| **Board of Mgrs. of the Columbus Common Condominium v Fife** |
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| 2016 NY Slip Op 30925(U) |
| May 19, 2016 |
| Supreme Court, New York County |
| Docket Number: 153260-2012 |
| Judge: George J. Silver |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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BOARD OF MANAGERS OF THE COLUMBUS COMMON CONDOMINIUM, on behalf of all unit Owners,

Plaintiff,

-against-

CHRISTINE FIFE, JOHN DOE No. 1 through JOHN DOE No. 10, the names being fictitious and Unknown, the persons or parties intended being the tenants, occupants, persons or entities, if any, having or claiming any interest in or lien upon the premises described in the Complaint,

Defendants.

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Index No. 153260-2012

**DECISION/ORDER**

Motion Sequence 002

**HON. GEORGE J. SILVER, J.S.C.**

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

| Papers | Numbered |
|---|---|
| Notice of Motion, Affirmations & Collective Exhibits Annexed | 1, 2, 3 |
| Notice of Cross Motion, Answering Affirmation & Exhibits Annexed | 4, 5, 6 |
| Reply Affirmation | 7 |

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In an action for foreclosure of a common charge lien, plaintiff Board of Managers of the Columbus Common Condominium ("Plaintiff," or the "Board") moves for an order, pursuant to CPLR § 3212, granting Plaintiff summary judgment against defendant Christine Fife ("Defendant") on the causes of action for foreclosure of its common charge lien and attorneys' fees, and for an order referring this matter to a referee for the purpose of selling the Condominium unit owned by Defendant and calculating the sums due Plaintiff from such sale. Defendant opposes, and cross-moves for an order, pursuant to CPLR § 3212, granting Defendant summary judgment dismissing the foreclosure action, and consolidating the instant action with Board of Managers of Columbus Common Condominium v. Dimitrios Koutsomitis, et al., Index No. 153262-2012. Plaintiff opposes the cross-motion for summary judgment but does not oppose

the cross-motion to consolidate.

The present action stems from a window replacement project (the "Window Project") conducted at the Columbus Common Condominium building located at 110 West 90th Street, New York, New York (the "Building") (Lupano Aff. at ¶ 4). The Building consists of 60 residential units, and construction was completed in 1990 (*Id.*). As early as five years after construction of the Building was complete, the Board began receiving complaints from Unit Owners regarding the condition of the windows (*Id.* at ¶ 6). The window deterioration was apparently at least partially due to a manufacturing defect in the windows that caused the windows to be subject to "premature rotting due to treatment with an allegedly defective wood preservative" (*Id.* at 3, n. 1). As a result, at a Unit Owners' meeting in February 2002, the Board disclosed that it was considering undertaking a window project that would be funded by an assessment to the Unit Owners because the windows were considered Condominium "Common Elements" (*Id.* at ¶ 7). Thereafter, Koutsomitis, plaintiff in the consolidated case, along with his then wife, Helene Langot, commenced an action in the Court (the "Prior Window Action"), challenging the Board's right to impose an assessment to fund the Window Project. Plaintiff argued the windows were not Common Elements, and thus were not subject to an assessment by the Board. On April 20, 2004, this Court granted the defendant Board's motion for a declaratory judgment under CPLR § 3001, holding that the windows are "common elements" (*Langot v Columbus Common Condominium*, Sup Ct, NY County, April 20, 2004, Heitler, J., index No. 117524/02).

Thereafter, the Board retained JMA Consultants, Inc. ("JMA") to perform a survey of every window in the Building in order to determine their condition. In its November 23, 2004 report, JMA noted "pervasive defects in the condition of the windows and terrace doors throughout the Building, and recommended that the Board proceed with replacing ... all of the Original Windows" (*Id.* at ¶ 12, Ex. F). However, despite JMA's recommendation, work on the Window Project was not immediately undertaken because in the interim the Board had to approve and undertake additional renovations to the Building, including a "complete roof replacement project, exterior waterproofing and brick replacement, extensive mold remediation in 17 residential units and all common hallways ... and water damage from the previously leaking roof that required the Board to heavily assess the Unit Owners" (*Id.* at ¶ 13).

In 2009, the Board decided it could no longer delay the Window Project and retained RAND Engineering & Architecture, PC ("RAND") to prepare specifications for the delayed Window Project (*Id.* at ¶ 15). Like JMA in 2004, RAND recommended the replacement of all of the original windows in the Building because "(i) repairing the Original Windows would not remediate underlying water tightness issues that were causing the wood windows to deteriorate; (ii) repairing the Original Windows would entail constant further maintenance; (iii) many of the Original Windows that appeared in decent condition on the surface likely had underlying rot and deterioration; (iv) repairing rotted wood sections of the Original Windows with new wood would result in variations in appearance that would likely require all of the wood windows in the Building to be repainted and recaulked to maintain a uniform appearance; (v) performing

ongoing repairs to the Original windows would be more disruptive to the Unit Owners; and (vi) the pool of qualified contractors willing to perform this type of time-consuming, labor intensive and low profit work was very shallow" (*Id.*).

Thereafter, RAND solicited bids from contractors and the Board ultimately awarded the Window Project to Historical Windows of New York ("Historical"), who submitted a bid of $743,615.24 (*Id.* at ¶ 17). On March 29, 2011, the Board formally resolved to impose the Assessment in the sum of $1,025,993.00 in order to pay for the Window Project (the "Assessment") (*Id.* at ¶ 18). This amount was in excess of the bid in order to cover "change orders, the cost of the sidewalk shed and for the sums charged by the Board's consulting engineers and attorneys" (*Id.* at 7, n. 1). Further, on May 17, 2011, the Board approved a 2011-2012 fiscal budget which included an increased Assessment in the amount of $1,035,261.25 (*Id.* at ¶ 18). The record does not reflect why the Assessment was increased. The Board allocated that the Assessment be made in twelve monthly payments (*Id.* at ¶ 19). After the Board entered into a contract with Historical, work commenced on the Window Project on July 30, 2012 (*Id.* at ¶ 26). RAND issued a certificate of substantial completion on June 24, 2013 (*Id.*).

According to Plaintiff, Defendant is one of only two Unit Owners (the other being the defendant in the proposed consolidated case) that have failed to pay their proportionate share of the Assessment Collection of fees. Accordingly, the Board caused its counsel to file a Notice of Lien with the Clerk of New York County against Defendant in the amount of $13,641.37, representing past due common charges and late fees under a continuing lien (the "Lien") (Plaintiff's Mem. Supp. at Ex. H). Defendant does not dispute the amount of the lien, but argues that the lien cannot be enforced because the underlying Common Charge was in violation of the by-laws (Defendant's Mem. Supp. at ¶ 5). Plaintiff now moves for summary judgment to foreclose the lien, by which Defendant opposes and cross-moves for summary judgment dismissing the claim.

Before addressing the motion and cross-motion for summary judgment, as an initial matter the Court will address the cross-motion to consolidate. Defendant seeks to consolidate the present case with Columbus Common Condominium v Dimitrios Koutsomitis Index No. 153262-2012. "Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Perini Corp. v WDF, Inc.*, 33 AD3d 605, 606 [2006]). Here, both actions involve common questions of law and fact and consolidation will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts (*Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 540 [2d Dept 2007] citing *Gutman v Klein*, 26 AD3d 464, 465 [2d Dept 2006]). Moreover, Plaintiff does not oppose. As such, the motion to consolidate is granted.

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227

AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*Id.*). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*Id.*).

In support of their motion for summary judgment, Plaintiff points to the Prior Window Action and sections 6.9.1 and 6.9.3 of the Board's by-laws, which govern maintenance, repairs, and replacements for common elements in the building. Section 6.9.1 of the by-laws reads, " all painting, decorating, maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary ... in or to the Common Elements shall be made by the Board, and the cost and expenses thereof shall be charged to the Unit Owners as a Common Expense" (Plaintiff Aff. Supp. at Ex. D). Further, section 6.9.3 reads:

> "Each Unit and all portions of the Commons Elements shall be kept in first-class condition by the Unit Owner or the Board, whichever is responsible for the maintenance thereof as set forth herein, and such Unit Owner or the Board, as the case may be, shall promptly make or perform, or cause to be made or performed, all maintenance work, repairs and replacement necessary in connection therewith. The public areas of the Building and those other areas exposed to public view shall be kept in good appearance, in conformity with the dignity and character of the Building, by the Board, with respect to such parts of the Building required to be maintained by it, and by each Unit Owner, with respect to such parts of the Building required to be maintained by it, and by each Unit Owner, with respect to the windows, shades, venetian or other blinds, drapes, curtains or other window decoration in or appurtenant to his Unit" (*Id.*).

Defendant, in opposition to Plaintiff's motion, and in support of the cross-motion for summary judgment, offers two arguments. First, Defendant argues that sections 6.9.1 and 6.9.3 are not the applicable by-laws governing the window project, and that the court should instead rule that section 6.12, the section governing additions and improvements, is the applicable by-law. Under by-law 6.12, Defendant argues, the Board would have been required to secure Unit Owner approval before assessing the Common Charge. In the alternative, Defendant argues that the Board violated two sections of the by-laws: 3.3 requiring the Board to call a special meeting when petitioned by more than 25% of the shares, and 6.9.1, requiring that the Board maintain the Common Elements.

First, in support of their argument that by-law 6.12 should govern, Defendant argues that because the initial project report, conducted by JMA, recommended the Board replace the defective windows with improved windows, the project is an "improvement" governed by section 6.12, and not a "repair" or "replacement" governed by 6.9.1. Specifically, Defendant argues, "it is undisputed that the JMA report recommended an improvement changing the windows with improved windows, as opposed to merely making repairs to the old windows, which amounts to an alteration and/or improvement under Article 6.12 of the By-Laws"

(Defendant's Mem. Opp. at ¶15). Defendant further contends that at a minimum, there is an "issue of fact .. as to whether the Board had authority" to proceed with the Window Project and the assessment (*Id.* at ¶ 19). Section 6.12, governing "Alterations, Additions or Improvements to Common Elements" reads:

> "Except as otherwise provided in the Declaration or by these By-Laws, all alterations, additions or improvements in or to any Common Elements shall be made by the Board and the cost and expense thereof shall be charged either to all Unit Owners as a Common Expense or to the Unit Owner responsible therefor, as the case may be. Whenever in the judgment of the Board the cost to the Board of any such alteration, addition or improvement would exceed $100,000 in the aggregate in any calendar year, and such proposed alteration, addition or improvement shall not be made unless first approved by a majority of the Unit Owners who shall be required to bear the cost and expense thereof as aforesaid, if any. Except as otherwise provided in the Declaration or these By-Laws, all such alterations, additions or improvements costing in the aggregate $100,000 or less in any calendar year may be made as aforesaid without the approval of the Unit Owners" (Plaintiff Mem. Supp. at Ex. D).

"The threshold decision of whether a writing is ambiguous is the exclusive province of the court . . . which must ascertain the intention of the parties from the language which they have employed" (*Perciasepe v Premuroso*, 208 AD2d 511, 511-512 [1994] [internal citations omitted]). The court should determine from contractual language, without regard to extrinsic evidence, whether there is any ambiguity (*Bd. of Managers of 4260 Broadway Condo. ex rel. Unit Owners v Caballero*, 36 Misc 3d 1219[A], 2012 NY Slip Op 51402[U] [Sup Ct, NY County 2012] *affd sub nom Bd. of Managers of 4260 Broadway Condo. v Caballero*, 118 AD3d 630 [1 Dept 2014] citing *Chimart Assocs. v Paul*, 66 NY2d 570, 573 [1986]). "[M]atters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument" (*Id.* at 572–573 [internal citation omitted]). Moreover, "[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency" *(National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969]). Thus, "where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [1st Dept 2001]).

Presently, reading the by-laws in total, the Court finds they are unambiguous on their face. Section 6.12 requires unit owner approval for "alterations, additions or improvements" exceeding $100,000 per year, but not for "repairs and replacements." Further, by-law 6.1.1 gives the Board sole discretion to determine whether a Common Charge is for a "repair and replacement" or should be considered an "improvement" (Plaintiff's Mem. Supp. at Ex. D). Defendant challenges the decision of the Board determining that the Window Project was a "repair and replacement." Here, courts apply the business judgment rule when determining challenges to the decisions of a board of directors of cooperative and condominium corporations (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]; *Helmer v Comito*, 61

AD3d 635 [2d Dept 2009]). Under the rule, a court's inquiry "is limited to whether the board acted within the scope of its authority under the by-laws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision" (*Schoninger v Yardarm Beach Homeowners' Assn.*, 134 AD2d 1, 9 [2d Dept 1987]). However, the rule does not serve to "shield boards from actions that have no legitimate relationship to the welfare of the condominium, or that deliberately single out individuals for harmful treatment" (*Perlbinder v Bd. of Managers of 411 E. 53rd St. Condo.*, 65 AD3d 985, 989 [1st Dept 2009] citing *Katz v 215 W. 91st St. Corp.*, 215 AD2d 265, 266-267 [1st Dept 1995]).

The evidence submitted on the motion and cross-motion establishes that the Board's determination that the proposed work constituted "repairs and replacements" under the by-laws was within its authority and was made in good faith to further a legitimate interest of the condominium. In response, Defendant fails to raise a triable issue of fact. The record establishes that the windows had fallen into a state of disrepair, owing at least in part to an alleged manufacturing defect. The Board, in accordance with its duties under bylaw 6.9.3, hired engineering firms to conduct inspections and issue a findings report. These reports recommended a full-scale replacement for a variety of reasons, including cost, invasiveness, and uniformity, as opposed to a more patch-work repair system. Thus, in relying on these reports, the Board had a basis in evidence to make a determination that the Window Project would be a "repair and replacement," and such a determination was made in good faith. Accordingly, the Board acted within its authority in entering into the Window Project contract without unit owner approval required for "alterations" or "improvements."

Defendant's contention that the Board violated the by-laws by either a) failing to call a special meeting, in violation of by-law 3.3, or b) failing to promptly repair windows in violation of by-law 6.9.3, even if true, is immaterial to the question of whether the Board possessed the authority under the by-laws to make a determination that the Window Project was a "repair and replacement," governed by by-law 6.9.1, and not an "improvement" governed by by-law 6.12. Thus, Defendant has failed to raise a triable issue of fact.

Further, Plaintiff has established their right to late fees in the amount of $25.00 per month, beginning ten days after the date the common charge was due, as well as interest, accruing at the statutory rate from the date the common charge was due, and reasonable attorney's fees incurred in the recovery of the Common Charges. Specifically, under by-law 6.2.1, the board is entitled to recover interest on a lien for unpaid Common Charges (Plaintiff's Mem. Supp. at Ex. D). Additionally, under 6.4, where "any Unit Owner fails to make payment of all or any part of Common Charges on or before ten (10) days from their due date, such Unit Owner shall be obligated to pay a 'late charge' of $25.00 per month for each Common Charge payment ... together with all expenses, including ... attorneys' fees paid or incurred by the Board or by its managing agent in any action to foreclose the lien on such Unit arising from said unpaid Common Charges" (*Id.*). Thus, pursuant to the by-laws, Plaintiff is entitled to recover interest,

late fees, and attorneys' fees it incurred in the recovery of the Common Charges (*Glenridge Mews Condo. v Kavi*, 90 AD3d 604, 605 [2d Dept 2011] citing *Board of Mgrs. of Bedford Mews Condominium v Nasr*, 37 AD3d 506, 507-508 [2d Dept 2007]), and it is hereby

ORDERED that the cross-motion to consolidate is granted and the above-captioned action is consolidated in this Court with Board of Managers of the Columbus Common Condominium vs. Dimitrios Koutsomitis, Index No. 153262-2012, under Index No. 1532260-2012, and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
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BOARD OF MANAGERS OF THE COLUMBUS COMMON CONDOMINIUM, on behalf of all unit Owners,

Plaintiff, Index No. 153260-2012

-against-

Christine Fife & Dimitrios Koutsomitis
Defendants,

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that the cross-motion is otherwise denied; and it is further

ORDERED that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the amount of damages, which shall include unpaid common charges, late charges, attorney's fees, interest, costs and other disbursements advanced, to which

Plaintiff is entitled is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that if the parties file a stipulation as permitted by CPLR 4317, the Special Referee shall determine the issue listed above; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Referee Part (Room 119M) to arrange for a date for the reference to a Special Referee. The Clerk, in accordance with the Rules of that Part, shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that this matter shall be 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; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury and that the parties shall appear for the reference hearing, with all such witnesses and evidence as they may seek to present, and shall be ready to proceed on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion; and it is further

ORDERED that Plaintiff is to serve a copy of this order, with notice of entry, upon Defendants within 20 days of entry.

Dated: 5/19/16
New York County

George J. Silver, J.S.C.

GEORGE J. SILVER