

**Board of Mgrs. of the Viscaya Condominium v
Robert**

2018 NY Slip Op 31550(U)

February 7, 2018

Supreme Court, New York County

Docket Number: 154486/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

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THE BOARD OF MANAGERS OF THE VISCAYA
CONDOMINIUM, ON BEHALF OF THE UNIT OWNERS,

Plaintiff,

Index No. 154486/2017
Motion Seq: 001

-against-

CHRISTINE ROBERT, WORKERS' COMPENSATION
BOARD OF NEW YORK STATE, and "JOHN DOE,"

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendants.

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The motion for summary judgment is denied.

Background

This action arises out of a condo unit owned by defendant Robert located at 110 East 71st Street in Manhattan. Plaintiff alleges that Robert failed to pay common charges and that it filed a lien for \$19,027.66. Plaintiff maintains it is entitled to summary judgment to foreclose the unit because Robert owns the apartment, has failed to pay common charges and that the lien setting forth the amount owed is valid.

In opposition, Robert points out that plaintiff brought an action against Robert in New York City Civil Court to recover \$23,319.98 in unpaid common charges. Robert submits an affidavit in which she claims that she has paid her monthly common charges. Robert claims that she missed three payments from May-July 2013 after her husband passed away and the bills were addressed to him. Robert claims she paid all three months owed in one check, but still faces charges (including late fees) stemming from these missed payments. Robert contends that

plaintiff's method of applying payments has created a "pyramiding of late charges." Essentially, Robert insists that plaintiff has been crediting her payments so as to ensure that Robert gets a late fee every month.

In reply, plaintiff claims that if there is a dispute over the amount of common charges owes, then it should be determined by a referee but a disagreement over the amount owed does not prevent this Court from granting the motion for summary judgment. Plaintiff stresses that Robert acknowledges that she failed to pay certain late 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 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], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Unfortunately for plaintiff, neither the ledger (*see* NYSCEF Doc. No. 28) nor the affidavit of Stephanie Minor (NYSCEF Doc. No. 17) establishes that plaintiff met its prima facie burden for summary judgment. The Court is unable to determine from the ledger what the basis is for plaintiff's claims that it is entitled to the charges underlying the lien. The ledger appears to confirm Robert's claim that she paid all three months worth of common charges and capital assessments for the months of May, June and July 2013 in July 2013 (totaling \$16,948.02).

In the next few months following July 2013, the column marked "paid" shows that Robert paid the required common charges and capital assessments. For instance, the billing period for September 1, 2013 lists common charges of \$4,259.34 and a capital assessment of \$1,390.00 and that Robert paid \$5,649.34 (the sum of those 2 fees). Then, for some unexplained reason, a late charge is assessed in March 2014 (and in many of the following months) despite the fact that Roberta appeared to have paid the amount due for the months prior to March 2014. According to the ledger, Robert paid the common charges (and capital assessments when applicable) from August 2013 through February 2014. And Robert paid the common charges due in March 2014. The Court recognizes that neither this March 2014 late fee nor other late fees (such as the late fees assessed in June and July 2014) are cited in the supporting documentation for the lien (*see* NYSCEF Doc. No. 21 [Schedule A]). But these obvious issues hinder plaintiff's ability to meet its prima facie burden because it relies on this ledger for the amount identified in Schedule A.

And the amounts cited in Schedule A, the basis for the lien, raise further questions about the ledger. Schedule A suggests that the fees underlying the lien includes a July 1, 2013 common charge of \$4,259.34 and an assessment for \$1,390.00. However, as stated above, the ledger suggests that was paid. Schedule A also lists late fees of \$100 in February 2015, March 2015 and April 2015 despite the fact that the ledger indicates Robert paid the common charges in those months. No explanation is given for these fees in the moving papers or in the Minor affidavit. Plaintiff simply insists that Robert owes the amount due in the lien and that it can assess late fees under the by-laws. That is not enough to meet its prima facie burden.

The fact is that plaintiff's supporting documentation raises more questions than answers. This Court will not simply assume that Robert owes something because a ledger is attached without a detailed explanation explaining the how it assessed those charges. And this Court declines to "run the numbers" to see if it can reconcile Schedule A and the ledger. That is for plaintiff to do in its moving papers, and the plaintiff has failed to do so.

It may be that Robert does, in fact, owe plaintiff something. But, on these papers, the Court cannot determine as a matter of law whether anything is owed or how plaintiff calculated the charges underlying the lien.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is denied.

This is the Decision and Order of the Court. The parties are directed to appear for a preliminary conference on May 22, 2018 at 2:15 p.m.

Dated: February 7, 2018
New York, New York

ARLENE P. BLUTH, JSC