

**Board of Mgrs. of 206 E. 124th St. Condominium v
Madison Realty Capital, L.P.**

2013 NY Slip Op 33564(U)

February 21, 2013

Sup Ct, New York County

Docket Number: 154763/2012

Judge: Ellen M. Coin

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

PRESENT: HON. ELLEN M. COIN

PART 63

Board of Managers of 206 East 124th
Street Condominium,

INDEX NO. 154763/2012

Plaintiff,

MOTION DATE Oct. 3, 2012

MOTION SEQ. NO. 1

E-FILED

-against-

Madison Realty Capital, L.P., et al.,

Defendants.

The following papers, numbered 1, were read on this motion:

<u>Papers</u>	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits	1
Answering Affidavits-Exhibits	2
Reply Affidavits	3
Cross-Motion	X Yes

In this foreclosure action plaintiff moves by Order to Show Cause for an order appointing a temporary receiver as to five residential units (the "Units") purchased in an earlier foreclosure by defendant 206 Condos Investors, LLC ("206"). Defendants Madison Realty Capital, L.P. ("Madison") and 206 cross-move to dismiss the complaint. Five days after argument of this motion and cross-motion plaintiff served and filed a First Amended Verified Complaint, thereby making it impossible for defendants to respond in any substantive manner.¹ Thus, plaintiff's amended complaint did not moot the cross-motion to dismiss. (*Fownes Bros. & Co. v JPMorgan Chase & Co.*, 92 AD3d 582, 583 [1st Dept 2012]; *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998]).

MOTION FOR TEMPORARY RECEIVER

The instant motion for appointment of a receiver is predicated (1) upon §339aa of the Condominium Act, which provides for the appointment of a receiver in an action for foreclosure by

¹Defendants rejected the amended complaint and served their answer thereto only (1) in response to plaintiff's threat to move for a default judgment and (2) without prejudice.

the Board of Managers, and (2) upon Article VI, Sections 5 and 6 of the Condominium's By-Laws, which authorize foreclosure and the appointment of a receiver in the event of a default in the payment of common charges.

It is undisputed that the Units were originally owned by the sponsor, 206 Condos, LLC. It is further undisputed that Madison held a mortgage on the Units and foreclosed upon them in an action commenced in this Court in 2009 (Index No. 600891/2009).

On November 6, 2009, the attorneys for Madison and plaintiff entered into a Stipulation of Settlement (the "1st Stipulation"), which provided that \$84,418.94 was the aggregate amount owed as of that date to plaintiff in arrears for unpaid common charges for the Units. The 1st Stipulation provided that upon foreclosure sale of any unit, plaintiff would be entitled to receive from the proceeds one fifth of the arrears plus one fifth of all of plaintiff's future attorneys fees in the foreclosure action (the "Common Charges Payments"). However, it further provided, "If Madison or its nominee is the purchaser of any Unit in the foreclosure sale, then the Common Charges Payment shall be due upon the first subsequent sale of each Unit for value."

It is also undisputed that at the foreclosure sale in July 2011 the Units were sold to 206, a nominee of Madison.

On this motion plaintiff alleges that Madison has failed to sell any of the Units and that Madison and 206 have made "no discernible effort to sell these units."

In opposition, Madison and 206 submit a brokerage agreement dated September 12, 2012 between "206 Condo, LLC" and Douglas Elliman Real Estate granting Douglas Elliman an exclusive right to sell the five units.² This agreement, executed more than a year after 206 took title to the Units and more than a month after issuance of the instant Order to Show Cause, fails to support defendants' contention that they proceeded in good faith to sell the Units.

Defendants also claim that at the time 206 took title the Units were not in marketable condition. However, this allegation appears only in their attorney's affirmation in opposition, without any factual support (Affirmation of Jerold C. Feuerstein dated October 1, 2012, para. 10).

²206 Condos, LLC was the sponsor of the condominium and the mortgagor of the five units.

Defendants also note that on the heels of issuance of the instant Order to Show Cause, their attorney entered into a stipulation (the "2d Stipulation") with plaintiff's attorney providing for immediate payment of \$20,000 in reduction of the common charges, plus payments in August 2012 and September 2012 for the monthly common charges due in those months. Thus, they contend that the amount of common charges outstanding is minimal, and therefore appointment of a temporary receiver is unwarranted.

While the amount of common charges alleged to have accrued from April 2011 through June 2012 is \$41,953.20 (Affidavit of Rodney C. Clayton sworn to July 19, 2012, para.21), the complaint also alleges defendants' breach of the 1st Stipulation by failing to pay the common charges arrears accrued as of November 6, 2009 (\$84,418.94) (Compl., Third Cause of Action). Thus, even crediting the \$20,000 defendants have paid on accrued charges, at least \$100,000 in arrears have accumulated. Plaintiff also alleges that the owners of the remaining condominium units have had to pay an assessment and have had their common charges increased as a result of non-contribution on behalf of the Units. Thus, the evidence shows that the amount outstanding is far from minimal, and damage to the other unit owners continues while the Units remain unsold.

Given the damage plaintiff has alleged and in the absence of evidence of good-faith efforts of 206 to sell the Units in accordance with the 1st Stipulation, the motion for a temporary receiver must be granted. (See, e.g., *Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 101 [1st Dept 2001]).

CROSS-MOTION TO DISMISS

Defendants cross-move to dismiss the First Cause of Action for foreclosure and the Second Cause of Action for breach of contract. First, relying on documentary evidence that the Units were sold to 206 and not to Madison, they contend that since only 206 is the owner of the units, Madison is not liable for common charges. Thus, they argue that the First Cause of Action for foreclosure does not lie as against Madison. Similarly, they argue that the Second Cause of Action, which alleges breach of the Declaration and By-Laws of the Condominium and seeks a money judgment for the unpaid common charges, cannot stand as against Madison, as it is not an owner of the Units.

Plaintiff fails to offer any argument in opposition to this aspect of the cross-motion.

Where, as here, documentary evidence conclusively establishes a defense as a matter of law, the motion to dismiss based on documentary evidence may be granted. (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Since the Referee's Deed (Exh. 6 to the Clayton Aff.) shows that 206 received title to the Units, the First and Second Causes of Action are dismissed as against defendant Madison.

Defendants also rely upon a document in seeking dismissal of the First and Second Causes of Action. Thus, they note that pursuant to the 1st Stipulation, 206 owes no sums until the Units are sold to one or more third parties, a condition precedent to its obligation to pay the common charges. Such a condition precedent is an affirmative defense to plaintiff's claim, and plaintiff alleges that defendants have breached the 1st Stipulation by not making any effort to sell the units (Compl., para. 49). Thus, the documentary evidence (the 1st Stipulation) does not utterly refute plaintiff's factual allegations and does not conclusively establish a defense to the First and Second Causes of Action. (*Magnus v Sklover*, k95 AD3d 837, 838 [2d Dept 2012]).

Next defendants argue that they have the right to redeem the property by paying the amounts due under plaintiff's lien, but that plaintiff has prevented them from doing so. This argument is tendered in their attorney's affirmation (Aff. of Jerold C. Feuerstein dated Oct. 1, 2012, paras. 17, 19) but lacks factual support. Thus, this allegation fails to serve as the basis for dismissal of the First and Second Causes of Action pursuant to CPLR §3211(a)(1).

Finally, defendants contend that plaintiff has the right to seek foreclosure or money damages, but not both remedies, under the condominium's By-Laws. Real Property Law §339-aa provides to the contrary: "Suit to recover a money judgment for unpaid common charges shall be maintainable without foreclosing or waiving the lien securing the same, and foreclosure shall be maintainable notwithstanding the pendency of suit to recover a money judgment." Indeed, the subject By-Laws incorporate by reference this provision of the Real Property Law. Accordingly, so much of defendants' motion as seeks dismissal of the First and Second Causes of Action on this ground is denied.

The balance of the cross-motion is predicated on CPLR §3211(a)(7). On a motion to dismiss for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as

alleged fit within any cognizable legal theory. (See *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326; *Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Defendants move to dismiss the Third Cause of Action for breach of the implied covenant of good faith and fair dealing in the 1st Stipulation. While they concede that plaintiff served a notice of cure, they argue that plaintiff's failure to send an additional copy by fax as required by the stipulation is a basis for dismissal of this cause.

To assert a cause of action for breach of an implied covenant of good faith and fair dealing, a plaintiff must "adequately allege that the defendant injured the plaintiff's right to receive the benefits of the parties' agreement" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 22 [2005]). Transmission of a notice to cure is not a requisite element of this cause. Accordingly, this aspect of their motion must be denied.

Defendants further contend that the complaint fails to allege the elements of this claim. However, the complaint alleges defendants' duty to pay the common charges upon resale of the Units, together with the allegations that defendants "are not making any effort to sell" the Units although that they have the ability to sell the Units (Compl., paras. 49, 51). Thus, the complaint alleges that defendants have injured plaintiff's right to receive the benefit of payment of the Common Charges Payments under the 1st Stipulation. Accordingly, the Third Cause of Action adequately alleges the requisite elements of this claim.

The Fourth Cause of Action alleges that defendants have maintained a dangerous condition in two of the Units and defaulted in appearing for a hearing on the condition, resulting in the imposition of a fine. In effect, it alleges the maintenance of a nuisance. The Fifth Cause of Action alleges that defendants have failed to apply for permits and cause work to be done on the premises that would permit issuance of a J-51 tax abatement.

Defendants allege that these obligations belong to the sponsor of the condominium, and not to them. They note that the complaint fails to allege that defendants were contractually obligated to complete construction in accordance with the plans filed by the sponsor or to obtain a tax abatement for benefit of the plaintiff.

As the purchaser of the Units, 206 is responsible for the maintenance of a nuisance, as alleged in the Fourth Cause of

Action, and cannot avoid liability for this claim by looking to its predecessor owner. However, the complaint fails to allege facts as against Madison which would support this cause against that defendant.

As to the Fifth Cause of Action, the complaint fails to state the basis for plaintiff's claim that defendants owe it the duty to complete the construction project. In opposition to the instant cross-motion, plaintiff merely attaches an email from an architect which fails to indicate who hired him or for what purpose. In the absence of factual allegations to demonstrate any duty owed by the defendants to plaintiff in this context, the motion to dismiss this cause of action is granted.

The Court notes that plaintiff's First Amended Verified Complaint (the "Amended Complaint") adds the following factual allegations: "The Referee's deed explicitly states that 206 [i]s the nominee of Madison Realty and [h]olds the deed or deeds for its benefit." (Amended Complaint, para.48). In fact, the Referee's deed states no such thing, and this allegation is negated by the document itself (Exh. 6 to the Clayton Aff.).

The Amended Verified Complaint thus makes no allegations that would alter the Court's determination of the lack of viability of the First and Second Causes of Action as against Madison. Accordingly, those causes of action are dismissed *sua sponte* as against Madison in the Amended Complaint. (See *DiPasquale v Security Mutual Life Ins. Co. of New York*, 293 AD2d 394, 395 [1st Dept 2005]).

In the Amended Complaint plaintiff reversed the positions of its original Fourth and Fifth Causes of Action. However, the factual allegations fail to state a basis for any duty of Madison and 206 under the new Fourth Cause of Action or any factual basis for any duty of Madison under the new Fifth Cause of Action.

In accordance with the foregoing, it is therefore

ORDERED that plaintiff's motion for appointment of a temporary receiver is granted, and it is further

ORDERED that plaintiff shall settle an order for this Court's signature appointing a temporary receiver to be selected by the Court, and it is further

ORDERED that the cross-motion to dismiss is granted to the extent that the First, Second and Fourth Causes of Action in the original Verified Complaint are dismissed as against defendant

Madison Realty Capital, L.P. and the Fifth Cause of Action therein is dismissed as against Madison Realty Capital, L.P. and 206 Condos Investors, LLC, and the motion is otherwise denied; and it is further

ORDERED that the First, Second and Fifth Causes of Action in the First Amended Verified Complaint are dismissed *sua sponte* as against defendant Madison Realty Capital, L.P. and the Fourth Cause of Action therein is dismissed *sua sponte* as against Madison Realty Capital, L.P. and 206 Condos Investors, LLC; and it is further

ORDERED that defendants' answer to the First Amended Verified Complaint is deemed served as of the date of this decision and order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on May 29, 2013 at 2:00 PM.

Dated: February 21, 2013

ENTER:



AJSC

Check One: CASE DISPOSED **X NON-FINAL DISPOSITION**
Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART
Check if appropriate: DO NOT POST REFERENCE SETTLE ORDER