

**Board of Mgrs. of the Palm Trees Condominium v
Osiris Prop. Holdings, LLC**

2019 NY Slip Op 31655(U)

June 11, 2019

Supreme Court, New York County

Docket Number: 161864/2018

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 161864/2018

THE BOARD OF MANAGERS OF THE PALM
TREES CONDOMINIUM,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

OSIRIS PROPERTY HOLDINGS, LLC,
ALEXANDER KASS, and "JOHN DOE #1" through
"JOHN DOE #10,"

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion for summary judgment.

By order to show cause, defendant Osiris Property Holdings, LLC moves for an order summarily dismissing plaintiff's third cause of action for attorney fees incurred in this action, and for an order compelling plaintiff to process all new applications made by Osiris to re-rent apartment 3A at 3-5 West 122nd Street in Manhattan.

I. RELEVANT BACKGROUND

On April 10, 2013, Osiris, non-parties Island Equity Group, Inc. and Robert Ainehsazan, Incorporated acquired ownership of the apartment in issue. (NYSCEF 25).

Pursuant to section 5.7 of the condominium's by-laws, owners are prohibited from using their apartments to accommodate transient occupants. Section 7.7 of the by-laws provides that owners are prohibited from conveying or leasing their units unless they have paid their common charges in full. Section 9.2 of the by-laws permits plaintiff to bring a proceeding in equity or law

to remedy violations of the by-laws, and section 9.4 provides that any expenses incurred in connection with remedying a violation constitute common charges. (NYSCEF 52).

By letter dated September 21, 2016, plaintiff's counsel informed Osiris that it owed \$11,319.90 in common charges and fees, and that Osiris is prohibited from leasing the unit until the balance is paid in full. (NYSCEF 28). On December 29, 2016, Island Equity Group and Robert Ainehsazan entered into a lease with defendant Alexander Kass for the unit. (NYSCEF 27).

By letter dated March 10, 2017, plaintiff's counsel informed Kass that the owner of unit 3A had failed to pay common charges, assessments, and other fees due plaintiff, and that if Kass pays rent directly to plaintiff, it would not seek to terminate his tenancy. (NYSCEF 29). By letter dated June 13, 2017, Kass's counsel informed counsel for one of the apartment's owners of the March 10, 2017 letter, and warned that neither he nor the apartment's owner may contact Kass, who is prohibited from paying rent to the owner until plaintiff advises Kass otherwise. (NYSCEF 29).

By summons and complaint dated July 27, 2017, Osiris, Island Equity, and Robert Ainehsazan initiated an unrelated action against plaintiff to enjoin it from collecting rent from Kass and charging additional interest and late fees. (NYSCEF 30). Thereafter, the parties entered into a settlement agreement by which plaintiff agreed to pay Island Equity Group in exchange for satisfying all claims, including allegations concerning the alleged overdue common charges. In addition, Osiris, Island Equity, and Ainehsazan agreed to comply with the condominium's rules and regulations. (NYSCEF 48).

On December 6, 2018, the condominium's property manager sent a letter to Osiris in which she claimed that Osiris was engaging in short-term leasing of the apartment on Airbnb,

and directed that it stop. (NYSCEF 32). That same day, plaintiff's counsel sent a letter to Osiris in which he claimed that Osiris had put a lockbox on the condominium's fence in connection with its short-term leasing, and demanded that the lockbox be removed. (NYSCEF 33).

On December 10, 2018, non-party Behrooz Benyamini sent a letter to the condominium's property manager with an email from Kass attached in which he states that the lockbox was used to allow his housekeeper to access the apartment, and that there were other lockboxes on the fence. In addition, Kass denies that the apartment is being used as a short-term rental, and that any persons observed using the lockbox have been visitors, not short-term renters. (NYSCEF 34).

By summons and complaint dated December 19, 2018, plaintiff initiated this action advancing three causes of action: (1) ejectment of Kass and all other occupants of the apartment; (2) permanently enjoining defendants from using the unit for transient occupancy; and (3) attorney fees. (NYSCEF 41).

Kass has since vacated the apartment, and thus, on January 7, 2019, plaintiff discontinued this action as against Kass. (NYSCEF 43). On January 9, 2019, a consent order was entered by which Osiris was enjoined from using the apartment for transient occupancy during the pendency of this litigation. (NYSCEF 44). Accordingly, only plaintiff's third cause of action remains.

II. CONTENTIONS

A. Defendant (NYSCEF 24)

Osiris contends that plaintiff is entitled to legal fees only if there is a finding by this court that the apartment was used for unlawful short-term rentals. It asserts that has been no such finding and that there is no basis to find that the apartment was used for such.

Even if there is an issue of fact as to the apartment's use, plaintiff should be compelled to consider defendant's new applications because it is being deprived of the funds necessary to pay off the apartment's mortgage and monthly common charges. In support, defendant submits the affidavit of Benyamini, "one of the owners of the apartment known as Unit 3A," who states that plaintiff has replaced its managing agent and superintendent at least six times, and that the building's superintendent, on whose affidavit plaintiff relied when this action was commenced, was fired two days after plaintiff initiated this action. He also asserts that he had conducted a search of the internet and found no evidence of the property being used for short-term rentals. He observes that there are many lock boxes attached to the fence, and that rental agents use the lock boxes to show vacant apartments. Moreover, he notes that Kass stated that he had removed the lock box used for his cleaning service to enter the apartment and that "he has proof of that," and that Kass told him on January 1, 2019, that he was vacating the apartment, and contended that the superintendent had physically threatened him. Due to Kass's vacatur, Benyamini states that he was assessed a monetary penalty and has been informed that no new rental applications will be processed. Thus, he receives no rental income with which to pay maintenance charges and the mortgage.

B. Plaintiff (NYSCEF 54)

Plaintiff contends defendant fails to establish its entitlement to summary judgment, as it offers only the hearsay affidavit of "an officer of one of the owners of the apartment," and none from Kass.

Moreover, a triable issue of fact exists as to whether the apartment was used for unlawful short-term rentals. In support, plaintiff submits the affidavit of its President who states, as pertinent here, that on December 4, 2018, she observed two women with luggage who informed

her that they were “checking out” after having stayed in the apartment, and that on December 8, 2018, she had talked with a couple leaving the apartment who claimed that they had rented it through Airbnb. (NYSCEF 55). By affidavit dated December 18, 2018, the condominium’s superintendent states that on December 13, 2018, he removed a gray lockbox on the fence and that on December 14, 2018, he observed a couple looking for the lockbox to get a key for the unit. He attaches a photograph of the couple outside the building that morning. (NYCEF 50). By affidavit dated December 18, 2018, the owner and resident of apartment 5D in the condominium states that on December 10, 2018, he observed a couple with luggage exit apartment 3A. (NYSCEF 51).

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Attorney fees

It is undisputed that plaintiff is entitled to legal fees if the court were to find that

defendant unlawfully used the premises for short term rentals.

Benyamini's affidavit does not suffice to satisfy defendant's burden of establishing that it did not use the apartment unlawfully, as it is unclear whether he has personal knowledge of the facts set forth therein. That Benyamini is "an officer of one of the owners of the apartment" does not demonstrate personal knowledge of the facts alleged (*see Castro v New York Univ.*, 5 AD3d 135, 136 [1st Dept 2004] [rejecting affidavits in support of summary judgment that do not contain facts by which affiant's personal knowledge can be inferred]), which derive from the hearsay statements of Kass (*see Oldham v City of New York*, 155 AD3d 477, 478 [1st Dept 2017] [affidavits relying on inadmissible hearsay are insufficient to meet *prima facie* burden]; *Acevedo v Williams Scotsman, Inc.*, 116 AD3d 416, 417 [1st Dept 2014] [same]). That the lock box was removed, and that Benyamini conducted an internet search and found no evidence of the apartment being used for short-term rentals does not, absent admissible evidence, establish that the apartment was not used unlawfully. Notably, Benyamini claims that Kass has proof that the lock box was not used for short-term rentals, but defendant offers neither such proof nor an affidavit from Kass. Accordingly, defendant fails to meet its *prima facie* burden of establishing that it did not use the apartment for short term rentals.

Even if defendant established *prima facie* that it did use the premises for unlawful short-term rentals, plaintiff raises an issue of fact with the affidavits of its president, the superintendent, and a tenant. That the superintendent was fired after submitting his affidavit has no impact on his credibility.

B. Injunction

Given the pertinent sections of the condominium's by-laws that costs and expenses incurred by plaintiff in connection with a breach or default of the lease constitute common

charges, and that a unit owner is prohibited from conveying or leasing its unit unless it has paid all outstanding common charges, and absent additional facts, defendant's only argument, that it is now deprived of its ability to collect rent from the premises, is no basis for ignoring these provisions, especially in light of its stipulation of settlement in which it expressly agrees to be bound by the condominium's governing documents.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion is denied in its entirety; and it is further

ORDERED, that the parties are directed for a preliminary conference on July 24, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

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BARBARA JAFFE, J.S.C.

6/11/2019
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE