

**Bowery 263 Condominium Inc. v D.N.P. 336 Convent
Ave. LLC**

2021 NY Slip Op 30989(U)

March 31, 2021

Supreme Court, New York County

Docket Number: 153614/2015

Judge: David Benjamin Cohen

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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. DAVID BENJAMIN COHEN **PART** **IAS MOTION 58EFM**

Justice

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INDEX NO. 153614/2015

BOWERY 263 CONDOMINIUM INC.,

Plaintiff,

MOTION SEQ. NO. 010

- v -

D.N.P. 336 CONVENT AVENUE LLC, NEXUS BUILDING
DEVELOPMENT GROUP INC., EYAL DEVIDAS, and
YANIV COHEN,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Bowery 263 Condominium Inc. (Condominium) moves for an order granting it summary judgment: (i) on the tenth cause of action alleged in its verified second amended complaint (Complaint), which seeks a lien foreclosure as against defendant D.N.P. 336 Convent Avenue LLC (DNP); (ii) striking DNP's affirmative defenses to plaintiff's claim for a lien foreclosure, and (iii) dismissing DNP's and defendant Eyal Devidas' counterclaim for breach of fiduciary duty, and, upon granting summary judgment, severing the tenth cause of action in the Complaint and directing an order of reference to appoint a referee to compute the amount owing on the subject lien. The motion is unopposed.

DNP, a developer, oversaw the construction of a building located at 263 Bowery New York, New York. This included sponsoring condominium ownership at the building and retaining three commercial units there. The captioned action stems from DNP's failure to pay a total of \$684,595.30, its proportionate share of two special assessments (the third and fourth) levied by the Condominium's Board of Managers (the Board) on all of the units in the

Condominium in order to pay for repairs to common elements of the building. Forestal, affirmation in support of plaintiff's motion for summary judgment, NYSCEF Doc. No. 253, ¶ 24. As a consequence of DNP's failure to pay, the Board docketed a lien, in the amount of \$105,000.00, on the commercial units, pursuant to Real Property Law §§339-z and 339-aa, on January 10, 2018. NYSCEF Doc. No. 259. The Board acknowledges that an unspecified portion of the outstanding common charges was paid as a result of a telephone conversation with DNP on August 20, 2020. NYSCEF Doc. No. 253, 7 at n 4.

It is well settled that the owners of units in a condominium building are required to pay their proportionate share of charges assessed to repair and maintain the common elements in the building. *Board of Mgrs. of 140 E. 56th St. Condominium v Hausner*, 245 AD2d 209, 209-210 (1st Dept 1997); *see also Board of Mgrs. of Brightwater Towers Condominium v Cheskiy*, 109 AD3D 944, 945 (2d Dept 2013). However, Eyal Devidas, a principal of DNP, acknowledged at his deposition that he did not pay the assessments:

- A. "Common charge I pay. . .
- Q. What about assessments?.
- A. No.
- Q. Why did you stop paying assessments?
- A. Because I don't have the money to pay them"

NYSCEF Doc. No. 251, 139-140. Accordingly, the Condominium has established its prima facie entitlement to summary judgment on its lien foreclosure claim.

Defendants' verified answer alleges six affirmative defenses, to wit: (1) failure to state a cause of action, (2) the Complaint is barred by documentary evidence, (3) plaintiff has not set forth facts sufficient to pierce the corporate veil, (4) the causes of action are duplicative, (5) the claim alleging fraud lacks the requisite particularity, and (6) the claim of negligence is time barred.

“In moving to dismiss an affirmative defense . . . the [movant] bears the heavy burden of showing that the defense is without merit as a matter of law.” *Granite State Ins. Co. v Transatlantic Reinsurance Co.*, 132 AD3d 479, 481 (1st Dept 2015), citing *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 (1st Dept 2011). However, where, as here, affirmative defenses are stated formulaically, with no factual basis, such as, for example, “[p]laintiff has not set forth sufficient facts to pierce the corporate veil” (NYSCEF Doc. No. 248, ¶ 180), the defenses must be dismissed. *Coleman v Norton*, 289 AD2d 130, 130 (1st Dept 2001); *see also Bruno v Sant’Elia*, 52 AD3d 556, 557 (2d Dept 2008).

Defendants’ counterclaim alleges breach of fiduciary duty on the part of the Board. More specifically, the counterclaim alleges favoritism on the part of the Board, insofar as the Board placed a lien on DNP’s commercial units, but refrained from placing liens on the units of other owners who were also allegedly in arrears in paying the special assessments. However, the counterclaim alleges nothing about either the relative values of the units, or the relative amounts of their owners’ indebtedness for the assessments. Defendants do not even suggest that the assessments were not imposed for work that would benefit the condominium as a whole. Under these circumstances, the decisions of the Board are clearly protected by the business judgment rule, which insulates it from liability. *See 40 W. 67th St. v Pullman*, 100 NY2d 147, 153-155 (2003); *Board of Mgrs. of Aphthorp Condominium v Aphthorp Garage, LLC*, 187 AD3d 632, 633 (1st Dept 2020).

Accordingly, it is hereby:

ORDERED that the motion of plaintiff Bowery 263 Condominium, Inc. for summary judgment on the tenth cause of action alleged in the plaintiff’s verified second amended complaint is granted; and it is further

ORDERED that the tenth cause of action is severed; and it is further

ORDERED that plaintiff Bowery 263 Condominium. Inc., having moved for an order of reference and it appearing that a reference to determine is proper and appropriate pursuant to CPLR 4317 (b) insofar as an issue of damages separately triable and not requiring a trial by jury is involved, a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the following individual issue of fact, which is hereby submitted to the JHO/Special Referee: the issue of the current amount of money owed by defendant D.N.P. 336 Convent Avenue LLC to plaintiff, including any costs, interest and/or attorneys’ fees; and it is further

ORDERED that this matter is hereby referred to the JHO/Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest date upon the calendar of the Special Referee 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/supctmanh 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 email 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 Referee Part; and it is further

ORDERED that plaintiff shall serve a proposed accounting within 24 days of this order and the defendants 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 the 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 Referee Part, subject only to any adjournment that maybe authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

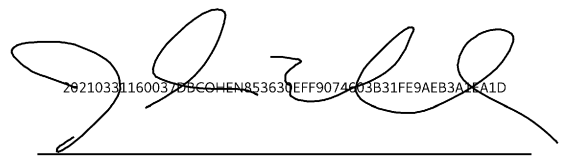
ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion and counsel shall arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the 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); and it is further

ORDERED that rest of this action shall continue.

3/31/2021

DATE



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DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: