Woodstock Land Dev. Assoc., 195 AD2d 677 [1993], supra) which the defendant has not disputed.

However, the court finds that the Referee's decision not to include late fees or as plaintiff called it 9% "interest" per year, was proper. The copy of the resolution adopted by the Board of Managers indicates the Board of Managers approved a resolution authorizing the institution of a foreclosure action for non-payment of "common charges," which phrase is defined in section 6(a) of the amended bylaws as including "Late Charges." A "Late Charge," in turn, is defined under that section of the amended bylaws as "ten (10%) percent of the unpaid amount payable to the Board of Managers for each month or part of the month that such amount or any part thereof remains unpaid." To the extent that the plaintiff asserts that it voluntarily elected to reduce the late charges sought from defendant Kaplan to 9% per annum, the plaintiff submitted no evidence or a copy of a further resolution by the Board authorizing such reduction for defendant Kaplan, or any other condominium unit. Moreover, any such

resolution would, in any event, have been in excess of the Board's authority. Article XI of the bylaws provide that any modification or amendment of the bylaws can be made only by "... 66 2/3% in number and in common interest of all unit owners." (see Yusin v. Saddle Lakes Home Owners Ass'n, Inc., 73 AD3d 1168, 1171 [2010])

The plaintiff's claim that the witness was prevented from explaining his testimony with respect to the amount of late fees plaintiff seeks to recover is without merit. Plaintiff's counsel asked no question on redirect to clarify the testimony.

The plaintiff now asks the Court to award 10% per annum late fees as allegedly set forth in the By-Laws. The bylaws do not provide for the recovery of late fees at 10% per year. The amount of late fees recoverable under the bylaws is "ten (10%) percent of the unpaid amount payable to the Board of Managers for each month or part of the month that such amount or any part thereof remains unpaid."

Although in this case the bylaws do provide for the recovery of late fees, there are limits on the amount of such charges. One limitation, relevant in this case, is that the amount of such late fee may not be a penalty (see Vernon Manor Co-op. Apartments, Section I, Inc. v. Salatino, 15 Misc. 2d 491 [County Ct. 1958]; see also Behler V. Ten Eighty Apartment Corp., 4/11/2001 NYLJ 18, [col.4] [Sup. Ct. New York Co.] quoting LeRoy

v. Sayers, 217 AD2d 63 [1995]) and must have a reasonable relationship to the cost or other loss that may be incurred by the condominium for which it is imposed (see New York Condominium & Cooperative Law (2d Ed.) § 11:4A ). In this case, applying the late fee provision of the bylaws would result in several hundreds of thousands of dollars in late fees as evidenced by the bills sent to the defendant for, inter alia, \$413,871.00 in June 2004, \$455,841.00 in July 2004, \$505,424.16 in August 2004, \$990,568.00 in March 2005, \$702,000.00.00 in August 2005 and \$198,000.00 in October 2005. Plaintiff has submitted no evidence to demonstrate that such amounts are a reasonable reflection of the amount of damages or loss sustained by the plaintiff as a result of defendant's default. On the contrary, plaintiff's revised assessment of 9% per annum and its present request for 10% per annum demonstrates that calculation of late fees in the manner provided in the bylaws therefor would result in imposition of exorbitant amounts. Thus, the provision in the bylaws with respect to the late fees is unenforceable as written. Neither the Court (see e.g. Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co., 1 NY3d 470 [2004]; Slamow v. Del Col, 174 AD2d 725 [1991], aff'd 79 NY2d 1016 [1992]) nor the Board has the authority to modify the bylaws which are in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate (see Murphy v. State, 14 A.D.3d 127,

133 [2004])). Any such amendment must be made in accordance with the provisions of the bylaws.

With respect to the Referee crediting defendant Kaplan with any amount "overlapping" the Civil Court judgment, it is the Court's finding that the Referee improperly included in his calculations any sums as being due prior to April, 2000. 10%

Article VII, Section 1(a) of the bylaws provides that the right to use a designated parking space is an "Appurtenant Interest" which the Board can suspended. Article 5 Section 6(b), provides that the Board can revoke the assignment of the parking space if the unit owner is in arrears in the payment of common charges, assessments or any other charges.

In March, 2000, as a result of Kaplan's continued failure to pay the amounts due for, inter alia, common charges, the plaintiff commenced a holdover proceeding in the Housing Court of the Civil Court of the City of New York, Queens County, to recover the defendant's parking space and to obtain a money judgment for the amounts due in accordance with the condominium's bylaws. The proceeding was settled by a stipulation providing, inter alia, that the defendant was to pay \$15,740.97 which was the amount he owed.

The settlement was approved by the Board on April 11, 2000, by passing a resolution which stated that "the Board of Managers hereby approves the proposed settlement offer in the amount of

\$15,740.97 for all past due charges, assessments, electrical charges, etc. through March 2000."

