

Board of Mgrs. of the Club at Turtle Bay v East Tex. Entertainers LLC
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2021 NY Slip Op 31592(U)

May 11, 2021

Supreme Court, New York County

Docket Number: 150150/2020

Judge: Margaret A. Chan

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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. MARGARET A. CHAN

PART

IAS MOTION 33EFM

Justice

-----X

BOARD OF MANAGERS OF THE CLUB AT TURTLE BAY,

INDEX NO. 150150/2020

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

EAST TEXAS ENTERTAINERS LLC, EAST RIVER
MORTGAGE CORP., NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY DEPARTMENT OF
FINANCE, "JOHN DOE" AND "JANE DOE",

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48.

were read on this motion for

SUMMARY JUDGMENT.

Plaintiff Board of Managers ("Board") of the Club at Turtle Bay ("the Condominium") moves for an order pursuant to CPLR 3212: (i) granting the Board summary judgment on its complaint as against defendant East Texas Entertainers, LLC ("East Texas") and defendant East River Mortgage Corp ("East River") ("collectively "the defendants"), and (ii) appointing a referee to compute common charges and other amounts due and owing to the Condominium, and to determine whether unit 9E ("the Unit") located at 232-236 East 47th Street, New York, NY may be sold in one parcel. Defendants oppose the motion.

Background

In this action, the Board seeks to enforce its lien for unpaid common charges, and expenses, including attorneys' fees, due and owing for the Unit, and to obtain a money judgment for these amounts (NYSCEF # 20). East River, which purchased the Unit at a foreclosure sale on January 29, 2013 for \$141,000 (NYSCEF #26), sold the Unit to East Texas on August 4, 2017 for \$100,000 (NYSCEF # 25). At the time of the sale, all common charges due and owing on the Unit were paid. It is undisputed that East River failed to notify the Condominium of the sale as required under the Condominium's Bylaws (NYSCEF # 28). The common charges on the Unit have not been paid since October 1, 2018 (NYSCEF # 30).

On July 5, 2019, the Board filed and caused to be recorded in the Office of the City Registrar, County of New York, a verified Notice of Lien in the sum of

\$12,671.80 for the amounts previously assessed by the Board against the Unit for the proportionate share of common charges unpaid and due at that time (hereinafter “Notice of Lien”) (NYSCEF # 29).

The summons and complaint in this action, together with a notice of pendency of the lien, were filed on July 2, 2020 (NYSCEF # 20). The complaint asserts a cause of actions to enforce the lien, including amounts accruing after the filing of the Notice of Lien, and during the pendency of the action and any expenses and attorneys’ fees, and for a money judgment in the amount of \$41,512,28, and amounts accruing during the pendency of the action, including late interest, expenses and attorneys’ fees. Defendants answered the complaint and asserted affirmative defenses of failure to state a cause of action, accord and satisfaction, ratification, expiration of the statute of limitations, lack of standing, and lack of subject matter jurisdiction.

In 2019, the Board commenced a separate action seeking a money judgment against East River, East Texas and James McGown, the president and principal of East River, who personally guaranteed East River’s obligations to the Condominium (*Board of Managers of Turtle Bay Condominium v McGown, et al*; Index No. 656713/2019). By decision and order dated April 5, 2021, this court granted the Board’s motion for summary judgment as to liability against East River, East Texas and McGown, and directed the Board to submit evidence supporting the amounts due and owing for the unpaid common charges, interest, expenses and reasonable attorneys’ fees. In light of this other pending action by the Board for a money judgment, in which the court has granted summary judgment in favor of the Board and against defendants, the second cause of action for a money judgment must be dismissed (*Heywood Condominium v Wozencraft*, 148 AD3d 38, 46 [1st Dept], *lv dismissed* 29 NY3d 986 [2017] [dismissing claim for money judgment in action by condominium board to foreclose on common charge lien where plaintiff sought money damages in separate action]).

Accordingly, the remaining issue on this motion is whether the Board is entitled to summary judgment on its first cause of action seeking to enforce the lien for common charges. In support of its motion for summary judgment, the Board submits, *inter alia*, the affidavit of its Co-President, Habib Elam (NYSCEF # 17), the Condominium’s Bylaws (NYSCEF # 28), the Notice of Lien (NYSCEF # 29), and the common charges ledger showing outstanding common charges due and owing as of June 1, 2020 (NYSCEF # 30). The Board asserts that it is entitled to summary judgment based on this evidence, 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 interest, and expenses, including attorneys’ fees, in the event of a default (NYSCEF # 28, Art V, §§1, 4-6 at 185, 188). In addition, although East Texas owned the Unit at the time the common charges at issue were incurred, the Board argues that East River is also liable for such charges, based on Elam’s

statement that as “the corporate officer of East River, [i.e., McGown] controls both entities,” and as a result of East River’s failure to notify the Board of the transfer and sale of the Unit to East Texas (NYSCEF # 20, ¶¶ 6-7).

Defendants oppose the motion, arguing that it is premature to grant summary judgment as there has been no discovery; that the Board has not adequately demonstrated the admissibility of records submitted on the motion; and that statements in Elam’s affidavit are not probative as he does not qualify as a person with knowledge. Defendants also argue that, at the very least, there are triable issues of fact as to the amounts due and owing to the Condominium which preclude summary judgment. In addition, defendants argue that East River cannot be held liable for common charges, as well as other amounts due and owing as a result of East Texas’ alleged default, since such charges were incurred after East River sold the Unit, and that contrary to Elam’s statements, East River and East Texas are separate entities and East Texas is not controlled by McGown.

In his affidavit in support of defendants’ opposition, McGown states that “neither I nor [East River] have any connection with the buyer East Texas [and]...[t]he transfer [of the Unit] to East Texas was [f]or fair market value and appropriate taxes were paid” (NYSCEF # 35, ¶ 5). He also states that “I am neither a member or [sic] corporate officer of [East Texas] ...which is owned by Amy Hicks” (*id.*, ¶’s 9, 10). He further states that while East River failed to offer the Condominium a right of first refusal, “[the Board] can only exercise that right... by paying [East River] \$100,000 ... and I will in turn give the money to East Texas and [the Board] can have the property” (*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 # 36, ¶¶2-3). She also states that the Board cannot claim it was “unaware that East Texas was the new owner of the [Unit] [as] [the Board] accepted money from East Texas without question...” (*id.*, ¶ 3).

In reply, the Board argues that even if McGown is neither an officer nor owner of East Texas, East River is nonetheless liable to the Board for 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 notifying the Board of the sale and transfer of the Unit. The Board also argues that it cannot be said that the Board ratified defendants’ actions by accepting payments of common charges, and that the conclusory affirmative defenses asserted in the amended answer must be stricken. As for the amounts due and owing, the Board asserts that that summary judgment should be granted, and a referee appointed to calculate the amounts due and owing for common charges and other amounts in accordance with its proposed order submitted in connection with this motion.

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]). Moreover, RPL § 339-z allows for the establishment of a lien for unpaid common charges in favor of a condominium, while RPL § 339-aa permits the Board to commence a foreclosure action to collect moneys owed to it for common charges. 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.”

Applying these principles, the court finds that the Board has met its burden of demonstrating its entitlement to summary judgment as to liability on the cause of action to enforce the lien for common charges based on its submission of the Condominium’s governing documents which establish defendants’ default on their obligations to pay common charges, the deeds showing the ownership of the Unit by East River and then East Texas, the ledger detailing the amounts due and owing for the common charges, and the filing of the notice of lien (*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 a triable issue of fact. Regarding East Texas, the Board’s showing that East Texas defaulted on its obligation to pay carrying charges is not controverted, and East Texas is therefore liable for these charges, together with interest, and expenses, including attorneys’ fees, in accordance with the Condominium Bylaws (NYSCEF # 28, Art V, §§1, 4-6 at 185, 188). And, as to defendants’ argument that summary judgment should be denied as there has been no discovery, this argument is unavailing since

defendants fail 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]; *see also Woodard v Thomas*, 77 AD3d 738, 740 [2d Dept 2010] “[the] mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion”) [internal citations omitted]).

As for defendants’ assertion that East River cannot be held liable for the common charges as it did not own the Unit at the time of the default in payment of common charges, this argument is unavailing as the record establishes that East River failed to comply the Bylaws of the Condominium governing termination of ownership of Unit.¹ In this connection, the unrefuted record shows that East River failed, as required by Article VII, Section 1 of the Bylaws, to provide the Condominium with the right of first refusal, and notice of the sale to East Texas, the terms of the sale and “such other information as the Residential Board shall reasonably require” (NYSEC # 28, at 193). Notably, under the Bylaws, the termination of the unit owner’s obligation to pay carrying charges upon 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*, at188).

Moreover, defendants’ belated offer to grant the Board a 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, the obligations of East River were not extinguished by the sale and transfer of the Unit to East Texas (*see* RPL§§ 339-j). As such, the defendants are liable to the Condominium for the sums due and owing upon enforcement of the lien, which under the Bylaws including expenses, interest, and attorneys’ fees incurred in enforcing the lien (*Heywood Condominium*, 148 AD3d at 46 [noting that under RPL § 339-z plaintiff Board of Managers has a lien for common charges and interest, and

¹ East 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 # 43, 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 # 43, Page C-1).

that when allowed under the Bylaws the lien may include additional charges including attorneys' fees]).

Additionally, the affirmative defenses asserted in defendants' answer do not provide grounds for denying summary judgment as they 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 of ratification, mere acceptance of payment cannot give rise to an inference that the Condominium had knowledge of the sale and transfer as well as East River's lack of compliance with the Bylaws such that would be needed to support a ratification defense (*see 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]).

Finally, that the Board's submissions are insufficient to establish the amounts due and owing for unpaid common charges, interest, expenses and reasonable attorneys' fees does not warrant the denial of summary judgment on its claim to enforce a lien for common charges, and the Board's request to refer this matter to a referee to compute is granted (*Board of Managers of Cent. Park Place Condominium v Potoschnig*, 111 AD3d 586 [1st Dept 2013], *mod on other grounds*, 136 AD3d 441 [1st Dept 2016] [holding that "[d]efendants' challenges to amounts due must be addressed by the referee pursuant to CPLR 1321 [who]... should also determine the amount of plaintiff's reasonable attorneys' fees" [internal citations omitted]).

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by plaintiff Board of Managers of the Club at Turtle Bay is denied as to the second cause of action for a money judgment; it is further

ORDERED that the second cause of action is dismissed and severed, and the remainder of the action shall continue; it is further

ORDERED that the motion for summary judgment by plaintiff Board of Managers of the Club at Turtle Bay is granted as against defendants East Texas Entertainers, LLC and East River Mortgage Corp to liability on the first cause of action to enforce the lien for common charges; it is further

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

ORDERED that his action be and the same is hereby referred to Elaine Shay, Esq., with offices at 800 Third Avenue, Suite 2800; email address Elaine@eshayesq.com and the telephone number 212-520-2690; who is hereby appointed Referee to ascertain and compute the amount due to plaintiff as unpaid condominium common charges, assessments, interest, costs, expenses and attorneys' fees owing from East Texas and East River to the Board, the statutory lien for such amounts which is being foreclosed upon in this action, and to examine and report whether the Unit can be sold in parcels; and that said Referee is to make a report to this Court with all convenient speed; and it is further

ORDERED that the Referee's hearing be held in the County of New York; and it is further

ORDERED, that upon receipt of the Referee's Report, and confirmation thereof by motion upon notice, the Board's attorney shall submit a judgment of foreclosure and sale; and it is further

ORDERED, that the issue of whether East Texas Entertainers, LLC and East River Mortgage Corp. are liable for a deficiency, if any, shall be addressed, if timely raised, following any foreclosure sale; and it is further

ORDERED, that the Board's attorney shall serve a conformed copy of this Order upon the County Clerk and the Trial Support Office for amendment of their records; and it is further

ORDERED, that by accepting this appointment, the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCCR Part 36), including, but not limited to, section 36.2(c) ("Disqualifications from appointment") and section 36.2(d) ("Limitations on appointments based on compensation").

This constitutes the Decision and Order of the court.

05/11/21
DATE

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CASE DISPOSED

GRANTED

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DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:


MARGARET A. CHAN, J.S.C.

MARGARET A. CHAN, J.S.C.