

Board of Mgrs. of the 4260 Broadway Condominium v Veloz
2020 NY Slip Op 32361(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 154573/2019
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN **PART** **IAS MOTION 33EFM**

Justice

-----X

BOARD OF MANAGERS OF THE 4260 BROADWAY
CONDOMINIUM,

Plaintiff,

INDEX NO. 154573/2019

MOTION DATE _____

MOTION SEQ. NO. 001

- v -

RAMON N. VELOZ, UNITED STATES OF AMERICA
(EASTERN DISTRICT) AND JOHN DOE #1 THROUGH
JOHN DOE #10, THE LAST TEN NAMES BEING
FICTITIOUS AND UNKNOWN TO THE PLAINTIFF, THE
PERSONS OR PARTIES INTENDED BEING THE
TENANTS, OCCUPANTS, PERSONS OR
CORPORATIONS, IF ANY, HAVING OR CLAIMING AN
INTEREST IN OR LIEN UPON THE PREMISES,
DESCRIBED IN THE COMPLAINT

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for JUDGMENT - DEFAULT.

In this condominium common charges lien foreclosure action, plaintiff Board of Managers of the 4260 Broadway Condominium (4260 Broadway) moves in motion sequence 001 for an order directing: (1) entry of default judgment against defendants Ramon N. Veloz and “John Doe” 1 through 10 pursuant to CPLR 3215¹; and (2) the appointment of a referee to compute and report the amount due to plaintiff pursuant to Real Property Actions and Proceedings Law (RPAPL) § 1321, or alternatively, pursuant to CPLR § 4311. Plaintiff’s motion is unopposed. The Decision and Order is as follows:

BACKGROUND AND PROCEDURAL FACTS

Plaintiff claims that Veloz purchased the premises known as 4260 Broadway, Unit 604 in the city, county, and state of New York by deed dated February 20, 1998 (NYSCEF #15 – Deed). The deed contained a recitation that Veloz’s title was subject to the Declaration and By-Laws of 4260 Broadway (*id.*). Plaintiff claims that pursuant to the governing documents of 4260 Broadway, all unit owners are

¹ Plaintiff submitted a Stipulation of Discontinuance with respect to defendant United States of America on October 17, 2019 (NYSCEF #9).

obligated to pay common charges and special assessments assessed by the Board of Managers (NYSCEF #16 – 4260 Broadway By-Laws at Art 6, § 6.2). Plaintiff also claims that if common charges are not paid on the date due, then such assessment shall become delinquent and, together with late fees and interest, shall constitute a lien on the unit owner, and the Board of Managers shall be entitled to collect legal fees (*id.* at Art 6, §§ 6.2, 6.4).

Due to Veloz's sporadic and insufficient common charges payments, plaintiff filed a lien on February 1, 2019, at the City Register of the City of New York in the amount of \$19,559.61 for unpaid payments through January 15, 2019 pursuant to RPAPL § 339-z (NYSCEF #17 – Lien). The lien is a continuing lien and encompasses the aggregate of unpaid common charges and special assessments that have accrued since the filing of the lien (*id.*). Plaintiff claims that as of November 20, 2019, Veloz was indebted to it in the amount of \$23,252.46 for unpaid assessments and fees (NYSCEF #21 – Ledger). The 4260 Broadway By-Laws permit plaintiff to foreclose on a lien for unpaid common charges or to recover a money judgment for unpaid common charges (NYSCEF #16 at Art 6, § 6.4).

Plaintiff's first cause of action is for breach of contract, and plaintiff seeks monetary damages including interest and costs incurred (NYSCEF #18 at 8). Plaintiff's second cause of action is for attorneys' fees pursuant to Article 6 of the 4260 Broadway By-Laws (*id.*). Plaintiff's third cause of action is for a judgment of foreclosure and sale on Veloz's apartment unit, and that all persons claimed under defendants or all persons or parties making claims subsequent to the filing of the notice of lien shall be barred and foreclosed from all estate, right, title, interest, claim lien and equity of redemption of the premises (*id.* at 8-9). Defendants "John Does" 1 through 10 are possible holders of interest in the subject premises (*id.*, ¶ 9).

Plaintiff filed its summons and verified complaint on May 3, 2019 (NYSCEF #18). Plaintiff served Veloz by substituted service at 4260 Broadway, Unit 604. Plaintiff personally delivered and left a copy of the documents with Cemio Ergun, a person of suitable age and discretion, who stated that he lived at the premises, on May 13, 2019 (NYSCEF #19 – Affidavits of Service). Plaintiff also mailed a copy of the documents by first-class mail on May 14, 2019 (*id.*). Subsequently, plaintiff filed an affidavit of service on May 21, 2019 (*id.*). In compliance with CPLR § 3215(g), plaintiff also served Veloz with a copy of the summons by first-class mail on November 20, 2019, and submitted an affidavit of additional service (NYSCEF #22).

Veloz did not appear or answer in this action by filing an answer to the complaint or by submitting an opposition to plaintiff's motion. Plaintiff's instant motion was timely filed within a year of Veloz's default. Veloz's time to answer or appear was not extended.

DISCUSSION

The branch of plaintiff's motion for default judgment against defendant Veloz is granted. Plaintiff has demonstrated compliance with CPLR 3215. CPLR 3215(f) states that on any default judgment application, "the applicant shall file proof of service of the summons and the complaint... proof of the facts constituting the claim, the default and the amount due by affidavit." Plaintiff's submitted proof demonstrates its entitlement to entry of default judgment against Veloz.

Plaintiff properly served Veloz with the summons and complaint by substituted service in compliance with CPLR § 308. CPLR § 308 requires the documents to be delivered to "a person of suitable age and discretion at the dwelling place of the person to be served" and to be mailed "to the person to be served at his last known residence by first-class mail." Plaintiff personally delivered the documents to Veloz's apartment unit and left them with a person over the age of eighteen who lived there. On the next day, plaintiff also mailed the documents to Veloz's apartment unit by first-class mail. Thus, service in this matter was proper.

Further, plaintiff shows proper proof of the default. Veloz never appeared or answered in this matter (NYSCEF #12, ¶ 16). Additionally, plaintiff complied with CPLR 3215(g), which states that "an affidavit shall be submitted that additional notice has been given by or on behalf of plaintiff ... by mailing a copy of the summons by first-class mail to defendant at his place of residence." Plaintiff submitted proof of service of additional notice in compliance with CPLR 3215(g), by mailing a copy of the summons by first-class mail to Veloz at his apartment unit.

Next, plaintiff produces proper proof to demonstrate its entitlement to foreclose on Veloz's premises and sell it to recover on the unpaid common charges as permitted by statute and the governing documents of 4260 Broadway. Real Property Law (RPL) § 339-aa reads in pertinent part as follows:

The lien... shall be effective from and after the filing in the office of the recording officer in which the declaration is filed a verified notice of lien stating the name (if any) and address of the property, the liber and page of record of the declaration, the name of the record owner of the unit, the unit designation, the amount and purpose for which due, and the date when due; and shall continue in effect until all sums secured thereby, with the interest thereon, shall have been fully paid or until expiration six years from the date of filing, whichever occurs sooner. In the event that unpaid common charges are due, any member of the board of managers may file a notice of lien as described herein if no notice of lien has been filed within sixty days after the unpaid charges are due... Such lien may be foreclosed by suit authorized by and brought in the name of the board of managers, acting on behalf of the

unit owners... In any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit for any period prior to sale pursuant to judgment of foreclosure and sale, if so provided in the by-laws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same. The board of managers, acting on behalf of the unit owners, shall have power, unless prohibited by the by-laws, to bid in the unit at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same. Suit to recover a money judgment for unpaid common charges shall be maintainable without foreclosing or waiving the lien securing the same, and foreclosure shall be maintainable notwithstanding the pendency of suit to recover a money judgment.

(RPL § 339-a).

Plaintiff filed a valid lien on February 1, 2019 that listed the pertinent information and was properly and timely recorded (NYSCEF #17). As this is a continuing lien, Veloz's common charges continued to accrue following the recording of the lien. Plaintiff's submitted evidence demonstrates that Veloz has unpaid common charges and special assessments due and owing in the amount of \$23,252.46 as of November 20, 2019. As permitted by statute, plaintiff is entitled to foreclose on Veloz's premises due to his failure to pay the common charges or clear the lien prior to this suit. As such, plaintiff has fully complied with all CPLR 3215 requirements and is entitled to entry of default judgment.

The branch of plaintiff's motion to appoint a referee is also granted. As Veloz failed to answer within the time allowed, an appointment of a referee pursuant to RPAPL § 1321 is appropriate here to determine the amount of charges outstanding and the amount on the prior incumbrances, and to examine and report whether Veloz's premises can be sold in parcels. All defendants who have or claim to have some interest in or lien upon Veloz's premises are subordinate to plaintiff's lien.

However, the branch of plaintiff's motion for default judgment against the Doe defendants is denied. While CPLR § 1024 permits a defendant to be designated as an unknown party, jurisdiction is not acquired over a Doe defendant unless the process is served in such a manner as to give that unidentified person notice that he or she is being summoned to court (*Lebowitz v Fieldston Travel Bureau, Inc.*, 181 AD2d 481, 482 [1st Dept 1992]). Plaintiff served notice on the Doe defendants at Veloz's apartment unit. It is unclear how this provides notice to the Doe defendants who possibly claim an interest in the lien at issue. As such, this branch of plaintiff's motion is denied, and this matter is dismissed as to the Doe defendants for lack of proper service.

Accordingly, it is ORDERED that the branches of plaintiff's motion for default judgment pursuant to CPLR 3215 and the appointment of a referee

pursuant to RPAPL § 1321 are granted with respect to Ramon N. Veloz a/k/a Ramon Veloz; it is further

ORDERED that plaintiff's motion for default judgment against Doe defendants 1 through 10 is denied and this matter dismissed as against them for lack of proper service; it is further

ORDERED that plaintiff is entitled to foreclose on its common charges lien filed on February 1, 2019, under CRFN: 2019000044576 and that the claims of defendants are subordinate to its claim; it is further

ORDERED that plaintiff is entitled to legal fees, including attorneys' fees and costs, to be calculated by the appointed Referee; it is further

ORDERED that *Elaine Shay, Esq.*, with an address of 800 Third Avenue, Suite 2800 New York, NY 10022, 212-520-2690 is hereby appointed Referee in accordance with this order, to hear, and determine the amount due to the plaintiff for principal, interest, water and sewer rents, insurance premiums, if any, and such other charges that may be due under the lien upon which this action was brought, and to examine and determine whether the premises should be sold in one or more parcels; it is further

ORDERED that the Referee may take testimony; it is further

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; it is further

ORDERED that, pursuant to CPLR § 8003(a), and in the discretion of the court, a fee of \$350 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); 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; it is further

ORDERED that the parties shall forward all necessary documents to the Referee within 30 days of the date of service of this order and shall *promptly*

respond to every inquiry made by the Referee (promptly means within two business days); it is further

ORDERED that this matter is discontinued without prejudice and without costs as against defendant United States of America (Eastern District) pursuant to the October 17, 2019 Stipulation of Discontinuance (NYSCEF #9); it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties, including the Referee, within 15 days of entry and proof of service to be filed with the New York County Clerk within 15 days of said service; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the Court.

<u>7/20/2020</u> DATE	 MARGARET A. CHAN, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION
APPLICATION:	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART ☐ OTHER
CHECK IF APPROPRIATE:	☐ SETTLE ORDER	☐ SUBMIT ORDER
	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT ☐ REFERENCE