

Board of Mgrs. of the Greene House Condominium v Nahoum
2012 NY Slip Op 30217(U)
January 23, 2012
Sup Ct, NY County
Docket Number: 114514/10
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
BOARD OF MANAGERS OF THE GREENE HOUSE
CONDOMINIUM,

Plaintiff,

-against-

Index № 114514/10

KENNETH NAHOUM and BASIA MILEWICZ a/k/a
BARBARA MILEWICZ, WASHINGTON MUTUAL
BANK, F.A., MERS, AS NOMINEE FOR COUNTRYWIDE
HOME LOANS, INC., COLGATE SCAFFOLDING &
EQUIPMENT CORP., JP MORGAN CHASE, NATIONAL
ASSOCIATION, JOHN DOE №. 1 THROUGH JOHN DOE
No. 10, the names being fictitious and unknown, the persons
or parties intended being the tenants, occupants, persons or
entities, if any, having or claiming any interest in or lien
upon the premises described in the Complaint,

Defendants,

-----X
KENNETH NAHOUM and BASIA MILEWICZ,

Plaintiffs,

-against-

Index № 107116/11

BOARD OF MANAGERS OF THE GREENE HOUSE
CONDOMINIUM,

Defendant.

-----X
EMILY JANE GOODMAN, J.:

Before the court are two separate actions stemming from the decision of Kenneth
Nahoum (Nahoum) and Basia Milewicz (Milewicz) (together, Nahoum/Milewicz) to withhold
payment of their monthly condominium common charges in response to what they view as an
inequitable apportionment of common charges against their penthouse units.

Under index number 114514/10 (the Board Action), the Board of Managers of the Greene

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House Condominium, on behalf of all unit owners (the Board) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor on its claims for lien foreclosure, breach of contract, attorneys' fees and related costs of collection based on the failure of Nahoum/Milewicz to pay their required common charges which, as of April 5, 2011, were in arrears in a total amount of \$109,423.10. Under index number 107116/11 (Nahoum/Milewicz Action), Nahoum/Milewicz move, by order to show cause, for a temporary restraining order and preliminary injunction restraining the Board from interfering with their use of their apartments, the Condominium's elevators, common areas and appurtenances thereto, and from posting and distributing information about plaintiffs, including their names, photographs, unit numbers, and purported arrearage balance. The motions, under index number 114514/10, motion sequence 001, and 107116/11, motion sequence 002, are consolidated for the purpose of disposition.

The following facts are taken from the parties' pleadings in both actions, as well as from the affidavits and documentary evidence submitted in support of each action, and are undisputed unless otherwise indicated.

Nahoum and Milewicz are residential condominium unit owners at the Greene House Condominium, located at 95 Greene Street, New York, New York (the Condominium). Of the approximately 30 residential, or "upper" units, Nahoum and Milewicz own four penthouse units (the Units). More specifically, Nahoum is the owner of Units PHA and PHE, Milewicz is the owner of Unit PHB, and together, Nahoum and Milewicz are the owners of Unit PHC. Penthouse unit PHD has, at all relevant times, been owned by nonparty Angela Feeser (Feeser). Each owner of a penthouse unit has the right to use and enjoy the roof space adjacent to that unit.

In or about 2002, Nahoum/Milewicz began extensive renovations to combine three of

their apartment units, PHA, PHB, and PHE into a single, combined unit. As part of that renovation process, Nahoum entered into an agreement with the Board which resulted in his acquisition of additional common area and mechanical space. Disputes arose during that period concerning the manner in which the renovations were being performed on the Units, Nahoum's ownership and use of the common area and mechanical space, and Feeser's use of roof space for a proposed build-out of her penthouse unit. The lawsuits stemming from these disputes, under New York County index numbers 120240/03,¹ 600826/06, and 108303/06 (the Prior Actions)², were ultimately resolved in or about November 2008, by stipulation of settlement (Settlement Agreement). As part of the terms of settlement, as between Nahoum/Milewicz and the Board, Nahoum/Milewicz agreed to relinquish, and did relinquish, 306 square feet of the roof space and 744 square feet of the mechanical space (roof/mechanical space) that they had acquired in 2002 (*see Nahoum/Milewicz Aff. in Opp.*, Exhibit 1, Settlement Agreement §§ 17, 18).

The common charges assessed against the Units were not mentioned in the Settlement Agreement. It is undisputed that following the execution of the Settlement Agreement, the discontinuance of the Prior Actions, and the relinquishment of the roof/mechanical space, no reapportionment was made to the common charges assessed against the Units. It is also undisputed that discord between Nahoum/Milewicz and the Board (presumably, about the common charges) escalated after the Prior Actions were discontinued and that

¹Along with the Board and the Condominium, Feeser named Nahoum as a defendant in her action (under index no. 120240/03) both individually, and in his then position as Board president.

²In the Prior Actions, the Board was the plaintiff and Nahoum and Milewicz were named as defendants.

Nahoum/Milewicz's response to their problems with the Board was to withhold payment of their monthly common charges.

The records submitted in support of the Board's motion reveal that, between November 1, 2009 and August 20, 2010, Nahoum/Milewicz paid the common charges for the Units at irregular intervals, missing some payments entirely. As a result, the Board caused liens to be filed and recorded against each Unit with the New York County Office of the City Register (City Register) on October 6, 2010, as follows: PHA - under CRFN 2010000335505, in the amount of \$11,491.58; PHB - under CRFN 201000033494, in the amount of \$8,023.17; PHC - under CRFN 2010000335536, in the amount of \$6,393.49; and PHE - under CRFN 2010000335542, in the amount of \$10,826.97 (together, the Liens). After the Liens were filed and recorded, Nahoum/Milewicz did not make any further payments toward their Units' common charges, regardless of whether the common charges were past due or currently due and accruing.

The Board, which is the governing body of the unit owners, and is responsible for handling the affairs of the Condominium (By-Laws, Article II, § 1), responded by commencing the Board Action, on or about November 4, 2010. Central to the complaint are the Board's assertions that, not only are Nahoum/Milewicz obligated under the By-Laws to pay their common charges, as assessed by the Board (By-Laws, Article VI, § 4), but that the Units constitute approximately 18% of the total common interest of the Condominium, and Nahoum/Milewicz's failure to pay their past due and current charges has had a severe impact on the Condominium's operating budget. Accordingly, the Board took the steps it deemed necessary to rectify the situation, which included both the filing and recording of the Liens and the commencement of the instant action (*see* By-Laws, Article II, §§ 1, 2 and Article VI, §§ 1, 5, 6).

The Board's complaint sets forth eight causes of action. The first, third, fifth and seventh causes of action seek lien foreclosure with respect to PHA, PHB, PHC, and PHE, respectively. The second, fourth, sixth and eighth causes of action accuse the owner of each of these Units with breach of contract based upon the respective owner's failure to pay all common charges, interest and late fees, as required under the terms of the By-Laws, plus attorneys' fees and expenses due to the Condominium in connection with the Board's collection of these charges and fees.

After the commencement of the Board's Action, and before issue was joined, the Board notified Condominium unit owners, by notice dated January 26, 2011, that a special meeting would be held in February to consider and vote upon several amendments to the By-Laws (the Amendments) which the Board had adopted for dealing with common charge delinquencies. According to the notice, ratification of the Amendments would enable the Board to "take all appropriate steps and measures against those owners who are seriously delinquent (more than 60 days past due)" (Nahoum/Milewicz Order to Show Cause, Exhibit E). Nahoum/Milewicz were two of the three unit owners who were identified, by name, in the notice and designated as "Serious Delinquents." Following a unanimous vote and ratification by the unit owners, the By-Laws were amended on February 28, 2011, and recorded with the City Register one month later, on March 28, 2011 (*see* The Board's Aff. in Opp., paragraph 5).

Of particular relevance to the instant motions, is the amendment to Article II, Section 2 (c), which provides, in relevant (*italicized*) part:

Collection of each Unit Owner's proportionate share of the Common Expenses, in accordance with the Common Interest or Upper Common Interest of such Unit . . .
In addition to the measures specifically referred to in Article VI of the By-Laws,

the Board shall have the authority to pursue all other lawful measures . . . against any [Serious Delinquents] . . . such measures to include, but not be limited to, restricting said Unit Owner's access to building services and amenities, deactivating any and all elevator keycard(s) appurtenant to a delinquent Unit Owner's Unit, posting the name, unit number, photograph, arrearage balance of said Unit Owner, together with any other reasonably pertinent information in the building's lobby, removing said Unit owner's nameplate from the intercom system

....

Also ratified and relevant herein, are the Amendments prohibiting Serious Delinquents from serving on the Board of Managers (Article II, Section 1), from voting at Annual or Special Meetings (Article III, Section 8), and from making structural additions, alterations or improvements to their units (Article VI, Section 12).

After the Amendments were ratified, Nahoum/Milewicz served their joint answer containing eight affirmative defenses, on or about March 9, 2011. Among the affirmative defenses are Nahoum/Milewicz's assertions that the causes of action contained in the complaint must fail because the Board failed to reapportion the common charges to reflect their current ownership interest, and because the Board breached the covenant of good faith and fair dealing.

While this action was pending and prior to submission of the instant motions for resolution, the Board took measures, which had recently been authorized under the Amendments (Article II, § 2 [c]), to induce Nahoum/Milewicz to pay their common charges. After notifying counsel for Nahoum and Milewicz of its intended course of action (in the absence of expedited payment of all outstanding sums), on June 17, 2011, the Board deactivated the Building's elevator key cards appurtenant to Nahoum/Milewicz's Units. The Board also posted a photograph of the couple in the lobby which contained information pertaining to their common charge arrearage.

On the same day, June 17, 2011, Nahoum/Milewicz responded by commencing their own action against the Board (the Nahoum/Milewicz Action), for both declaratory relief and monetary damages based upon the same underlying fact pattern. More specifically, Nahoum/Milewicz seek a declaration that the Board must reapportion the common charges assessed against their Units consistent with their relinquishment of the approximately 1,000 square feet of roof/mechanical space, and that the Amendments are invalid and unenforceable. They seek monetary damages based upon allegations of negligence, breach of contract, conversion, and their overpayment of common charges and corresponding real estate taxes, and they demand that this court sanction the Board for denying them use of the elevator and for posting of their photographs and information in the Building's elevator and/or lobby.

On June 17, 2011, Nahoum/Milewicz also served their motion, by order to show cause, for a temporary restraining order (TRO) and preliminary injunction restraining the Board from interfering with their use of the elevator, their apartment units, and common areas, and from posting and distributing photographs and information about them and their purported arrearage balance. According to the affidavit of Nahoum which accompanied the motion for emergency relief, the Board's actions were having a detrimental effect on his family's health and well-being. On June 22, 2011, this court granted the motion to the extent of conditioning the TRO (pending a hearing on a preliminary injunction) on Nahoum/Milewicz's payment of one-quarter of the amounts due on the first of each month, beginning July 1, and staying current with their monthly obligations.

The posting was removed from the lobby the same day and Nahoum/Milewicz's key cards for use of the elevator were reactivated on the next, June 23, 2011. However, according to

the Board, when Nahoum/Milewicz continued to withhold payment of their common charges, failing to make even the reduced payments ordered by the court, it once again, on July 8, 2011, deactivated the elevator key cards appurtenant to their Units.

The Board claims that Nahoum/Milewicz have still not made any payments towards their common charges, entitling it to summary judgment on its claims for lien foreclosure, breach of contract, attorneys' fees and the costs of collection. The uncontradicted proof submitted by the Board reveals that: (1) Nahoum/Milewicz have, at all relevant times, owned the Units at issue; (2) Nahoum/Milewicz agreed when they purchased the Units to be bound by the Declaration and By-Laws; (3) the Declaration and By-Laws require unit owners to pay the common charges assessed by the Board; (4) Nahoum/Milewicz have failed to pay anything towards the common charges (or assessments or late fees) of the Units since August 2010; (5) the amount of common charge arrearage for each of Nahoum/Milewicz's Units (*see* sworn affidavit of Paul Brensilber [Brensilber], the Condominium's property manager, together with the account statement for the Units); (6) the Board has an automatic lien on Nahoum/Milewicz's Units based upon Real Property Law (RPL) § 339-z, which grants a condominium board of managers a lien on each unit for which there are unpaid common charges; and (7) Article VI, § 6 of the By-Laws authorizes the Board to institute "any proceeding . . . to collect such unpaid Common Charges or . . . [to institute] an action to foreclose the lien on such unit [or units] arising from said unpaid Common Charges," and to recover "all expenses . . . attorneys' fees, paid or incurred by the [Board] in any proceeding brought to collect such unpaid Common Charges or in an action to foreclose the lien on such unit arising from said unpaid Common Charges" in accordance with RPL §§ 339-z and 330-aa (*see* Aff. in Support, Exhibits A - N). The Board contends that, based on the above, it has

established its cause of action sufficiently to warrant the court, as a matter of law, to direct judgment in its favor on the issue of liability (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Nahoum/Milewicz neither contradict or deny the Board's proof regarding their delinquency, nor do they dispute the documentary evidence or meaningfully challenge the Board's authority to seek lien foreclosure and/or damages pursuant to the By-Laws and the RPL. Rather, they oppose the motion on the ground that questions of material fact exist as to whether the Board breached the covenant of good faith and fair dealing by failing to reapportion the common charges to reflect their reduced interest in their Units following their post-settlement relinquishment of approximately 1,000 square feet of roof/mechanical space, and by amending the By-Laws in the manner set forth above in order to harass and shame them into paying their common charges at a disproportionately higher rate than is appropriate under the circumstances. Nahoum/Milewicz further argue that the Amendments contravene the Declaration of the Greene House Condominium (Declaration),³ and that following their ratification in February 2011, the Board stepped up its campaign against them by, among other things, denying Nahoum/Milewicz, their family and guests, access to the elevator, hanging the photograph containing disparaging information about them in the elevator and/or lobby, ignoring their complaints of leaks into their Unit, subjecting their minor children to harassing comments by Board members, and by serving the instant motion.

In opposition to the motion, Nahoum/Milewicz submit Nahoum's sworn affidavit in

³The Declaration, dated January 24, 1985, and recorded in the New York County Office of the City Register (City Register) on January 28, 1986.

which he asserts, in relevant part, that:

21. . . . despite several requests, [the Board] has failed to reapportion any of the allotted common charges of the [Condominium/Building] to reflect my reduced interest of the common and mechanical space of the Building.

22. Since 2003, despite never having utilized the space, Milewicz and I have paid these inflated common charges despite having relinquished more than a thousand square feet of roof and mechanical space under the Settlement Agreement. We have also paid more than our allocable share of real estate taxes.

23. [The Board] now brings this action seeking, among other things, an order of foreclosure of liens filed against the Units and monetary damages arising from [Nahoum/Milewicz's] purported breach of the Condominium's declaration and by-laws, despite the fact that common charges were never apportioned despite [the Board's] clear duty to do such.

They also submit copies of the Settlement Agreement, stipulations of discontinuance, notice of release of liens against Nahoum/Milewicz's units, an albeit not fully executed contract of sale for "common elements" between the Condominium and Nahoum/Milewicz, and other documents relevant to the Prior Actions, without explaining their relevance or applicability to this action.

To the extent to which Nahoum/Milewicz appear to argue that they understood that there would be a reapportioning of the common charges consistent with their reduced interest, they fail to submit any documents, e-mails, letters, etc., to confirm the basis for, and/or content of, their understanding. In fact, a review of the documents submitted both by Nahoum/Milewicz and the Board fails to reveal that the parties involved in those transactions contemplated an adjustment to the common charges, and conspicuously absent is any evidence, probative or otherwise, that their common charges were increased when Nahoum/Milewicz acquired the additional common area and mechanical space in or about 2002, to support their claims of reasonable expectation and/or of inequitable treatment. Not only have Nahoum/Milewicz failed to raise a question of fact with respect to any of the evidence submitted by the Board, but their failure to produce any competent

evidence to support the essential elements of their affirmative defenses requires this court to disregard those assertions in their entirety (*see Alvarez v Propect Hosp.*, 68 NY2d 320, 324, 325 [1986]).

Nahoum/Milewicz's attempt to use their withholding of payment of any part of the common charges as leverage to force the Board to reassess their common charges based upon their post-Settlement Agreement reduced percentage of common interest, is misguided. The more appropriate vehicle for addressing the perceived inequity and/or challenging the Board's actions is through its causes of action under the Nahoum/Milewicz Action for a declaratory judgment, monetary damages and other forms of equitable relief.

Finally, the TRO issued on June 22, 2011 is vacated and the balance of the requested emergency relief is denied. Nahoum/Milewicz's failure to meet the conditions set forth in this court's order by paying even the reduced amount ordered by this court demonstrates that the Board's actions were not as detrimental to Nahoum/Milewicz's family as attested to in Nahoum's affidavit in support of the emergency relief, and they are not entitled to the protections of the TRO.

Based upon the documentary evidence, as set forth above, the Board has established entitlement to judgment as to liability. Accordingly, it is

ORDERED, with respect to the action under index number 114514/10, that the motion by the Board of Managers of the Greene House Condominium, on behalf of all unit owners, for an order pursuant to CPLR 3212, granting it summary judgment on its claims for lien foreclosure, breach of contract, attorneys' fees and related costs of collection against Kenneth Nahoum and Basia Milewicz, is granted only as to liability; and it is further

ORDERED, with respect to the action under index number 114514/10, that the Board of Managers of the Greene House Condominium, on behalf of all unit owners, serve a copy of this order with notice of entry upon all parties and the Clerk of the Trial Support Office (Room 158), file a notice of issue and a statement of readiness and pay the proper fees, if any, by 2/15/12 2012, for a trial on damages, and appear for a trial on damages in Part 17 on March 5, 2012 2012, at 10 A.M./P.M.; and it is further *confirmed in advance with trial judge* *Shlomo Heller* *646 386 5691*

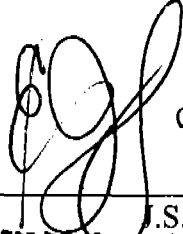
ORDERED, with respect to the action under index number 107116/11, that the motion, by order to show cause, by Kenneth Nahoum and Basia Milewicz, for a preliminary injunction is denied; and it is further

ORDERED, with respect to the action under index number 107116/11, that the Temporary Restraining Order granted and issued on June 22, 2011, against the Board of Managers of the Greene House Condominium is hereby vacated.

This constitutes the Decision and Order of the Court.

Dated: January 23, 2012

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J.S.C.
EMILY JANE GOODMAN