

Board of Mgrs. of the Clinton West Condominium v Desmond
2012 NY Slip Op 31791(U)
July 2, 2012
Sup Ct, New York County
Docket Number: 103409/11
Judge: Joan A. Madden
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. JOAN A. MADDEN
J.S.C.

PRESENT:

PART 7

Justice

Index Number : 103409/2011

BD. MGRS. OF CLINTON

VS.

DESMOND, EDWARD

SEQUENCE NUMBER : 001

APPT REF COMPUTE/EXAMINE ACCT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ No(s).

Replying Affidavits	No(s).
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Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

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

FILED

JUL 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

1. CHECK ONE: ☐ CASE DISPOSED ☒ ~~NON-FINAL DISPOSITION~~
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

HON. JOAN A. MADDEY J.S.C.

☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
THE BOARD OF MANAGERS OF THE CLINTON WEST
CONDOMINIUM, suing on behalf of the unit owners,

INDEX NO. 103409/11

Plaintiff,

-against-

EDWARD DESMOND, NYC PARKING VIOLATION
BUREAU, NYC ENVIRONMENTAL CONTROL BOARD,
and JOHN DOE AND/OR JANE DOE inclusive the last two
names being either tenants or occupants of the lien premises
or persons or parties having or claiming a right, title or interest
in the lien premises herein being sued fictitiously because
their representative names are presently unknown to the plaintiff,

FILED

JUL 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action to foreclose on a lien for unpaid condominium common charges in the sum of \$9,461.53, plaintiff The Board of Managers of the Clinton West Condominium ("Board of Managers") moves for an order pursuant to CPLR 3212 striking the answer of defendant Edward Desmond, and granting plaintiff summary judgment against said defendant "for the relief demanded in the complaint." Defendant Desmond appears pro se and opposes the motion.¹

The Clinton West Condominium is a condominium apartment building located at 516 West 47th Street in Manhattan, operated by plaintiff Board of Managers. Defendant Desmond is the owner of unit S3G. Plaintiff commenced the instant action by filing a summons and complaint on March 21, 2011; on April 1, 2011 plaintiff filed an amended summons, but did not

¹After the parties appeared for oral argument and the motion was submitted, defendant improperly sent the court additional papers and exhibits, which the court returned to defendant and has not considered.

amend the complaint. The complaint asserts one cause of action for judgment of foreclosure and sale based on its lien for unpaid condominium common charges,² alleging that as of March 1, 2011, defendant owes "common charges and other assessments in the sum of \$8,698.54 per the schedule annexed here as Exhibit 'B,' in addition to applicable interest thereon and late charges and penalties."³ Defendant Desmond answered pro se. The answer includes denials and one defense of failure to state a cause of action.

Plaintiff is now moving for summary judgment "for the relief demanded in the complaint on the ground that there is no defense to the cause of action alleged in the complaint." In support of the motion, plaintiff submits an affidavit from its Board President Michael Dowling, who refutes the denials in defendant's answer and concludes that the "simple, uncontroverted fact is that the Defendant has failed to comply with the Declaration, By-Laws and rules and regulations of the Condominium by failing to pay his monthly common charges," and as a result "plaintiff filed a lien of common charges with the Office of the City Register and now elects to foreclose on same, pursuant to its statutory rights. Defendant has failed to raise any triable issue of fact in his answer." Plaintiff also submits documents, including the pleadings, the verified lien as filed

²Plaintiff's claim for attorney's fees appears in the "Wherefore" clause of the complaint, which states that plaintiff is seeking, *inter alia*, "attorney's fees and expenses in connection with the collection of the amount due."

³Exhibit B is the Tenant Ledger for defendant's unit for the period from September 2010 through February 2011. The Ledger lists a total amount owed as of February 1, 2011 of \$8,689.54, consisting of arrears (\$6,834.79 as of 9/1/10), common charges (\$821.99 per month for September, October, November and December 2010); and late charges (\$50 per month for 5 months). The Ledger also lists payments of \$1,120.86 and \$1,124.40 on November 18, 2010, that were applied to arrears, and payments of monthly common charges in the amount of \$838.43 for January and February 2011.

[* 4]

with the City Register, several provisions in the condominium's by-laws, and the Tenant Ledger for defendant's unit updated through December 1, 2011 (hereinafter the "Updated Tenant Ledger").

In opposition to the motion, defendant Desmond submits an unsworn "Answer" and documents consisting of his two checks payable to plaintiff, dated April 18, 2011 and May 2, 2011, each in the amount of \$7,397.91; correspondence between plaintiff and defendant regarding those checks; and letters plaintiff sent defendant in April, May, July, August and September 2011, enclosing invoices from plaintiff's attorney, advising that defendant was responsible for the condominium's legal expenses and that those charges would appear on his next monthly bill. In his "Answer," defendant explains that he is a "Local 3 Electrician here in New York," and that "for most of 2010," he has been unemployed and he is "currently unemployed." He admits that in 2010, he "fell behind" in his common charges and that he notified "former building Manager Steven Katz of Rudd Management" that he was "unemployed and unable to pay at this time." He asserts that when the condominium changed management companies, he informed the new building manager, Ellen Marrone of Midboro Management "the same," and she suggested that if "I were to begin making my current payments it would be a show of good faith." He states that he did just that, "even though I was still unemployed," and that as of January 2011, "I have made all my monthly payments."

Defendant admits that he still owed common charges for nine months in 2010 and when he was "threatened with impending foreclosure on my home for common charge arrears of \$8689.54 . . . I was able to make a Hardship Withdrawal from my 401K Plan" and "mailed a

check to Midboro Management for the amount of \$7397.91 (\$821.99 per month) for the nine months I owed (April through December)." He states that the check was "held for over six weeks, then returned to me on May 4, 2011." He states that he e-mailed plaintiff's attorney to explain that the \$8689.54 amount was "incorrect," and requested "an itemized statement of the arrears," and said, "I will send you the check for that amount." Defendant states he received no response to his email, "[s]o on May 2, 2011, I resent another check for the same amount \$7,397.91." He states that the check "was not deposited until June 8, 2011," and contends that "this was done so that I could not vote in the Annual Meeting (May 24, 2011) and election of new Board Members, for which I was running." Defendant explains that he has "been very critical of the Clinton West Board of Managers," and based on his "experience in the construction building trades, I have seen what the Board has done wrong and how I could help to do things right." He states that the Board of Managers "personally dislikes me, and are using the resources of the Condominium to get rid of me."

Defendant further states that "[i]n the months after I paid the common charge arrears, I have received invoices for thousands of dollars of legal fees," and questions whether he should "be liable for things like telephone conferences with the Board President, Building Manager, Building Managers Supervisor; review and analysis of emails between me and the Building Manager; called Title Co a few separate times; draft summons; draft amended summons? Why should I be billed if they didn't draft the first one properly?" He asserts that "[m]any of the statements and letters are confusing and I am being charged for late fees every month, though my payment is on time."

Defendant admits that "I did fall behind in my common charges," but "[i]n April 2011, they said I owed \$8689.54 and I said I owed \$7397.91. A difference of \$1291.63." He states that he "asked for an itemized statement from 2010," which "they did not provide," and that "they did not email me or phone me, to explain the difference." He asserts that he "would have paid, if I had seen what the differences in charges were for, instead the Clinton West Board of Managers, Midboro Management, and Rosen Livingston and Cholst, decide to run up \$10,000 in legal fees and charge it to me, in hopes of driving me from my home. Again show me what the other \$1291.63 is for, and I will pay it. I do not believe that I should be held liable for any other charges after April 2011 when I, in good faith, tried to pay the arrears which I owed." He also asserts that "[i]f someone owed me \$1291.63, I would take them to Small Claims Court, I would not waste this Court's time, or run up thousands of dollars in legal fees, for what amounts to be a personal vendetta directed at me from the Clinton West Board of Managers. It was their decision to pursue this course of action. Let them pay the cost."

In response to defendant's opposition, plaintiff submits an Attorney's Affirmation in Further Support, arguing that based on defendant's admission that he owed common charges, "he has failed to submit any legal or factual basis for precluding a computation by a Referee." Plaintiff objects that defendant's opposition is not in admissible form and "cannot defeat plaintiff's motion." Plaintiff also asserts that defendant "has not had a zero balance on his common charge statements in almost three years," and that "[a]ny payments he did make were applied to his oldest arrears," and for that reason defendant's payment "was insufficient to cover his total balance since his arrearages cover a period of approximately twenty (20) months."

Plaintiff states that even if defendant's first check of \$7,397.91 had been deposited, "the account ledger indicates that Defendant would have had remaining arrears . . . [and he] would have found himself in the same position of default at the time of the Annual Meeting regardless of when the check was accepted by the Board of Managers." Plaintiff asserts that defendant was provided with an itemization of charges, based on his own Exhibit E, which according to plaintiff "includes letters and details regarding charges on his account."⁴ Plaintiff also asserts that pursuant to Section 6.6 of the Condominium by-laws, it is entitled to attorney's fees and that "counsel's various efforts, which Defendant disputes, were integral to Plaintiff's efforts to collect common charges from Defendant." Plaintiff argues that defendant will have a chance to be heard on the attorney's fees issue, since it will be "submitted to a Court-appointed Referee upon notice to Defendant" and is "ultimately subject to review by the Court."

As the proponent of a motion for summary judgment, plaintiff bears the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. See JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Alvarez v.

⁴As noted above, defendant's Exhibit E consists of plaintiff's letters enclosing invoices from its attorney and advising that defendant was responsible for the condominium's legal expenses. Exhibit E does not include any documents or statements as to any other charges on defendant's account, such as common charges or late fees. Notably, the Tenant Ledgers in the record do not contain any details as to defendant's account prior to September 1, 2010, and simply list a lump sum of "arrears" in the amount of \$6834.79.

Prospect Hospital, 68 NY2d 320, 324 (1986). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. See id.

Notwithstanding defendant's unsworn opposition, based on plaintiff's motion papers and the parties' undisputed documentary evidence, the court concludes that plaintiff has failed to make a sufficient prima facie showing so as to be entitled to judgment as a matter of law on its claim to foreclose on its lien against defendant for unpaid common charges. As detailed below, with respect to the unpaid common charges, plaintiff fails to acknowledge defendant's payment of \$7,397.91 during the pendency of this action, and with the exception of \$8,071.69 in attorney's fees, the disputed amount of unpaid common charges and late fees is presently limited to \$1,661.84.⁵

Plaintiff's verified lien is for \$9,461.53 and is dated January 28, 2011. Plaintiff commenced this action on March 21, 2011, asserting one cause of action to foreclose on the lien,

⁵Since Real Property Law §§ 339-z and 339-aa limit a condominium's lien and its right to foreclose on such lien, to unpaid common charges and interest, a condominium does not have a right to foreclose based on a claim for attorney's fees. See Board of Managers of Dickerson Pond Condominium I v. Jagwani, 276 AD2d 517 (2nd Dept 2000) (court awarded condominium summary judgment on its claim to foreclose liens for unpaid common charges and association fees, and denied request for attorney's fees without prejudice to the commencement of a plenary action to recover such fees). Here, plaintiff's right to attorney's fees arises from Section 6.6 of the by-laws, which states in relevant part as follows:

The Board of Managers shall have the right and duty to attempt to recover such Common Charges or assessments, together with interest thereon, and the expenses of the proceeding, including, but not limited to attorney's fees and expenses, in an action to recover the same brought against such Unit Owner, or by foreclosure of the lien on such Unit granted by Section 339-z of the Real Property Law of the State of New York, in the manner provided in Section 339-aa thereof.

alleging unpaid common charges and assessments in the sum of \$8,698.54.⁶ Shortly thereafter, defendant attempted to pay what he believed he owed in common charge, by sending plaintiff a check in the amount of \$7397.91, dated April 18, 2011 (April - December 2010 = 9 months x \$821.99 = \$7397.91). On April 21, defendant sent the following email to plaintiff's managing agent, Ellen Marrone at Midboro:

Please be informed that due to the impending foreclosure on my home, I was able to make a Hardship Withdrawal from my 401K Plan. I mailed a check for \$7397.91. As I have said to you several times in as many months, the amount in the Attorneys letters is incorrect according to my records. My Common Charges in 2010 were \$821.99 per month. I owed from April 1 through December 31, being 9 months, which is \$7397.91. I have looked at the statement you sent me on 3/9/11. I have tried to make sense of it, but with no luck. If you or anyone else should look at this statement I am sure you will all agree. So, I have sent what I owe according to my records. Any questions please feel free to phone or email me. Thank you

By letter dated May 4, 2011, plaintiff's counsel returned the check to defendant, explaining as follows:

Please be advised that the Condominium is rejecting this check because it does not reflect payment in full. If you wish to discontinue the foreclosure action by paying the arrears in full, please contact me and I will prepare a payoff letter

which will include all common charges, legal fees, and late fees due and owing to date.

On May 10, 2011, defendant responded to plaintiff's counsel with the following email:

Ms. Spell. In receipt of your letter dated May 4th 2011, and returned check. I have sent this check in the amount of \$7397.91 because that is the amount of common charge arrears that I owe from April 2010 thru December 31, 2010. Nine months at 821.99 per month. Ellen Marrone has told me the Board agreed to forego any and all late charges and legal fees. The amount that you are requesting is

⁶As noted above, plaintiff's claim for attorney's fees appears in the "Wherefore" clause of the complaint.

incorrect. Also the arrears statement that I have received is very confusing. If you would like to send me an itemized statement then I will send you the check for that amount. Thank you.

It is undisputed that defendant sent plaintiff a second check dated May 2, 2011, for the identical amount of \$7397.91, noting on the memo line, "cc arrears 2010." It is also undisputed that plaintiff accepted this check, as the Updated Tenant Ledger for defendant's unit lists a payment of \$7397.91 on June 7, 2011. The Updated Tenant Ledger also lists monthly payments of \$838.43 beginning in January 2011 and continuing through December 2011.

Even though plaintiff's Updated Tenant Ledger clearly shows that defendant made a \$7397.91 payment during the pendency of this action in June 2011, in its motion papers plaintiff simply seeks the relief "as demanded in the complaint," without mentioning such payment and acknowledging that defendant satisfied a substantial portion of the lien for unpaid common charges. Plaintiff's motion papers likewise fail to acknowledge that from the commencement of this action in March 2011, plaintiff has been charging defendant for "legal fees" which as of December 1, 2011 total \$8071.69.⁷ Since the legal fees are included in the final "running balance" of \$9733.53, the disputed amount of common charges and late charges is presently limited to \$1661.84 ($\$9733.53 - \$8071.69 = \1661.84). Plaintiff's silence as to the foregoing payment and charges is inexplicable. For that reason and in view of the relatively small amount of unpaid common charges and late fees remaining at issue, the court finds that plaintiff has failed to establish a prima facie case to foreclose on its lien against defendant for unpaid common

⁷The Updated Tenant Ledger lists the following charges for legal fees: \$89.88 charged on 3/1/11; \$1611.26 charged on 5/1/11; \$1619.22 charged on 6/1/11; \$854.26 charged on 8/1/11; \$1465.50 charged on 9/1/11; and \$2431.57 charged on 10/1/11. No legal fees are charged in November or December 2011.

charges and to sell defendant's unit. Thus, regardless of defendant's unsworn opposition papers, since plaintiff has failed to satisfy its prima facie burden, it is not entitled to summary judgment. See JMD Holding Corp. v. Congress Financial Corp., *supra*; Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for a settlement conference on July 27, 2012 at 9:30 a.m. in Part 11, Room 351, 60 Centre Street.⁸

The court is notifying the parties by mailing copies of this decision and order.

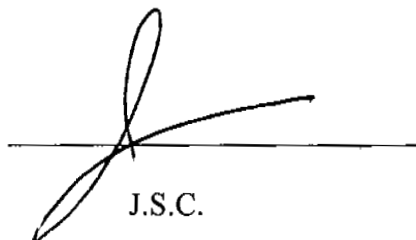
DATED: July 2, 2012

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JUL 10 2012

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COUNTY CLERK'S OFFICE**


J.S.C.

⁸In advance of the July 27, 2012 conference, the parties are directed to confirm the date by calling the Part 11 Clerk at 646-386-3314.