

Board of Mgr. of the Alfred Condominium v Wu

2013 NY Slip Op 32547(U)

October 17, 2013

Sup Ct, New York County

Docket Number: 116966/2009

Judge: Donna M. Mills

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10/21/13
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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 ALFRED
CONDOMINIUM,

Plaintiff,

-v-

CHENG HSIEN WU, et al.,

Defendants.

INDEX No. 116966/09

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3, 4

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION.

Dated: 10 / 17 / 13

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

S/D

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

-----X
THE BOARD OF MANAGERS OF THE ALFRED
CONDOMINIUM, acting on behalf of the
Unit Owners OF THE ALFRED CONDOMINIUM,

Plaintiff,

Index No.:
116966/2009

-against-

CHENG HSIEN WU, GRACE HUIMEI HUANG
WU, THE LINCOLN SAVINGS BANK, FSB,
UNITED ORIENT BANK, FLEET NATIONAL BANK
n/k/a BANK OF AMERICA, THE CITY OF NEW YORK,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,
THE COMMISSIONER OF TAXATION AND FINANCE
OF THE STATE OF NEW YORK, INTERNAL REVENUE
SERVICE, JOHN DOE #1 through JOHN DOE # 20,

Defendants.

The true names of defendants "JOHN DOE
Nos.1-20" are unknown to Plaintiff and said
fictitious parties are intended to designate
those persons, tenants, occupants, or
corporations, if any, having or claiming an
interest or lien upon the premises
described in this complaint and which
are the subject of this action.

-----X
DONNA MILLS, J.:

This lien foreclosure action arises out of the assertion
that defendants Cheng Hsien Wu (Cheng Wu) and Grace Huimei Huang
Wu (Grace Wu) (collectively, Wu defendants), failed to pay common
charges, legal fees and other assessments due to plaintiff the
Board of Managers of the Alfred Condominium, acting on behalf of
the Unit Owners of the Alfred Condominium (the Alfred). As a

result of these unpaid charges, the Alfred filed a lien on August 21, 2009. The Alfred now moves, pursuant to CPLR 3212, for an order granting it summary judgment of foreclosure against the Wu defendants' apartment, granting it default judgment against Cheng Wu (whose default, as co-owner of the premises will also include a judgment of foreclosure), granting it a default judgment against defendants the Lincoln Savings Bank, FSB (Lincoln Bank), United Orient Bank, Fleet National Bank n/k/a Bank of America (Bank of America), the City of New York, New York City Parking Violations Bureau, New York City Environmental Control Board, New York City Transit Adjudication Bureau, The Commissioner of Taxation and Finance of the State of New York and Internal Revenue Service, for their failure to appear in the action; dismissing Grace Wu's affirmative defenses pursuant to CPLR 3211 (b); discontinuing this action as against defendants "John Doe #1" through "John Doe #20; and appointing a referee to compute the amount due to the Alfred on the subject lien.

BACKGROUND AND FACTUAL ALLEGATIONS:

The Prior Action/Order to Access Unit and Clean (the cleaning action):

The Wu defendants own apartment unit 5C in the Alfred Condominium, located in Manhattan. In April 2009, the Alfred commenced the cleaning action (Index # 105602/2009) as against the Wu defendants for, among other things, an order requiring the

Wu defendants to restore their apartment unit to a liveable condition and cure any violations. The Wu defendants' apartment, at the time the cleaning action was commenced, contained excessive accumulations of flammable materials, debris and also had rodent infestations.

On January 21, 2011, the Honorable Marcy S. Friedman held, in the cleaning action, that the Wu defendants were in breach of the bylaws by allowing their apartment to remain in an unsanitary condition. The Wu defendants were ordered to pay for cleaning costs and the court held that they were liable for the condominium's legal fees.

Subsequent fee hearings took place, resulting in money judgments totaling over \$100,000 being docketed against the Wu defendants. During the course of those hearings, the Alfred presented evidence of legal fees that started to be incurred as of May 1, 2008, stemming from the prosecution of the cleaning action. The Alfred accumulated invoices not only for legal fees, but also for the extermination costs.

Foreclosure Action (the instant motion):

On August 21, 2009, the Alfred filed a notice of lien pursuant to Real Property Law (RPL) § 339-z and § 339-aa against the Wu defendants for failure to pay common charges and expenses that were owed to the condominium. The lien was in the amount of \$20,000.00, and provided the names of the Wu defendants, their

address and the reason for the lien, as required by RPL § 339-aa. The Alfred explains that, pursuant to the Condominium Declaration, unit owners are obligated to pay common charges to the Alfred, as well as any legal fees incurred by the Alfred to cure any violations by the unit owners.

In December 2009, the Alfred Condominium commenced this foreclosure action seeking foreclosure of the August 21, 2009 lien. The complaint alleges that the Wu defendants failed to comply with the declaration and bylaws of the condominium by failing to pay common charges, legal fees and other assessments, from May 1, 2008 through and including August 21, 2009, in excess of \$20,000. The Alfred demands that the defendants' unit be sold, with the proceeds of the sale going towards their obligation to pay the lien.

In support of its complaint, the Alfred attaches a copy of the lien and also a current schedule of arrears. The only charges listed that were incurred prior to the date of the lien are a legal charge for \$530.00 for a five-day notice of default, and a \$650.00 charge for filing the lien. The other arrears included charges that were incurred after August 21, 2009, such as common charges for the month of October 2009. Under legal fees, there was a fee due in the amount of \$21,315.94 listed as a fee for "legal proceedings." This fee is listed as occurring on November 10, 2009.

The Alfred is now seeking summary judgment on this foreclosure action, to satisfy the August 21, 2009 lien by foreclosing on the Wu defendants' apartment. In support of its contentions, the Alfred submits the recorded lien, as well as the statement of the account as described above. According to the Alfred, pursuant to its bylaws, legal fees incurred by the Alfred in compelling a unit owner to remedy a violation or collect on unpaid common charges are also considered additional common charges. The bylaws allow the Alfred to take prompt action to collect on such common charges, including filing liens pursuant to RPL § 339-z, and seeking lien foreclosure, pursuant to RPL § 339-aa. Since the Wu defendants have failed to make any payments on the lien, the Alfred asserts that it is entitled to summary judgment foreclosing on the lien.

In response, Grace Wu argues that the lien is not validly substantiated, as the invoices attached to the lien mostly post-date the lien. Grace Wu contends that, since the Alfred cannot show a basis for the lien, that is, documentation of charges pre-dating the lien, summary judgment on the foreclosure action should be denied. Through counsel, she alleges that the "prior lien appears to have been wholly without basis at the time it was placed on the property. It was placed there in anticipation of acquiring attorney's fees in the prior action some time in the future." Affirmation of Barbara Cass, ¶ 33.

The Alfred replies, attaching multiple documents as evidence, such as legal fee invoices, that pre-date the lien. These amounts totaled approximately \$20,000. Account statements received by the Wu defendants, are also provided. One of these statements, dated March 2009, has a "profession [sic]" charge listed for \$2,455.00. The reply papers also refer to the transcript from the fee hearing during which the court was shown invoices, starting from May 1, 2008.

Grace Wu then submitted a sur-reply in which she opposes the Alfred's submission, as being improperly imposed, on reply.

The Alfred is also seeking to dismiss Grace Wu's affirmative defenses. In her answer, Grace Wu claims that the current foreclosure action is duplicative of the cleaning action as a way to pursue monetary relief and should be consolidated or dismissed. She also claims that the sums that form the basis of the lien are not properly chargeable. Furthermore, she argues that, since there has not been an award of legal fees, no basis exists to sustain the foreclosure action.

As additional relief, the Alfred is seeking default judgment as against Cheng Wu and the other defendants for failing to answer this action.

DISCUSSION

I. Summary Judgment:

"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 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). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *People v Grasso*, 50 AD3d at 544, citing *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

Grace Wu does not dispute that she owes money to the Alfred; she disputes the amounts that serve to substantiate the lien. Through counsel she avers, "[n]o one is suggesting that Plaintiff is not entitled to pursue a foreclosure action predicated on a lien which is based on amounts due and owing at the time it is placed on the property. The instant foreclosure and the instant motion for summary judgment may not be appropriate [emphasis in

original]." *Id.*, ¶¶ 36, 37.