When the defendant failed to make payment in accordance with the stipulation, the plaintiff elected to entered a money judgment in the Civil Court for \$15,740.97. The judgment included an amount for attorney's fees, however, on appeal, the Appellate Term, vacated the amount representing attorney's fees.

As plaintiff claims, Article 9-B of the Condominium Act gives a condominium two remedies, as holder of a lien for unpaid common charges, to enforce payment of the sum encompassed by the lien, with interest thereon (Real Property Law § 399-aa). However, Real Property Law § 339-aa, provides that "[t]he lienholder can either elect (emphasis added) to recover a money judgment for the sum secured by the lien or the lien may be foreclosed in the name of the board of managers 'in like manner as a mortgage of real property....'" (Bergman on New York Mortgage Foreclosure § 36.10, at 58). No specific prohibition against the dual pursuit of both remedies exists in Article 9-B of the Condominium Act (cf. RPAPL 1301). Real Property Law § 339-aa instead provides that a suit to recover a money judgment for unpaid common charges is maintainable without foreclosing or waiving the lien which secures that obligation. That statute also authorizes the foreclosure of the lien for condominium common charges even though a suit is pending to recover a money

judgment (cf. Bd. of Mgrs. of the Mews at N. Hills Condominium v Farajzadeh, [Supreme Court, Nassau County, Index No. 4437/2003, order Dec. 16, 2003, O'Connell, J.]). However, Real Property Law § 339-aa cannot be interpreted so as to result in the condominium obtaining two judgments encompassing the same debt regardless of whether plaintiff denominates the Civil Court Judgment as recovery of use and occupancy or common charges and other charges. Moreover, the resolution of the Board clearly states that the amount was for "all past due charges, assessments, electrical charges, etc. through March 2000." In addition, Eugene Gardner testified at the hearing that the Civil Court judgment included all charges up to and including March, 2000 in accordance with the April, 2000 resolution of the Board. Thus, the calculation of the amounts due to plaintiff in this action to foreclose its lien cannot include any amounts due prior to April, 2000.

Accordingly, the court finds that the amount due to the plaintiff for common charges, electric charges, assessments and fines from April, 2000 through and including January, 2010 is \$72,024.99. This determination, however, does not preclude the plaintiff from enforcing the Civil Court Judgment in any manner permitted by law.

Finally, although it was not improper for the Referee to exclude in his computations any recommendation as to legal fees,

this is so inasmuch as the referee is generally not empowered to compute the amount of legal fees due upon foreclosure (see Emery v. Fishmarket Inn of Granite Springs, Inc., 173 AD2d 765 [1991]).

The Order of Reference in this case did not mention that the Referee was empowered to compute the amount of the legal fees.

Even where there exists a contractual provision between parties to recover attorney's fees, such agreement may only be enforced to the extent that the amount demanded is reasonable and warranted for the services actually rendered (see Yonkers Rib House, Inc. v. 1789 Cent. Park Corp., 63 AD3d 726 [2009]; Kamco Supply Corp. v. Annex Contr., 261 AD2d 363, 365 [1999]). The determination of what constitutes a reasonable attorney's fee is left to the discretion of the trial court, based upon the consideration of such factors as the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel (see Miller Realty Associates v. Amendola, 51 AD3d 987 [2008]; SO/Bluestar, LLC v. Canarsie Hotel Corp., 33 AD3d 986 [2006]; Juste v. New York City Tr. Auth., 5 AD3d 736 [2004]). A hearing is not required where the court has sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered ( Bankers Fed. Sav. Bank v. Off W. Broadway Developers, 224 AD2d 376, 378 [1996]).

It is undisputed that Article V, Section 6 of the bylaws provides for the recovery of attorney's fees in an action to recover all charges due to the Board of Managers or by foreclosure of the lien. The plaintiff has established that it is entitled to recover the attorney's fees incurred from the services provided by (1) Windels Marx in the amount of \$7,582.00; (2) Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. in the amount of \$11,537.93; and (3) Beckman, Henoch, Peterson, Peddy & Fenchell, P.C. \$43,482.88 for services through January 31, 2010.

Accordingly and in view of all of the above, the plaintiff's and defendant's respective motions are granted in part and denied in part as follows.

The referee's report is affirmed to the extent that he recommended that the property be sold in one parcel and that plaintiff should not be awarded any amount for late fees.

The referee's report is disaffirmed with respect to his findings as to the amount due and owing plaintiff and modified to find that the amount due and owing plaintiff for common charges, electric charges, assessments and fines from April, 2000 through and including January, 2010, to be \$72,024.99 and that plaintiff is entitled to an award of \$62,602.81 which the court finds to be the reasonable value of legal fees incurred in this action.

That branch of the plaintiff's motion for leave to enter a judgment of foreclosure and sale is granted.

The Referee is granted \$2,000.00 for the services rendered in this action.

Settle judgment.

Dated: February 28, 2011  
D# 44

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J. S. C.