

**Estates of Hallet's Cove Homeowners Assoc. Inc. v
Fakir**

2015 NY Slip Op 31842(U)

September 30, 2015

Supreme Court, Queens County

Docket Number: 10962/2014

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

THE ESTATES OF HALLET'S COVE
HOMEOWNERS ASSOCIATION INC.,

Index No. 10962/2014

Plaintiff

Motion Date: 6/29/15

-against-

Motion Seq. No.: 1

MOSHAROF FAKIR, MAZEDA HOSSAIN,
HSBC BANK USA, and MERS as nominee for
GREENPOINT MORTGAGE FUNDING INC.,
and
"JOHN DOE # 1 THROUGH "JOHN DOE #10",
The last ten names being fictitious and unknown
to the Plaintiff, the person or parties intended
being the persons or parties, if any, having or
claiming an interest in or lien upon the mortgaged
premises described in the Verified Complaint,

Defendants

The following papers read on this motion by plaintiff to strike the answer of defendants Mosharof Fakir and Mazedada Hossain, to strike the counterclaim asserted by defendant Hossain, for summary judgment against defendants Fakir and Hossain on its foreclosure claim, for leave to enter a default judgment against those defendants who are in default in answering, to discontinue the action against defendants "John Doe #1" through "John Doe #10," for leave to appoint a referee to ascertain and compute the sums due and owing plaintiff and to examine and report whether the subject premises can be sold in parcels, and for leave to file an amended notice of pendency.

Papers
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Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff Estates of Hallet’s Cove Homeowners Association Inc. commenced this action on July 21, 2014 alleging that the title of defendants Fakir and Hossain to the real property known as 13-08 33rd Avenue, Long Island City, New York (the subject property), is subject to the “Declaration of Covenants Restrictions, Easements, Charges and Liens” and by-laws recorded at liber/reel 4354, page 354, on June 4, 1996 (denominated in the complaint as “the Declaration” and “By-Laws”) (hereinafter the “Declaration” and “By-Laws”), the “Easements” recorded at liber/reel 4535, page 1048 and the “Declaration of Covenants, Restrictions and Agreement of Record,” recorded at reel 5135, page 778, and an amended declaration filed on September 6, 2007 (CRFN # 2007000458983) (hereinafter the “Amended Declaration”). Plaintiff alleges that defendants Fakir and Hossain acquired title to the subject property by deed dated November 7, 2005 and recorded on December 28, 2005, and the deed contains a recitation that title to the property is subject to the “Declaration and By-Laws.” Plaintiff also alleges that pursuant to the “Declaration,” all unpaid sums assessed by it, together with interest thereon, are chargeable to the “unit owner” in the homeowner association, and constitute a lien against the owner’s unit. Plaintiff further alleges that defendants Fakir and Hossain failed to pay the homeowner association assessments against the subject property when due. Plaintiff additionally alleges that on May 6, 2014, it filed a notice of lien dated March 6, 2014 with the Office of the City Register, Queens County against the subject property in the amount of \$5173.22, representing the unpaid common charges and late charges and attorneys’ fees. It is alleged that the lien is a continuing lien, and that plaintiff has elected to foreclose it. In the complaint filed on July 21, 2014, plaintiff sets forth causes of action for foreclosure, to recover unpaid assessments, legal fees, interest and other charges, including pursuant to Real Property Law §§ 339-AD2d, and 339-z, breach of contract, and to recover reasonable attorneys’ fees.

Defendants Fakir and Hossain, each appearing in a self-represented capacity, served answers, asserting various affirmative defenses, including based upon lack of standing. Defendants Fakir and Hossain each assert a counterclaim for an award of attorneys’ fees. It

is unclear whether plaintiff has served a reply to the counterclaims of defendants Fakir and Hossain.

Defendants HSBC Bank USA (HSBC Bank) served an answer, claiming priority of its mortgage lien over plaintiff's lien. Counsel for defendant MERS as nominee for Greenpoint Mortgage Funding Inc. (MERS) made an informal appearance on behalf of defendant MERS by virtue of his execution of a stipulation dated June 4, 2015 as counsel for both HSBC Bank and MERS. Plaintiff named "John Doe #1" through "John Doe #10" as party defendants as persons in possession or, or having or claiming an interest in or lien on the premises.

At the outset, the court notes that to the extent defendant Hossain opposes the motion on the ground she was not properly served with process, she failed to raise such defense in her answer and therefore has waived it (*see* CPLR 3211[a]; *McGowan v Hoffmeister*, 15 AD3d 297 [1st Dept 2005]; *Urena v NYNEX Inc.*, 223 AD2d 442 [1st Dept 1996]; *Wiesener v Avis Rent-A-Car Inc.*, 182 AD2d 372 [1st Dept 1992]).