As set forth below, the Alfred has met its burden to demonstrate that it is entitled to summary judgment foreclosing on a valid lien. RPL § 339-aa only requires certain information be present on the face of the lien, such as listing the address of the property, the record owner of the unit, the unit designation, the amount and purpose for which the sum is due and the date when due. The lien filed by the Alfred complied with these requirements and is valid.

As a result of the cleaning action, the Alfred was allowed to restore the Wu defendants' unit to a sanitary condition. The Wu defendants were ordered to pay for legal fees in connection with the cleaning action and money judgments were docketed as against them. This cleaning action was commenced in April 2009, which was prior to the August 21, 2009 lien being filed. As such, it is evident that the Alfred started to incur legal fees prior to the date which forms the basis of the lien. The Wu defendants have yet to make any payments to the Alfred.

However, the post-dated charges which were attached as evidence in support of the lien foreclosure action cannot form the basis of the lien. Although the Alfred replies with the alleged proper documentation in support of the lien, these submissions will not be considered in reply. "Arguments advanced for the first time in reply papers are entitled to no

consideration by a court entertaining a summary judgment motion." *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 (1st Dept 1995).

Since a question of fact remains as to the amount of the lien as of date filed, pursuant to CPLR 3212 (c), the Alfred is entitled to an immediate trial by a referee as to the issue of damages. Where, as here, on a motion for summary judgment, the only issues of fact that remain "relate to the extent and amount of damages, the court may ... order an immediate trial of such issues of fact raised by the motion, before a referee ... [internal quotation marks and citation omitted]." *Trocom Constr. Corp. v Consolidated Edison Co. of N.Y., Inc.*, 7 AD3d 434, 438 (1st Dept 2004).

Dismissal of Affirmative Defenses:

As previously mentioned, the court determined that the Wu defendants are responsible for legal fees incurred as a result of the action brought to clean their apartment. The bylaws also allow for a lien to be placed on an apartment for failure to pay common charges and legal fees. Money judgments were docketed, comprised of legal fees owed to the Alfred, stemming from the first action commenced in April 2009, which was prior to the lien. Finally, RPL § 339-aa provides that a foreclosure action can be commenced simultaneously with an action for money judgment. As such, Grace Wu's affirmative defenses are without

merit as a matter of law and are dismissed, pursuant to CPLR 3211 (b).

Default Judgments:

The Alfred provides proof of service indicating that all of the named defendants were served with the summons, complaint and notice of pendency. See plaintiff's exhibit F. According to the Alfred, the City of New York and the Internal Revenue Service both appeared and waived service of all notice of proceedings in this action except for "pleadings, notices of settlement of judgments and orders, notice of entry of judgments and orders, notices of application for discontinuance, referees reports and all surplus money proceeding." Aff of Elliott Meisel at 2. As such, the Alfred is requesting that these two defendants be treated as defaulting defendants. Bank of America also answered this action and brought its own motion to dismiss.¹ None of the other defendants, including Cheng Wu, have appeared in this action.

Since the City of New York, the IRS and Bank of America appeared in this action, the Alfred is not granted default judgment as against those defendants. However, the Alfred is granted a default judgment in the instant action as against defendants Cheng Wu, Lincoln Bank, United Orient Bank, New York

¹This motion sequence number, 002, is not a subject of this decision.

City Parking Violations Bureau, New York City Environmental Control Board, New York City Transit Adjudication Bureau and The Commissioner of Taxation and Finance of the State of New York for failing to appear in this action. The Alfred's additional request to discontinue the action as against defendants John Doe #1 through John Doe #20 is also granted.

CONCLUSION

The Alfred is entitled to a judgment of foreclosure, and the issue of the amount of the lien is referred to a referee.

SETTLE ORDER

Dated: 10/17/13

ENTER:

Donna M. Mills

J.S.C.

DONNA M. MILLS, J.S.C.