

Board of Mgrs. v Tenenbaum
2019 NY Slip Op 32959(U)
September 25, 2019
Supreme Court, Nassau County
Docket Number: 611169/2019
Judge: Julianne T. Capetola
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At a Term of the Supreme Court
of the State of New York held in
and for the County of Nassau,
100 Supreme Court Drive,
Mineola, New York, on the 25th
day of September 2019

P R E S E N T:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

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BOARD OF MANAGERS OR HORIZON AT
WESTBURY CONDOMINIUM,

Plaintiff,

**DECISION AND ORDER
ON MOTION**

Index No: 611169/2019

Mo. Seq: 001

- against -

JASON TENENBAUM, et. al.,

Defendants,

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The following papers were read on the instant motion:

Defendant Jason Tenenbaum's Notice of Motion and Supporting Documents

Plaintiff's Affirmation in Opposition and Supporting Documents

Defendant Jason Tenenbaum's Reply Affirmation

Defendant Jason Tenenbaum (hereinafter "Defendant") has moved by notice of motion for an order dismissing the complaint pursuant to CPLR §3211(a)(1) and/or (7), cancelling the notice of pendency pursuant to CPLR §6514, joining this action with a related matter pursuant to CPLR §602(a), disqualifying Plaintiff's counsel, and for statutory attorneys fees pursuant to RPL §282. Plaintiff opposed the motion, Defendant replied and the motion was deemed submitted on September 19, 2019.

CPLR §3211 states, in relevant part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- 1. a defense is founded upon documentary evidence; or . . .
- 7. the pleading fails to state a cause of action.

The underlying action seeks to foreclose on a lien for unpaid common charges. Defendant argues that, inasmuch as Defendant tendered funds to Plaintiff in the full amount of lien prior to the prosecution of this action, the action is improper. Defendant claims that Plaintiff rejected the full payment because it did not include an amount added to the outstanding condominium association fees for attorneys' fees to which Defendant claims Plaintiff is not entitled.

The By-Laws of the Plaintiff condominium state, in relevant part, that:

“In the event any Unit Owner fails to make payment of the Unit Owner's Common Charge payment, the Unit Owner who owns such Unit shall be obligated to pay (a) a 'late charge' of \$0.15 for each \$1.00 of such amounts which shall remain unpaid for more than ten (10) days from their due date (although nothing herein shall be deemed to extend the period within which such amounts are to be paid) and (b) interest at the rate of two (2%) percent per month (but in no event in excess of the maximum rate theretofore collected on such amounts) computed from the due date thereof, and (c) all expenses, including, without limitation, **attorneys' fees paid or incurred by the Board or by any Managing Agent in any proceeding brought to collect such unpaid Common Charges** in the manner permitted by applicable law. All such 'late charges', interest and expenses shall be added to and shall constitute Common Charges payable by such Unit Owner”. (emphasis added).

Defendant has annexed to his moving papers a billing statement from Plaintiff dated July 1, 2019 showing an outstanding balance of \$4,110.66 and a copy of his bank statements reflecting the payment made June 24, 2019 in the amount of \$4,110.66 to Plaintiff. He has attached to his reply papers a copy of a letter from Plaintiff's counsel to Defendant dated August 5, 2019 which states “We are returning your [Check] in the amount of \$4,110.66, as this matter is in legal with our office and only the full balance due and owing can be accepted at this time”.

Plaintiff does not dispute that a check was tendered to the Managing Agent of Plaintiff in the full amount due less the attorneys' fees claimed by Plaintiff. Plaintiff has annexed to their opposition papers a copy of a letter dated July 8, 2019 from Plaintiff's counsel to Defendant stating “You cannot circumvent the legal fees by making a payment directly to the Managing Agent”.

Plaintiff argues in opposition that because Defendant was sent a “warning notice from the Managing Agent, dated May 16, 2019” which stated that “all legal fees and expenses

incurred will be added to your account balance” and a “thirty (30) day demand letter” dated May 31, 2019 which states “Please note that the above balance contains common charge arrears, late charges and legal fees through the date of this letter only. All payments received by this office must include any applicable late charges and/or interest as well as any current common charges, special assessments, violations, etc. through the date of payment”, and didn’t formally dispute the charges prior to remitting his payment, that Defendant is responsible for the legal fees added because “the failure to dispute the amounts contained in the thirty (30) day demand letter is tantamount to an acknowledgment of the debt”. Plaintiff cites no legal authority whatsoever for this assertion.

Plaintiff further argues that “for the past thirty (30) years, pursuant to my fee agreements with the Condominiums and Homeowners Associations which your affirmant represents, as a courtesy, your affirmant has collected and continues to collect all outstanding legal fees and disbursements directly from the defaulting unit owner up until completion of the foreclosure action rather than have the Condominium/ Homeowners Association and its remaining owners suffer the expense”. Plaintiff again cites no legal authority for their assertion that counsel’s own history entitles them to legal fees in this matter as claimed.

The language contained in the By-Laws is clear. Plaintiff is only entitled to legal fees incurred by the Board “in any proceeding brought to collect such unpaid Common Charges”. Plaintiff is not entitled to legal fees incurred for any work performed by their counsel prior to the commencement of a foreclosure action and Plaintiff cites no legal authority to demonstrate otherwise. Accordingly, Plaintiff’s rejection of Defendant’s June 24, 2019 payment of the full amount due and owing according to the July 1, 2019 billing statement issued by Plaintiff was improper and it follows that the commencement of the instant action was also, therefore, improper and the action must be dismissed and the Notice of Pendency and Notice of Lien must be cancelled.

The dismissal of the action renders the remaining relief sought by Defendant moot with the exception of the application for statutory attorneys’ fees. Defendant makes no arguments in support of that application in his moving papers, and it must be noted that Defendant is an attorney and is representing himself in this matter. Accordingly, that application is denied.

Accordingly, it is hereby:

ORDERED, that the motion is hereby granted to the extent that the complaint filed under Index #611169/2019 is hereby dismissed, and the Notice of Pendency and Notice of Lien shall accordingly be cancelled. Defendant may submit a proposed order on notice. All other relief not specifically granted is otherwise denied.

Defendant shall serve a copy of this order upon all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

Dated: 9/25/19

ENTER



HON. JULIANNE T. CAPETOLA
J.S.C.

ENTERED

SEP 30 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE