

**Board of Mgrs. of the Regatta Condominium v
Dewan**

2019 NY Slip Op 30078(U)

January 4, 2019

Supreme Court, New York County

Docket Number: 150523/2017

Judge: Margaret A. Chan

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
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

INDEX NO. 150523/2017

BOARD OF MANAGERS OF THE REGATTA CONDOMINIUM,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

VINAY DEWAN, ANJALI DEWAN, JP MORGAN CHASE BANK,
JOHN DOE NO. 1 THROUGH JOHN DOE NO. 15

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for JUDGMENT - SUMMARY.

In this lien foreclosure action to collect on arrears in condominium common charges, plaintiff Board of Managers of the Regatta Condominium (Board) moves in motion sequence 002 for summary judgment pursuant to CPLR 3212 regarding the liability of defendants Vinay Dewan and Anjali Dewan and, upon finding liability, referring this matter to a judicial referee to determine the amount due to the Board on the lien as per Real Property Actions and Proceedings Law (RPAPL) § 1321. Additionally, plaintiff moves to: dismiss the Dewan defendants' affirmative defenses pursuant to CPLR 3211(b); dismiss the Doe defendants pursuant to CPLR 3025; and to discontinue the action as against defendant JP Morgan Chase Bank pursuant to CPLR 3217. The Dewan defendants oppose the branches of the motion that relate to them. None of the defendants oppose the branches of plaintiff's motion to discontinue the action against the Doe defendants and JP Morgan. The decision and order is as follows:

The Dewans are owners of condominium units 638 and 639 at 21 South End Avenue, New York, New York, known as the Regatta Condominium. Plaintiff alleges that the Dewans are in arrears on common charges and filed liens against the units on June 24, 2016 (NYSCEF Doc. Nos. 51-52). As of that time, plaintiff's lien against Unit 638 was in the amount of \$10,014.98 and the lien against Unit 639 was in the amount of \$11,867.85 (*id.*). Plaintiff proceeded to commence this action on January 17, 2017 to foreclose on the liens (NYSCEF Doc. No. 53 – Complaint).

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in

the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

Here, there is no dispute with regards to the Dewan defendants' liability regarding the unpaid common charges. The Board is the governing body of the condominium. The defendants own the units and agreed to be bound by the condominium's declaration and bylaws which require all owners to pay common charges (NYSCEF Doc. Nos. 49-50; 65 – Assignment; Bylaws). The defendants have failed to pay common charges and are in arrears (NYSCEF Doc. Nos. 60-61 – Ledgers for Units). The Board duly filed valid liens for the arrears (NYSCEF Doc. Nos. 51-52). Defendants have not cleared the liens. As there is no dispute with regards to liability in this matter, summary judgment on this issue is appropriate.

The only issue in dispute is the amount of common charges due. Pursuant to RPAPL § 1321, the court has the discretion to order a judicial referee to compute the amount due to the plaintiff in a lien foreclosure action. Plaintiff claims that the amount due between the two units as of June 12, 2018 is \$261,069.98. The bylaws state that the defendants are obligated to pay additional common charges and assessments, late fees and legal fees, and costs and disbursements incurred by the Board in litigation commenced to enforce its rights as a result of the defendants' default in their obligations.

Defendants dispute the calculations of plaintiff and claim that payments have not been credited to their account. Defendants argue that the Board failed to demonstrate the reliability of the amounts it claims are due. However, defendants do not provide any documentary evidence that no common charges are due and indeed admit that *some* amount is owed (*see* NYSCEF Doc. No. 68 – Affidavit of Vinay Dewan at ¶5). As such, summary judgment and the appointment of a judicial referee to resolve how much plaintiff is due is warranted here. In cases where a valid lien is asserted and plaintiff has prevailed on a motion to appoint a referee to compute amounts due under the subject lien, it is within the province of the referee to determine the validity of the disputed amounts allegedly due to the lienor by reason of her asserted lien (*see Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831 [2d Dept 1990]). Accordingly, this matter will be referred to a judicial referee for a determination of the amount due on the liens.

Next, plaintiff moves pursuant to CPLR 3211 to dismiss the Dewan defendants' affirmative defenses contained in their answer. The defendants offer five affirmative defenses: (1) the complaint fails to state a cause of action upon which relief may be made; (2) plaintiff has not properly credited the answering defendants with payments of common charges and have unreasonably demanded interest, late fees and counsel fees which are not warranted; (3) the liens for common charges are excessive and the amounts demanded are unreasonable and confiscatory in nature; (4) the plaintiff, in prosecuting the underlying liens, has infringed upon the right of the defendants' real property ownership with discriminatory practices in violation of state and federal law; and (5) the plaintiff has violated the doctrine of unclean hands in that plaintiff is guilty of immoral, unconscionable

conduct and that conduct is directly related to the subject matter in this instant litigation and defendants were injured by such conduct (NYSCEF Doc. No. 58 – Answer).

In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). “The court must determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon*, 84 NY2d at 88). However, the court need not accept “conclusory allegations of fact or law not supported by allegations of specific fact” or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

As to the first affirmative defense, plaintiff’s motion is granted. As evidenced by the grant of summary judgment above, plaintiff has a valid cause of action that is supported by documentary evidence. Defendants’ affirmative defense is without merit and is conclusory. Accordingly, it is dismissed.

Turning to defendants’ second and third affirmative defenses, plaintiff’s motion is granted. The documentary evidence in this matter is clear – “plaintiff’s entitlement to unpaid common charges brings with it a right to late fees, interest, and attorney’s fees, all of which are provided for in the condominium bylaws” (*Board of Mgrs. Of Cent. Park Place Condominium v Potoschnig*, 111 AD3d 586 [1st Dept 2013]). Hence plaintiff is entitled to demand interest, late fees, and legal fees. Furthermore, defendants do not point to any evidence that would raise an inference that plaintiff improperly credited common charges payments. The defendants also fail to show how any of the common charges are excessive or confiscatory in nature. In any event, defendants will have an opportunity to contest the amount demanded by plaintiff at the referee hearing pursuant to RPAPL §1321 (*see id.*).

Regarding dismissing the fourth affirmative defense, plaintiff’s motion is granted. Defendants’ allegation regarding discriminatory practices is plead in a conclusory manner and is devoid of any facts, details, or conduct to support defendants’ claim. As such, it is dismissed.

As to the fifth affirmative defense, plaintiff’s motion is granted. “The doctrine of unclean hands is only available when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct” (*Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316 [1956]). Defendants do not point to any conduct that harmed them or that indicate that plaintiff has unclean hands. Consequently, defendants’ fifth affirmative defense is dismissed.

Plaintiff’s motion to dismiss the Doe defendants pursuant to CPLR § 3025 is unopposed and is granted. Likewise, plaintiff’s motion to discontinue this action as it relates to defendant JP Morgan Chase Bank is unopposed and is granted as well.

Accordingly, it is hereby ORDERED that plaintiff Board of Managers of the Regatta Condominium's motion for summary judgment as it relates to the liability of defendants Vinay and Anjali Dewan for the unpaid common charges and liens is granted; it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report on the issues of ascertaining and computing the amount due to plaintiff for unpaid common charges contained in the complaint, together with the principal, interest, late fees, legal fees, and other costs and disbursements advanced as provided for by statute and the Regatta Condominium's bylaws and declaration; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of the Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days for the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; it is further

ORDERED that the plaintiff shall serve a proposed accounting within 30 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they 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 Referees Part in accordance with the Rules of that Part; it is further

ORDERED that, the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/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; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant and the Clerk of the Court within 20 days of entry; it is further

ORDERED that plaintiff's motion to dismiss the Dewan defendants' affirmative defenses is granted; it is further

ORDERED that plaintiff's motion to dismiss the Doe defendants from this matter is granted; it is further

ORDERED that plaintiff's motion to discontinue this action as it relates to defendant JP Morgan Chase Bank is granted; and it is further

ORDERED that the clerk of the court enter judgment as written.

This constitutes the decision and order of the court.



MARGARET A. CHAN, J.S.C.

1/4/2019
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE