

Zoltek LLC v 349 Greenwich St. Condo Assn.

2020 NY Slip Op 30093(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 156843/2015

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 156843/2015

ZOLTEK LLC and CHRISTOPHER ROLF,

MOTION DATE 05/29/2019

Plaintiffs,

MOTION SEQ. NO. 004

- v -

349 GREENWICH STREET CONDO ASSOCIATION, THE BOARD OF MANAGERS OF 349 GREENWICH STREET CONDO ASSOCIATION, JOHN MCCUE, MAIN FOUNTAIN LLC, PETER DANER, ADJ GREENWICH REALTY LLC, PLEASANT ST BRIDGEWATER LLC

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 134, 135, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153

were read on this motion to/for

JUDGMENT - SUMMARY

The plaintiffs, Zoltek LLC, the corporate owner of units 4, 5 and 6, representing 54% of the condominium at 349 Greenwich Street, a six-story building in Manhattan, and Christopher Rolf, the principal of the corporation, commenced this action seeking, inter alia, (1) a judgment declaring that the liens then encumbering the plaintiffs' condominium units for unpaid common charges have been paid in full, and (2) an accounting of the condominium board's books and records. The defendants, the condominium association, the condominium board, two individual board members, and two LLC unit owners, answered and counterclaimed seeking payment of the unpaid common charges.

By an order dated August 3, 2015, this court denied the plaintiffs' application for a temporary restraining order enjoining the defendants from excluding the plaintiffs from voting at any condominium meeting on account of their delinquency. That order was affirmed by the Appellate Division, First Department, by an order dated December 8, 2015. By orders dated January 11, 2016, and July 28, 2017, this court denied the plaintiffs' motions for a preliminary injunction. In 2018, the plaintiffs satisfied the liens in the amount of \$172,298.29.

Having satisfied the liens and filed a Note of Issue, the plaintiffs now move for summary judgment on the remaining claim, the third cause of action of the complaint seeking an accounting, and seek an order directing the defendant board to produce all books and records from July 1, 2009, to the present. The defendants oppose the motion and cross-move for summary judgment (1) dismissing the complaint as against the individual board members, (2) granting a money judgment in favor of the defendants and against the plaintiffs in the sum of \$68,958.00 representing unpaid assessments for façade repair work on the building, and (3) awarding attorney's fees as provided in the condominium by-laws..

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). The plaintiffs have failed to meet their burden and the defendants have met theirs in part.

The plaintiffs do not establish entitlement to summary judgment on the cause of action for an accounting. First, the gravamen of the plaintiffs' remaining claim is that the defendants have, for years, overcharged him for his share of the common charges and failed to properly credit him or applied a set-off for certain improvements he paid for with personal funds. The plaintiffs have not substantiated that claim. Furthermore, the defendants correctly argue that the

plaintiffs' motion is an improper attempt to obtain post-note discovery. Indeed, discovery was ongoing for more than three years and the last compliance conference order, dated November 15, 2018, states that "all document discovery is complete" and there shall be "no post-note discovery." The defendants allege that, in any event, they have provided the plaintiff with all books and records in their possession and that, indeed, Rolf was a board member from 2004 through 2015 and had always had access the book and records he now demands and that he was also provided books and records for review in October 2010 after his attorney requested same. They provide affidavits and documentary evidence in support of that assertion.

In reply, the plaintiffs do not deny that Rolf was a board member for many years or that his attorney requested the books and records review in 2010, and they concede that the defendants provided voluminous, though incomplete, records. They simply dispute that he was granted access to all requested books and records at any time. In that regard, the defendants also correctly observe that the plaintiffs' failure to pay common charges, which resulted in liens on the property, and any continuing failure to pay assessment charges, would have put them in bad standing and could provide a basis for denying access to the books and records.

As to their cross-motion, the defendants correctly assert that the plaintiffs have not demonstrated bad faith, fraud or any other basis to support any claim against the individual board members, John W. McCue III and Peter Daneker. Indeed, the plaintiffs offer only a conclusory allegations that these two individual board members failed to fulfill their responsibilities under the by-laws by failing to provide him with books and records and in charging him an incorrect amount for his share of the façade assessment. No further details are provided. The plaintiffs' bare allegations and arguments in this regard fall far short on the standard for imposing individual liability on condominium board members. Thus, the complaint must be dismissed as against those defendants.

In seeking a money judgment, the defendants assert that the plaintiffs are still not in good standing with the condominium since, although they satisfied the liens arising from unpaid common charges, they have also accrued unpaid assessment charges in the sum of \$68,958.00 as of March 11, 2016, which is more than half of the total cost of the facade. The defendants do not address the fact that they did not assert any claim or counterclaim for those unpaid assessment charges in this or any other action, which precludes the monetary relief sought herein. Summary judgment cannot be granted on a claim that has never been pleaded.

In their answer with counterclaims, the defendants demanded costs and expenses incurred in this litigation, including attorney's fees, as per Section 6.4(B) of the by-laws. Contrary to the plaintiffs' contention, the defendants are entitled to recover attorney's fees and costs stemming from the plaintiffs' failure to pay common charges. The amount is to be determined at trial or a hearing. However, to the extent the defendants seek attorney's fees and costs occasioned by the plaintiffs' failure to pay assessment charges, that portion of the motion is denied without prejudice to seek that relief should the defendants assert a proper claim for the unpaid assessments.

The court notes that the action was previously discontinued as against defendant DJ Greenwich Realty LLC, and, since the complaint is now dismissed as against the two individual defendants, the only remaining defendants are the condominium association and two LLC owners of two of other units in the building. The remaining issues are the plaintiffs' claim for an accounting, the success of which is far from certain, and the calculation of the defendants' award for attorney's fees and costs. Given the limited issues, the court has scheduled a settlement conference.

Accordingly, it is

ORDERED that the plaintiffs' motion for partial summary judgment on the third cause of action of the complaint, seeking an accounting, is denied, and it is further


ORDERED that the defendants' cross-motion for summary judgment is granted to the extent that the complaint is dismissed as against the individual board members, defendants John W. McCue III and Peter Daneker, the defendants are awarded attorney's fees and costs incurred in the collection of unpaid common charges, the amount to be determined at a hearing or trial; and the cross-motion is otherwise denied without prejudice, and it is further

ORDERED that the remaining parties shall appear for a settlement conference on March 12, 2020, at 2:30 p.m. and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

1/6/2020
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED
 GRANTED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER