Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Board of Managers of Polo Club Condominium, Plaintiff, -against- Adekunmi Browne and Rhoda Okelarin, and "John Doe" and "Jane Doe", being fictitious names and intended to be tenants or persons in possession, and/or any other person who by bond, note, extension agreement or otherwise may be liable for deficiency judgment, if such deficiency judgment is desired and/or any party in possession of any part of the liened premises whose interest plaintiff desires to bar. Defendants.	Motion Sequence No.: 001; MG Motion Date: 11/5/12 Submitted: Index No.: 23338/2012 Attorney for Plaintiff: Cohen & Warren, P.C. 80 Maple Avenue Smithtown, NY 11787 Attorney for Defendants: Derrick Magwood, Esq. 366 North Broadway, Suite 304 Jericho, NY 11753 Clerk of the Court

Upon the following papers numbered 1 to 24 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Answering Affidavits and supporting papers, 13 - 17; Replying Affidavits and supporting papers, 18 - 24; it is

ORDERED that the plaintiff's motion for, *inter alia*, an order pursuant to CPLR 3212 awarding summary judgment in its favor against the defendants Adekunmi Browne and Rhoda Okelarin and striking their joint answer and the affirmative defenses therein; amending the caption; fixing the defaults of the non-answering defendants; and pursuant to RPAPL § 1321 appointing a referee to compute the amount due and owing the plaintiff, is determined as set forth below; and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon the defendants Adekunmi Browne and Rhoda Okelarin, and upon all parties who have appeared herein and not waived further notice, pursuant to CPLR 2103(b)(1), (2) or (3), within thirty (30) days of the date herein, and to file the affidavits of service with the Clerk of the Court.

The Board of Managers of Polo Club Condominium (the plaintiff) commenced this action to foreclose a notice of lien for, *inter alia*, unpaid common charges, late fees, and other related charges on a residential condominium unit situate in Suffolk County. By way of background, the plaintiff is the governing body of the Unit Owners (Unit Owners) of the Polo Club Condominium located at 615 Broadway, Amityville, New York 11701 (the Condominium), an unincorporated association. The plaintiff was created pursuant to a Declaration of Condominium (the Declaration) allegedly recorded on March 12, 1992 in the Office of the Suffolk County Clerk. In addition to the Declaration, the By-Laws (the By-Laws) for the Condominium were also allegedly recorded on March 12, 1992.

Pursuant to the Declaration and the By-Laws (the Governing Documents) of the plaintiff, all sums assessed by the plaintiff as common charges and assessments, but unpaid, together with interest thereon at the legal rate per annum, plus late fees and reasonable attorneys' fees, are chargeable to any Unit Owner in the condominium, and cause a lien on their unit. The Governing Documents also provide, inter alia, that the plaintiff is entitled to foreclose on the lien for unpaid common charges or bring suit to recover a money judgment for unpaid common charges or assessments. Pursuant to the Governing Documents, all Unit Owners have an absolute and unconditional obligation to pay the common charges.

The defendants Adekunmi Browne and Rhoda Okelarin (collectively the Browne Defendants) are the record owners of Unit No. 11 (the Unit) in the Condominium. The Browne Defendants acquired title to the Unit by deed dated June 7, 2007 (the deed) and recorded in the Office of the Suffolk County Clerk on September 27, 2007. The deed for the Unit contains a recitation that title held by the Defendants Browne is subject to the Declaration of the plaintiff.

In the complaint filed on August 1, 2012, the plaintiff sets forth two causes of action. In the first cause of action, the plaintiff demands that a judgment of foreclosure of sale be entered with respect to the Unit. In the second cause of action, the plaintiff requests reasonable attorneys' fees incurred in connection with this action. In the complaint, the plaintiff alleges that the Browne Defendants defaulted in the payment of common charges allotted to and due upon the Unit in the amount of $2,565.98 as of June 26, 2012. On July 11, 2012, the plaintiff filed a verified notice of lien dated June 26, 2012 for unpaid common charges in the amount of $2,565.98 in the Office of the Suffolk County Clerk pursuant to Real Property Law § 339-Z. The plaintiff further alleges that the Browne Defendants continued to fail to remit common charges allotted to and due upon the Unit $2,565.98, plus interest and the expenses of sale and costs of this action, together with attorneys' fees permitted pursuant to the Governing Documents.

In response to the complaint, the Browne Defendants interposed a joint answer dated August 24, 2012. In their answer, the Browne Defendants generally deny some of the allegations in the complaint and admit other allegations, including their default, the filing of the lien, and the amount due the plaintiff. The remaining defendants have neither answered nor appeared in this action.

The plaintiff's now moves for, *inter alia*, an order pursuant to CPLR 3212 awarding summary judgment in its favor against the Browne Defendants and striking their joint answer and the affirmative defenses therein; amending the caption; fixing the defaults of the non-answering defendants; and pursuant to RPAPL § 1321 appointing a referee to compute the amount due and owing the plaintiff. In support of the motion, the plaintiff has submitted, inter alia, the summons and complaint, the Governing Documents, an affidavit from the plaintiff's managing agent, and an affirmation from the plaintiff's managing agent. In her affidavit, the plaintiff's representative alleges that the plaintiff caused a notice of lien to be filed against the Unit due to the Browne Defendants' failure to common charges and related fees in the sum of $2,565.98 as of June 26, 2012. In her affirmation, counsel avers that the affirmative defenses contained in the answer lack merit, as the Browne Defendants admit their failure to pay the common charges as well as the validity of the lien filed against the Unit.

In opposition to the motion, the Browne Defendants have submitted, *inter alia*, the affidavit of the defendant Adekunmi Browne. In his affidavit, Browne alleges, among other things, that he has made payments to the plaintiff which have not been credited to his account and that some charges are no valid.

In reply, the plaintiff has submitted the affirmation of counsel. In her affirmation, counsel avers that her review of the plaintiff's account ledger shows that the Browne Defendants have not made any payments since April, 2012. Counsel asserts that the Browne Defendants have failed to come forward with admissible evidence showing that they made payments which were not credited to their account. Counsel further argues that partial payment, even if made, would not bar the award of summary judgment.

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). In order for a defendant to successfully oppose such a motion, the defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (***Feinstein v Levy***, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]), and do not require the

plaintiff to respond to alleged affirmative defenses which are based on such allegations (***Charter One Bank, FSB v Leone***, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

Once created, "the administration of a condominium's affairs is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements" (***Glenridge Mews Condominium v Kavi***, 90 AD3d 604, 605, 933 NYS2d 730 [2d Dept 2011]; *citing* ***Schoninger v Yardarm Beach Homeowners' Assn., Inc.***, 134 AD2d 1, 6, 523 NYS2d 523 [2d Dept 1987]).

"A purchaser of a unit in a condominium enters into a binding relationship with every other unit owner by both contract and statute. One of the elements of that relationship is the obligation to pay common charges...." (***Bd. of Mgrs. of Lido Beach Towers Condominium v Gartenlaub***, 27 Misc3d 1213A, 910 NYS2d 403, 2010 NY Slip Op 50729 [U] [Sup Ct, Nassau County, Apr. 8, 2010, Palmieri, J. slip op, at 2]). Real Property Law § 339-e (2) defines common charges as each unit's proportionate share of the common expenses in accordance with the common interest. Common expenses are defined as (a) expenses of operation of the property and (b) all sums designated common expenses by or pursuant to statute, the declaration or the by-laws (*see*, Real Property Law § 339-e [2]).

The obligation of a condominium unit owner to pay common charges is, for the most part, absolute and cannot be avoided (***90 E. End Ave. Condominium v Becker***, 2010 NY Misc LEXIS 3036, 2010 WL 2754086, 2010 NY Slip Op 31660 [U] [Sup Ct, New York County, June 29, 2010, Wooten, J., slip op at 10]; *see also*, Real Property Law § 339-x). Therefore, absent a valid defense, the plaintiff is entitled to judgment in its favor on the issue of liability as a matter of law (***Bd. of Mgrs. of Gerden Terrace Condominium v Chiang***, 247 AD2d 237, 237, 668 NYS2d 364 [1st Dept 1998]; ***90 E. End Ave. Condominium v Becker***, 2010 NY Slip Op 31660 [U], *supra*, slip op at 10]).

By its submissions, the plaintiff demonstrated its entitlement to judgment as a matter of law awarding it the amounts that it assessed against the Browne Defendants for common charges, costs and disbursements, and attorneys' fees (*see*, ***Bd. of Directors of Squire Green at Pawling Homeowners Assn., Inc. v Bell***, 89 AD3d 657, 933 NYS2d 288 [2d Dept 2011]; ***Bd. of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb***, 72 AD3d 997, 900 NYS2d 145 [2d Dept 2010]; ***Bd. of Mgrs. of the Village Mall at Hillcrest Condominium v Dadon***, 29 Misc3d 1238A, 2010 NY Misc LEXIS 6127, 2010 WL 5173180 [Sup Ct, Queens County, Dec. 20, 2010, Markey, J.]; ***Bd. of Mgrs. of Lido Beach Towers Condominium v Gartenlaub***, 27 Misc3d 1213A, 910 NYS2d 403 [Sup Ct, Nassau County, Apr. 8, 2010, Palmieri, J.]; ***Bd. of Mgrs. of the Silk Bldg. Condominium v Levenbrown***, 2009 NY Misc LEXIS 5439, 2009 WL 3062467, 2009 NY Slip Op 32127 [U] [Sup Ct, New York County, Sept. 16, 2009, Edmead, J.]). The plaintiff submitted evidence of its authority to collect those assessments pursuant to the relevant sections of the Governing Documents. The plaintiff also demonstrated the validity of the lien (*see*, Real Property Law § 339-aa). It is undisputed that the Browne Defendants agreed to be bound by the

Condominium's Governing Documents when they purchased the Unit in June 2007. It is also undisputed that the Governing Documents require that the Browne Defendants, as Unit Owners, to pay common charges, late charges, interest and the plaintiff's attorneys' fees and expenses incurred to collect such charges. Further, the plaintiff submitted an affidavit from its managing agent and a detailed account history demonstrating the Browne Defendants' failure to pay common charges, and other related charges and expenses as required by the Governing Documents.

Additionally, the plaintiff submitted sufficient proof to establish, prima facie, that the affirmative defenses set forth in the Browne Defendants' answer are subject to dismissal due to their unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., Natl. Assn. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [*unsupported affirmative defenses are lacking in merit*]; *see also*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011]; ***Morales v AMS Mtge. Servs., Inc.***, 69 AD3d 691, 692, 897 NYS2d 103 [2d Dept 2010] [*CPLR 3016(b) requires that the circumstances of fraud be "stated in detail," including specific dates and items*]; ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007] [*no competent evidence of an accord and satisfaction*]; ***Prudential Home Mtge. Co. v Cermele***, 226 AD2d 357, 640 NYS2d 254 [2d Dept 1996]; ***Naugatuck Sav. Bank v Gross***, 214 AD2d 549, 625 NYS2d 572 [2d Dept 1995] [*unsubstantiated allegations of facts are insufficient to raise a triable issue of fact with respect to an estoppel defense*]; ***Connecticut Natl. Bank v Peach Lake Plaza***, 204 AD2d 909, 612 NYS2d 494 [3d Dept 1994] [*defense based upon the doctrine of unclean hands lacks merit where a defendant fails to come forward with admissible evidence of showing immoral or unconscionable behavior*]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the Browne Defendants (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the Browne Defendants to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Wash. Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; ***Grogg v South Rd. Assocs., L.P.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). In instances where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 951 [2d Dept 2010]).

In opposition to the motion, the Browne Defendants failed to raise a triable issue of fact as to whether the charges were properly assessed or had been paid (*see*, ***Bd. of Directors of Squire Green at Pawling Homeowners Assn., Inc. v Bell***, 89 AD3d 657, *supra*; ***Bd. of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb***, 72 AD3d 997, *supra*; ***Bd. of Managers of***

Windridge Condos. One v Horn, 234 AD2d 249, 651 NYS2d 326 [2d Dept 1996]). To the contrary, the Browne Defendants concede, in their answer, that they have not paid the assessments and other charges underlying the subject lien (*see*, CPLR 3018[a]). Furthermore, the dispute as to the exact amounts due and owed by the Browne Defendants to the plaintiff does not preclude the award of summary judgment to the plaintiff on the issue of foreclosure (*see*, ***Shufelt v Bulfamante***, 92 AD3d 936, 940 NYS2d 108 [2d Dept 2012]; ***Long Island Sav. Bank, F.S.B. v Denkensohn***, 222 AD2d 659, 653 NYS2d 683 [2d Dept 1995]; ***Bd. of Mgrs. of Beechhurst Shores at Riverside Drive Condo. v Capote***, 2012 NY Misc LEXIS 4567, 2012 WL 4472293, 2013 NY Slip Op 32426 [U] [Sup Ct, Queens County, Sept. 19, 2012, McDonald, J.] [*a dispute as to the exact amount owed by the mortgagor is not a defense to a foreclosure action*]). Any such dispute may be resolved after a reference pursuant to RPAPL § 1321. Moreover, the claim by the Browne Defendants that a partial payment was made by them in an attempt to settle the owed maintenance charges, even if true, does not warrant denial of the summary judgment motion (*see*, ***Home Sav. Of Am. v Isaacson***, 240 AD2d 633, 659 NYS2d 94 [2d Dept 1997]; ***Natl. Sav. Bank of Albany v Hartmann***, 179 AD2d 76, 582 NYS2d 523 [3d Dept 1992]).

Under these circumstances, the Court finds that the Browne Defendants failed to rebut the plaintiff's *prima facie* showing of its entitlement to summary judgment requested by it (*see*, ***Bd. of Managers of Windridge Condos. One v Horn***, 234 AD2d 249, *supra*). The plaintiff, therefore, is awarded summary judgment against the Browne Defendants (*see*, ***Bd. of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb***, 72 AD3d 997, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the Browne Defendants' answer, and the affirmative defenses contained therein, are stricken.

By its moving papers, the plaintiff further established the default in answering on the part of the defendants, John Doe and Jane Doe, as these defendants never interposed answers to the complaint (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the non-answering defendants, John Doe and Jane Doe, are fixed and determined. Since the plaintiff has been awarded summary judgment against the Browne Defendants, and has established the default in answering by John Doe and Jane Doe, the plaintiff is entitled to an order appointing a referee to compute amounts allotted to the Unit and due from the Browne Defendants pursuant to the Governing Documents (*see*, RPAPL § 1321; *see also*, ***Bd. of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb***, 72 AD3d 997, *supra*; ***Bd. of Mgrs. of Plaza E. Condominium, v Ezra Realty, LLC***, 2012 NY Misc LEXIS 1102, 2012 WL 893860, 2012 NY Slip Op 30588 [U] [Sup Ct, Nassau County, Feb. 29, 2012, Parga, J.]).

Accordingly, this motion by the plaintiff is granted and a referee shall be appointed to examine and compute the sums due the plaintiff, which shall include common charges, special assessments, late charges, interest and costs, except for attorneys' fees, and shall submit a report regarding the same to this Court. The plaintiff is also entitled to prejudgment interest on the common charges and special assessments from June 26, 2012. Prejudgment interest shall accrue at the rate of .75% per month (*i.e.*, 9% per annum), as provided in Article IX of the By-Laws.

The proposed order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: 7/3/2013

William B Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**