

Board of Mgrs. of the Club at Turtle Bay v McGown
2021 NY Slip Op 31100(U)
April 5, 2021
Supreme Court, New York County
Docket Number: 656713/2019
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

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INDEX NO. 656713/2019

BOARD OF MANAGERS OF THE CLUB AT TURTLE BAY,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

JAMES MCGOWN, EAST TEXAS ENTERTAINERS LLC
AND EAST RIVER MORTGAGE CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36m 37, 38, 39, 40, 41, 42, 43, 44, 45, 56, 57

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Board of Managers (“Board”) of the Club at Turtle Bay (“the Condominium”) moves for an order pursuant to CPLR 3212 granting the Board summary judgment on its claims against: (i) defendant East Texas Entertainers , LLC (“East Texas”) and defendant East River Mortgage Corp (“East River”) arising out of their default in payment of common charges, assessments, interest/late fees and expenses, including attorneys’ fees, due and owing to the Condominium, and (ii) defendant James McGown for the same relief based on his execution of a personal guaranty of East River’s obligations to the Condominium. Defendants oppose the motion.

Background

In this action, the Board seeks a money judgment against defendants arising out of an alleged default in payment of common charges, interest, and expenses, including attorneys’ fees, due and owing for Unit 19E (“the Unit”) of the Condominium located at 232-236 East 47 Street, New York, New York (NYSCEF ## 6-11).

East River purchased the Unit at a foreclosure sale on January 29, 2013, for \$141,000 (NYSCEF # 8). In connection with the purchase, defendant James McGown, as president and principal of East River, signed a personal guaranty dated January 31, 2013 (“the Guaranty”) under which he acknowledged that East River “is subject to certain obligations to ...[the Condominium] pursuant to the

Declaration, By-Laws, Rules and Regulations and other applicable documents relating to the Condominium [and that]...as a Unit Owner [East River] is obligated to the pay the Common Charges allocated to it that are assessed by the Board...” (NYSCEF # 9). McGown agreed to “guarantee to the Condominium...the faithful performance and fulfillment of such obligations by [East River], including but not limited to payment of such Common Charges and all applicable late payment charges, together with all reasonable legal or other out-of-pocket expenses of the Condominium in obtaining performance of these obligations and collecting such Common Charges and late payment charges” (*id.*).

East River sold the Unit to East Texas on August 4, 2017 for \$100,000 (NYSCEF # 10). At the time of the sale, all common charges due and owing for the Unit were paid. It is undisputed that East River and/or McGown failed to notify the Condominium of the sale and transfer to East Texas as required under of the By-Laws (NYSCEF # 30 at 193). The common charges for the Unit have not been paid since October 1, 2018.

The Board initially commenced this action against McGown based on the Guaranty (NYSCEF # 1). The Board subsequently amended the summons and complaint to add East River and East Texas as defendants (NYSCEF # 23). After defendants filed their amended answer (NYSCEF # 25) to the amended complaint, the Board moved for summary judgment (NYSCEF # 20-32).

In support of its motion, the Board submits, *inter alia*, the affidavit of its Board Co-President, Habib Elam (NYSCEF # 21), the Guaranty (NYSCEF # 28), the Condominium’s Bylaws (NYSCEF #30) and common charges ledger showing outstanding common charges due and owing as of June 1, 2020 (NYSCEF # 31). The Board argues that this evidence establishes its entitlement to summary judgment, including the Bylaws which provide that unit owners are liable for their pro rata share of common expenses of the Condominium and are required to pay assessments imposed by the Board as well as interest, and expenses, including attorneys’ fees, in the event of a default (NYSCEF # 30, Art V, §§ 1, 4-6 at 185, 188).

Although the common charges were incurred during the Unit’s ownership by East Texas, and not East River, the Board asserts that under the Guaranty McGown is liable for payment of the outstanding common charges and additional expenses resulting from the default by East Texas. In support of this assertion, Elam avers that “upon information and belief...[McGown] is a member and corporate officer of both East Texas and East River, respectively ...[and] [a]s such, upon information and belief, [McGown] simply transferred the Unit between East Texas and East River, both of which are under his control” (NYSCEF # 21, Elam aff ¶¶ 6-7). Elam further states that “at no time did any of the defendants notify the Board of the transfer of ownership from East River to East Texas” (*id.*, ¶ 8).

In opposition, defendants argue that Elam's affidavit, the Bylaws, and the records of the Condominium are inadmissible hearsay, that the motion is premature as there has been no discovery, and that, at the very least, there are issues of fact as to the amount of debt due and owing the Condominium. In addition, defendants argue that East River and McGown cannot be held liable for common charges and other amounts due as result of East Texas' alleged default as such charges were incurred after East River sold and transferred the Unit.

In his affidavit in support of defendants' opposition, McGown states that he "is neither a member or [sic] corporate officer of [East Texas], which is owned by Amy Hicks" (NYSCEF # 36, ¶ 11). He also states that while East River failed to offer the Condominium a right of first refusal, that he is of "the opinion all of the defendants would now consent to Plaintiff exercising its first right of refusal" (*id.*, ¶ 16). Defendants also submit the affidavit of Amy Hicks who states that she is "the president and sole officer of East Texas," and that after the sale of the Unit from East River, "East Texas paid the mortgage and maintenance charges" (NYSCEF # 37, ¶¶ 2-3). She also states that the Board cannot claim it was "unaware that East Texas was the new owner of the property... [as it] accepted money from East Texas..." (*id.*, ¶ 3).

In reply, the Board argues that even if McGown is neither an officer nor owner of East Texas, McGown and East River are liable for the outstanding common charges and other amounts arising out of East Texas' default based on East River's failure to comply the Condominium's Bylaws and Rules and Regulations relating to the sale and transfer of the Unit.¹ The Board also argues that it cannot be said that the Board ratified defendants' actions by accepting payments of common charges, and that none of the defenses raised in the amended answer are viable and therefore must be stricken. As for the amount due and owing, the Board asserts that that summary judgment should be granted as to liability and that a referee should be appointed to calculate these amounts.

With regard to defendants' assertions that Elam's affidavit is not probative, Elam avers in his reply affidavit that as the Co-President of the Board since 2013, he is "qualified to provide an affidavit of the facts and circumstances supporting this motion" based on his responsibilities as Co-President and his familiarity with "[d]efendants and [McGown] and their history of ownership" (NYSCEF # 38, ¶¶ 35, 39-41).

¹ The Board also asserts that McGown and Hicks are related, married and/or working together, and in support of this assertion submits cases involving foreclosure actions in which McGown and Hicks are both parties (NYSCEF ## 42, 43), and evidence that McGown remained a tenant of the Unit following its transfer to East Texas (NYSCEF # 44). However, these assertions are insufficient to eliminate factual issues as to McGown's relationship and control over East Texas.

Discussion

“The proponent of a motion for summary judgment must establish that there are no material issues of fact in dispute and that it is entitled to summary judgment as a matter of law” (*Mazurke v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Once a plaintiff makes such a showing, the burden shifts to the opposing party to produce evidentiary proof sufficient to raise an issue of fact (*CitiFinancial Co (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

Under Real Property Law (“RPL”) §§ 339-dd and 339-j, a condominium board “is statutorily empowered to enforce its bylaws, rules, and regulations” (*Board of Managers of the Ocean Terrace Town House Condominium v Lent*, 148 AD2d 408 [2d Dept], *appeal denied* 75 NY2d 702 [1989]). And, in accordance with RPL § 339-j, the failure of a unit owner of the condominium to “comply strictly with the by-laws and with rules, regulations, resolutions...shall be grounds for an action to recover sums due...by the board of managers.”

Under these principles, the Board has met its burden of showing entitlement to summary judgment as to liability by submitting the Condominium’s governing documents which establish defendants’ obligations to pay common charges as well as costs, interest and attorneys’ fees upon a default. The ledger shows the amounts that are due and owing. The Guaranty and the Board Co-President’s affidavit set forth defendants’ default (*Board of Mgrs. of Brightwater Towers Condominium v Cheskiy*, 109 AD3d 944, 945 [2d Dept 2013] [holding that a plaintiff may establish “its prima facie entitlement to judgment as a matter of law by submitting, *inter alia*, evidence of its authority to collect certain assessments of common charges and fees, invoices reflecting the defendants’ account, and an affidavit of the president of the plaintiff attesting to the defendants’ failure to pay the balance on the account”]; *Glenride Mews Condominium v Kavi*, 90 AD3d 604, 605 [2d Dept 2011] [holding that under Condominium’s bylaws, unit owner who defaulted in paying common charges assessment was liable for unpaid common charges and attorneys’ fees]).

In opposition, defendants fail to proffer evidence sufficient to raise an issue of fact as to their liability. Regarding East Texas, the Board’s showing that East Texas defaulted on its obligation to pay carrying charges is not controverted; East Texas is therefore liable for these charges, together with interest, and expenses, including attorneys’ fees, in accordance with the Condominium Bylaws (NYSCEF # 30, Art V, §§ 1, 4-6 at 185, 188). And, while East River argues that summary judgment should be denied as there has been no discovery, this argument is unavailing since East River fails to identify any information that would enable it to demonstrate a triable issue of fact (*Global Mins. & Metals Corp. v Holmes*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007])

As for East River and McGown, although these defendants have submitted proof that East River did not own the Unit at the time of the default, the record establishes that East River failed, as required by Article VII, Section 1 of the Bylaws, to provide the Condominium the right of first refusal, and a notice of the sale to East Texas, the terms of the sale and “such other information as the Residential Board shall reasonably require” (NYSCEF # 30, at 193).² In this connection, under the Bylaws, the termination of the unit owner’s obligation to pay carrying charges upon the sale and transfer of a unit is conditioned on compliance with the Bylaws governing such sale and transfer. Specifically, Article V, Section 4 of the Bylaws provide that “[n]o Unit Owner shall be liable for payment of any part of the Common Charges assumed against his Unit subsequent to a sale, transfer or other conveyance by him (**made in accordance with the provisions of Section I of Article VII of these By-Laws**) of such Unit together with Appurtenant Interests, as defined in Section I, Article II herein (emphasis supplied) (*id.*, at 188). Moreover, McGown’s belated offer to give the Board the right of first refusal is insufficient to remedy East River’s failure to comply with the Condominium’s requirements for the transfer and sale of the Unit.

Accordingly, as the sale and transfer to East Texas was not made in compliance with the Condominium’s Bylaws and Rules and Regulations, the obligations of East River, as unit owner, and of McGown, as guarantor of these obligations, were not extinguished by the sale and transfer of the Unit to East Texas. As such, these defendants are liable to the Condominium for the sums due and owing (*see* RPL §§ 339-j).

Next, the affirmative defenses asserted in the amended answer are not a basis for denying summary judgment. The affirmative defenses of failure to state a cause of action, accord and satisfaction, expiration of the statute of limitations, lack of standing and lack of subject matter jurisdiction, are conclusory and must be dismissed (*see generally Kronish Lieb Weiner & Hellman, LLP v Tahari*, 35 AD3d 317, 319 [1st Dept 2006]). As to the affirmative defense that the Board accepted payment of common charges from East Texas and thus ratified that transfer and sale, and the related defense of ratification, such defenses are unavailing as the

²East River also failed to comply with the Rules and Regulations for the Condominium mandating that unit owners give notice of a proposed sale to the Board, that the Board be provided with information and required materials, and that the unit owner provide the Board with the right of first refusal (NYSCEF # 40, Page C-1). And, the Rules and Regulations provide that in the case of transfers to “limited liability entities” such as East Texas, “the Condominium requires that an unconditional guarantee of performance and payment be provided to the Condominium by an owner of the limited liability entity” (NYSCEF # 40, Page C-1).

mere acceptance of payment does not give rise to an inference that the Condominium had knowledge of the sale and transfer of the Unit and the defendants' lack of compliance with the Bylaws (*148 South Emerson Partners LLC v 148 South Emerson Associates, LLC*, 157 AD3d 887, 889 [2d Dept 2018])["The act of ratification, whether express or implied, must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language"] [internal citations and quotations omitted]).

Accordingly, the Board is entitled to summary judgment as to liability on its claims, and dismissal of defendants' affirmative defenses, and the issue of the amounts due and owing is reserved pending the court's determination upon the submissions directed below.

Conclusion

In view of the above, it is


ORDERED that plaintiff Board of Managers of the Club at Turtle Bay's motion for summary judgment on the causes of action against defendants James McGown, East Texas Entertainers, and East River Mortgage Corp in the amended complaint is granted as to liability only; and it is further

ORDERED that defendants' affirmative defenses are dismissed; and it is further

ORDERED that that the issue of the amount of common charges due and owing to the Board as well as other costs and expenses, including reasonable attorneys' fees, shall be determined by the court upon the Board's e-filing of affidavits, invoices and other evidence; and with regard to attorneys' fees, the Board shall efile invoices for such fees, together with affirmation(s) of counsel sufficient to establish the basis for the hourly amounts charged and the reasonableness of such charges; and it is further

ORDERED that the Board shall efile the proof supporting the amounts sought on its claims within 30 days of e-filing of this order and any response by defendants shall be efiled within 30 days of the Board's e-filing of its submission.

4/5/21
DATE


MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER