Board of Mgr. of Soho Greene Condominium v Clear, Bright & Famous LLC
2012 NY Slip Op 33273(U)
November 5, 2012
Sup Ct, New York County
Docket Number: 850025/2010
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN **PART** 11
Justice

THE BOARD OF MGRS OF SOHO GRAND CONDOMINIUM

-v-

CLEAR, BRIGHT & FAMOUS LLC, ET AL.

INDEX NO. 850025/10

MOTION DATE _____

MOTION SEQ. NO. 05

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 is decided in accordance with the annexed Memorandum Decision + Order.

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Dated: November 5, 2012

_____ *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 11

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THE BOARD OF MANAGERS OF SOHO GREENE CONDOMINIUM,

Plaintiff,

–against-

Index No.: 850025/11
Mot. Seq. 005

CLEAR, BRIGHT & FAMOUS LLC, JAMES T. MACCGREGOR, ROULETTE INTERMEDIUM, INC., LOCATION ONE, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and "John Does" 1 -10, the name "John Does" being fictitious and unknown to Plaintiff, the persons and firms intended being those who may be in possession of, or may have possessory, lien or other interests in, the premises herein described,

Defendants.

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CLEAR, BRIGHT & FAMOUS LLC, JAMES T. MACCGREGOR, and LOCATION ONE, INC.,

Third-Party Plaintiffs,

–against-

FRED ROSS, DANIEL HOUSER, PHILIP TAUBER, RENAISSANCE RENOVATIONS LLC, NINA SIMON, ALI HOCEK, and TOM MCKAY,

Third-Party Defendants.

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MADDEN, J.:

Plaintiff Board of Managers of SoHo Greene Condominium (the Board) and third-party defendants Dan Houser, Frederic Ross, and Philip Tauber (together, movants) move, pursuant to CPLR 3212 and 3211, for an order (1) granting the Board summary judgment on "Count I" of the complaint seeking foreclosure of its lien for unpaid common charges assessed against units 1-A,

1-B owned by defendant Clear, Bright & Famous, LLC (CBF) and leased to defendants Location One, Inc. and Roulette Intermedium, Inc., and against units 2-A and 2-B, owned by defendant James T. MacGregor (MacGregor); and (2) dismissing the first, second, and third third-party claims and counterclaims.

Familiarity with the court's decision and order dated February 17, 2012 (Decision) denying the movants' prior motion for summary judgment is presumed.

This dispute concerns a condominium building located at 20-26 Greene Street in Manhattan. Defendants CBF and MacGregor, who own four units in the Building, failed to pay their share of a $700,000 special assessment declared by the Board in June 2010 to perform work on the building's front steps and vault. Defendants claimed that the Board approved the work in violation of section 5.3 of the bylaws of the condominium, which requires that any necessary or desirable alterations, additions or improvements to the common elements of the building costing in excess of $100,000 be approved by a majority of the unit owners.

The Decision denied the movants' motion for summary judgment on its claim for foreclosure upon liens against the four units for unpaid common charges and assessments pursuant to Real Property Law § 339-z (first cause of action), a money judgment against CSF and MacGregor for unpaid common charges and assessments (second cause of action), and to collect rents from Location One, Inc. and Roulette Intermedium, Inc. pursuant to Real Property Law § 339-kk (third cause of action). Dismissal of the first, second, third, fourth and fifth counterclaims against the Board and the first, second, third and fourth third-party claims against the individual members of the Board was also denied. However, during a conference held on March 9, 2012, the court granted the movants permission to file another motion for summary

judgment on the issue of whether, regardless of other purported problems identified by the defendants with respect to the Board's conduct of the vault and stair replacement project, 62% of all unit owners of the Building voted to ratify the Board's actions on March 23, 2011.

As the Decision points out, it is within the unit owners' rights to ratify the prior actions of the Board. This court previously held:

> There is no doubt that any irregularity in the Board not seeking unit owner approval of the Work may be waived or ratified by the unit owners. *See Skytrack Condominium Bd. of Mgrs. v Windberk Partners*, 167 AD2d 381 (2d Dept 1990) (vote by majority of condominium's unit owners ratified "arguably voidable" acts by the board of managers); *see also Winter v Bernstein*, 177 AD2d 452, 453 (1st Dept 1991) (holding that ratification and acquiescence by shareholders of closely-held corporation barred claims alleging that board acted improperly). However, "[t]he act of ratification must be founded upon knowledge of the situation or upon acquiescence in the action after knowledge or in the retention of benefits derived from the voidable action." *Brooklyn Hgts. R.R. Co. v Brooklyn City R.R. Co.*, 151 App Div 465, 477 (2d Dept 1912).

Decision, at 15. The court found that factual issues existed as to (i) whether the unit owners were provided with the necessary information to properly ratify the Board's actions with respect to the vault and stair replacement project, and (ii) whether the unit owners were pressured into signing off on the Board's actions, because they were told that they would have to pay for CBF and MacGregor's share of the assessments if they did not approve the resolution.

These factual issues were not raised by the defendants until the eve of oral argument, and two months after the prior motion was submitted, via a reply affidavit from MacGregor. At oral argument of the motion, the Board's counsel objected to the consideration of this affidavit without an opportunity to submit a response. *See* 8/18/11 Tr. at 21. Accordingly, since the court did, in fact, consider the affidavit and exhibits annexed thereto in rendering the Decision, the court properly gave movants an opportunity to bring a further motion for summary judgment

with regard to the issue of ratification. Defendants' present objection that this motion violates the rule against successive motions for summary judgment, is rejected. *See Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 (1st Dept 2002) (exceptions are permitted to the rule against successive summary judgment motions when "sufficient cause" exists). Even if the court were to consider the motion as a motion for renewal, pursuant to CPLR 2221 (e), there is "reasonable justification for the failure to present [the new facts] on the prior motion."

The Board has now submitted affidavits from every other unit owner, namely Darnell Martin, Dave Olsen, Stephen Michael Satchell, Daniela Pestova and Ed Scheetz, each of whom aver that no one coerced their vote or made misleading statements to them. Rather, each of these affiants state that their votes stemmed from long-standing knowledge of the vault and stair replacement project and full awareness of the alleged improprieties claimed by MacGregor.

There is no dispute that each unit owner was provided with copies of the Whitlock and WASA engineering reports. This fact was alleged in the defendants' answer, and admitted by the Board in its reply. *See* Answer, ¶ 99; Reply, ¶ 30; *see also* Ross Aff., ¶10. In addition, the affidavit testimony currently submitted demonstrates that the unit owners were fully familiar with the vault and stair replacement project through a variety of formal and informal contacts with the Board and each other. This is a small condominium comprising only ten residential units and two commercial units (*see* Answer, ¶ 87; Reply, ¶ 18), and, according to unit owner Ed Scheetz, "[i]nformation is shared often and fluidly." Scheetz Aff., ¶ 7.

Defendants had claimed that the unit owners were coerced into voting for ratification, because they were told that they would have to pledge their units as collateral to obtain a bank loan to cover CBF and MacGregor's share of the assessments if they did not approve the

resolution. *See* MacGregor 8/17/11 Reply Aff., ¶ 13. Movants offer evidence that the unit owners had, in fact, decided to pay MacGregor's share themselves more than a month before the ratification vote, and that vote merely reaffirmed this decision. *See* Scheetz Aff., ¶¶ 34-38.

Movants have clearly met their burden, on summary judgment, of establishing that the unit owners have ratified the actions of their Board. The burden now shifts to defendants to produce "'evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).[1]

Defendants argue that material issues of fact exist that warrant denial of the motion and that discovery is needed to prove that the stair and vault replacement project is merely a non-urgent and unnecessary beautification project, the costs of which have not been properly documented. However, the issues of fact defendants attempt to raise are not germane to the issue of ratification, and defendants fail to raise a triable issue of fact that the unit owners did not ratify the actions of their Board at the March 23, 2011 meeting after being duly informed of all of MacGregor's objections and complaints.

Defendants raise a new argument to oppose payment of the special assessment based on certain language of the condominium's Offering Plan. Defendants argue that the Offering Plan

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[1]In connection with the prior motion and cross motion, defense counsel submitted an affirmation consisting of 38 pages and 140 numbered paragraphs. *See* Werth 5/31/11 Affirm. On this present motion, although limited to the single issue of ratification, defense counsel submits an even lengthier affirmation, that comprises 59 pages and 214 numbered paragraphs (*see* Werth 4/23/12 Affirm.). Both of these affirmations were submitted in violation of rule 14 (b) of the Rules of the Justices of this court, which limits memoranda of law to 30 pages and affidavits/affirmations to 25 pages unless advance permission is granted by the court for good cause. Counsel is cautioned that any further submissions in violation of rule 14 (b) will not be considered by the court.

prohibits the Board from allocating a new expense to the commercial units without the express consent of the commercial unit owners. *See* Werth 4/23/12 Affirm., ¶¶ 200-213. Defendants rely on the following language appearing in Section G of the Offering Plan entitled "Commercial Units":

> The Declaration provides that, with respect to building expenses which are either exclusively associated with the Commercial Units or, on the contrary, are exclusively incurred with respect to the Residential Units . . . , the Board of Managers may, in its discretion, allocate the entire expense associated with such item to either the Commercial Units or the Residential Unit Owners as the case may be. Any change in the allocation of expenses which increases the obligations of the Commercial Unit Owners, however, can only be made upon the affirmative vote of the Board including the member(s) of the Board representing the Commercial Units. Thus, unless the Commercial Unit Owners consent to the allocation of such an expense, for example, exclusively or even partially to their Units, the Common Charges associated with a Commercial Unit arising out of new types of expense (rather than mere increases in amounts incurred by the Condominium with respect to existing types of expense) cannot be imposed upon the Commercial Units without their consent.
>
> In the event of a dispute between the Commercial Unit Owners and the Condominium Board as to the basis for allocation of Common Charges to the Commercial Units, the parties shall select a licensed engineer, real estate broker or management firm to determine the allocation. If the parties are not able to agree on selection of an appropriate professional or his determination, the dispute shall be submitted to arbitration in accordance with Article 10 of the By-Laws.

Id., Ex. I.

This new argument fails for a variety of reasons. First, this section of the Offering Plan only applies to expenses allocated to the commercial units -- units 1-A and 1-B owned by CBF. Second, defendants never once raised this provision of the Offering Plan in opposition to the special assessment, and never sought to resolve what defendants now term an allocation dispute by a neutral professional or via arbitration, which is also required by Section 6.1 (B) (4) of the

bylaws.[2] This bylaw provides:

> If in the future, any categories of Common Expense other than those provided for at the date of recording of the Declaration are assessed by the Board as Common Charges, then the Commercial Unit Owners will pay their allocable share of the expense fairly attributable to the Commercial Units (based on their Common Interest). However, if the Commercial Unit Owners use or incur a disproportionate portion of the expense relative to their Common Interest (whether too low or too high), then such Commercial Unit Owners shall be required to pay only their fair share of such expense as determined by a licensed engineer, real estate manager or management firm selected by the Commercial Unit Owners and Board or in the event the Commercial Unit Owners and the Board cannot agree upon a real estate manager or management firm, as determined by arbitration in accordance with the provisions of Article 10.

This argument was also not raised in defendants' Answer or pled as a defense on the prior motion for summary judgment.

Third, the cited provision of the Offering Plan clearly applies to instances in which the Board attempts to allocate an expense which would have the effect of changing the "Common Interest" of the commercial units, which is currently set at 12.44% for unit 1-A and 12.65% for unit 1-B. *See* Ross 3/31/11 Aff., ¶ 23; Ross 3/19/12 Aff., ¶ 18. The vault and stair replacement project was undertaken to repair the Common Elements, defined in the Offering Plan as "all areas of the Property (other than the Units) and the equipment and installations contained in such areas or elsewhere." Werth 4/23/11 Affirm., Ex. I at 6. In accordance with section 5.3 of the bylaws, the initial cost of the stair and vault replacement project was assessed against all unit owners in accordance with their respective allocation of the Common Interest. Thus, the argument that the Board was prohibited from imposing a special assessment on the commercial

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[2]A complete copy of the bylaws was previously submitted in connection with the first motion for summary judgment as Exhibit 2 to the moving affidavit of Frederic Ross sworn to on March 31, 2011.

units without CBF's permission is not supported by the Condominium's governing documents.

Finally, defendants object that plaintiff is now seeking summary judgment "on its foreclosure claim in the amount of $420,889.92," but the only liens filed against defendants' units are in the total amount of $224,875.00, which is also the amount pleaded in the complaint. Defendants argue that "a party may not seek foreclosure for a sum greater than the underlying lien," summary judgment must be denied "giving the discrepancy in the amount being sought in foreclosure," and a lien pursuant to Real Property Law §339-z for condominium common charges, does not include assessments. Defendants' arguments are insufficient to raise a material issue of fact as to plaintiff's right to foreclose.

The increased amount alleged as due and owing is explained in the affidavit submitted by plaintiff's President, Frederic Ross, who states that "[t]he total cost of the vault project, which does not include additional fees due to the architects (which will be assessed at a later time), is $1,091,802.64. Thus, the total amount owed by MacGregor at present for the vault project is $420,889.92 (.3855 x $1,091,802.64)." Plaintiff does not dispute that it has not filed any additional liens, since the original liens totaling $224,875 were filed in October 2010. However, neither the statute nor case law indicates that condominium board must update its lien in order to exercise its right to foreclose. Rather, as the court determined in *Washington Fed. Sav. & Loan Assn. v Schneider* (95 Misc 2d 924 [NY Sup, Rockland Co 1978]), Real Property Law § 339-z includes not only the amount listed in the duly-filed notice of lien, but "all unpaid common charges which have accrued. . . . To read into this statute, as has been suggested, a requirement that the board of managers update its liens monthly in order to protect additional amounts accruing each month would be an interpretation which would be costly, burdensome and contrary

to the aforementioned legislative objective." *Id.*

Any issues as to the actual amount owed, will be addressed by the court's appointment of a referee to compute. Defendants' reliance on Private Capital Group v. Housseinipour, 86 AD3d 554 (2nd Dept 2011) is misplaced as that case did not involve the foreclosure of a lien pursuant Real Property Law § 339-aa. While defendants also argue that the section 339-a lien for "unpaid common charges" does not include assessments, they cite no legal authority in support of their interpretation, which is contrary to the definition in the statute and the condominium by-laws. The statute defines "common charges" as "each unit's proportionate share of the *common expenses* in accordance with its common interest," and "common expenses" as "(a) expenses of operation of the property, and (b) all sums designated common expenses by or pursuant to the provisions of this article, the declaration or the by-laws." Defendants submit an excerpt from the Offering Plan defining "common charges" as the "charges assessed by the Condominium Board from time to time to all Unit Owners for, among other things, the cost and expense of operating, maintaining and repairing the Common Elements." The Offering Plan defines "common elements" as "all areas of the Property (other than the Units) and the equipment and installations."

Based on the foregoing, defendants have failed to raise as material issue of fact as to the the foreclosure claim, and plaintiff is entitled to summary judgment of foreclosure.

Plaintiff is also entitled to summary judgment dismissing the first, second and third third-party claims and counterclaims. The first counterclaim and first third-party cause of action alleges that the movants have breached the bylaws of the condominium by taking on expenditures of approximately $1.5 million without first obtaining the express consent of the unit

owners. The second counterclaim seeks a declaration nullifying the special assessments and striking the related lien notices. The third counterclaim and second third-party cause of action seeks an order of specific performance against the movants requiring them to comply with the condominium's governing documents. The fourth and fifth counterclaims and the third and fourth third-party claims allege that the movants breached their fiduciary duty to defendants and the rest of the unit owners by failing to keep them adequately informed of the activities of the Board, failing to call unit owner meetings, provide correct information, and by engaging in the disparate/unequal treatment of units owners, all in connection with the stair and vault replacement project. In light of the unit owners' ratification of the Board's decision to undertake the stair and vault replacement project, all of these claims are dismissed.

Based on the foregoing, the court concludes that plaintiff motion is granted to the extent it is entitled to summary judgment on Count I of the complaint for foreclosure of lien for unpaid common charges, dismissal of the first, second and third third-party claims and counterclaims, and the appointment of a referee to compute. The balance of the action is severed and shall continue. Settle order on notice.

DATED: ~~October~~ November 5, 2012

J.S.C.