

**Board of Mgrs. of the 200 E. 65th St. & 210 E. 65th
St. Condominium v McCallum**

2020 NY Slip Op 33890(U)

November 24, 2020

Supreme Court, New York County

Docket Number: 157147/2019

Judge: W. Franc Perry

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**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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BOARD OF MANAGERS OF THE 200 EAST 65TH STREET & 210 EAST 65TH STREET CONDOMINIUM,

Plaintiff,

- v -

ANGUS MCCALLUM, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 15

Defendant.

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INDEX NO.	<u>157147/2019</u>
MOTION DATE	<u>09/13/2019</u>
MOTION SEQ. NO.	<u>001</u>
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 32

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

Upon the foregoing documents, the motion is granted.

Plaintiff Board of Managers, (“the Board”) is a condominium board of managers of the property known as 200 East 65th Street & 210 East 65 Street, New York, NY. Defendant, Angus McCallum, is the fee owner of apartment 21K (“subject apartment”) located in the building.

The Board commenced this action to foreclose on a lien for unpaid common charges and for a money judgment for sums filed as a result of defendant’s failure to make common charge payments, assessments and other charges assessed against the subject apartment. Defendant interposed an answer with cross-claims. The Board now moves for summary judgment alleging that no material issues of fact exist as to whether plaintiff is entitled to foreclose on the lien.

The Board asserts that it is entitled to summary judgment because the admissible documentary evidence proves that; (1) there is no dispute that defendant is the fee owner of the subject apartment, (2) there is no dispute that defendant has not paid the common charges and

assessments billed to him and, (3) that it is charged by law and by the By-Laws with the duty to enforce the owners of units to pay common charges and special assessments against their units.

Defendant cross moves for summary judgment requesting; (1) that this Court dismiss the complaint, (2) that the Court consolidate the action at bar with an action previously filed by him against the plaintiffs and, (3) that the Court award him summary judgment in the amount of \$10,000.00, to enable him to engage counsel to assist in the defense of this action.

"In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party" *Stukas v Streiter*, 83 AD3d 18, 22; *see Pearson v Dix McBride, LLC*, 63 AD3d 895. "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" *Kolivas v Kirchoff*, 14 AD3d 493.

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form" *Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 507; *see Zuckerman v City of New York*, 49 NY2d 557, 562). Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts" *GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967; *see CPLR 3212[b]; Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d at 508.

Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action, *Alvarez v Prospect Hosp.*, 68 NY2d at 324.

According to the papers, this dispute began in January, 2019, when defendant wrote to plaintiff complaining of a problem with an exhaust vent in one of the apartment's bathrooms. Defendant then further outlined his complaint in a letter dated February 28, 2019, claiming that the exhaust issue had been ongoing since 2008. In that letter, he demanded reimbursement of a percentage of the common charges he had paid in the past as "compensation" for the inconvenience he had endured due to the exhaust's ventilation problem and admitted that he had withheld payment of the common charges because of this inconvenience.

The papers indicate that the condominium, staff, and HVAC technicians investigated the complaint, detected some issues with the exhaust vent line, and corrected the problem on or about May 3, 2019.

On June 18, 2019, a lien was recorded against the subject apartment.

Once created, "the administration of a condominium's affairs is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate and which sets forth the respective right and obligation of unit owners both with respect to their own units and the condominium's common elements" *Glenridge Mews Condominium v Kavi*, 90 AD3d 604 (2 Dept 2011)

A purchaser of a unit in a condominium enters into a binding relationship with every other unit owner by both contract and statute. One of the elements of the relationship is the obligation to pay common charges *Bd of Managers of Lido Beach Towers Condominium v*

Grartenlaub, 27 Misc. 3d 1213 A, 910 NYS 2d 403 (Sup Ct Nassau County 2010). RPL § 339-e [2] defines common charges as each unit's proportionate share of the common expenses in accordance with the common interest. Common expenses are defined as [a] expenses of operation of the property, and [b] all sums designated common expenses by or pursuant to statute, the declaration or the by-laws (*see* RPL § 339-e [2] *supra*).

The obligation of a condominium unit owner to pay charges is for the most part absolute, and cannot be avoided *see 90 E. End Ave. Condominium v Becker*, 2010 WL 2754086 (Sup Ct New York County 2010); *see also* RPL § 339-x. Consequently, absent a valid defense, the plaintiff is entitled judgment in its favor on the issue of liability as a matter of law *see Bd of Mgrs. of Garden Terrace Condominium v Chiang*, 247 AD 2d 237 668 N.S. 2d 364 (1 Dept 1998); *90 E. End Ave. Condominium v Becker*, 2010 WL 2754086. *supra*.

The By-Laws governing this dispute at Article 6, section 6.2 (a) state that the owner of a unit is obligated to pay all special assessments and common charges.

Article 6, Section 6.2 (c) states that all such payments are due on the first day of each month in advance.

Article 6, Section 6.2 (d) provides that “no unit owner shall be exempted from liability for the payment of common charges or special assessments by waiving the use or enjoyment of any or all of the “common elements” or by abandoning his unit. No unit owner shall be entitled to a diminution or abatements in the common charges or special assessments payable thereby for any inconvenience or discomfort arising from (i) the failure or interruption of any utility or other services; (ii) the making of repairs or improvements to the common elements of any unit.”

Article 6, Section 6.4` charges the Board with the responsibility of taking “prompt action” to collect unpaid charges due from the owners including; charging delinquent owners

interest for late or unmade payments; to file liens for arrears and; to recover reasonable attorneys fees incurred by the Board or its managing agent in any action or proceeding commenced against a delinquent unit owner to recover sums due to the Condominium.

Article 7 of the Condominium Declaration lists what are the “common elements” of the building. That list includes the building’s exhaust vents.

In the case at bar, the Board has demonstrated its entitlement to judgment as a matter of law awarding it the amount of the lien upon which this case was commenced *Bd. of Directors of Hunt Club at Coram Homeowners Assn. Inc. v Heb.*, 72 AD 3d 997, 900 NYS 2d 145 (2 Dept 2010); *Bd. of Mgrs. of the Village Mall at Illcrest Condominium v Dadn*, 29 Misc. 3d 1238A. 2010 WL 5173180 (Sup Ct Queens County 2010); *Bd. of Mgrs. of the Silk Bldg. Condominium v Levenbrown*, 2009 WL 3062467 (Sup Ct New York County 2009).

The Board, through the affidavit of Jeffrey R. Pirkl, managing agent of the Board, the affirmation of Robert T. Holland, Esq., and NYSCEF Docs. 12-15, which include the deed, By-Laws and correspondence between the parties show that defendant is the owner of the subject apartment and that he is in default of his obligation to pay common charges and special assessments pursuant to the By-Law. The plaintiff has also demonstrated the validity of the lien (NYSCEF Doc. 17.) *see* RPL § 339-aa.

Plaintiff has also shown that defendant is not entitled to withhold payment of the common charges for any inconvenience related to a common element of the unit and that the exhaust system in the subject apartment is a common element under the By-Laws.

Defendant agreed to be bound by the Condominium’s By-Laws when he purchased the subject apartment. The By-Laws require that defendant, as a Unit owner, pay common charges, late charges, interest and attorneys’ fees and expenses incurred to collect such charges. Defendant

does not contest the affidavit testimony by Jeffrey Pirkel, the Board's managing agent, to which is attached a detailed account history demonstrating defendant's failure to pay the common charges, and other related charges and expenses as required by the By-Laws.

Since plaintiff has presented documentary evidence of its entitlement to summary judgment as a matter of law, it now becomes incumbent upon defendant to come forward and lay bare his proof and demonstrate, by admissible evidence, and evidentiary facts showing the existence of a triable issue with regards to bona fide defenses to the action such as waiver, estoppel, bad faith, fraud, oppressive and/or unconscionable conduct on the part of the plaintiff *see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD 3d 882,895 NYS 2d 199 2" 2010 ; *Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.*, 203 AD2d 538, 611 NYS2d 34 (2 Dept 1994); *Marion Assoc. v Vitale*, 172 AD2d 501, 568 NYS2d 119 (2 Dept 1991); *Andre v Pomery*, 35 NY2d 362 NYS2d 131 (1974), or the existence of a material issue of fact requiring a trial (*see Grogg v South Road Assoc.,L.P.*, 74 AD 3d 1021. 907 NYS 2d 22 (2 Dept 2010) ; *Washington Mut. Bank v O'Conner*, 63 AD 3d 832. 880 NYS 2d 696 (2 Dept 2009); *Aames Funding Corp. v Houston*, 44 AD 3d 692. 843 NYS 2d 660 (2 Dept 2007) ; *lv app den* 10 NY3d 704, 857 NYS 2d 37 (2008) ; *reargument den.* 10 NY 3d 916, 862 NYS 2d 222 (2008); *Charter One Bank v Houston*, 300 AD 2d 429. 751 NYS 2d 573 (2 Dept 2002) ; *lv app dismissed* 99 NY 2d 651, 760 NYS 2d 104 (2003).

Defendant has failed to present to this Court any proof or evidence showing the existence of a triable issue of fact which would warrant a trial in this case. It is clear that defendant failed to pay the common charges and assessments because he was "inconvenienced" due to an issue with a bathroom exhaust fan. However, defendant was not permitted to withhold payment of

these fees by the governing documents of the condominium. Defendant has no defense to this action.

In view of the foregoing, the Court finds that plaintiff has established a prima facie case for summary judgment based upon the submissions which prove the failure of defendant to pay the common charges due and owing in accordance with the By-Laws (*see* RPL § 339-u; New York Jurisprudence. Second Edition, II Condominiums; § Foreclosures). The Court finds that in opposition, Defendant has failed to raise a factual issue vis-a-vis a viable defense to plaintiff's claim.

Accordingly, plaintiff is awarded summary judgment striking defendant's answer, striking defendant cross-claims and affirmative defenses, and for any additional relief sought therein (*see Rossrock FundII, L.P. v Commack Inv. Group, Inc.*, 78 AD 3d 920,912 NYS 2d 71 (2 Dept 2010); *Matter of Augustine v Bank United FSB*, 75 AD 3d 596, 905 NYS 2d 652 (2 Dept 2010).

Accordingly, the defendant's cross motion is also denied in its entirety, and it is hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to compute and ascertain the amount due on the lien on which this matter was brought to foreclosure and to decide the appropriate manner in which the foreclosure may be conducted; 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 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/petitioner 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 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) .

This constitutes the Decision and Order of the Court.

11/24/2020 _____ DATE		 _____ W. FRANC PERRY, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input checked="" type="checkbox"/> REFERENCE