

**Board of Mgrs. of the Alexandra Condominium v
Adelman**

2018 NY Slip Op 31469(U)

July 3, 2018

Supreme Court, New York County

Docket Number: 153870/2017

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

----- X
**BOARD OF MANAGERS OF THE ALEXANDRA
CONDOMINIUM, AS AGENT OF THE UNIT OWNERS
OF THE ALEXANDRA CONDOMINIUM,**

**Index No. 153870/2017
Motion Seq: 004**

Plaintiff,

DECISION & ORDER

-against-

HON. ARLENE P. BLUTH

**ROBERT C. ADELMAN A/K/A R.C. ADELMAN, LINDA
RACKIS, COMMISSIONER OF JURORS and JOHN DOE
#1 through JOHN DOE #10**

**The names "John Doe #1 through John Does #10" being
fictitious and unknown to Plaintiff, the persons or parties
intended being the tenants, occupants, persons or
corporations, if any, having or claiming an interest in
or lien upon the premises described in the complaint.**

Defendants.

----- X

The motion by plaintiff for partial summary judgment is granted.

Background

This is a foreclosure action wherein plaintiff seeks to recover unpaid common charges from defendant Adelman related to an apartment he owns located at 201 West 72nd Street in Manhattan. Plaintiff seeks (1) partial summary judgment as to liability against defendant Adelman and summary judgment against defendant Rackis (who has a judgment against Adelman), (2) dismissal of Adelman's and Rackis' affirmative defenses, striking these defendants' answers and converting them to notices of appearance, (3) granting a default judgment against defendant Commissioner of Jurors, (4) appointing a referee to calculate the

amount due to plaintiff and to examine whether the apartment can be sold in one parcel and (5) discontinuing the action against the “John Doe” defendants and amending the caption to reflect this change.

Only defendant Adelman offers opposition to the motion and he does not deny the fact that he failed to pay common charges. Instead, Adelman insists that he has been denied access to the apartment and, therefore, should not have to pay these outstanding fees.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec*,

Lee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affid* 99 NY2d 647, 760 NYS2d 96 [2003]).

Plaintiff is Entitled to Partial Summary Judgment on Liability

There is no dispute that Adelman, as owner of an apartment in the subject premises, owes common charges to plaintiff. Therefore, plaintiff is entitled to summary judgment on its claim to foreclose on unpaid common charges. The question of how much Adelman owes, as will be discussed below, is a different issue and one that is to be determined by a referee.

Adelman's Affirmative Defenses

The Court also severs and dismisses Adelman's affirmative defenses. Adelman failed to raise an issue of fact with respect to his allegations that the complaint is a "nullity by reason of defective and sham [v]erification" and there is no basis to hold that the "Clean Hands Doctrine" bars plaintiff's ability to seek unpaid common charges (*see* NYSCEF Doc. No. 14 at 2).

Similarly, Adelman failed to raise material issues of fact on his claims that the "Complaint must be rejected because it threatens abuse of process" and that "Plaintiff is barred from relief based on the doctrine that courts cannot reward wrongdoing or create the perception that wrongdoing enjoys the imprimatur of judicial approval" (*id.*).

Adelman's fifth affirmative defense, which alleged that he has been prevented from the use and enjoyment of his apartment, presents a closer question. According to Adelman, he was denied access to "building services, benefits and amenities" and that he was locked out of his apartment unless he was supervised by management (NYSCEF Doc. No. 92, ¶¶ 50, 51).

In response to these claims, plaintiff offers the affidavit of Yasin Khan (a concierge at the building) who claims that "A key to Unit 10-M is at the Concierge desk, and has been for years"

(NYSCEF Doc. No. 95, ¶ 2). Phyllis Weisberg, an attorney for the board, insists in reply that the locks to Adelman's apartment were changed in 2014 after a fire and that Adelman was told he could pick up a new key, enter the unit and leave with the key when he left (NYSCEF Doc. No. 96, ¶¶ 2-4).

Plaintiff also submits the affidavit of Marianne Ciccantelli, an account executive who works for plaintiff's managing agent, who cites to two letters Adelman sent to her (NYSCEF Doc. No. 94). In a letter dated December 29, 2017, Adelman writes that he "left the only key to 10-M with Kahn the concierge" (NYSCEF Doc. No. 97). A letter dated January 12, 2018 from Adelman states that "I authorize Lucy and Anya [access] to Unit 10-M any time no matter what with or without me" (NYSCEF Doc. No. 98). Lucy and Anya were apparently real estate brokers hired by Adelman to sell the apartment.

Ciccantelli also observes that she was contacted by Anya, who sent her an exclusive contract to sell the unit dated March 26, 2018 (NYSCEF Doc. No. 94, ¶7). Ciccantelli notes that Adelman previously entered into a contract to sell the apartment in 2017, which was approved by plaintiff, but the sale fell through (*id.* ¶ 8; *see also* NYSCEF Doc. No. 47 [copy of the contract of sale]).

Although Adelman insists that he was denied access to his apartment, the record before this Court shows exactly the opposite. Adelman's own writings suggest that he had ownership rights, including access to the key to his apartment and the ability to have real estate brokers show his home. Adelman can only offer conclusory contentions that he was denied access; claims that are directly contradicted by his own words.

The fact is that Adelman gives no specific account of when he was denied access, how

many times this occurred or the circumstances surrounding this denial. Adelman's general claim that he was unfairly denied access cannot defeat a motion for summary judgment when it is contradicted by Adelman's admission that he left the *only* key with the concierge. Given the record before this Court, there is no basis to find that this motion is premature and that there must be discovery.

Remaining Claims

Although Rackis filed an answer, she did not submit opposition. Therefore, Plaintiff is entitled to summary judgment against Rackis-- her affirmative defenses are stricken and her answer is converted to a notice of appearance.

Plaintiff is also granted a default judgment against defendant the Commissioner of Jurors. A special referee will be appointed to calculate the amount due to plaintiff and the complaint is dismissed against the "John Doe" defendants.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and plaintiff is awarded partial summary judgment as to liability against defendant Robert C. Adelman and Adelman's affirmative defenses and answer are stricken and converted to a notice of appearance; and it is further

ORDERED that plaintiff is awarded summary judgment against defendant Linda Rackis and her affirmative defenses and answer are stricken and converted to a notice of appearance; and it is further

ORDERED that plaintiff is awarded a default judgment against defendant Commissioner of Jurors; and it is further

ORDERED that the claims against the "John Doe" defendants are severed and dismissed;

and it is further

ORDERED that a Special Referee shall be designated to hear and report to this Court on the issue of how much is due to plaintiff for outstanding common charges (and any other expenses or fees plaintiff may be entitled to, including legal fees); and it is further

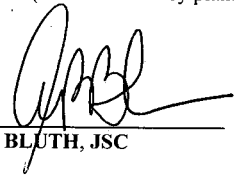
ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028) or spref@nycourts.gov) for placement upon the calendar of the Special Referees' Part (Part SRP) which shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by email an Information Sheet (accessible at the "References" link on the Court's website) containing all the information called for therein and that the Special Referee Clerk shall advise the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees' Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Plaintiff is reminded that, as Mr. Adelman has advised the Court that he has no access to email, plaintiff must mail to Mr. Adelman any document efiled (whether efiled by plaintiff or any court user).

Dated: July 3, 2018
New York, New York



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH
J.S.C.