Board of Mgrs. of the Apthorp Condominium v Apthorp Garage LLC
2019 NY Slip Op 31337(U)
April 29, 2019
Supreme Court, New York County
Docket Number: 850021/2018
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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BOARD OF MANAGERS OF THE APTHORP CONDOMINIUM,

Plaintiff,

- v -

APTHORP GARAGE LLC, IMPERIAL PARKING SYSTEMS, INC. D/B/A PARK, 254 WEST 79TH STREET PARKING CORP., JOHN DOE NO. 1 THROUGH JOHN DOE NO. 15

Defendants.

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INDEX NO. 850021/2018

MOTION DATE 04/11/2019, 04/11/2019

MOTION SEQ. NO. 001 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49

were read on this motion to/for SUMMARY JUDGMENT AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for CONTEMPT.

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion (MS001) by plaintiff for summary judgment and to appoint a referee to compute is granted and the cross-motion by defendant Apthorp Garage LLC ("Garage") for summary judgment is denied. The motion by the Garage (MS002) to hold plaintiff in contempt for the failure to turn over discovery is denied.

Background

This common charge foreclosure action arises out of a condo located at 2211 Broadway in Manhattan. Defendant Apthorp Garage LLC owns the garage unit at the condo and defendants Imperial Parking Systems, Inc. d/b/a iPark and 254 West 79th Street Parking Corp.

(collectively, the "Tenant") operate the parking garage. The central dispute in this case surrounds the Garage's failure to pay special assessments for July, August and September 2017.

Plaintiff claims that in 2017, it sought to replace the condo's roof, the cornice roof, replace mechanical systems for the elevators, update the boilers and upgrade the service switches in the electrical distribution system. Plaintiff approved funding for the first phase of the work with a $5 million assessment to be paid by all unit owners in three installments in July, August and September 2017 and the remaining $2 million to be assessed in the third quarter of 2018.

Plaintiff contends that the assessments were "general common charges" because they improved the general common elements as defined in the condo's declaration. Plaintiff convened a special meeting to approve and ratify the assessment on September 25, 2017. Plaintiff argues that the cost to replace or modernize the building systems at issue here (the cornice and roof work, elevator modernization, boiler replacement and electrical system update) must be shared by all unit owners including the Garage. Plaintiff claims that the Garage owes $385,270.

In opposition and in support of its cross-motion, the Garage claims that plaintiff's actions were unauthorized. The Garage claims that the condo's by-laws require a majority vote of affected unit owners where alterations cost more than $100,000. The Garage claims that the residential board of plaintiff sent a letter on June 6, 2017 that it had finalized a capital improvement plan and it is undisputed that this was done without the necessary vote of the majority of unit owners. The Garage argues that the work done had no benefit to the Garage, which occupies the basement level. It contends the boiler system upgrade is irrelevant because the garage unit is not heated, the elevators do not connect to the basement and it is not aware of any necessary repairs to the roof or the electrical system.

The Garage contends that it complained to plaintiff and plaintiff then held a vote on the assessment on September 25, 2017. It observes that the minutes from this alleged meeting contain no fact finding or discussion about why the capital improvements were "required repairs" as defined under the by-laws. The Garage also takes issue with a $1.5 million loan plaintiff entered into to fund the capital improvement project without unit owners' approval.

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

"Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. However, when the meaning of the contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented which cannot be resolved on a motion for summary judgment" (*Ruttenberg v Davidge Data Systems Corp.*, 215 AD2d 191, 192-93, 626 NYS2d 174 [1st Dept 1995] [citations omitted]).

The key provision of the by-laws is Section 6.12, which provides:

> "Alterations, Additions, Improvements or Repairs to Common Elements. Except as otherwise provided in the Declaration or these By-Laws, all alterations, additions, improvements or repairs in or to any General or Limited Common Element shall be made by the Board or Unit Owner(s) required to maintain such General or Limited Common Element and the cost and expense thereof shall be charged to the Residential Unit Owners and the Commercial Unit Owner as a General Common Expense, to all Residential Unit Owners or Commercial Unit Owners as Residential or Commercial Common Expense, or to the Unit Owner(s) responsible therefor, as the case may be. Whenever in the judgment of the Residential Board, the Commercial Board or the Condominium Board, as the case may be, the cost of any alteration, addition, or improvement would exceed $100,000 in the aggregate in any calendar year (except if such alteration, addition, or improvement is provided for in a duly approved budget), then such proposed alteration, addition, or improvement shall not be made unless first approved by a Majority of Residential Unit Owners, a Majority of Commercial Unit Owners, or a Majority of Unit Owners, as the case may be, who shall be required to bear the cost and expense thereof as aforesaid with respect to alterations, additions, or improvements made by the Residential or Commercial Board, respectively. Except as otherwise provided in the Declaration or these ByLaws, all alterations, additions, or improvements costing in the aggregate $100,000 or less in any calendar year may be made as aforesaid without the approval of the Unit Owners. *Required repairs to the Common Elements including replacement of existing elements of the Building shall be made by the respective Board in their own discretion regardless of the cost*" (NYSCEF Doc. No. 34 [emphasis added]).

The last sentence makes clear that plaintiff can make required repairs to common elements at its discretion no matter the cost. As an initial matter, the Court must consider whether the improvements were made to the common elements. The definition of "General Common Elements" in the declaration is "the Land, and all parts of the Building, including the

foundations, roofs, supports, other than the Units and the Limited Common Elements" (NYSCEF Doc. No. 17, exh B[1]). The Building is defined as "the structures and improvements including above and below grade segments, known as 2207 Broadway and 390 West End Avenue, New York, New York in which the Units of the Condominiums are located" (*id.*).

Section 8.3.3 states that the General Common Elements include the "boiler room, electric switchboard room, elevator mechanical rooms, shop, superintendent's office, water meter rooms, toilet, staff work room, staff lockers and janitor's sink, and mechanical room, and related Facilities on the roof" (*id.* exh G).

These definitions make clear that the work done by plaintiff was to the General Common Elements and, therefore, the Garage must share in the cost to repair these elements if the repairs were *required.* A vote was not necessary if the repairs were necessary regardless of the cost. A review of the by-laws and the declaration contains no definition for required repairs, but that does not end the Court's inquiry.

The June 6, 2017 letter from plaintiff states that "At present none of these projects pose any safety issues although, in most if not all cases, the systems and mechanicals being discussed are at risk of critical failure and the work is necessary to maintain and upgrade the Apthorp's aging infrastructure" (NYSCEF Doc. No. 26). That is enough for this Court to find that the work constituted required repairs—the fact that the building may not have been on the verge of collapse does not render the improvements unnecessary. The letter demonstrates that plaintiff wanted to make these improvements before these issues posed an imminent safety risk. That decision is subject to the business judgment rule and limited judicial review (*see Levandusky v*

[1] For some reason, plaintiff e-filed *all* of its exhibits as one document rather than e-filing each exhibit as a separate document (*see* Procedures for Electronically Filed Cases § [D][6]).

One Fifth Ave. Apartment Corp., 75 NY2d 530, 538-39, 554 NYS2d 807 [1990]). This Court will not disturb plaintiff's conclusion that it had to make these repairs.

The Garage's argument that another provision of the by-laws (Section 2.2.2.1[k]) compels dismissal of the instant action is inapposite. That provision requires the consent of all unit owners where plaintiff borrows more than $250,000 in connection with repairs. It also provides that "no lien to secure repayment of any sum borrowed may be created on any Unit or its appurtenant interest in the Common Elements without the consent of the owner of such Unit" (NYSCEF Doc. No. 33). The Garage claims that plaintiff took out a loan for $1.5 million against the super's apartment (6D).

Plaintiff claims that the unit in question is the resident manager's unit and is, therefore, a residential common element, which enables the plaintiff to take out a mortgage on the unit without the Garage's consent. (The Garage is, after all, the commercial unit owner). Plaintiff also argues that this mortgage is irrelevant because the Garage is not responsible for the repayment of that loan.

The Court finds that the $1.5 million mortgage does not create an issue of fact because it has nothing to do with the Garage. Plaintiff points out that no part of its lien against the Garage seeks repayment for the mortgage. Therefore, whether it was permissible or not is irrelevant to this case.

Plaintiff is entitled to summary judgment and the dismissal of the Garage's affirmative defenses and counterclaims.

Discovery Motion

With respect to the Garage's discovery motion (MS002), the Court denies the motion because plaintiff claims it provided documentation to the Garage and discovery is irrelevant now that the Court has found that plaintiff is entitled to summary judgment.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendants Apthorp Garage LLC, Imperial Parking Systems, Inc. d/b/a iPark and 254 West 79th Street Parking Corp. is granted and the cross-motion for summary judgment by defendant Apthorp Garage LLC for summary judgment is denied; and it is further

ORDERED that the motion by defendant Apthorp Garage LLC to hold plaintiff in contempt for failure to produce requested discovery is denied; and it is further

ORDERED that the counterclaims and affirmative defenses asserted by defendant Apthorp Garage LLC and the affirmative defenses and cross-claims asserted by Imperial Parking Systems, Inc. d/b/a iPark and 254 West 79th Street Parking Corp. are severed and dismissed; and it is further

ORDERED that Thomas Kleinberger, Esq. 411 5th Avenue NY NY 10016 917-326-5523 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

and if a hearing is required, the referee shall be entitled to $250/hr plus cost of conference room

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

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ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

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ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of ~~$350~~ $500.00 (five hundred) shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that the caption be amended to remove John Doe #1 through John Doe #15 as defendants; and it is further

ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BOARD OF MANAGERS OF THE APTHORP CONDOMINIUM,

Plaintiff,

v.

APTHORP GARAGE LLC, IMPERIAL PARKING SYSTEMS, INC. D/B/A iPARK, 254 WEST 79th STREET PARKING CORP.,

Defendant(s).

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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed; and it is further

ORDERED that such service upon the County Clerk 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 (ww.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: July 30, 2019 @ 2:15 p.m.

4.29.19
DATE

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

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE