

Macarthur Props. I, LLC v Galbraith
2019 NY Slip Op 30658(U)
March 15, 2019
Supreme Court, New York County
Docket Number: 651504/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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INDEX NO. 651504/2018

MACARTHUR PROPERTIES I, LLC,
Plaintiff,

MOTION DATE N/A

- v -

MOTION SEQ. NO. 002

CHRISTINA GALBRAITH, ROMAN KAZAN, BRIAN MCCONVILLE,
and RONALD HOWARD, in their capacities as the Residential
Members of the Board of Managers of such Condominium, and
AKAM ASSOCIATES, INC.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62,
63, 64, 65, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 89

were read on this motion to/for DISMISSAL

OSTRAGER, BARRY R., J.S.C.:

Before the Court is defendants' pre-answer motion to dismiss the Amended Complaint
(NYSCEF Doc. No. 54) pursuant to CPLR §3211(a)(1), (7) and (10) based on documentary
evidence, failure to state a cause of action, and failure to join The Board of Managers of the Lex
54 Condominium ("the Board") as a necessary party. Plaintiff has opposed the motion and cross-
moved to file a Second Amended Complaint. The Proposed Second Amended Complaint
(NYSCEF Doc. No. 73) seeks to add the Board as a defendant, but the allegations are otherwise
substantially the same as those asserted in the Amended Complaint that defendants now seek to
dismiss.

By decision and order dated July 12, 2018 (NYSCEF Doc. No. 46), this Court granted in
substantial part defendants' pre-answer motion to dismiss the original Complaint (NYSCEF Doc.
No. 2). As indicated in that decision, plaintiff is the owner of the Commercial and Professional
Condominium Units (together, the "Commercial Units") at the mixed-use building located at

East 54th Street and Lexington Avenue in Manhattan. The building also contains 142 residential condominium apartments (together, the “Residential Units”).¹

The issue in this case is the methodology for the Board’s calculation of Common Charges payable by the Commercial Units. In the prior decision, this Court rejected plaintiff’s argument that the Board was barred from calculating the charges for the Commercial Units based on their 22% Common Interest and was instead obligated to charge based on the Commercial Unit’s actual use of the Common Elements (NYSCEF Doc. No. 15). Specifically, the Court found that the Condominium Documents, including the Second Amendment to the Offering Plan which expressly allowed the 22% charge, and the applicable law entitled the Board to apply the 22% beginning with its 2017/18 budget and going forward. However, the Court declined to bar defendants as a matter of law from collecting six years of retroactive charges, finding issues of fact relating to plaintiff’s claims of waiver and estoppel and the Board’s course of conduct charging and accepting lesser amounts before 2017. The Court also dismissed the breach of fiduciary duty claim against defendants.

The Court determined the instant motion and cross-motion in substantial part on the record on February 20, 2018 (NYSCEF Doc. No. 87). At that time, the Court granted on consent defendant’s motion to dismiss the Fourth Cause of Action for an accounting, and also granted without significant opposition plaintiff’s cross-motion to add as a defendant The Board of Managers of the Lex 54 Condominium. The Court also granted defendants’ motion to dismiss any and all claims against the individual Board Members, who had been sued in their

¹ The Commercial Units actually consist of eight retail stores on the first floor, seven storage rooms in the basement, one storage room on the first floor, and six offices on the second floor. There are 142 residential apartments, not 141 as stated in the earlier decision.

representative capacities only, as well as all claims against the managing agent Akam Associates, Inc., finding no basis for liability against any of those parties.

As to the remaining issues raised, the Court stated (at p 23): “I’m going to adhere to the construction of the condo documents as reflected in my prior decision.” By letters dated March 5, 2019, both counsel requested a written order clarifying certain aspects of the decision on the record. Defense counsel specifically requested that “the decision with respect to the three remaining new claims asserted in the amended complaint based on plaintiff’s new theory – that the condominium consists of just three, rather than 144 units, and that expenses incurred allegedly benefitting only the 142 residential units should not be included in the common expenses – be clarified to order that they are dismissed because the claims are contrary to the condominium’s recorded declaration and by-laws. The only claim then remaining, as the Court held in its prior dismissal order in the case, is whether plaintiff has liability for its percentage share of common expenses incurred prior to the 2017/2018 fiscal year of the condominium.” (NYSCEF Doc. No. 88). Plaintiff’s counsel asked the Court to find that, “even if expenses that solely benefit the residential unit owners are properly allocated by common interest percentage and charged as common expenses, Defendants have nevertheless violated the Condominium Documents by failing to share or provide services and access to certain Common Elements that have historically been provided only to residential owners.” (NYSCEF Doc. No. 89).

The Court implicitly on February 20, and explicitly now, rejects plaintiff’s position as inconsistent with the Court’s interpretation of the Condominium Documents as set forth in the prior decision, as well as the plain meaning of the Documents as written. Both parties agree that plaintiff’s argument is based on the theory that the Condominium consists of only three Units – one Residential, one Commercial and one Professional. At no point does plaintiff quote a

provision in any of the Condominium Documents for that claim. Rather, the claim is based solely on the assertion that the Board is judicially estopped from claiming otherwise because it asserted in a prior action that the Condominium consisted of three Units, and Justice Carol Huff adopted that position. The record here provides no basis for a finding of judicial estoppel.

As the Appellate Division recently explained in *Anonymous v Anonymous*, 156 AD3d 412 (1st Dep't 2017), quoting *Shamoon v 230 Park S. Apts., Inc.*, 48 AD3d 103, 112 (1st Dep't 2007) (with emphasis added, citations omitted):

The judicial estoppel doctrine “precludes a party who assumed a certain position in a prior legal proceeding and *who secured a judgment in his or her favor* from assuming a contrary position in another action simply because his or her interests have changed. ... Judicial estoppel does not apply where, as here, the prior action does not result in a judgment...”

The *Anonymous* Court thus declined to find that the wife in a divorce action was judicially esstopped from asserting a separate property claim on an insurance proceeds check based on her position in an earlier motion that certain checks were joint property under the parties' prenuptial agreement, as the court had not adopted the wife's position, nor rendered a judgment in favor of the wife based on the assertion, but had merely determined that the husband had failed to demonstrate, as a matter of law, that the checks were not marital property.

The proceedings before Justice Huff in *MacArthur Properties Investors, Inc. v The Board of Managers of the Lex 54 Condominium*, 102152/98, are similar to those in *Anonymous*. Plaintiff had moved before Justice Huff for declaratory and injunctive relief regarding the Board's obligations relating to repairs, maintenance and replacement of certain areas of the building, and both the Board's counsel and the superintendent in their opposition statements described the Condominium as consisting of three Units. (NYSCEF Doc. No. 78). However, counsel attached to his affirmation page B-1 of the Offering Plan that described the building

otherwise, stating that: “The Building contains 142 residential apartments, 5 professional apartments and a superintendent’s apartment on the second floor, 4 maids rooms (the “Maids Rooms) on the third floor, and 8 retail stores.” Thus, it is apparent that the phrase “three Units” was being used for ease of reference to facilitate the argument, and the Condominium Offering Plan is clearly controlling. To the extent Justice Huff adopted the three Unit description in the decision determining the motion (NYSCEF Doc. No. 79), the judge did so only in her recitation of the facts, but the Court did not render a judgment in favor of the Board based on the number of Units, which would be required for judicial estoppel, and instead simply denied plaintiff’s motion for a preliminary injunction. Plaintiff’s reliance on *Karasik v Bird*, 104 AD2d 758 (1st Dep’t 1984) is misplaced; the case is readily distinguishable on the ground that the party estopped had sought to change his position in a new trial after a jury verdict had been rendered in an earlier trial. Similarly, defendant’s discovery demands in this case simply reflect plaintiff’s claims and do not justify a finding of estoppel.

Nor is there merit to plaintiff’s reliance on the term “Limited Common Elements” to challenge the Board’s assessment of Common Charges based on plaintiff’s 22% ownership interest. Both the Condominium Declaration at Section 7(2) and the By-Laws at Article V, Section 15, define “Limited Common Elements” to include only those areas accessible to only one Unit, be it a single individual residential apartment or the commercial or professional space, stating that:

The Limited Common Elements consist of all portions of the Common Elements that are *for the use of one Unit to the exclusion of all other Units*, including, but not limited to, terraces and balconies to which there is direct and exclusive access from the Unit, and the roof area over the existing restaurant which is included within the Commercial Unit, which roof area will constitute a Limited Common Element appurtenant to the Professional Unit....

(NYSCEF Doc. Nos. 61 and 62, with emphasis added).

The above definition of Limited Common Elements is clear and unambiguous and contradicts plaintiff's claim. Plaintiff has not cited to a single Condominium Document that supports its claim. On the contrary, as this Court spelled out in its prior decision, all the Condominium Documents support defendant's right to charge plaintiff based on its 22% ownership interest, including The Second Amendment which describes the precise percentages as follows:

**SIXTH: REALLOCATION OF PERCENTAGES OF
INTEREST IN THE COMMON INTEREST**

As a result of the Sponsor-Tenants Association negotiations, the Sponsor has reallocated the percentage of interests of the Units in the Common Elements of the Condominium. Based on the floor space and location of the Commercial Unit and the relative value of the space and location in relation to that of the Residential Units and Professional Unit, the uniqueness of the Commercial Unit, the availability of Common Elements for exclusive use or shared use and the overall dimensions of the Residential Units, taken as a whole, as compared to the Commercial Unit, the percentage interest of the Commercial Unit is increased to 15.1%, and, with the percentage interest in the Professional Unit remaining at 6.9%, the percentage interest of the aggregate of the Residential Units is reduced to 78%. ... The reallocation of percentage interests in the Common Elements will reduce the pro rata portions of the Common Charges payable by owners of Residential Units.

(NYSCEF Doc. No. 15).

For these reasons and those stated in the Court's July 12, 2018 decision on the motion to dismiss the Complaint, and the February 20, 2019 decision on the record determining the motion to dismiss the Amended Complaint and the cross-motion to serve a Second Amended Complaint, all claims by plaintiff in this action are dismissed, with the exception of the claims relating to retroactive charges that was expressly preserved in the earlier decision. Accordingly, it is hereby

ORDERED that plaintiff's motion and defendant's cross-motion are granted to the extent provided herein, and plaintiff is directed to efile a Second Amended Complaint within ten days

of the date of this order that conforms to this decision, without prejudice to any party's right to appeal; and it is further

ORDERED that the summons and complaint in the above-entitled action be amended by adding The Board of Managers of the Lex 54 Condominium thereto as a party defendant and deleting all other defendants named in the caption to the Amended Complaint; namely, Christina Galbraith, Roman Kazan, Brian McConville, and Ronald Howard, in their capacities as the Residential Members of the Board of Managers of such Condominium, and AKAM Associates, Inc.; and it is further

ORDERED that the Second Amended Complaint prepared as directed herein shall be deemed to have been served upon service of a copy of this order with notice of entry, and defendant shall respond within ten days thereafter, or such other time as directed by the Court; and it is further

ORDERED that the attorney for the plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 232, at the Courthouse located at 60 Centre Street, New York, NY on April 9, 2019, at 9:30 a.m.

3/15/2019
DATE

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER
JSC

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