Board of Mgrs. of the Woods III in Westchester Condominium II v Kaur
2018 NY Slip Op 31016(U)
May 28, 2018
City Court of Peekskill, Westchester County
Docket Number: CV-226-17
Judge: Reginald J. Johnson
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CV-226-17

CITY COURT OF THE CITY OF PEEKSKILL

COUNTY OF WESTCHESTER

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THE BOARD OF MANAGERS OF THE WOODS III IN WESTCHESTER CONDOMINIUM II,

Index No. CV-226-17

Plaintiff, DECISION & ORDER

-against-

SATVIR KAUR,

Defendant.

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Levine & Montana

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Satvir Kaur

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REGINALD J. JOHNSON, J.

The Plaintiff, The Board of Managers ("the Board") of the Woods III in Westchester Condominium II (the "Condo"), by Matthew Montana, Esq. of Levine & Montana, commenced this civil action against the Defendant Satvir Kaur (the "Defendant") for the collection of common charges, late fees, assessments, fines and attorney's fees, pursuant to the Rules and Regulations ("Rules and Regulations") and Declaration and By-Laws ("Declaration and By-Laws") of the Condominium. The Defendant is pro se and has opposed the relief requested by the Board.

Factual & Procedural History

On or about May 5, 1988, the Condo was created by the filing of a Declaration and By-Laws with the Westchester County Clerk's Office for the establishment of a plan for condominium ownership at the Woods III in Westchester Condominium II (Plt's "1-a"). On or about October 17, 2008, the Defendant became the fee owner of 31 Bleakley Drive, Unit 26-1, at the Condo (Plt's "4"). On February 27, 2016, the Board[1] sent a letter to the Defendant advising her of the following violations: weights and an exercise machine stored on the rear patio; a wooden table and firewood not neatly stored on the common elements; holiday lights and plants hanging from the trellises; and an air conditioner and wood in the rear window of the unit. The Defendant was advised she had five (5) days to remove these items (Plt's "5").

On March 14, 2016, the Defendant sent an email to the Board advising it of water damage to her ceiling from the condo unit above her unit. The Defendant went on to state, "I've complained to the tenant living

[1] The Ferrara Management Group, Inc. is the management agent of the Board and is deemed to be "the Board" for purposes of this Decision.

above and they said that they've told their landlord who said to contact the management. Please advise" (Def's "B").

On March 21, 2016, the Board sent the Defendant a letter again requesting that she remove the weights and exercise machine from the rear patio and wooden table and firewood from the common elements near the rear patio. The March 21 letter stated that the Defendant advised the Board that the table and firewood on the common elements near the rear patio did not belong to her, and that the other items on the patio belonged to her tenant. The letter further stated that since the prohibited items were still present on her rear patio on March 16, the Board would impose a fifty-dollar ($50.00) per day fine for each day after March 4 (Plt's "6"). The Defendant was fined fifty-dollars ($50.00) per day from March 5 –16 for a sum of $600.00 (Plt's "7").

On April 8, 2016, the Board sent a written certification to the Defendant waiving its right of first refusal regarding her sublet to a tenant and certifying that "all common charges and assessments affecting [Unit 31] have been paid through April 30, 2016" (Plt's "8").

In an email sent on May 24, 2016 from Lauren Turley, the Claims Adjuster for the Condo, to the Board (Tina Thiakodemitris), Ms. Turley stated that she was the adjuster regarding Defendant's claim; that she and Tina had already spoken on April 29, 2016 at which time she requested a copy of the by-laws and photographs showing the source of the water leak from the above condo unit; that she had not received the requested information and had called back several times and got Tina's voicemail; and that she needed the "documents as soon as possible in order for me to conclude the claim for Ms. Kaur" (Def's "B").

On June 6 and 10, 2016, the Defendant sent emails to the Board requesting that her damages claim be processed so that her unit could be repaired, since the occupants of the above unit told her that it was 'best to go through management" (Id.).

On June 21, 2016, the Board informed the Defendant that it was in contact with a plumber regarding "drainage solutions"; that the matter would be discussed at tonight's Board meeting; and that the Board would contact her tomorrow "with an update on moving forward with this" (Id).

On June 22, 2016, the Board sent the Defendant a letter informing her that all unit owners were required to have a fire inspection and chimney and dryer vent cleanings completed and that a report of same must be sent to the Board no later than September 30, 2016 (Plt's "8-a"). After the Defendant failed to submit the report by September 30, the Board sent the Defendant a Reminder notice to have the required work done and a report sent to it no later than November 15, 2016 or the Board would impose a fine of $50.00 per month (Id.). The Board granted Defendant a second extension to December 31, 2016 to have the fire inspection and chimney and dryer vent cleanings completed and a report submitted to it or the Board would impose a fine (Final Notice Id.). When the Defendant failed to submit proof of the dryer vent cleaning by December 31, the Board imposed a $50.00 per month fine (Id.). The Final Notice also informed the Defendant that if she failed to submit proof of the fire inspection to the Board by March 31, 2017, then it would forward her account to the Board's attorney and subject her cars to towing pursuant to the Condo's House Rules (Id.).

On January 27, 2017, the Board sent the Defendant a notice informing her that she owed $1280.47[2]; that said amount was due within three (3) days of the receipt of the notice; and that failure to pay said amount would result in it being added to her account (Plt's "16").

On February 10, 2017, the Defendant sent an email to the Board informing it that her husband slipped and fell on ice on the walkway

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[2] The notice referred to arrears in common charges (Plt's "3-a") and did not include Home Owner Association (HOA) fees (Plt's "3-b").

leading to her condo and injured himself (Def's "A" and "C"). Defendant went on to state the "pathway should have been cleaned by this time and enough salt should have been spread on it" (Id.).

On February 28, 2017, the Board sent the Defendant a Notice to Cure Default (dated February 23, 2017) and Notice Under the Condominium Act for Unpaid Common Charges (Plt's "9"). The Notice to Cure Default informed her that she failed to pay monthly assessments and late charges in the sum of $1,571.77; that she had ten (10) days to cure the default; that she if failed to cure the default, the Board may file a lien and institute legal action to collect the delinquent charges; that she is responsible for interest on all unpaid sums as well as reasonable attorneys' fees incurred in the collection and enforcement of such lien; and that she would be prohibited from voting at any regular or special meeting while she was in default in the payment of common charges.

On March 12, 2017, the Board sent the Defendant a letter informing her that the cure period had expired and that she had failed to cure the arrears in common charges—now $2,444.57; that her cars as well as the cars of her guests will be towed, pursuant to House Rule; and that she must remove any cars, including the cars of guests and occupants, from her assigned parking spaces numbers 89 & 90 after Friday, March 17, 2017 or the vehicle(s) will be towed "without further notice" (Plt's "10").

On March 28, 2017, the Board's attorney sent a letter to the Defendant in which he stated that all of the charges set forth in the Notice to Cure Default(s), dated February 27, 2017, were valid and remain past due; that the $600.00 fine for failure to remove the treadmill was a proper charge because the treadmill was not moved by her tenant and she is responsible for the actions of her tenant; that the Defendant had been assessed fines for failing to comply with the Condo's rules regarding the cleaning of her chimney; that he was advised that she was informed to submit a written claim of her husband's injury to the Board; and that as counsel to the Board he could not give her legal advice (Def's "C").

On May 10, 2017, the Board commenced the within legal action against the Defendant by filing a Summons and Verified Complaint seeking on the First Cause of Action $1571.77 in common charges, fines, late fees, legal expenses and other assessments; seeking on the Second Cause of Action damages, common charges, late fees and monthly assessments that continue and remain unpaid during the pendency of this action; and seeking on the Third Cause of Action reasonable attorney's fees in the collection of unpaid monthly assessments.

On May 23, 2017, the Defendant joined issue.

On June 5, 2017, the Board received an email with a photograph from a resident who complained that someone was improperly disposing of his or her garbage which contained dirty baby diapers; the photograph depicted the dirty diapers and an Amazon box with the name and address of the Defendant (Plt's 11). On June 13, 2017, the Board sent the Defendant a letter advising her that it had received a complaint that she was improperly disposing of garbage, advising her of the applicable rule regarding the proper disposal of garbage, and admonishing her that future violations will subject her to a fifty-dollar ($50.00) fine for each violation (Plt's "12").

On July 5, 2017, the parties were scheduled to appear in Court for an initial conference which was adjourned by the Defendant to August 9, 2017.

On August 9, 2017, the parties appeared in Court and conferenced the matter without reaching a resolution, so the case was adjourned to August 30, 2017 for a Pre-Trial Conference.

On August 22, 2017, the Plaintiff filed a Note of Issue.

On August 30, 2017, the parties appeared for a Pre-trial Conference and the Court certified the case trial ready and set a control date for November 29, 2017 so that the matter could be sent to mandatory arbitration in White Plains.

On September 14, 2017, the case file in this matter was sent to mandatory arbitration in White Plains.

On February 2, 2018, the Arbitrator awarded the Board a judgment against the Defendant in the sum of $10,437.38[3] together with interest from same date.

On February 15, 2018, the Defendant filed a letter with the Court requesting a trial de novo.

On February 22, 2018, the parties appeared in Court for a pre-trial conference, which was adjourned to April 4, 2018 for trial.

On April 4, 2018, a bench trial in this matter commenced; the trial was continued to April 10, 2018.

On April 10, 2018, the bench trial was concluded.

Trial Testimony

The Board presented Tina Thiakodemitris ("Tina"), a Senior Account Executive at the Ferrara Management Group, as its witness. The Court found her to be a credible witness. Her duties included inspecting the premises, attending monthly Board meetings and responding to tenant issues. Tina testified that the Rules and Regulations were amended in 2015 regarding parking rules and that these rules were distributed to all unit owners ((Plt's "2"). She said that as of April 3, 2018, the Defendant was in arrears in common charges, legal fees, late charges and assessments in the sum of $14, 262.63 (Plt's "3-a"), and in arrears HOA fees in the sum of $5,807.99 (Plt's "3-b").

Tina said that the Condo consisted of 96 units with a Board of Managers, whose President was Robert Sullivan. She said that the Board had the power to levy common charges pursuant to its By-Laws (Plt's "1-

[3] The Arbitrator awarded the Board $4,229.47 in assessments, common charges, and late fees and $6,207.91 in attorneys' fees.

a" §5(a)2 at p. 161; Article VI [Finances] Section 2. [Assessments]); that common charges are to be paid in advance to cover roofing expenses, insurance, plumbing repairs; and that HOA fees are used to cover landscaping and snow removal costs. Tina stated that all unit owners have a duty to pay common charges pursuant to the By-Laws (Plt's "1-a" ¶Twelve at p. 144) and that all unit owners are subject to the Declaration and By-Laws and Rules and Regulations (Id. at ¶Seventeen [Covenants and Restrictions] at p. 146). She further stated the Board is authorized to sue unit owners who remain in default in the payment of common charges and other assessments for at least 10 days after written notice of default, including reasonable attorney's fees, pursuant to Amended By-Laws, Article VIII [Default] (Plt's "1-b"). In addition, the Board can collect damages from the unit owners (Plt's "1-a" Section 5(a)11 at p. 162).

According to Tina, a weekly inspection was made of the Condo units and it revealed that Defendant's tenant stored a treadmill and weights on the patio and hung plants and lights from trellises in violation of Sections 2.1 and 2.7 of the Rules and Regulations (Plt's "2" and "5"). She said she called and spoke with the Defendant twice about removing the prohibited items, but they were not removed. The tenant vacated the premises and the Defendant moved back into the premises on or about early February 2016. In a letter dated February 27, 2016, the Board requested that the Defendant remove the prohibited items within 5 days of the receipt of the letter (Plt's "5"). After a re-inspection of the premises on or about March 16, 2016 showed that the prohibited items were not removed, the Board sent the Defendant a letter dated March 21, 2016 informing her that she would be fined $50.00 per day from March 5th to 16th for a total fine of $600.00 (Plt's "6" and "7"). Tina said that a subsequent inspection of the premises showed that the Defendant eventually removed the prohibited items.

Tina then explained the process of renting a unit as follows: 1. An owner must complete an application; 2. pay a $75.00 fee for processing

the transaction; 3. obtain a waiver of the right of first refusal; 4. obtain one month's security from the prospective tenant; and 5. obtain a credit check (Plt's "2" Section 7.5 [Leasing and Sale of Units] (Rules and Regulations); Plt's "1-a" Article X [Selling, Mortgaging and Leasing Units] at pp. 173-176). Tina said the Defendant submitted a tenant application to the Board on or about April 1, 2016 when the unit was in arrears in the sum of $803.77 for common charges and assessments (Plt's "3-a"). On April 8, 2016, the Board issued the Defendant a Waiver of the Right of First Refusal pursuant to Article 10, Section 1 of the By-Laws and certified "that all common charges and assessments affecting the captioned unit have been paid through April 30, 2016" (Plt's "8"). Tina said that the Board made an error and that the Defendant, in fact, had a common charges arrears on April 8, 2016 in the sum of $803.77. On May 1, 2016, the Defendant's check for common charges and assessments in the amount of $2150.00 bounced (Plt's "3-a"). Tina said that when a condo owner fails to pay his or her common charges, then other condo owners must make up the shortfall.

Tina also testified that all unit owners were required to get fire inspections and chimney and dryer vent cleanings completed every two years and that the Defendant had failed to do so in a timely manner after having been given several extensions (Plt's "8-a"). As a result, the Defendant was fined $50.00 per month until the required inspections and cleanings were completed.[4] From January 1, 2016 to February 28, 2017, the Defendant owed $1571.77 in common charges. In a letter dated January 27, 2017, the Board notified the Defendant that she owed $1280.47 (Plt's "16"). On February 28, 2017, the Board's attorney sent the Defendant a Notice To Cure Default(s) (dated February 23, 2017) and a Notice Under the Condominium Act for Unpaid Common Charges (dated February 23, 2017) and requested that she the pay the outstanding

[4] A review of the Condo and HOA ledgers (Plt's "3-a" and "3-b") does not clearly indicate whether the $50.00 per month fine was imposed on the Defendant.

common charges in the sum of $1571.77 within 10 days of the service of the notice or dispute same within 30 days (Plt's "9"). On March 12, 2017, the Board sent the Defendant a letter informing her that she remained in default in the payment of her common charges in the sum of $2444.57 and that her cars will be subject to removal after March 17, 2017 without further notice pursuant to the Rules and Regulations (Plt's "10").

Tina further testified that on June 5, 2017, the Board received a complaint from a resident that someone was improperly disposing of dirty diapers and garbage by tossing them over the dumpster wall (Plt's "11"). The resident also sent the Board a photograph of the garbage which consisted of an Amazon box and dirty diapers; the name and address on the Amazon box was the Defendant's (Id.). In a letter dated June 13, 2017, the Board informed the Defendant that it received information that she was improperly disposing of her garbage in violation of the Rules and Regulations and that further violations would result in a fifty-dollar ($50.00) fine per violation (Plt's "12").

As of July 26, 2017, Tina stated that the Defendant owed $5,562.18 in common charges (Plt's "3-a"). As of April 3, 2018, the Condo and HOA Ledgers indicated that the Defendant owed $14, 262.63 and $5,807.99 respectively (Plt's "3-a" and "3-b"). Tina further stated that Plaintiff's Exhibit "13" are copies of the legal bills[5] that the Board incurred in its attempt to collect common charges, fines, assessments and other expenses from the Defendant.

Tina then testified about the Resident Notification System (RNS); she stated that all tenants are required to fill out an RNS form so that they can receive prior notification of all projects affecting the premises, snow removal, paint jobs, among other activities affecting condo owners (Plt's "15"). Tina stated that the Defendant did not submit an RNS form to the Board.

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[5] The Board's attorneys are the Law Offices of Levine and Montana.

On cross examination, Tina conceded that the Board sent the Defendant a written Right of First Refusal certifying that she has a zero balance as of April 8, 2016 (Plt's "8"); she said that the Board made an error when it informed the Defendant that she had a zero balance. Tina also stated that she was informed of a water leak from a unit above the Defendant's unit, and that she informed her that the issue was between unit owners. Tina stated that the plumbing issue and damages sustained by the Defendant were eventually paid by the Board's insurance.

Lastly, Tina testified that the Defendant never paid the $600.00 fine imposed for failing to timely remove the treadmill and that she violated the rules by having her windows covered with sheets instead of curtains (Plt's "14").

Defendant's Testimony

Defendant testified that she is of Sikh descent and a minority; she said that the Board was biased in the administration of its services to unit owners. Defendant sent an email to Ms. Evans (Managing Agent) regarding the Board's failure to timely remove snow from her walkway which contributed to her husband's slip and fall accident (Def's "A" and "C"). Defendant also stated that Tina ordered her vehicles towed (Def's "E"). The Defendant said that she was unable to take her small children to their medical appointments after the cars were towed, because their child seats were in the towed vehicles. She also stated that prior to her vehicles being towed, the Board conducted a campaign of harassment by placing an anonymous note on her vehicle threatening to tow her vehicles (Def's "G"). Defendant then testified that while she was informed that she was in violation of the rules for having her windows covered with a sheet, there were other owners who covered their windows with sheets and were not issued a violation (Def's "F"). Defendant said that she purchased curtains for her windows (Def's "F"). She also testified that the Board delayed in providing its insurance carrier with the proper documentation in order to timely resolve her damages claim resulting from a water leak

from the above unit (Def's "B"); that she and her family were essentially under surveillance by Board members or others which made them feel unsafe (Def's "D"); that she was falsely accused of improperly disposing of garbage; that the Board turned off the water to her unit for several hours during the day while her elderly parents were visiting without giving her prior notice of said water interruption; and that she did not owe the condo any arrears because the Board gave her a written Right of First Refusal certifying that as of April 8, 2016, she did not owe any charges (Plt's "8"). Lastly, Defendant stated that given the fact that she has been subjected to selective and bias administration of services from the Board and that the Board delayed for several months before repairing her unit after it sustained water damage from the upstairs unit, she should be entitled to an abatement of the common charges.

Discussion

It is well settled that all unit owners are obligated to pay common charges and special assessments imposed by the board of managers (see *Board of Managers of Madison Medical Building Condominium v. Rama*, 249 A.D.2d 140 [1st Dept. 1998]); *Board of Mgrs. of Montauk Manor Condominium v. Levenas*, 2012 N.Y. LEXIS 5888, 2012 NY Slip Op 33086(U) (Sup. Ct. Suffolk County 2012); *Board of Mgrs. of Lido Beach Towers Condominium v. Gartenlaub*, 27 Misc.3d 1213(A), (Sup. Ct. Nassau County 2010); Real Property Law (RPL) §339-x). Further, unit owners may not withhold payment of their common charges and assessments based on either defective conditions in their units or in common areas, or in disagreement with lawful actions taken by the board of managers (see *Abbady v. Abbady*, 216 A.D.2d 115 [1st Dept. 1995]); *Frisch v. Bellmarc Management, Inc.*, 190 A.D.2d 383, 389 [1st Dept. 1993]). When a unit owner challenges the actions of the board of managers, the Courts will apply the business judgment rule (see *Levandusky v. One Fifth Ave Apartment Corp.*, 75 N.Y.2d 530, 539 [1990]); *Helmer v. Comito*, 61 A.D.3d 635, 636 (2d Dept. 2009); *Acevedo*

v. Town N Country Condominium, Section I, Bd. of Managers, 51 A.D.3d 603, 604 [2d Dept. 2008]).

Under the business judgment rule, the Court's inquiry will be limited to whether the board of managers acted within the scope of its authority under the by-laws and whether the action was taken in good faith to further a legitimate interest of the condominium (see *Perlbinder v. Board of Managers of 411 East 53rd Street Condominium*, 65 A.D.3d 985, 989 [1st Dept. 2009]). In *Levandusky v. One Fifth Ave Apartment Corp.*, the Court of Appeals stated that a cooperative board's "business judgment" will be upheld absent a showing of fraud, illegality, self-dealing or bad faith (75 N.Y.2d at 554); *40 W. 67th St. Corp. v. Pulman*, 100 N.Y.2d 147, 155 (2003). Lower courts have applied the holding in *Levandusky* to a "business judgment" of a condominium (see *Board of Managers of Cooper Square Condominium v. Cooper Third Assocs.*, N.Y.L.J., July 24, 1991, at 21, col. 4 [Sup. Ct. New York County]) (the court applied *Levandusky* in upholding the attempted enforcement by a condominium board of managers of payment of unpaid common charges and a special assessment notwithstanding the unit owner's allegation that the board was selectively enforcing the collection of such charges); *600 West 115th St. Corp. v. 600 West 115th St. Condominium*, N.Y.L.J., March 2, 1992, at 27, col 4 (Court upheld condo board's decision to require unit owner to obtain its consent prior to renovating his unit consistent with *Levandusky* holding).

Turning to the facts of this case, the Declaration ("Plt's 1-a" at ¶11)

clearly states that

> All present or future Unit owners, tenants, future tenants, or any other person(s) that might use the facilities of the Condominium in any manner or who shall take title to or possession of any Unit, are subject to the provisions of this Declaration and the By-Laws and Rules and Regulations of the Condominium and the Declaration of

> the Woods III in Westchester Homeowners Association, Inc., recorded on June 25, 1987, in Liber 8864, page 250.

The By-Laws ("Plt's 1-a" Section 3. Personal Application)

state that

> All present or future Unit Owners, mortgagees and lessees, their employees, guests, tenants or invitees or other person that might use the facilities of the Property in any manner are subject to these By-Laws, the Declarations and rules and regulations established by the Board of Managers. The mere acquisition or rental of any Units or the mere act of occupancy of any of said Units or Property signifies that these By-Laws, the Declaration and the rules and regulations are accepted, ratified and will be complied with.

It is beyond cavil that the Defendant is subject to every provision in the Declaration, By-Laws and Rules and Regulations of the Condo by virtue of her taking title to her unit thereat. The By-Laws [Section 5. Powers (a) 2.] empowers the Board to determine and collect assessments and common charges against all unit owners to pay for the costs and expenses of the Condo. The Declaration [Twelfth: Common Expenses] states

> Every Unit Owner shall pay the Common Expenses assessed against his Unit when due and no Unit Owner may exempt himself from liability for the payment of the Common Expenses assessed against his Unit by waiver of the use or enjoyment of any of the Common Elements or by abandonment of his Unit.

"A purchaser of a unit in a condominium enters into a binding relationship with every other unit owner by both contract and statute. One

of the elements of that relationship is the obligation to pay common charges…" (*Bd. of Mgrs. of Lido Beach Towers Condominium v, Gartenlaub, supra,* 27 Misc.3d *2-3). Here, the Court finds that the Defendant is obligated to pay common charges and assessments to the Condo. The Court further finds that the Board has submitted sufficient credible proof that the Defendant owes $1,571.77 on the First Cause of Action and $3,392.25 on the Second Cause of Action for a collective sum of $4,964.02. The Defendant argued that she should not be obligated to pay these common charges and assessments because the Board has harassed her and her family and has been biased and selective in its delivery of services—to wit, that it delayed for several months in repairing her unit; that it failed to notify her that water would be turned off in her unit for several hours; that it towed her cars from their assigned parking spaces; that it falsely accused her of improperly disposing of garbage; and that it failed to timely clear the snow from her walkway which allegedly contributed to her husband's trip and fall accident, when snow had been removed from the walkway of other unit owners earlier in the day.

Although the Courts engage in a deferential standard of review under the business judgment rule when examining a Board's decision, that does not mean that a Board's discretionary decision-making is unfettered. (see *Residential Board of Managers of Columbia Condominium v. Alden,* N.Y.L.J., Dec. 5, 1991, at 23, col. 1 [1st Dept.]) (Appellate Division reversed order of Supreme Court which granted the board of managers a preliminary injunction requiring a unit owner to remove walls and restore them to their original condition, even though the unit owner had an express written agreement with the board of managers to make the subject renovations). While this Court is sensitive to the complaints of the Defendant, she has not submitted sufficient proof at trial to demonstrate that the Board had acted in bad faith or acted outside the scope of its legitimate authority. To the contrary, the Court finds that the proof at trial demonstrated that the Board acted in good faith in the enforcement of its

Rules and Regulations and in its attempt to collect common charges and assessments due and owing from the Defendant.

The Defendant did not really dispute that she owed the common charges and assessments sued upon; she merely disputed the fairness in paying them. Specifically, Defendant argued that since she and her family were the subject of disparate treatment by the Board, she should be entitled to an abatement in the common charges. Unit owners have an absolute obligation to pay common charges and assessments and they simply cannot withhold them because they disagree with a lawful action taken by the Board.

The proof at trial demonstrated that the Defendant's cars were towed after notification from the Board that it intended to do so pursuant to the Rules and Regulations based on her non-payment of common charges (Plt's "10"). The claim that the Board delayed in getting her unit repaired because it failed to timely provide its insurance company with timely documentation is not prima facie actionable without some attendant facts of malicious or discriminatory intent. In fact, the Board's insurance company eventually paid the Defendant for damages to her unit. The claim that the Defendant was improperly disposing of garbage is also not actionable since the Board took no action against her other than issue a warning letter, based on the email and photographic evidence it received (Plt's "11"). The claim that the Board singled her out for late snow removal was also not borne out by the evidence. It would have been immensely helpful if the Defendant had provided photographic evidence of the condition of her walkway as well as the condition of her neighbors' walkways to support her claim of selective administration of services. Lastly, the claim that the Board failed to notify her that water would be turned off to her unit for several hours was further proof of bias or discrimination, was met with unrebutted testimony that she failed to complete and submit an RNS form to the Board, which when done allows

the Board to communicate with unit owner about upcoming projects, snow removal, painting, and other important notifications.

RPL §339-j states that an action for damages will be maintained by the board of managers when a unit owner does not strictly comply with the by-laws of the condominium. The unrebutted testimony is that the Defendant failed and/or refused to pay her common charges and assessments based on claims of mistreatment, harassment, bias and/or a delay in addressing the conditions in her unit[6]. Since the Court has found that the Defendant failed to satisfy her burden of demonstrating that the Board acted in bad faith or outside the scope of its legitimate authority, the Court holds that the Defendant is liable for the above referenced amounts under the First and Second Causes of Action. A unit owner simply cannot withhold the payment of common charges and assessments based on unproven claims that the Board acted in bad faith or that it acted outside the scope of its legitimate authority (see *Levandusky v. One Fifth Ave Apartment Corp.*, *supra*, 75 N.Y.2d 530).

The undisputed facts are that the Defendant was subject to the Declaration, By-Laws and Rules and Regulations when she took title to her unit at the Condo. The By-Laws clearly state that any unit owner who fails to pay a monthly or special assessment imposed by the Condo shall be liable for any expenses including reasonable attorney's fees incurred by the Condo in the collection of same, together with 16% interest. By-Laws, Article VI, Finances, Section 2. Assessments.

Matthew Montana, Esq., from Levine and Montana, stated that he was admitted to New York Bar in 1992; that he was a Manhattan prosecutor for 6 ½ years and tried 24 cases to verdict; that the firm of Levine and Montana represents 30 condominiums and cooperatives; that

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[6] It is not clear to the Court if the Defendant was raising a warrant of habitability claim as a basis for not paying her common charges and assessments. If so, this defense would fail as warranty of habitability claims are not applicable to condominiums. Frisch v. Bellmarc Management, Inc., 190 A.D.2d 383 (1st Dept. 1993).

the hourly rate of the firm is $240.00 (2017) and $250.00 (2018); that his father is also a principal in the firm; and that he has specialized in condominium law for approximately 30 years and his hourly rate is $310.00-$320.00 per hour. Mr. Montana went on to state that the Arbitrator awarded the full amount of his attorney's fees in the amount of $6,207.91 in a prior arbitration[7] involving the parties; that he expended 13.46 additional billable hours ($3,365.00) to prepare for trial; and that the total amount of attorneys' fees due and owing is $9,298.61 + 3,365.00 = $12,663.61 (Plt's "13"). In determining an award of reasonable attorney's fees, the Courts first look to determine if there is a contractual agreement that provides for attorney's fees. If there is an agreement, an award of reasonable attorney's fees is proper (see *Granda Condo I. v. Morris,* 225 A.D.2d 520 (2d Dept. 1996). A condominium is entitled to reasonable attorney's fees it incurred to recover a unit owner's unpaid common charges (see, *Frisch v. Bellmarc Management, Inc., supra*, 190 A.D.2d 383*; Board of Managers of First Ave. Condominium v Shandel,*143 Misc.2d 1084 [N.Y. City Civ. 1989]).

"In determining what is reasonable compensation for an attorney, the court may consider a number of factors including 'the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained" (Granda Condo I. v. Morris, *supra*, 225 A.D.2d at 522, *quoting* Matter of Potts', 213 A.D. 59, 62, 209 N.Y.S. 655 (1925), *aff'd* 241 N.Y. 593, 150 N.E. 568 [1925]). In the case at bar, Mr. Montana presented the Court with an hourly billing sheet that purported to detail the work hours his firm has expended on this case, including the arbitration proceedings (Plt's "13"). Courts are not required to accept at face value an attorney's summary of the hours he expended on a case (see *Granda Condo I. v. Morris, supra,* 225 A.D.2d at 522, *citing*

[7] The Arbitrator's prior award of $6,207.91 in attorneys' fees in favor of the Plaintiff is not binding on this Court, as the Defendant is entitled to a trial de novo of all the issues, including an award of attorneys' fees. See Part 28 of the Rules of the Chief Judge [22 NYCRR §28.12(d)].

Matter of Bobeck, 196 A.D.2d 496 [2d Dept. 1993]). The determination of a reasonable attorney's fee is generally left to the sound discretion of the trial court, which is often in the best position to determine those factors integral to the fixing of a reasonable fee (see *Clifford v. Pierce,* 214 A.D.2d 697, 698 [2d Dept. 1995]). Based on this Court's review of counsel's billing sheet as well as his in-court representations regarding his experience, time expended on this case, etc., the Court finds that counsel is entitled to a reasonable attorney's fee in the sum of $9,572.91, which represents $6,207.91 (this Court agrees with and adopts the Arbitrator's attorney's fees award and finds it reasonable) plus $3,365.00 which represents the 13.46 hrs. of billable hours expended to prepare for trial in this matter, as testified to by counsel.

There is one remaining issue that requires some elaboration; the issue involving the Waiver of the Right of First Refusal (Plt's "8"). The testimony and evidence at trial clearly showed that the Board issued the Defendant a Waiver of the Right of First Refusal which certified that she had a zero balance as of April 8, 2016 through April 30, 2016. The Defendant argued that the waiver constituted proof that she did not owe any arrears warranting the instant lawsuit. In her Answer, she stated that the waiver cleared the $600.00 fine for the treadmill and that this suit was based on a fine that the Board said she no longer owed (Answer at ¶ 2). This claim is belied by the Board's letter to the Defendant dated January 27, 2017, which informed her that she owed $1280.47 (Plt's "16"). Further, Defendant's ledger clearly indicated that she never had a zero balance after January 11, 2016 (Plt's "3-a"). In other words, even if the Court were to credit her argument that the $600.00 treadmill fine was waived by the Board, her ledger clearly shows that she owed other amounts in common charges. Importantly, the Defendant presented no evidence that she paid the other amounts in common charges or that the Board's certification that she had a zero balance constituted a voluntary waiver of its right to collect all sums due and owing.

Any other arguments and/or claims for relief raised by the parties and not addressed in this Decision and Order are denied.

Based on the foregoing, it is

Ordered, that the Plaintiff is entitled to a judgment in the sum of $1,571.77 on the First Cause of Action.

Ordered, that the Plaintiff is entitled to a judgment in the sum of $3,392.25 on the Second Cause of Action.

Ordered, that the Plaintiff is entitled to an award of attorney's fees in the sum of $9,572.91 plus costs.

The foregoing constitutes the Decision and Order of the Court.

_____

Hon. Reginald J. Johnson

City Court Judge

Dated: Peekskill, NY

May 28, 2018

The Court considered the testimony of the parties and the exhibits marked into evidence at trial in rendering this decision.

Judgment entered in accordance with the foregoing on this ____ day of May, 2018.

_____

Concetta Cardinale

Chief Clerk