With respect to that branch of the motion by plaintiff for leave to amend the notice of pendency and to dismiss the affirmative defense asserted by defendant Fakir based upon the failure of plaintiff's counsel to sign the notice of pendency, CPLR 2101(d) provides that each paper served or filed "shall be endorsed with the name, address and telephone number" of the attorney appearing in the action (*see also* 22 NYCRR 130-1.1a). The failure by plaintiff's counsel to sign the notice of pendency was due to an oversight on his part. CPLR 2101(f) allows defects in the form of papers to be disregarded by the court or waived in order to promote dispositions of matters on the merits. There has been no showing of prejudice by defendants Fakir and Hossain resulting from the lack of the signature of plaintiff's counsel on the filed notice of pendency (*see Schulman Family Enterprises v Schulman*, 104 AD3d 934 [2d Dept 2013]; *Tilden Development Corp. v Nicaj*, 49 AD3d 629 [2d Dept 2008]; *Matter of Green v Tierney*, 59 AD3d 900 [3d Dept 2009]), and the defect does not constitute an affirmative defense to the action. Those branches of the motion by plaintiff for leave to file an amended notice of pendency, and to dismiss the affirmative defense asserted by defendant Fakir based upon the filing of the defective notice of pendency, are granted.

With respect to the branch of the motion by plaintiff to discontinue the action as against the fictitiously-named defendants, plaintiff caused defendants "John Doe #1" and "Jane Doe" (s/h/a "John Doe #2") to be served with process pursuant to "affix and mail" service (*see* CPLR 308[4]). A motion for leave to voluntarily discontinue an action against a defendant without prejudice pursuant to CPLR 3217(b), is addressed to the sound discretion of the court (*see Tucker v Tucker*, 55 NY2d 378, 383 [1982]). In the absence of special

circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted (*see Mathias v Daily News*, 301 AD2d 503 [2d Dept 2003]; *Great Western Bank v Terio*, 200 AD2d 608 [2d Dept 1994]). Here, no special circumstances have been shown to warrant the denial of that branch of plaintiff's motion to discontinue the action as against defendants "John Doe #1" and "Jane Doe" s/h/a "John Doe #2" without prejudice.

Plaintiff has determined that defendants "John Doe #3" through "John Doe #10" are unnecessary party defendants. As a consequence, that branch of the motion by plaintiff to discontinue the action as against defendants "John Doe #1" through "John Doe #10" is granted to the extent of discontinuing the action without prejudice as against defendant "John Doe #1" and "Jane Doe" s/h/a "John Doe #2," and granting leave to amend the caption deleting reference to defendants "John Doe #1" through "John Doe #10."

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

-----X
THE ESTATES OF HALLET'S COVE HOMEOWNERS
ASSOCIATION INC.,

Plaintiff

Index No. 10962/2014

-against-

MOSHAROF FAKIR, MAZEDA HOSSAIN,
HSBC BANK USA, and MERS as nominee for
GREENPOINT MORTGAGE FUNDING INC.,

Defendants

-----X.

With respect to that branch of the motion by plaintiff for summary judgment against defendants Fakir and Hossain on its foreclosure claim, the proponent of such a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Where standing is put into issue by a defendant, a plaintiff must prove its standing in order to be entitled to relief (*see Deer Park Associates v Town of Babylon*,

121 AD3d 738 [2d Dept 2014]; *U.S. Bank, N.A. v Adrian Collymore*, 68 AD3d 752, 753 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2d Dept 2007]; *see also Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

In support of its motion, plaintiff offers, among other things, affidavits of service, copies of the complaint and answers of defendants Fakir, Hossain and HSBC Bank, the Amended Declaration recorded on September 6, 2007 (CRFN # 2007000458983), the November 7, 2005 deed, a ledger reflecting the charges and payments on account for the subject property, the notice of lien, and affidavits of Anne Carpenter, the vice president of the Board of Directors of plaintiff and Gregory Cohen, the vice president of Impact Real Estate Management Inc., the managing agent for plaintiff.

With respect to the issue of standing, plaintiff has failed to show it is a condominium established under the Condominium Act (Real Property Law article 9-B) or that defendants Fakir and Hossain are owners of a condominium unit. Plaintiff has failed to provide a copy of the Declaration (recorded on June 4, 1996 at liber/reel page 4354, page 354¹), and the Amended Declaration (CRFN # 2007000458983) indicates that plaintiff was incorporated as a not-for-profit corporation. The Amended Declaration makes no reference to plaintiff being a condominium.

To the extent plaintiff is a homeowners' association, a homeowners' association has standing to sue relative to liens resulting from unpaid assessments, or other charges, made, in accordance with the association's declaration and by-laws, against owners who are members of the association. A declaration establishing a homeowners' association must be recorded or filed prior to the first conveyance of title to a home or lot in the residential community included in the association (*see General Business Law article 23-A; 13 NYCRR 22.1 et seq.; Bd. of Directors of Millennium Homeowners Assn. v Bosco*, 8 Misc 3d 950 [Civ Ct, Richmond County 2005]). In this instance, plaintiff has failed to show that a declaration, establishing it as an association, was recorded or filed prior to the

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To the extent plaintiff offers, in reply, a copy of the "DECLARATION OF COVENANT, RESTRICTIONS AND AGREEMENT" (*see Plaintiff's Exhibit "F" annexed to the reply affirmation of Stuart Halper*), such declaration is dated September 7, 1995 and was recorded on March 3, 1999 at liber/reel 5135, page 0778. Contrary to the assertion of plaintiff's counsel, the declaration dated September 7, 1995 is not identical to the Amended Declaration recorded on September 6, 2007 (CRFN # 2007000458983), and does not, by its terms, establish a homeowners' association.

recording of the November 7, 2005 deed of defendants Fakir and Hossain (*see* General Business Law article 23-A; 13 NYCRR 22.1 *et seq.*). The April 4, 1997 deed, which immediately preceded the November 7, 2015 deed in the chain of title, provided that the subject property was subject to the Declaration “as the same may be amended from time to time by instruments recorded in the City Register’s Office of Queens County,” and that the provisions of Declaration, “together with any amendments thereto,” constituted “covenants running with the land” and bound any person “having at any time any interest or estate” in the property as if “such provisions were recited and stipulated at length” therein. No copy of the Declaration,² however, has been provided to the court. It is therefore unclear whether the Declaration established plaintiff as a homeowners’ association. Notably, defendants Fakir and Hossain took title prior to the recording of the Amended Declaration-- which itself declares the establishment of plaintiff, and indicates it amends the Declaration to include all blocks and lots listed therein.

Thus, plaintiff has failed to establish *prima facie* that it has standing to foreclose based upon unpaid assessments and fees from defendants Fakir and Hossain pursuant to Real Property Law article 9-B [the Condominium Act] (*see Board of Directors of Hunt Club at Coram Homeowners Assn. v Hebb*, 72 AD3d 997 [2d Dept 2010]) or as a homeowners’ association, or on any other basis. In addition, plaintiff has failed to present a copy of its by-laws and to the extent plaintiff seeks a money judgment based upon unpaid homeowner association assessments, late charges, interest and other charges, plus interest, it appears that plaintiff previously obtained a money judgment against defendants Fakir and Hossain in the amount of \$4493.66 in Civil Court. It is unclear from the submissions whether such Civil Court judgment is based upon the same alleged unpaid assessments, etc. which form the basis of plaintiff’s lien herein.

Under such circumstances, summary judgment is unwarranted. Those branches of the motion by plaintiff for summary judgment against defendants Fakir and Hossain on its foreclosure claim and to dismiss the affirmative defense based upon standing asserted in the answers of defendants Fakir and Hossain are denied.

With respect to that branch of the motion by plaintiff to dismiss the affirmative defense asserted by defendant Fakir based upon improper service of process, defendant Fakir failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of his answer. Defendant Fakir has made no application to extend the period of time upon the ground of undue hardship (CPLR 3211[e]). As a consequence, his defense based upon improper service of process is deemed waived (CPLR 3211[e]; *see Dimond v Verdon*,

² see n 1.

5 AD3d 718 [2d Dept 2004]). That branch of the motion by plaintiff to dismiss the affirmative defense asserted by defendant Fakir based upon improper service of process is granted. In view of the open question as to plaintiff's standing to bring this action, the branch of the motion by plaintiff to dismiss the remaining affirmative defenses asserted by defendant Fakir in his answer, and the affirmative defenses asserted by defendant Hossain in her answer, is denied at this juncture.

With respect to the branch of the motion by plaintiff for leave to enter a default judgment, contrary to the assertion of plaintiff's counsel, defendants HSBC Bank and MERS are not in default in appearing or answering in the action. That branch of the motion by plaintiff for leave to enter a default judgment against defendants HSBC Bank and MERS is denied.

The branch of the motion by plaintiff for leave to appoint a referee is denied at this juncture.

That branch of the motion by plaintiff to dismiss the counterclaim asserted by defendant Hossain is granted. The rule is well settled in this state that the successful party in litigation may not recover attorneys' fees, except where authorized by the parties' agreement, statutory provision or court rule (*Hunt v Sharp*, 85 NY2d 883 [1995]; *Chapel v Mitchell*, 84 NY2d 345, 348-349 [1994]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]). Defendant Hossain has failed to cite to any agreement, statutory provision or court rule which would authorize her to recover attorneys' fees even if she were to retain counsel and be the prevailing party.

Dated: September 30, 2015

J.S.C.