

**Department of Env'tl. Protection of the City of
N.Y.-Water Bd. v Board of Mgrs. of the Davis Ct.
Condominium**

2022 NY Slip Op 30668(U)

March 3, 2022

Supreme Court, New York County

Docket Number: Index No. 452607/2019

Judge: Laurence L. Love

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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. LAURENCE LOVE PART 63M

Justice

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DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK-WATER BOARD,

Plaintiff,

INDEX NO. 452607/2019

MOTION DATE 12/06/2021

MOTION SEQ. NO. 002 003

- v -

BOARD OF MANAGERS OF THE DAVIS COURT CONDOMINIUM, JAMES BARRINGTON, RENEE JORDAN, TIFFANY SMITH, SANDRA PICERNO, WILMINGTON SAVINGS FUND SOCIETY, FSB D/B/A CHRISTIANA TRUST, AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST, ANGELO MARVELLI, VIVIAN PORTUNATO, NEAL FREDERICKSON, FEDERAL HOME LOAN MORTGAGE CORPORATION

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105, 109, 111, 112, 121, 123, 124, 125, 128, 130, 131, 132, 133, 134, 135, 136

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 103, 110, 113, 114, 115, 116, 117, 118, 119, 120, 122, 129

were read on this motion to/for DISMISS.

Upon the foregoing documents, the decision on defendants James Barrington, Sandra Picerno, Vivian Portunato and Neil Frederickson's ("the Moving Defendants") motion for summary judgment, or in the alternative, apportionment of water bills between the individual defendants, seeking the installation of water meters for the individual dwelling units and directing the reconstitution of the Board of Managers of the Davis Court Condominium, plaintiff's cross-motion for summary judgment and defendant, Federal Home Loan Mortgage Corporation's motion to dismiss is as follows:

Plaintiff commenced this action by filing of a summons and complaint on December 24, 2019, seeking to recover unpaid water and sewer charges allegedly incurred by defendants. Defendants Renee Jordan and Tiffany Smith interposed an answer on February 19, 2020. Defendants, James Barrington, Sandra Picerno, Vivian Portunato and Neil Frederickson interposed an answer on February 27, 2021. On March 3, 2021, defendant, Wilmington Savings Fund Society d/b/a Christiana Trust As Owner Trustee of the Residential Credit Opportunities Trust interposed an answer. All of the answers contain cross-claims for apportionment against all defendants. In an Order dated, February 1, 2020, this Court granted plaintiff a default judgment against Angelo Marvelli.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d 331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989).

Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true and accord plaintiffs the benefit of every possible favorable inference” *People by Schneiderman v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 642 (2018). On a CPLR 3211(a)(7) motion to dismiss, the question is whether the facts as alleged fit within any cognizable legal theory. See *Leon v. Martinez*, 84 N.Y.2d 83, 88–89 (1994). “While factual allegations set forth in a complaint should be accorded every favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration.” *M & E 73-75, LLC v. 57 Fusion LLC*, 189 A.D.3d 1, 5, 128 N.Y.S.3d 200, 204 (1st Dept. 2020)

Plaintiff is a public benefit corporation, established pursuant to the New York City Municipal Water Finance Authority Act, which is codified as Public Authorities Law §§ 1045-a, et seq., whose primary function is to establish and collect water and sewage charges. Public Authorities Law §1045-j (5) provides that if "Such fees, rates, rents or other charges, if not paid when due, [they] shall constitute a lien upon the premises served and a charge against the owners thereof, which lien and charge shall bear interest at the same rate as would unpaid taxes of the city. Such lien shall take precedence over all other liens or encumbrances, except taxes, and may be foreclosed against the lot or building served in the same manner as a lien for such taxes. Section §11-315 of the New York City Administrative Code, provides that any action for the recovery of any water and sewage rents, charges, penalties, fines, and interest thereon may be maintained against the person for whose benefit or by whom the water is taken or used or for whose benefit or by whom sewer service is used. Real Property Law §339-i(2) provides that for a condominium

the "common elements shall remain undivided and no right shall exist to partition or divide any thereof...", and that any provision contrary shall be null and void". Water and Sewage services are statutorily considered part of the "common element" of a condominium under R.P.L. §339-e(3) and are a "common expense" of the condominium under R.P.L. §339-e(4)(a). Neither of which can be divided nor partitioned as a matter of law and any provision providing for such division or partition is null and void as a matter of law.

In support of its motion, the Moving Defendants submit the affidavit of Sandra Picerno, together with the pleadings and a copy of the Offering Plan for the Davis Court Condominium, which establish as follows: The Davis Court Condominium is comprised of eight (8) units with a Board of Managers established by the Declaration of Davis Court Condominium. Each unit owner is responsible for 12.5% of the common charges, including, as relevant here, water and sewer services.

The moving defendants seek dismissal of this action alleging that the Verified Complaint fails to state how the Defendant Unit Owners are personally liable for the alleged unpaid invoices since the individual Defendant Unit Owners did not personally sign any contracts or agreements with the Plaintiff. Moving Defendants further argue that were unable to obtain information pertaining to the alleged unpaid invoices individually or negotiate settlement of the alleged unpaid invoices in their individual capacities since the agreement with Plaintiff was made with the Board of Managers of the Davis Court Condominium. Said defendants further seek the installation of branch water meters for each individual unit and further seek that the Court order the reconstitution of the Board of Managers.

It is entirely undisputed that defendants benefited from the use of water and sewer services. As such, plaintiff has plainly stated a cause of action as against all defendants. Defendants clearly

contracted to split the common charges into eight equal shares and to have said common charges paid by the Board of Managers. Defendants failure to observe corporate formalities in maintaining its board will not be remedied by this Court. Further,

In opposition to said motion and in support of its cross-motion, plaintiff submits the affidavit of Kayetrina Murchison, the Administrative Manager- Legal Liaison of the Bureau of Customer Services for the Plaintiff, Department of Environmental Protection of the City of New York - Water Board, together with the relevant supporting documentation including account summaries, bills, and rate schedules, which establish as follows: Plaintiff maintains two service accounts at the subject premises, service account number 6000004566001 at the documented service address of 22 Davis Court, Staten Island, NY 10310, BBL: 05-00149-7501, and service account number 2000004565001 at the documented service address of 18 Davis Court, Staten Island, NY 10301, BBL: 05-00149-7501. A total amount of \$123,970.45 is due and owing as of June 9, 2021, for service account number 6000004566001 and that a total amount of \$61,690.00 is due and owing as of June 9, 2021 for service account number 2000004565001. No objections to any of the open invoices have been received by the Water Board from the Defendants nor have the Defendants commenced an Article 78 proceeding objecting to or challenging any administrative determination made by the Water Board or any of the open invoices. As such, plaintiff has established a *prima facie* entitlement to summary judgment, which has not been rebutted by defendants.

Defendant, Federal Home Loan Mortgage Corporation (“Freddie Mac”) moves to dismiss this action pursuant to CPLR 3211(a)(10) or in the alternative substitute Sean Foley as a named defendant in Freddie Mac’s place pursuant to CPLR 1018. Countrywide Home Loans, Inc., commenced a foreclosure action against Sean Foley in January 2007 under Richmond County

index number 100047/2007. A foreclosure sale was conducted on February 11, 2008, and title passed to Freddie Mac pursuant to a referee's deed dated February 11, 2008. Said foreclosure sale was vacated on April 7, 2008, however, said Order was not recorded in the Richmond County Clerk's Office until June 17, 2021, a year and a half after the filing of this action. As such, title remains in the name of Sean Foley. However, as said defendant waited thirteen years to correct the property records and as said defendant is currently prosecuting a foreclosure action against Sean Foley and the instant property, Freddie Mac is not entitled to dismissal of this action. There is no objection to adding Sean Foley as a party defendant.

ORDERED that the moving defendants' motion to dismiss is DENIED in its entirety; and it is further

ORDERED that the plaintiff's cross-motion for summary judgment on the complaint herein is granted against defendants, BOARD OF MANAGERS OF THE DAVIS COURT CONDOMINIUM, JAMES BARRINGTON, RENEE JORDAN, TIFFANY SMITH, SANDRA PICERNO, WILMINGTON SAVINGS FUND SOCIETY, FSB D/B/A CHRISTIANA TRUST, AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST, ANGELO MARVELLI, VIVIAN PORTUNATO, NEAL FREDERICKSON and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against said defendants, jointly and severally, in the amount of \$185,660.45, together with interest at the rate of 9% per annum from the date of June 9, 2021 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Freddie Mac's motion is granted to the extent that leave to amend the complaint herein to add Sean Foley as a party defendant is granted; and it is further

ORDERED that, within 20 days from entry of this order, Freddie Mac shall serve a copy of this order with notice of entry and the amended complaint in conformity herewith upon Sean Foley pursuant to the CPLR; and it is further

ORDERED that the defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that an assessment of damages on the issue of attorney’s fees is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

3/3/2022
DATE


LAURENCE LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE