

**Board of Mgrs. of the Empire Condominium v  
Attwood**

2014 NY Slip Op 31279(U)

May 13, 2014

Sup Ct, New York County

Docket Number: 102191/12

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW  
COUNTY OF NEW YORK: PART 11

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THE BOARD OF MANAGERS OF THE EMPIRE  
CONDOMINIUM,

INDEX NO. 102191/12

Plaintiff,

-against-

MARIE-HELENE ATTWOOD, WELLS FARGO BANK, N.A.  
and ANY DEFENDANT HEREIN IF LIVING AND IF DEAD  
ANY ALL OTHER PERSONS WHOSE NAMES ARE KNOWN  
TO THE PLAINTIFF, AND WHO MAY BE SUCCESSORS IN  
INTEREST OF SAID NAMED DEFENDANTS, HEREIN  
DECEASED, AS HEIRS LEGATEES, DEVICEES,  
DISTRIBUTEES, LEGAL REPRESENTATIVES, CREDITORS,  
LIENORS GRANTEES AND SUCCESSORS IN INTEREST  
HEIRS, ALL OF WHOM WHOSE NAMES ARE UNKNOWN  
TO PLAINTIFF; "JOHN DOE," "JANE DOE," and "XYZ CORP,"

Defendants.

-----X  
JOAN A. MADDEN, J.:

In this is an action to foreclose on a lien for condominium common charges, plaintiff moves (motion seq. no. 001) pursuant to CPLR 3212 for summary judgment against defendant Marie-Helene Attwood granting a money judgment for unpaid common charges, assessments and late fees through January 2013, in the total amount of \$72,428.98. In the alternative, plaintiff moves for summary judgment against defendant Attwood on its claim to foreclose on its lien, and for an order appointing a referee to compute. Plaintiff also moves to dismiss or sever Attwood's defenses and counterclaim, and for an order directing Attwood to pay ongoing common charges, assessment and/or late fees, pendente lite, or alternatively for an order permitting plaintiff to collect directly the rent purportedly paid by Attwood's tenant pursuant to section 339-gg of the Real Property Law to satisfy ongoing common charges obligations or to offset arrears. Plaintiff

further moves for an order granting summary judgment on its claim for reasonable attorney's fees. Defendant Attwood opposes the motion and cross-moves for discovery sanctions. In a separate motion (motion seq. no. 002), defendant Attwood seeks an order pursuant to Judiciary Law §§ 753 and 756, and CPLR 5104, punishing plaintiff for civil contempt of court for its "failure and refusal to comply with and carry out the provisions" of this Court's Interim Order dated June 20, 2013 and entered June 26, 2013. Motion sequence nos. 001 and 002 are consolidated for determination herein.

Turning first to defendant Attwood's contempt motion, it is well settled that contempt is a drastic remedy, which should not issue absent a clear right to such relief. See Benson Park Assocs v. Herman, 93 AD3d 609 (1<sup>st</sup> Dept 2012); Coronet Capital Co v Spodek, 202 AD2d 20 (1<sup>st</sup> Dept 1994); Usina Costa Pinto, SA v Sanco Sav Co Ltd, 174 AD2d 487 (1<sup>st</sup> Dept 1991). "A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court." Chambers v. Old Stone Hill Road Associates, 66 AD3d 944, 946 (2<sup>nd</sup> Dept 2009), app dism 14 NY3d 747 (2010). To sustain a finding of civil contempt based on an alleged violation of a court order, the moving party has the burden to establish, by clear and convincing evidence, that a lawful order of the court expressing a clear and unequivocal mandate was in effect, and that the order was disobeyed to a reasonable degree of certainty. See Matter of Department of Environmental Protection of City of N.Y. v. Department of Environmental Conservation of State of N.Y., 70 NY2d 233 (1987); McCormick v Axelrod, 59 NY2d 574, amended 60 NY2d 652 (1983); Gryphon Domestic VI, LLC v. APP International Finance Co, 58 AD3d 498, 499 (1<sup>st</sup> Dept 2009). The party to be held in contempt must be shown to have had knowledge of the order, and the disobedience must have prejudiced the moving party's rights. See McCain v

Dinkins, 84 NY2d 216 (1994); McCormick v Axelrod, *supra*; Garcia v Great Atlantic & Pacific Tea Co, Inc, 231 AD2d 401 (1<sup>st</sup> Dept 1996).

Applying the foregoing standards, the court concludes that defendant Attwood has failed to meet her burden to sustain a finding of civil contempt. Defendant seeks to hold plaintiff in contempt for violating the following portion of this Court's June 20, 2013 Interim Order:

"ORDERED that defendant Attwood is entitled to inspect and photocopy the books and records of the condominium within 30 days and plaintiff shall make such documents available."<sup>1</sup> In support of the motion, defendant Attwood submits her own affidavit, and an affirmation from her attorney, Susan C. Warnock, and an affidavit from James L. Manning, an intern at attorney Warnock's office. Defendant also submits copies of email communications between attorney Warnock and plaintiff's counsel James C. Mantia, regarding the scheduling of the court-ordered inspection.

Attorney Warnock states that on July 22, 2013, she and intern Manning, accompanied her client, defendant Attwood, "to the office of Hiye Realty" for the purpose of "inspecting Plaintiff's books and records." Previously, on July 19, 2013, attorney Mantia emailed attorney Warnock to clarify that she would be "the one inspecting the records," and advising that his

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<sup>1</sup>The Interim Order also directed defendant Attwood to pay plaintiff monthly common charges in the amount of \$648.02 commencing with June 2013; determined that the \$48,000 defendant Attwood paced in counsel's escrow account with respect to past common charges shall remain in such account pending further order of the court; directed defendant Attwood to submit supplemental papers by August 30, 2013; directed plaintiff to submit supplemental papers responsive to defendant's papers by September 23, 2013; and scheduled plaintiff's summary judgment motion and defendant's cross-motion for oral argument on October 3, 2013. As noted herein above, in lieu of submitting supplemental papers, defendant Attwood filed the instant order to show cause (motion seq. no. 002) seeking to holding plaintiff in contempt for violating the Court's Interim Order.

“client [Mr. Chou] is concerned that if its [sic] just your client there, she’s going to cause a problem. As such we are requiring your presence to go forward with the inspection either alone or with your client.” Attorney Warnock responded, “Judge Madden did not order my presence.” Attorney Mantia replied, “I’m gonna give you a heads up that he’s gonna give her a problem if your [sic] not there,” and offered to reschedule when Warnock was available. Attorney Warnock responded, “it is likely that I will be available to accompany my client,” and asked how “your client would feel if we were to remove the docs from office to have them professionally scanned. They would be promptly returned the next day by the scanning guys. Please let me know if your client would permit this.”

The morning of the inspection, attorney Mantia responded: “Just spoke to client, he said that you need to just identify the documents you wanted [sic]. He’ll copy them for me and then I will send over to you.” Attorney Warnock replied, “Jim, Just to be clear – copies will be made at no expense to my client. The cost of scanning would have been borne by [my] client. Also – I will have a portable scanner with me and we will identify everything scanned so that you are aware of the documents we scanned. If scanning turns into a ridiculously time consuming process we might just settle for copies.”

Attorney Warnock states she did not receive a response to the foregoing email, and when she, Ms. Attwood and Mr. Manning arrived at Mr. Chou’s office, “he advised us that there was to be no ‘pictures, no scanning and no photocopying of documents.’” Attorney Warnock explains that she called “Mr. Chou’s attorney, who advised me that he would speak to his client and that I should have Mr. Chou call him” and also “indicated . . . that we would be able to obtain

photocopies of the documents.” She states that “Mr. Chou spoke to his attorney in our presence and remained adamant that there would be no photocopies.” Attorney Warnock states that “[i]n the interim, we were shown to chairs in front of a cluttered desk,” occupied by Mr. Ming, an employee of Mr. Chou’s, and when she opened up her net-book computer, “and turned it on with the expectation that I would type notes as I was reviewing documents. . . . Mr. Chou became extremely hostile . . . and began ranting again about no scanning.” She states she “shut down” her computer since she “did not wish to be thrown out of Mr. Chou’s office,” and Mr. Ming “supplied” them with “paper and pens to take notes.”

As to the inspection, attorney Warnock states that they were permitted to inspect bank statements for all of 2012 and through June 2013, invoices for 2012 and a spreadsheet showing maintenance payments, but when they requested invoices and other documents for 2013, “we were told that they ‘had not been filed yet,’” and that “he was compiling them for the accountant.” She states that when they requested documents for 2009, 2010 and 2011, “we were told that the documents were in storage.” Attorney Warnock states that Mr. Ming “advised us that he had not prepared anything other than the documents he showed us for the year 2012 since ‘they did not know what documents we wanted to see.’” She states that “[w]hen it became apparent that Mr. Chou and Mr. Ming had no intention of producing any other documents, I advised them that the inspection was incomplete and that we would be returning on another date,” and “also advised that we were entitled to photocopies of the documents produced pursuant to the Court’s order.”

The next day, July 23, 2013, attorney Warnock emailed attorney Mantia about the inspection, and inquired whether “you might be able to convince your client to provide copies of

the relevant documents and/or (I know this is doubtful) permit us to take the documents off the premises to scan?" She explained they were "looking for copies of bank statements, invoices from vendors and contractors, deposit records, the ledger for maintenance collection and/or rent for the relevant period 2009-13," and "any documentation received from the Department of Buildings or any related city agency pertaining to violations or conditions in need of repair."

Attorney Mantia replied by letter dated July 25, 2013, stating that the court's order "did not serve as an open ended license for you to conduct a fishing expedition as to the condominium's records," and that "[e]ven though we did allow you to inspect the books maintained by the condominium, we will not provide copies of records which are neither relevant to your clients' actions with respect to the condominium or are otherwise confidential and which the management has a duty to maintain the integrity of for the benefit of all the unit owners." Attorney Mantia objected that defendant "has no right to view the payment history or records of payments" for any unit owner other than herself, and that the "carte blanche request for all the bank records of the condominium from 2009 to the present again is over broad and irrelevant to any of Ms. Attwood's defenses to this foreclosure action and as such we are not willing to provide same." He states that plaintiff is "prepared to take any measure necessary to safeguard this information from the unwarranted intrusion by your client including seeking a protective order from the court or if necessary any higher court willing to enforce the protection of the condominium records." He explains that "[i]t is plaintiff's position that we have complied with Judge Madden's order by allowing you and your client to inspect the books and records maintained by the condominium," and he has "asked his client "to see if there any additional

records which have been retained by the condominium and if additional records are located, we will be happy to arrange for an additional inspection,” but “this does not change the Plaintiff’s position that we will only provide relevant records which are related to Ms. Atwood and/or have some relevance to the foreclosure at large.” In conclusion, attorney Mantia advises that unless defendant “can identify specific records seen at the inspection which have direct bearing on the Plaintiff’s motion for summary judgment, we are prepared to advise Judge Madden on August 1 that she should simply deem the prior motions submitted.”

Attorney Warnock responded by letter dated July 26, 2013, advising that “your client has failed to comply” with this Court’s Interim Order since he “did not make the books and records of the Condominium available for inspection or photocopying on July 22, 2013,” and “your client behaved in an uncooperative, impolite and bizarre manner.” Attorney Warnock states that “we are entitled to basic bookkeeping documents and records such as copies of bank statements, invoices from vendors and contractors, deposit records, ledgers for the common charges and/or rent for relevant period dating from January 1, 2009 to the present,” and any documents from the Department of Buildings or any other related city agency pertaining to violations. She cautions, that “[i]n the event your client refuses to cooperate (which seems to be the case) we shall have no alternative but to make a motion to hold your client in contempt of court.”

Based upon the foregoing, the court concludes that defendant Attwood has failed to make a sufficient showing to warrant the drastic remedy of civil contempt, as defendant acknowledges that plaintiff complied at least in part with the court’s interim order, by producing some documents for 2012 and 2013, and permitting defendant and her attorney to inspect those documents. See Matter of Department of Environmental Protection of City of N.Y. v.

Department of Environmental Conservation, supra; McCormick v Axelrod, supra; Gryphon Domestic VI, LLC v. APP International Finance Co, supra. Moreover, the broadly worded language of the court's Interim Order determining that "defendant Attwood is entitled to inspect and photocopy the books and records of the condominium within 30 days," and directing that "plaintiff shall make such documents available," does not express the clear and unequivocal mandate necessary for a finding of contempt, since the interim order does not identify with any specificity the particular documents, nor the date or range of dates for such documents. See e.g. Trabanco v. City of New York, 81 AD3d 490, 492 (1<sup>st</sup> Dept 2011) (order insufficient as it leaves the interpretation of the phrase "'appropriate material' open to debate"); Chung v. Maxam Properties, LLC, 52 AD3d 423 (1<sup>st</sup> Dept 2008) (injunction at best ambiguous, and "not clear and unequivocal enough to warrant a contempt finding"); Quick v. ABS Realty Corp, 13 AD3d 1021 (3<sup>rd</sup> Dept 2004) (quoting Upper Saranac Lake Assn v. New York State Department of Environmental Conservation, 263 AD2d 916, 917 [3<sup>rd</sup> Dept 1999]) (where order "contains ambiguous and vague language, a finding of civil contempt is not tenable").

Thus, defendant's motion for contempt is denied. The parties' continuing dispute regarding the production of such documents, as well as any other discovery issues, shall be resolved at the preliminary conference directed below.

Turning to plaintiff's motion for summary judgment, plaintiff submits an affidavit of board member, Yu Hu Chen, explaining that on March 3, 2009, the condominium board passed a resolution increasing the common charges for all unit owners by 20%, which resulted in an increase of defendant Attwood's monthly common charges to \$648.02. Chen states that board

increased the common charges “to help increase the influx of revenue to help offset steadily increasing operation costs and was done in the best interest of the condominium.” Chen also states that such “action was taken after a discussion with various unit owners at the annual meeting and was passed by a majority of the board.” Chen further states that at a board meeting on August 24, 2011, the board “voted and approved” a special assessment in the amount of each unit owner’s monthly common charges, to be paid in October, November and December 2011, to cover the “repair from a significant leak.” He additionally states that on August 24, 2011, the Board “passed a resolution” authorizing a 10% late fee for all common charge arrears. Chen states that in April 2009, defendant Attwood “began to fall behind on her obligations to pay common charges and assessments,” and as a result on January 24, 2012, plaintiff filed notice of common charges lien for all amount owed through November 2011. Chen states that no part of the lien has been satisfied, and that defendant Attwood owes a total of \$72,478.98 “in outstanding common charges, assessments, late fees and legal fees,” through January 2013.

In opposition, defendant Attwood argues that plaintiff’s motion for summary judgment is premature since plaintiff has not provided the documents “relevant and necessary” to defend the action. Defendant asserts that since 2009, she has been attempting to inspect the condominium books and records, and she would “never have withheld” her common charges if plaintiff had complied with the bylaws and provided her with access to the books and records. Defendant cites Article XV Section 5 of the bylaws which gives every unit owner the right “to examine the books and records of the condominium on reasonable notice to the Board but not more often than once a month.”

Defendant Attwood also asserts that the condominium's financial statements raise material issues of fact as to the propriety of plaintiff's financial records and plaintiff's compliance with the bylaws. She cites Article III Section 9 of the bylaws which requires the board to provide a "full and clear statement of the business conditions and affairs of the condominium, including a balance sheet and profit and loss statement verified by an independent public accountant and a statement regarding any taxable income attributable to the unit owner."

Defendant Attwood additionally argues that "serious issues" exist as to the "corporate governance and the blurred line between the board, the sponsor and the managing agent." She alleges plaintiff has improperly permitted the sponsor to control the board since the inception of the condominium, and the board meeting minutes show that the sponsor, Katherine Chou and her husband Robert and daughter Rita, "vote the majority of the shares of the unit owners at meetings and also control the board of managers." Defendant alleges that Robert Chou is also the sole principal and owner of Chou Management, the condominium's managing agent, and that Richard Chou "was also designated a principal of the Sponsor."

Defendant Attwood objects that the 10% late fee is an unenforceable penalty and improperly compounded as late fees on late fees. She further objects that the board's August 2011 resolution adopting the 10% late fee, violates Article VI, Section 2, paragraph 2 of the bylaws, which provides that the board "may charge a delinquent Unit Owner a fee of not more than forty dollars." She argues the imposition of 10% late fee would have required an amendment of the bylaws in accordance with the procedures set forth in Article XII, which include a "meeting of the unit owners," notice of the proposed amendment and approval "by

eighty percent (80%) of the Unit Owners in number and common interest.” Defendant Attwood also notes that the records of her account show a 10% late fee was assessed to her account on August 15, 2011, which was eight days before the board meeting at which the 10% late fee was adopted.

Defendant Attwood additionally argues that plaintiff has not complied with a condition precedent to maintenance of this action. Citing bylaw Article XI which requires the board to issue a formal notice of default to the unit owner and the mortgagee, defendant asserts that plaintiff does not allege or prove that such notice was given to her or her mortgagee. Defendant argues that Article XI also requires plaintiff to wait 90 days after giving such notice before commencing legal action.

In reply, plaintiff argues defendants’ discovery demands are unduly burdensome and overreaching, and in any event it has already provided adequate responses. Plaintiff also argues that defendant does not dispute that she has failed to pay common charges and assessments owed to date, and that the defenses she has asserted are without merit, since the board’s actions in increasing the common charges and imposing assessments and late fees, were conducted at a board meeting and are protected by the business judgment rule. Plaintiff further argues that the increased common charges, assessments and late fees have been “applied to all unit owners.”

Based on the foregoing, the court concludes that summary judgment is premature, since the parties have not conducted any discovery, and defendant has established that the evidence necessary to defend such motion is within plaintiff’s exclusive knowledge and control. See CPLR 3212(f); Abrams v. Pecile, 115 AD3d 565 (1<sup>st</sup> Dept 204). Under the deferential standard

of the business judgment rule, the court's inquiry is limited to whether the condominium board acted within the scope of its authority under the bylaws, and whether the action was taken in good faith to further a legitimate interest of the condominium. See 40 West 67<sup>th</sup> Street Corp v. Pullman, 100 NY2d 147 (2003); Perlbinde v. Board of Managers of the 411 East 53<sup>rd</sup> St Condominium, 65 AD3d 985 (1<sup>st</sup> Dept 2009). The business judgment rule, however, will not shield a condominium board from fraud, self-dealing or unconscionability. See id. Thus, to defeat plaintiff's motion for summary judgment, defendant must raise a material issue fact as to one of the following: 1) plaintiff acted outside the scope of its authority; 2) plaintiff acted in a way that did not legitimately further the purpose of the condominium; or 3) plaintiff acted in bad faith. See 40 West 67<sup>th</sup> Street Corp v. Pullman, supra.

Although a the owner of a condominium cannot withhold payment of common charges and assessments in derogation of the condominium by-laws based on a disagreement with actions lawfully taken by the condominium board, see Frisch v. Bellmarc Management, Inc, 190 AD2d 383 (1<sup>st</sup> Dept 1993), here defendant alleges that the 20% increase in common charges in 2009, the 2011 special assessment, and the 10% late fee, were not properly authorized or approved by the board, and that the board's actions in approving those increases and fees were tainted by misrepresentation, self-dealing and illegality in violation of the board's fiduciary duty to the unit owners, including defendant Attwood. Since defendant's allegations raise questions as to whether the increases in common charges, assessments and late fees by the board were properly authorized, made in good faith and imposed in compliance with the by-laws, they are sufficient to show that defendant Attwood has potentially viable defenses to the business judgment rule. See 40 West 67<sup>th</sup> Street Corp v. Pullman, supra. The evidence to support such defenses,

however, is exclusively within plaintiff's knowledge and control, and the parties have not yet conducted any discovery. Under these circumstances, plaintiff's motion for summary judgment must be denied as premature. See CPLR 3212(f); Abrams v. Pecile, supra. Such denial is without prejudice to renewal upon the completion of discovery, if appropriate. See Gao v. City of New York, 29 AD3d 449 (1<sup>st</sup> Dept 2006).

Finally, as noted above, this Court's June 20, 2013 Interim Order dated June 20, 2013, also directed defendant Attwood to pay to plaintiff monthly common charges in the amount of \$648.02 for June 2013 within five days, and thereafter on the first of the month. By letter dated April 10, 2014, plaintiff's counsel notified the court that defendant Attwood made only three payments for June, July and August 2013, and has not paid anything since that time. Defendant Attwood has not notified the court otherwise. In view of defendant Attwood's disregard of the court's prior order, she is now directed to resume making such payments as of May 2014, and within ten days of the date of this order, defendant Attwood shall pay plaintiff \$648.02 for May 2014, and shall continue making such payments thereafter on the first of each month during the pendency of the instant action. The court cautions that if defendant Attwood fails to comply with this order, the court will entertain a motion for a money judgment against her based on the total unpaid amount since September 2013.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied in its entirety with leave to renew upon the completion of discovery (motion seq. no. 001); and it is further

ORDERED that defendant Attwood's motion for contempt is denied (motion seq. no. 002); and it is further


ORDERED that defendant Attwood's motion for contempt is denied (motion seq. no. 002); and it is further

ORDERED that within ten days of the date of this order, defendant Attwood shall pay plaintiff \$648.02 for May 2014, and shall continue making such payments thereafter on the first of each month during the pendency of this action; and it is further

ORDERED that defendant Attwood's cross-motion for discovery and plaintiff's cross-motion for a protective order as to defendant Attwood's use of discovery, are granted to the extent the parties are directed to appear for a preliminary conference on June 19, 2014 at 11:00 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: May *B*, 2014

ENTER:

  
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**HON. JOAN A. MADDEN**  
J.S.C. J.S.C.