

**Board of Mgrs. of the Modern 23 Condominium v  
Scime**

2017 NY Slip Op 31878(U)

August 17, 2017

Supreme Court, New York County

Docket Number: 850268/15

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

BOARD OF MANAGERS OF THE MODERN 23  
CONDOMINIUM,

Plaintiff,

Index No.: 850268/15

**DECISION/ORDER**

Motion Sequence No. 001

-against-

SANDRA SCIME, JOSEPH SCIME, GLADYS  
PEREZ-SCIME, DE CAPITAL MORTGAGE, LLC,  
WELLS FARGO BANK, N.A., NYC DEPARTMENT  
OF FINANCE, and "JOHN DOE #1" through "JOHN  
DOE #10,"

Defendants.

*Cozen O'Connor*, New York City (Ally Hack of counsel), for plaintiff.

*Frederick Mehl, Esq.*, Brooklyn, for defendants Sandra Scime, Joseph Scime, and Gladys Perez-Scime.

Gerald Lebovits, J.

Defendants move and plaintiff cross-moves for summary judgment.

Defendant Sandra Scime owns a condominium unit ("the Unit") in Modern 23 Condominium in New York County. Defendants Joseph Scime and Gladys Perez-Scime, Sandra Scime's brother and sister-in-law, respectively, reside in the Unit and are alleged to be Sandra Scime's "successors in interest." Plaintiff alleges that defendants failed to pay common charges as well as repair fees, condominium fines, and attorney fees between September 1, 2014, and March 10, 2015. Plaintiff alleges that defendants owe \$194,598.23.

On or about March 10, 2015, plaintiff submitted for recording a notice of lien against the Unit for \$16,488.36. The lien provides that the lien amount is for "common charges outstanding since September 1, 2014" and that "the claim of the lien is said Amount together with accruing common charges unpaid as said lien remains unpaid, together with interest thereon and reasonable attorney's fees."

Plaintiff filed its complaint on September 15, 2015, to foreclose on the lien and for monetary damages for breach of contract and for attorney fees.

On March 15, 2016, during the pendency of this action, defendants paid \$25,423.76 to plaintiff. Plaintiff applied that sum to defendants' arrears from October 2014 through April 2016. (Hack Affirmation in Further Support of Plaintiff's Cross-Motion, ¶¶ 16, 17.)

Defendants argue that the lien has been satisfied; plaintiff argues that defendants still owe outstanding amounts. At oral argument on June 7, 2017, plaintiff stated that defendants' arrears total \$194,589.39, calculated as follows: \$188,262.29 in attorney fees; \$5327.09 in repairs; and \$1000 in fines for allegedly violating condominium rules. Plaintiff argues that the lien is unsatisfied and that it is entitled to foreclose on the Unit.

This court disagrees.

Defendants satisfied the lien. Defendants are entitled to summary judgment on the foreclosure cause of action.

Real Property Law § 339-z gives a condominium board the right to foreclose on property for unpaid common charges: "The board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon . . . ." RPL § 339-aa sets forth the requirements for a lien to be effective: "The lien provided for in the immediately preceding section shall be effective from and after the filing in the office of the recording officer in which the declaration is filed a verified notice of lien . . . and shall continue in effect until all sums secured thereby, with the interest thereon, shall have been fully paid . . . ."

Common charges are those charges assessed to all unit owners in a condominium for "each unit's proportionate share of the common expenses in accordance with its common interest." (RPL § 339-e.) The Modern 23 Condominium's Declaration recognizes its right to foreclose on a lien for unpaid common charges, but it explicitly excludes attorney fees from the lien. Article 15 provides that "[s]uch lien may be foreclosed when past due in accordance with the laws of the State of New York . . . and the Condominium shall also have the right to recover all costs incurred, including reasonable attorney's fees (but such right shall not be a lien against the Unit)."

In its moving papers submitted to this court, plaintiff's counsel acknowledged that defendant Sandra Scime paid \$25,423.76 to cover the outstanding common charges that are the basis for the lien. (Hack Affirmation in Further Support of Plaintiff's Cross-Motion, ¶¶ 16, 17.) Plaintiff's counsel reaffirmed at oral argument that defendants have paid all past due common charges.

The remaining amounts that plaintiff alleges are outstanding cannot be considered part of the lien or form the basis for a foreclosure action. Plaintiff seeks \$188,262.29 in attorney fees. But some of that money is attorney fees that plaintiff incurred in this action, and some of the money accrued in a nuisance action pending in another court in a different action. The former fees are, by the terms of Article 15 of the Condominium's Declaration quoted above, not a lien against the Unit. The latter fees are not part of the lien: they are not "common charges" within the definition of RPL § 339-e, quoted above. Plaintiff is holding defendants liable for all the attorney fees in the nuisance action, not their proportionate share "in accordance with [their] common interest." Moreover, the attorney fees in the nuisance case are the basis for one of the causes of action in that lawsuit. It is inappropriate for this court to foreclose for sums sought in another court before this action began and which the other court has not yet even determined are owing.

The \$1000 fine against defendants is not a "common charge." nor is the \$5327.09 for repairs, under RPL § 339-e. Both are charges solely against defendants, not assessments against all units in shares proportionate to their interest. A lien under RPL § 339 z-aa may include only unpaid common charges.

Therefore, this court finds that Sandra Scime's \$25,423.76 payment to plaintiff, which plaintiff's applied to the outstanding amounts for common charges, satisfied the lien. Defendants are entitled to summary judgment on the issue of foreclosure on the lien.

Plaintiff's causes of action for breach of contract (first and second causes of action) rest solely on defendants' supposed failure to pay common charges under Article IV, Section 2, of the By-Laws and Section 15 of the Declaration. Because defendants paid the common charges and the condominium accepted the payments, these causes of action are dismissed.

Plaintiff's other two causes of action are for attorney fees incurred to recover unpaid common charges (third and fourth causes of action). As provided in Article IX of the Condominium's By-Laws and Section 15 of its Declaration, plaintiffs are entitled to costs and reasonable attorney fees incurred in plaintiff's recovery of unpaid common charges. This court will consider only those reasonable attorney fees related to plaintiff's recovery of unpaid common charges, not those related to the nuisance action pending before another court.

Defendants' motion to dismiss and for summary judgment is granted in part and denied in part. On the issues of foreclosure and breach of contract, defendants' motion is granted. On the issue of attorney fees, defendants' motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is denied in part and granted in part: denied with respect to foreclosure and breach of contract, and granted with respect to attorney fees.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted in part and denied in part: plaintiff's causes of action for foreclosure and breach of contract are dismissed; and summary judgment is denied on the issue of attorney fees, in that plaintiff is entitled to costs and reasonable attorney fees incurred in recovering unpaid common charges in this action; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied in part and granted in part: plaintiff's cross-motion is denied on the causes of action for foreclosure and breach of contract, and granted on the causes of action for costs and reasonable attorney fees incurred in recovering unpaid common charges in this action; and it is further

ORDERED that the determination of reasonable attorney fees incurred by plaintiff in recovering unpaid common charges is hereby referred to a special referee to hear and determine; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on plaintiff, on the County Clerk, who shall enter judgment accordingly, and on the Referee Clerk of the General Clerk's Office to arrange a date for the reference to a special referee.

NYSCEF DOC. NO. 57

RECEIVED NYSCEF: 09/06/2017

Dated: August 17, 2017

J.S.C. 

**HON. GERALD LEBOVITS**  
**J.S.C.**