

**Board of Mgrs. of Academy House Condominium v  
Peoples Foreign Exch., Corp.**

2020 NY Slip Op 32724(U)

August 20, 2020

Supreme Court, New York County

Docket Number: 158796/2017

Judge: W. Franc Perry

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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. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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**INDEX NO. 158796/2017**

BOARD OF MANAGERS OF ACADEMY HOUSE  
CONDOMINIUM, SUING ON BEHALF OF THE UNIT  
OWNERS,

**MOTION DATE 02/06/2020**

**MOTION SEQ. NO. 002**

Plaintiff,

- v -

PEOPLES FOREIGN EXCHANGE, CORPORATION,  
ALANDALOUS PROPERTIES CORP.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

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

This is an action by the Board of Managers of Academy House Condominium, on behalf of its unit owners (“Plaintiff”), against Defendant Alandalous Properties Corporation (“Defendant”)<sup>1</sup> to collect unpaid common charges. Defendant is the record owner of the sole commercial unit located in the condominium building.

In motion sequence 002, Plaintiff moves for summary judgment on its sixth cause of action for a declaratory judgment, seeking an order declaring that the common charges formula set forth in the Condominium’s Declaration and By-laws is controlling for the time period of January 1, 2012 to August 21, 2017; and August 22, 2017 to the present. Further, Plaintiff moves for summary judgment on its causes of action for breach of contract, unjust enrichment, foreclosure, and legal fees, and to dismiss Defendant’s affirmative defenses. Defendant opposes the motion

<sup>1</sup> Defendant Alandalous Properties Corporation is the successor to People’s Foreign Exchange. (NYSCEF Doc No. 107 at 1, fn 1.)

and cross-moves for partial summary judgment on its first counterclaim, seeking a declaration that Plaintiff lacked the authority to effectuate the increase in common charges and that the retroactive charges for amounts owed are void and unenforceable.

### BACKGROUND

Academy House Condominium is located at 24 West 45th Street, New York, New York 10019 and contains eight residential units and one commercial unit. Plaintiff is the duly elected governing body of the Condominium which manages the common elements and finances of the building, pursuant to the Condominium's Declaration and By-Laws (the "By-Laws").<sup>2</sup> Defendant is the owner of the commercial unit in the building, pursuant to an October 25, 1999 deed of sale (the "Deed").

The crux of the parties' dispute lies in determining whether the 1999 Offering Plan (the "Offering Plan") or the By-Laws contain the proper formula for calculating the common charges owed by the Defendant. The Offering Plan contains a formula that holds the Defendant responsible for common charges based on its usage of the common elements, while the By-Laws grant Plaintiff the power to charge the Defendant an amount of common charges based on its percent ownership of the common interest. Ultimately, the Offering Plan calculation would hold the Defendant responsible for 5.95% of the total common charges, while the By-Laws give the Plaintiff the power to charge 13%.

Defendant argues that the Offering Plan should be read in conjunction with the By-Laws, while Plaintiff argues that the Offering Plan was merged into and extinguished by the Deed, which expressly adopted the By-Laws.

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<sup>2</sup> Plaintiff is comprised of five managers, one of whom is Mr. Alami Binani, the President of Defendant Alandalous Properties.

### The 1999 Offering Plan and Deed of Purchase

The Offering Plan is a sales document that was provided to Defendant by the initial sponsor of the Condominium. Defendant cites to a provision of the document under the heading “Footnotes to Schedule A,”<sup>3</sup> which states that the Commercial Unit would be responsible for 5.95% of the total common charges pursuant to the Condominium’s first year budget estimate, despite having been allocated 13% of the common interest. The Offering Plan goes on to explain that the rate is due to the fact that the commercial unit “will not be utilizing the services of a doorman . . . [and] will be separately metered for heat, electricity, and any water and sewer charges.” (NYSCEF Doc. No. 110 at 21-22.)

Schedule B of the Offering Plan lays out the projected budget for the Condominium’s first year of operation and further elaborates upon the Commercial Unit’s share of common charges. (*Id.* at 24-25.) In that year, the Commercial Unit was estimated to pay \$381.75 per month for a total of \$4,581.00 in common charges. This figure was reached by adding: 5% of the salaries and wages category (to represent 10% of the superintendent’s wages) with 13% of the total amount derived from the addition of the categories of repairs/maintenance, insurance, management, legal/audit, and contingency. Notably, this calculation excludes the charges for heating, electricity, and water/sewer and represents the Commercial Unit’s “total estimated expenses”. (*Id.*) Schedule B concludes with a disclaimer stating that the budget estimate “should not be taken as a guarantee by anyone that the annual common charges or common expenses for the first or any subsequent year of operation of the property by the Board of Managers will be as set forth in said budget [estimate].” (*Id.* at 28.)

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<sup>3</sup> Schedule A is a spreadsheet outlining the prices and associated costs of each of the Condominium’s units.

Defendant purchased the Commercial Unit on October 25, 1999, pursuant to the Deed. The Deed describes the purchase as being subject to “the Declaration establishing a plan for Condominium Ownership of said premises . . . dated the 9th day of June, 1999, recorded in the New York County Office of the Register of New York City . . . on June 29, 1999[.]” (NYSCEF Doc No. 76 at 5.) Further, the Deed states that “the Grantee accepts and ratifies the provisions of the Declaration and the By-Laws (and any Rules and Regulations adopted under the Bylaws) and agrees to comply with all the terms and provisions thereof.” (*Id.* at 2.)

### **The By-Laws**

The By-Laws permit the Plaintiff to:

determine and levy monthly assessments (“common charges”) to cover the cost of common expenses, payable in advance. The Board of Managers may increase the monthly assessments or vote a special assessment in excess of that amount, if required, to meet any additional necessary expenses, but said increases can only be assessed among the Unit Owners pro rata according to the formula provided for herein.

(NYSCEF Doc No. 88 at 4.)

Common Charges are the “charges allocated and assessed by the Condominium Board to the Unit Owners, pro-rata in accordance with their respective Common Interests (except as otherwise provided in the Declaration or in the Bylaws), to meet the Common Expenses,” while Common Interest is defined as “the undivided percentage interest of each Unit in the Common Elements.” (*Id.* at 17.)

Common Expenses are defined as:

“all costs and expenses to be incurred generally by the Unit Owners pursuant to this Declaration and/or the Bylaws 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 replacements with respect to the Common Elements or to make up any deficit in the Common Charges for any prior year(s); (III) the purchase, lease, or sublease by

the Board of Managers or its designee, corporate or otherwise of any Unit whose owner has elected to sell, lease, transfer, or convey the same or that is to be sold at a foreclosure or other sale; and (iv) generally, the conduct of the affairs of the Condominium.”

(*Id.*)

The By-Laws set forth the Plaintiff’s budgeting procedure in more detail:

The Board of Managers shall from time to time, but at least annually, fix and determine the budget representing the sum or sums necessary and adequate for the continued operation of the Condominium and shall send a copy of the budget and any supplement to the budget to every Unit Owner and, if requested in writing, to any Mortgagee requesting a copy thereof. They shall determine the total required, including the operational items such as insurance, repairs, reserves, betterments, maintenance of the Common Elements and other operating expenses as well as charges to cover any deficits from prior years. The total annual requirements shall be assessed as a single sum against all Units and prorated against each of said Units according to the respective Common Interests appurtenant to such Units. This proration of assessments shall remain constant regardless of the percentage of the building square footage included in each Unit or the Limited Common Elements restricted to the use of the Owner of said Unit.

(*Id.* at 36.)

Additionally, Plaintiff has the power to impose liens upon the Condominium units for unpaid common charges, with the ability to foreclose upon said lien and recover reasonable attorneys’ fees. (*Id.* at 10.)

### **The Plumbing Charges**

This action initially stems from a dispute regarding which party was to be responsible for paying a plumber. In September 2014, the tenant in the Commercial Unit notified Defendant that there was a leak coming from the ceiling and spilling into the Commercial Unit space. Plaintiff hired a plumber to fix the leakage and the bill came to a total of \$1,383.14. (NYSCEF Doc No. 17.) Defendant refused to pay that bill.

Defendant had been paying the fixed monthly rate of \$659.40 in common charges, representing the 5.95% rate contained in the Offering Plan, since 1999. (NYSCEF Doc No. 107 at ¶ 19.) However, that rate was increased on February 1 2017, when Defendant received a notice

that Plaintiff had determined that it needed to increase Defendant's payments by 23.26% to "balance the 2017 budget and secure the financial health of the Condominium." (NYSCEF Doc No. 119.) The 23.26% increase resulted in Defendant being charged \$812.78 per month.

The rate was further increased in October 2017, after Plaintiff retained legal counsel to advise it regarding the ongoing plumbing dispute. Plaintiff's counsel noted that Plaintiff may have been undercharging Defendant for quite some time and advised that, pursuant to the By-Laws, Plaintiff could charge Defendant 13% of the total common charges and apply that rate retroactively for the last 6 years. (NYSCEF Doc No. 115.)

Plaintiff commenced this action on October 3, 2017 with the filing of the summons and complaint after Defendant continued to pay only the \$659.40 rate, setting forth claims for 1) breach of contract; 2) unjust enrichment; 3) account stated; 4) foreclosure of lien based on unpaid common charges; 5) legal fees. Plaintiff filed an amended complaint adding Defendant Alandalous Properties Corporation and a second amended complaint adding a sixth cause of action for declaratory judgment declaring that the Condominium Declaration and By-Laws are the controlling documents in determining the proper amount of monthly common charges levied against Defendant. (NYSCEF Doc Nos. 25, 63.)

The court denied Defendant's pre-answer motion to dismiss by decision and order dated May 24, 2018 (NYSCEF Doc No. 60), finding that there was a factual dispute as to the timeline of the accrual of charges. (NYSCEF Doc No. 108 at 8.) Defendant filed an answer with counterclaims for: 1. declaratory judgment; 2. breach of contract; 3. injunctive relief; 4. declaratory judgment; 5. breach of fiduciary duty; and 6. breach of contract. (NYSCEF Doc No. 66.)

Plaintiff moves for summary judgment on its sixth cause of action for declaratory judgment, seeking an order declaring that the Common Charge formula set forth in the

Condominium's Declaration and By-laws is controlling for the time period of January 1, 2012 to August 21, 2017; and August 22, 2017 to the present. Further, Plaintiff moves for summary judgment on its causes of action for breach of contract, unjust enrichment, foreclosure, and legal fees, and to dismiss Defendant's affirmative defenses.

On its claims for breach of contract and unjust enrichment, Plaintiff seeks a money judgment in the amount of \$73,007.90, representing a \$10,547.14 balance incurred by Defendant between January 1, 2012 and August 21, 2017 while being billed under the incorrect common charge formula, plus a \$62,460.76 balance incurred between August 22, 2017 and May 31, 2019 while being billed under the correct common charge formula. (NYSCEF Doc No. 75 at ¶ 8.) The latter sum includes \$40,168.38 in retroactive fees representing the difference between the amount that should have been charged minus the amount charged (\$810.63, from \$1,470.03 minus \$659.40).

Defendant opposes and cross-moves for partial summary judgment on its first counterclaim, seeking a judgment declaring that the "reallocation by the Board is contrary to the terms of the Offering Plan as the Offering Plan, Declaration, and By-laws are integrated documents that are intended to be read together, that [sic] the retroactive increase is void and unenforceable." (NYSCEF Doc No. 107 at ¶ 3.)

### DISCUSSION

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977].) "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306

[1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].) Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

### Declaratory Judgment

“A declaratory judgment is intended ‘to declare the respective legal rights of the parties based on a given set of facts, not to declare findings of fact.’” (*Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 679 [1st Dept 2017], quoting *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 100 [1st Dept 2009].) “A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract.” (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988], citing *James v Alderton Dock Yards*, 256 NY 298, 305 [1931].) However, a declaratory judgment that a board of managers of a condominium acted with authority in setting a certain rate for common charges has been found to be appropriate. (*Board of Managers of 25 Charles Street Condominium v Seligson*, 106 AD3d 130 [1st Dept 2013].)

Here, Defendant’s argument that the Offering Plan must be read in conjunction with the By-Laws is without merit. The Offering Plan contains a disclaimer stating that the first-year budget estimate was subject to change by the Plaintiff during any year of the Condominium’s operation. The terms of the Offering Plan were then merged into and extinguished by the Deed of

purchase, where Defendant specifically ratified all provisions of the By-Laws, including the provisions granting Plaintiff the power to determine and levy monthly assessments based upon each Unit Owner's respective common interests. This formula is in accordance with Real Property Law § 339-m, which states that common charges "shall be charged to the unit owners according to their respective common interests . . . [except] to one or more non-residential units where so authorized by the declaration and bylaws."

Defendant attempts to argue that the By-Laws contain such an exception as envisioned by RPL § 339-m and discussed in *Lesal Associates v Board of Managers of the Downing Court Condominium*, 2003 WL 25684179 [Sup Ct, NY County 2003]. However, Defendant cites at length to an *older* version of the Condominium Declaration which contains a provision stating that common charges "should only be payable by the Commercial Unit Owner to the extent the Commercial Unit is benefited by the item or service created such assessment or common charge." (NYSCEF Doc No. 107 at ¶ 20, citing NYSCEF Doc No. 114 at 10.) Plaintiff correctly notes that this version of the Declaration was contained in the Offering Plan but was never adopted by the Plaintiff or recorded in the City Register. (NYSCEF Doc No. 121 at ¶ 6.)

Defendant also argues that the common charge increase is without legal effect because it was procedurally improper pursuant to the By-Laws. (NYSCEF Doc No. 107 at 15.) Without citing to a specific provision, Defendant argues that the By-Laws required Plaintiff to convene a special meeting, with notice, before voting on the issue of increasing the amount of common charges attributable to the Commercial Unit. However, the By-Laws state that regularly scheduled meetings do not require special notice (NYSCEF Doc No. 88 at 33) and there is no specific provision stating that any meeting is required for Plaintiff to exercise its power to increase monthly common charges (*Id.* at 29.) Additionally, Plaintiff has submitted an email chain demonstrating

that Defendant did receive notice of the 2017 budget discussion, which culminated in the February 1, 2017 increase in the amount of 23.26%. (NYSCEF Doc No. 124.) Further, Defendant received and even submitted the legal advice email contemplating the 13% flat rate charge before it was implemented. (NYSCEF Doc No. 19.) Thus, these contentions are without merit.

Plaintiff has established that no material issues of fact are in dispute as to whether the By-Laws set forth the proper formula for calculating common charges. The court will therefore grant partial summary judgment as to Plaintiff's cause of action for a declaratory judgment but will withhold judgment on the total amount owed by Defendant and refer the matter to a special referee. Accordingly, Defendant's cross-motion seeking summary judgment on its counterclaim for a declaratory judgment that Plaintiff acted beyond its authority is denied.

However, the court finds that Plaintiff is not entitled to apply the 13% rate retroactively. Plaintiff's power to levy monthly assessments is to "cover the cost of common expenses, payable in advance" (NYSCEF Doc No. 88 at 29) and, while common expenses are defined as any expenses "to make up any deficit in the Common Charges for any prior year(s)" (*Id.* at 17), there is no indication that Plaintiff accrued a deficit resulting from the bills it transmitted to Defendant. Additionally, while Plaintiff has submitted a one-paragraph document entitled "Retroactive Common Charges Breakdown" (NYSCEF Doc No. 95), it has failed to establish that the \$40,168.38 it seeks to retroactively collect is an accurate calculation of 13% of the Condominium's total budget for the years 2012 through 2016. Thus, the court finds that Plaintiff is entitled to assess common charges upon Defendant using the 13% rate commencing on August 2017 onward.

Further, the court finds that Plaintiff is not entitled to collect any late fees or accrue any interest on late common charge payments unless Plaintiff demonstrates that it took action to collect any such outstanding payments within 90 days of the due date, pursuant to By-Laws Article VI,

Section 2. (NYSCEF Doc No. 88 at 37-38); (*see also*, *Board of Managers of 25 Charles Street Condominium v Seligson*, 106 AD3d 130, 136 [1st Dept 2013] [“Although the bylaws authorized the assessment of interest chargeable for late payment of common charges, plaintiffs, in our view, waived the assessment of such late fees during the time period it took no steps to collect them”].)

**CONCLUSION**

Accordingly, it is hereby

ORDERED that Defendant’s cross-motion is denied; and it is further

ORDERED that Plaintiff’s motion for summary judgment on its cause of action for declaratory judgment is granted in part to the extent that the court declares that the Condominium Declaration and By-Laws are the controlling documents for calculating the proper amount of common charges to be paid by the Defendant; and it is further

ORDERED that, the court having determined that a reference to determine is proper and appropriate pursuant to CPLR 4317 [b], in that an examination of a long account will be required, a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of the total amount of common charges owed to Plaintiff using a rate of \$659.40 per month from the inception of Defendant’s ownership of the Commercial Unit until August 2017, at which point the rate of common charges shall be calculated at 13% of the total common charges; and

(2) the issue of whether \$10,547.14 is an accurate calculation of the deficit owed by Defendant while being billed under the \$659.40 common charge rate for the period of January 1,

2012 through August 21, 2017, and specifically to determine the propriety of all line items in Plaintiff's ledger (NYSCEF Doc No. 93) for that period; and

(3) the issue of reasonable attorneys' fees due to Plaintiff, pursuant to the By-Laws; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that Plaintiff shall serve a proposed accounting within 30 days from the date of this order and Defendant shall serve objections to the proposed accounting within 20 days from service of Plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further;

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

08/20/20  
DATE

  
W. FRANC PERRY, 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