

**Crown 181 Broadway Holdings LLC v Board of
Mgrs. of the 4260 Broadway Condominium**

2020 NY Slip Op 31765(U)

June 3, 2020

Supreme Court, New York County

Docket Number: 652781/2019

Judge: Arthur F. Engoron

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

INDEX NO. 652781/2019

CROWN 181 BROADWAY HOLDINGS LLC,

MOTION DATE 11/04/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

BOARD OF MANAGERS OF THE 4260 BROADWAY
CONDOMINIUM,

DECISION + ORDER ON
MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 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

were read on this motion to DISMISS.

Upon the foregoing documents, defendant’s motion to dismiss and/or to consolidate is denied to the extent that it seeks to dismiss and is granted to the extent that it seeks to consolidate the instant action with Board of Managers of the 4260 Broadway Condominium v 4260 Broadway Realty LLC, et al, Index No. 154582/2019 (the “Foreclosure Action”) for the reasons stated hereinbelow.

The Players

Non-party 4260 Broadway Condominium (the “Condominium”) owns the subject building (the “Building”) at that address in New York, NY, which occupies the block between West 181st and 182nd Streets, between Broadway and Wadsworth Avenue. Defendant, Board of Managers of the 4260 Broadway Condominium (the “Board”), controls the Condominium and runs the Building. Non-party 4260 Broadway Realty LLC (“Realty LLC”) is the owner of fifteen condominium units in the Building. Plaintiff, Crown 181 Broadway Holdings, LLC (“Crown”), leases said fifteen units pursuant to a May 1, 2015 lease (the “Lease”).

Background

Pursuant to the Lease, Crown is responsible for all of Realty LLC’s obligations vis-à-vis the Commercial Units. For example, Lease § 5(b) obligates Crown to “pay when due all...[Condominium] common charges and assessments [including ‘periodic Special Assessments to cover costs that exceed typical monthly expenses’]...arising after the Commencement Date [of the Lease]” (NYSCEF Doc. No. 24).

In a March 14, 2016 letter, the Board notified all Unit Owners that the 2016 Operating Assessment (of which the Commercial Units were responsible for \$43,956.00) was necessary to address, inter alia, “the unexpected emergency repair on the corner of the Wadsworth

Building...resolving city code violations...continuance of the hallway project, and recovering from several years of bad debt” (NYSCEF Doc. No. 1).

On December 15, 2016, the Board notified all unit owners that it would levy a special assessment totaling \$600,000.00 against the units in the Building (the “2017 Special Assessment”). According to the complaint, despite Crown’s written and oral requests, the Board failed to specify “any reason at all” for the Special Assessment and/or to provide a breakdown of the costs that underlay the 2017 Special Assessment, which Crown nonetheless paid.

Subsequently, the Board notified all unit owners that it would levy another special assessment, again totaling \$600,000.00, against all units in the Building (the “2018 Special Assessment”) and, according to the complaint, again failed to specify the reason and/or cost breakdown for said Special Assessment. Crown did not pay this second Special Assessment.

On July 12, 2018, the Board notified Crown that Crown “was in arrears for its share of both common charges and the 2018 Special Assessment and that [the Board] would place liens against the Commercial Units unless Crown paid in full immediately” (NYSCEF Doc. No. 1).

On August 22, 2018, Crown disclaimed responsibility for (1) “numerous objects previously labeled as common charges that only benefited residential units;” (2) the 2017 Special Assessment; and (3) the 2018 Special Assessment.

On September 4, 2018, Crown paid \$2,000.00 for August and September 2018 Common Charges (\$1,000 for each month, apparently for each unit) and notified the Board that it would not pay the remainder of the \$11,580.00 assessment without a detailed explanation of the “actual and/or planned allocation” of the 2017 and/or 2018 Special Assessments.

On October 14, 2018, the Board responded to Crown, claiming that Crown had “misconstrued the governing documents” and had violated RPL § 339-m (governing the allocation of condominium costs). The Board also claimed that Crown had “‘ratified’ the original governing documents for the Condominium via its participation in a 2004 amendment to the [Condominium’s] Declaration—which predates Crown’s lease by over a decade” (NYSCEF Doc. No. 1).

Subsequently, the Board placed liens against the fifteen Commercial Units. Crown alleges that said liens jeopardize Crown’s “Leasehold Mortgages as to each unit” (NYSCEF Doc. No. 1).

On May 8, 2019, Crown commenced the instant lawsuit, asserting four causes of action: (1) breach of contract (i.e. breach of the By-Laws); (2) a declaration that Crown does not owe the money that the Board claims; (3) unjust enrichment; and (4) an accounting. Crown seeks a judgment (1) on its first cause of action, for compensatory damages in an amount to be determined at trial, but no less than \$1.7 million; (2) on the second cause of action, “declaring that any repairs made to the façade of the building, the elevators, or any of the interior portions of the Building that are attributable only to Residential Limited Common Elements are not repairs to the Common Elements of the Building, rendering the Board’s purported levy of the 2017 and 2018 Special Assessments against [Crown] improper;” (3) on the third cause of action,

granting compensatory damages in an amount to be determined at trial, but no less than \$1 million, plus punitive damages in an amount to be determined at trial; and (4) on the fourth cause of action, granting Crown “a comprehensive accounting of the Condominium budget, in conformance with its obligations under By-Laws 6.1, that allocates the income and expenses of the Condominium by Unit” (NYSCEF Doc. No. 1). On May 16, 2019, Crown served process upon the Board (NYSCEF Doc. No. 2).

The Board now moves, [1] pursuant to CPLR 3211(a) (1), upon documentary evidence; (7), for failure to state a cause of action; (3, for no contractual privity; (4), as a prior action is pending between the parties covering the same subject matter; and (10) for failure to add an indispensable party, to dismiss the complaint; and [2] for a judgment on the Special Assessments and Common Charges, plus back charges incurred; or [3], in the alternative, pursuant to CPLR 602, to consolidate the instant action with *Board of Managers of the 4260 Broadway Condominium v 4260 Broadway Realty LLC, et al*, Index No. 154582/2019, (the “Foreclosure Action”) which is currently pending in the Supreme Court of New York, New York County (NYSCEF Doc. No. 6).

Crown opposes the instant motion, arguing that an Estoppel Certificate established its standing to bring the instant action against the Board. Crown also argues that the Board fails to establish that it is entitled to a dismissal of the complaint pursuant to CPLR 3211(a)(4), as “mere connection between the parties and the relief sought in the two forums is not enough to merit dismissal” (NYSCEF Doc. No. 20).

Crown also opposes the Board’s request to consolidate the instant action with the Foreclosure Action. Crown notes that the Board commenced that action to foreclose each of fifteen common charge Liens placed against the Commercial Units (NYSCEF Doc. No. 21). On or about January 9, 2020, Crown “caused each of the liens filed by the Board as against the Commercial Units to be bonded in its entirety” (NYSCEF Doc. No. 21).

On February 14, 2020, the Board replied to Crown’s opposition, claiming that elements of the complaint and opposition papers are purposefully ambiguous and arguing that the fact that Crown “paid the assessments for years without objection” is tantamount to “waiving [Crown’s] rights to object now” (NYSCEF Doc. No. 47).

Discussion

CPLR 3211(a)(1) The By-Laws and the Declaration

The law on dismissing complaints pursuant to CPLR 3211(a)(1) is clear; dismissal is warranted only where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dep’t 2013) (“[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”).

Crown points to By-Laws § 6.1(c), which states, in pertinent part:

The owners of the Commercial Units shall not be responsible for, or be required to pay, assessments or charges in connection with expenditures of the Condominium for additional services provided to, or *alterations and*

improvements made in or to the Residential Units or the Common Elements accessible to or used solely by the Residential Units.

NYSCEF Doc. No. 1 (emphasis added by Crown).

However, the Board alleges that Crown “conveniently” omits the following language from By-Laws § 6.1(c):

[I]n addition to the foregoing duty to determine the amount of and assess Common Charges, *the Condominium Board shall have the right, subject, in all aspects, to the strictures contained in Section 2.5 hereof, to levy Special Assessments to meet the Common Expenses.*

NYSCEF Doc. No. 4 (emphasis added by the Board).

The Board also cites the Declaration, which defines “Common Charges” as the following, in pertinent part:

All the costs and expenses to be incurred generally by the Unit Owners pursuant to the Declaration and/or the By-Laws in connection with: (i) the repair, maintenance, replacement, restoration and operation of, and any alteration, addition or improvement to, the Common Elements; (ii) the establishment and/or maintenance of a general operating reserve or a reserve fund for working capital, for replacement with respect to the Common Elements, or to make up any deficit in the Common Charges for any prior year(s).

NYSCEF Doc. No. 13 (emphasis added by the Board).

The Board thus asserts that “one way in which [the Board] is authorized to ensure that [expenses] are met is by imposing Special Assessments” (NYSCEF Doc. No. 4).

The Board also claims that Crown’s arguments about the Special Assessments fail under the Business Judgment Rule, which states, in pertinent part:

[S]o long as the corporation’s directors have not breached their fiduciary obligation to the corporation, “the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient. Levandusky v One Fifth Ave. Apartment Corp. 75 NY2d 530, 537-38 (1990) (citing to Pollitz v Wabash R. R. Co., 207 NY 113, 124 (1912)

NYSCEF Doc. No. 4.

However, Crown cites By-Laws § 6.1(A), which requires the Board to provide the Building’s annual budget “in a reasonably itemized form” (NYSCEF Doc. No. 12). In response, the Board

claims that “this requirement does not exist either under the Condominium’s governing documents, nor under the law” (NYSCEF Doc. No. 4). However, By-Laws § 6.1(A) obligates the Board to submit copies of the budget “in a reasonably itemized form” (NYSCEF Doc. No. 12). The Board has thus failed to establish, pursuant to CPLR 3211(a)(1), upon documentary evidence, that this Court must dismiss the complaint.

CPLR 3211(a)(3) – Contractual Privity

The Board argues that since Crown and the Board “bear no contractual relationship” and, as the Board is not a party to the subject lease, Crown does not have legal capacity to sue the Board (NYSCEF Doc. No. 4).

Crown asserts that in the subject Estoppel Certificate ¶ 3, the Board agreed to:

Accept payment of any sum or performance of any obligation required to be paid or performed by Landlord pursuant to the provisions of the Condominium Documents from or by Tenant with the same force and effect as though paid or performed by Landlord.

NYSCEF Doc. No. 21.

Thus the subject Estoppel Certificate establishes privity.

CPLR 3211(a)(4) – Prior Action Pending

The Board also emphasizes that the Foreclosure Action names “all of the requisite parties and deals with the same exact issues in dispute” including the subject Special Assessments and Common Charges (NYSCEF Doc. No. 4). The Board thus argues that this Court would only “drive up court costs for both parties, protract the ultimate resolution of the issues in dispute, and allow for a contradictory record” by denying the instant motion (NYSCEF Doc. No. 15).

Crown argues that the Foreclosure Action is not “sufficiently similar” to warrant dismissal of its complaint. See generally, Sprecher v Thibodeau, 148 AD3d 654, 656 (1st Dep’t 2017); Parker v Rich, 140 AD2d 177 (1st Dep’t 1988) (NYSCEF Doc. No. 21).

However, Crown acknowledges that the Foreclosure Action states that “the Liens purport to be based upon the failure of the Commercial Units to pay certain Common Charges and Special assessments assed by the Board, the propriety of which is admittedly one of the disputed issues in this case” (NYSCEF Doc. No. 21).

Crown emphasizes that notwithstanding said Liens, its complaint’s requests for, inter alia, (1) a declaration of Crown’s rights pursuant to the Declaration and By-Laws; and (2) an accounting from the Board, remain active. Furthermore, Crown asserts that those requests do not appear in the Foreclosure Action.

Thus, the Foreclosure Action pending in this Court does not bar the instant action.

CPLR 3211(a)(7) – Failure to State a Cause of Action

Crown has adequately stated all four of its causes of action (albeit some are stated more clearly, and may be stronger, than others).

CPLR 3211(a)(10) – Failure to Add an Indispensable Party

The Board asserts that Realty LLC, given its capacity as “the fee absolute owner,” is an indispensable party that the instant complaint fails to name (NYSCEF Doc. No. 4). However, as noted above, Crown’s causes of action survive the instant motion.

Crown’s Prima Facie Cases for Claims in its Complaint

Crown has made out prima facie cases for its causes of action.

(1) Breach of contract (i.e. breach of the By-Laws)

To make out a prima facie case for breach of contract, Crown must plead (1) that a contract exist; (2) that Crown performed under said contract; (3) that the Board breached said contract; and (4) that damages resulted. Normandy Real Estate Partners LLC v 24 E. 12th St. Assocs. LLC, 168AD3d 429, 430 (1st Dep’t 2019).

Crown has e-filed the subject Memorandum of Lease (NYSCEF Doc. No. 8 and 9); the subject Irrevocable Proxy of Unit Owner (NYSCEF Doc. No. 10); the subject Certificate of Estoppel (NYSCEF Doc. No. 26); the subject Declaration (NYSCEF Doc. No. 27); and the subject By-Laws (NYSCEF Doc. No. 28).

(2) A declaration that Crown did not owe the money claimed

“Where a proper case for a declaration is set out the merit of the claim is not a relevant factor and the action should be allowed to proceed to trial and judgment.” Law Research Serv., Inc. v Honeywell, Inc., 31 AD2d 900, 901 (1st Dep’t 1969). Crown asserts, “all that is required is the existence of a bona fide justiciable controversy” (NYSCEF Doc. No. 21). The question of whether or not the phrase “Commercial Common Elements” includes “Residential Common Elements” constitutes a “justiciable controversy.”

(3) Unjust Enrichment

“To adequately plead such a cause of action, a plaintiff must allege that ‘(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.’” Mannino v Wells Fargo Home Mortg., Inc., 155 AD3d 860, 862 (2d Dep’t 2017).

Crown has adequately pleaded that its construction projects on the Commercial Units increased the Building’s total value by at least \$2 million (NYSCEF Doc. No. 20).

(4) For an Accounting

To make out its claim for an accounting, Crown must allege that “in connection with a fiduciary relationship, it sought, and ‘defendants denied, demands for an accounting and access to their books and records.’” Atlantis Mgmt. Grp. II LLC v Nabe, 2019 NY App Div LEXIS 8492, at *1, 2019 NY Slip Op 08499 (1st Dep’t 2019).

The Board asserts that Crown failed to establish a fiduciary relationship between the parties.

However, Crown asserts that Bd. of Managers of Fairways at N. Hills Condo. v Fairway at N. Hills, 193 AD2d 322, 325 (2d Dep't 1993) held:

By definition in a “fiduciary” relationship with the unit owners, because a “fiduciary” is one who transacts business, or who handles money or property, which “is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.”

NYSCEF Doc. No 21.

The By-Laws § 6.3 state that “each Unit Owner shall be permitted to examine the books of account of the Condominium at reasonable times on business days, but not more frequently than once a month” (NYSCEF Doc. No. 12).

Crown pleads that, over the course of more than three years, Crown repeatedly has requested access to the Condominium’s books and records but the Board has consistently refused. Crown has thus adequately pleaded that it is entitled to an accounting.

The Board’s Request to Consolidate the Instant Action and the Foreclosure Action
CPLR 602(a) states that a court may consolidate actions if they involve a common question of law or fact.

Crown opposes the Board’s request to consolidate the instant action with the Foreclosure Action, arguing that it bonded the Liens that are the subject of the Foreclosure Action, which, according to Crown, renders the Board’s causes of action seeking to foreclose on the Liens, moot (NYSCEF Doc. No. 20).

The Board replies that Crown failed to acknowledge that “the two matters arise from the exact same common nucleus of facts and law.” According to the Board, the question of “whether the charges assessed to Crown by the Board were proper” drives both the instant action and the Foreclosure Action. The Board states that, if this Court fails to consolidate the instant action and the Foreclosure Action, the instant action “runs the risk of producing contradictory rulings and overlapping of the same discovery processes.” (NYSCEF Doc. No. 47.)

Additionally, the Board asserts that, as the charges accrue on a per diem bases prospectively, Crown’s claim that the bonded liens render the adjudication of the instant claims as moot “is of no legal moment” (NYSCEF Doc. No. 47).

This Court finds that the Board has established that at least one common question fact exists between the instant action and the Foreclosure Action and that they should be consolidated.

Conclusion

Thus, for the reasons stated herein, the request of defendant, Board of Managers of the 4260 Broadway Condominium, to dismiss the complaint of plaintiff, Crown 181 Broadway Holdings LLC, is hereby denied, and the Board’s request to consolidate the instant action with *Board of Managers of the 4260 Broadway Condominium v 4260 Broadway Realty LLC, et al*, Index No. 154582/2019 (the “Foreclosure Action”) is hereby granted. The Clerk is hereby directed to consolidate the instant action with *Board of Managers of the 4260 Broadway Condominium v 4260 Broadway Realty LLC, et al*, Index No. 154582/2019 and to meld the captions and amend the files accordingly.

6/3/2020
DATE

ARTHUR F. ENGORON, J.S.C.

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