

**Board of Mgrs. of the Park Ave. Ct. Condominium v
R20F 120 E. 87th St., LLC**

2013 NY Slip Op 32149(U)

September 10, 2013

Supreme Court, New York County

Docket Number: 103177/12

Judge: Donna Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

THE BOARD OF MANAGERS OF THE PARK AVENUE COURT CONDOMINIUM,

Plaintiff,

-v-

R20F 120 EAST 87TH STREET, LLC, et al.,
Defendants.

INDEX No. 103177/12

MOTION DATE _____

MOTION SEQ. No. 002

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1

Answering Affidavits- Exhibits _____

FILED

2, 3

Replying Affidavits _____

4, 5

CROSS-MOTION: _____ YES NO SEP 12 2013

NEW YORK

Upon the foregoing papers, it is ordered that _____
COUNTY CLERK'S OFFICE

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 9/10/13

Donna M. Mills

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
THE BOARD OF MANAGERS OF THE PARK AVENUE
COURT CONDOMINIUM, suing on behalf of the unit owners,

Plaintiff,

-against-

Index No.

R20F 120 EAST 87th STREET, LLC, NYC DEPARTMENT
OF FINANCE, NYC WATER BOARD, ZOYA
KUZNETSOVA, JOHN DOE and/or JANE DOE

103177/12

inclusive the last two names being either tenants or occupants
of the liened premises or persons or parties having or claiming
a right, title or interest in the liened premises herein being sued
fictitiously because their representative names are presently
unknown to the plaintiff,

FILED

SEP 12 2013

Defendants.

-----X
DONNA MILLS, J. : **NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff moves for summary judgment on its complaint and for an order striking the answer, an order appointing a referee, and an order compelling defendants to pay common charges and electric charges pendente lite. The parties executed a stipulation dated July 12, 2013, where defendants R20F East 87th Street, LLC (R20F) and Zoya Kuznetsoua (Kuznetsoua) agreed to pay partial use and occupancy by tendering an amount of no less than \$5,000 to an attorney to be placed in an escrow fund. The payment is accepted without prejudice to all claims and defenses, and without prejudice to plaintiff's right to collect all outstanding amounts, and is subject to further orders regarding use and occupancy and defendants' defenses thereto.

This action involves plaintiff's attempt to foreclose on a lien attached to a unit owned and occupied by R20F. This property is subject to a lien of common charges brought about by plaintiff, the board of managers of a condominium located at 120 East 87th Street, New York,

New York. The complaint alleges that R20F owes the condominium base common charges, electric charges, and late fees, as well as a portion of legal fees and disbursements. Defendant Kuznetsoua is a party to this action based on her alleged residency in the unit owned by R20F. Plaintiff asserts that any interest she has in this property is subordinate to R20F's. The inclusion of New York Department of Finance and New York City Water Board as defendants in this action is allegedly due to possible liens they hold on the unit. Plaintiff claims that, based on a stipulation, it has discontinued its action against New York City Water Board. The inclusion of John and/or Jane Doe as defendants was due to plaintiff's initial ignorance of the occupants of the unit. Plaintiff claims that it intends to delete these parties from the caption at a later date.

Plaintiff moves for summary judgment, contending that no issues of fact exist. Plaintiff argues that R20F does not deny that it is the owner of the subject unit and that it did not pay the charges. Plaintiff states that, pursuant to the condominium's declaration and bylaws, R20F has committed violations due to a failure to make timely payments of monthly charges, and that plaintiff, acting on behalf of the other unit owners, has the legal right to recover the overdue charges.

Moreover, plaintiff argues that the answer should be stricken and its four affirmative defenses dismissed. The affirmative defenses are: (1) plaintiff's failure to state a cause of action; (2) plaintiff's unclean hands; (3) plaintiff's claim of overdue charges based on gross miscalculations; and (4) plaintiff's failure to mitigate damages. It is plaintiff's position that all of these defenses are without merit.

Plaintiff asserts that it has set forth all of the legal requirements for a claim for foreclosure of a lien. Plaintiff denies that it can be said to have unclean hands when it allegedly

fulfills its legal duty of collecting delinquent charges from its unit owners. According to plaintiff, there is no duty in a common charge lien foreclosure action to mitigate damages. The claim of miscalculation is denied by plaintiff. Plaintiff claims that the calculation of common charges owed by unit owners is in accordance with that unit owner's interest in the common elements. Plaintiff contends the calculations were properly made and that the amount due is approximately \$55,654.95 through June 2013, not including legal fees incurred. Plaintiff states that the amount of its legal fees and disbursements should be determined by a referee to be appointed by the court.

In opposition, R20F argues that this motion should be denied because plaintiff cannot establish the accuracy of the monthly charges claimed. An affidavit from Janna Bullock (Bullock), a representative of R20F, is submitted, which refers to a 2011 annual meeting of unit owners conducted by plaintiff. Bullock states that, at this meeting, unit owners questioned the propriety of plaintiff's monthly common charges, complaining of the allocation of charges. Bullock avers that, after seeking documentation about the charges from plaintiff, she was denied access to information, which she claims is properly accessible to unit owners, as according to the bylaws. R20F contends that plaintiff's alleged failure or refusal to disclose demanded information, which has continued during pre trial discovery, is a sufficient ground for denying the motion. Said information, according to R20F, is pertinent to understanding how the charges have been calculated for a considerable period of time.

In reply, plaintiff argues that R20F does not dispute its liability or oppose the demand for charges. Plaintiff asserts that this defendant has not addressed the request for dismissal of the affirmative defenses. Plaintiff also asserts that it has continually provided representatives like

Bullock access to its documents when requested. Plaintiff insists that there is no miscalculation of any of the charges here.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon a proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] 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). “[W] here there is any doubt as to the existence of a triable issue” of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

“An equitable lien is a ‘right ... to have a fund, specific property, or its proceeds, applied in whole or in part to the payment of a particular debt.’” *Bank of India v Weg & Myers*, 257 AD2d 183, 192 (1st Dept 1999), quoting 75 NY Jur2d, Liens, section 131 (2d ed). A lien foreclosure action is an equitable action. *See Salerno Painting & Coating Corp. v National Neurolabs, Inc.*, 43 AD3d 1140, 1141 (2d Dept 2007).

The court finds that plaintiff has made out a case for a lien foreclosure claim. The only material dispute is whether the overdue charges are properly calculated. Defendants opposing summary judgment contend that the charges have not been substantiated and that the evidence submitted is not reliable or authenticated. There is also a dispute as to whether plaintiff has been responsive to requests for pertinent financial information in its possession. In effect, summary

judgment would be unwarranted in light of questions relating to the accuracy of the calculations. See *Board of Mgrs. of 229 Condominium v J.P.S. Realty Co.*, 308 AD2d 314, 316-317 (1st Dept 2003).

As the subject dispute concerns the amount of the charges, not the validity of the charges themselves, the court shall assign the disputed matter to a Special Referee to here and report with recommendations. The matter of proper attorney's fees will also be addressed by the Referee.

Accordingly, it is

ORDERED that the issue of the common charges, including electric charges, along with legal fees, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as a referee, shall determine the aforesaid issue; and it is further

ORDERED that the motion for summary judgment and for an order striking the answer is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date.

DATED: 9/10/13

ENTER:

DM

J.S.C.

DONNA M. MILLS, J.S.C.

FILED
SEP 12 2013
NEW YORK
COUNTY CLERKS OFFICE