

**Baxter St. Condominium v 125 Vertical Parking  
Group, LLC**

2022 NY Slip Op 30798(U)

March 10, 2022

Supreme Court, New York County

Docket Number: Index No. 157093/2019

Judge: David B. 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 B. COHEN PART 58

Justice

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INDEX NO. 157093/2019

BAXTER STREET CONDOMINIUM, BY ITS BOARD OF MANAGERS,

MOTION SEQ. NO. 004

Plaintiff,

- v -

125 VERTICAL PARKING GROUP, LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE DEPARTMENT OF FINANCE, DESIGNERS MANAGEMENT AGENCY, INC., and AUTOMOTION PARKING SYSTEMS LLC,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Plaintiff Baxter Street Condominium commenced this action against defendants 125 Vertical Parking Group, LLC ("Vertical") and Automotion Parking Systems, LLC ("Automotion") (collectively "Defendants") to foreclose on its lien against Defendants and recover allegedly unpaid monthly common charges, capital assessment fees, late charges, and attorneys' fees (Doc 2). This Court, in its Decision and Order dated June 25, 2021 ("the Underlying Decision"), granted Plaintiff's motion for summary judgment on liability (Motion Sequence No 001) and denied Defendants' motion to dismiss (Motion Sequence No 002) as moot (Doc 82). This Court referred this case to a referee to compute the exact amount Vertical owed to Plaintiff (id.). Defendants now move, pursuant to CPLR 2221 (d)(2), for leave to

1 In the Underlying Decision, this Court inadvertently referred to Motion Sequence No 002 as a cross motion.

reargue Plaintiff's motion for summary judgment as well as their motion to dismiss; and, upon reargument, denying Plaintiff's motion for summary judgment and granting their motion to dismiss. After consideration of the parties' contentions, as well as a review of the relevant statutes and caselaw, the motion is granted in part.

### **I. Factual and Procedural Background**

The condominium located at 123 Baxter Street in New York was owned by Plaintiff and operated by its Board of Managers ("the Board"). It had twenty-three residential units, four commercial units, and a garage, which was also considered a commercial unit (Doc 18). The garage unit was owned by Vertical (Doc 20) and leased to Automotion.

The condominium's By-Laws provide, in relevant part, that "[a]ll ... repairs and replacements ... to the Common Elements (including Limited Common Elements ...) whether located inside or outside of the Units ..., shall be made by the [Board] and shall be charged to all the Unit Owners as a Common Expense" (Article V § 10[B], Doc 19).

The Board's Declaration provides, in relevant part, that "Common Elements" include ... lobbies ..., roofs, [and] [a]ll other equipment and facilities in the Building wherever they may be located which serve or benefit or are necessary or convenient for the existence, maintenance, operation or safety of more than one Unit" (Para. 1[e][iii], [e][xviii], [e][xxi], Doc 18).

The Declaration further provides, in relevant part, that:

[W]ith regard to any Limited Common Element of which exclusive use is shared by or available to fewer than all Unit Owners, including Limited Common Elements of which use is available to all Residential Unit Owners but no Commercial Unit Owners ("Residential Limited Common Elements") or of which use is available to all Commercial Unit Owners but no Residential Unit Owners ("Commercial Limited Common Elements"), the responsibility for maintenance and repair of same shall be apportioned among the Unit Owners who share such use (or the availability of such use) in accordance with their relative Common Interests.

The Limited Common Elements [include] [a]ll ... air conditioning and/or utility lines, equipment and/or pipes, and rooms or areas in which any of same are contained to the exclusion of other items, which serve ... more than one Residential Unit but no Commercial Unit, shall be deemed limited in use to all Residential Unit Owners[.]

(Para. 1[1][ii][b], Doc 18).

On June 6, 2018, the Board voted to impose a “capital assessment” on all unit owners in the amount of \$150,000, which amount was based on unit ownership and to be paid over three consecutive months (Doc 21 at 2 [“the June 2018 Board minutes and assessment letter”]). The funds from the assessment were to be utilized for “the lobby A/C, repairing the roof exhaust fans, repairing the Hester Street sidewalk and other operational repairs and upgrades along with funding the capital reserve account” (*id.* at 1). At the meeting, Vertical argued that it should not be responsible for some or all of these costs since the assessment, at least in part, was to subsidize the residential uses of the building (*id.*).

In July 2018, Vertical emailed the Board’s managing agent, Tom Doran (“Doran”), asserting that certain items, such as the lobby air conditioning, should not be assessed to the commercial unit owners (Doc 83 at 2).

On August 1, 2018, Vertical was charged the first capital assessment in the amount of \$2,975.00 (Doc 23).

On August 30, 2018, Doran responded to Vertical in an email as follows:

According to the [By-Laws], the only expense listed that the commercial unit owners/sponsor are NOT responsible for is the lobby air conditioning. The total cost for lobby A/C [is] \$9,100. Please deduct this amount from the total assessment and pay the difference with you[r] regular monthly payments moving forward.

(Doc 83 at 5).

On September 1, 2018, Vertical was charged the second capital assessment fee in the amount of \$2,975.00 (Doc 23). As of September 4, 2018, Vertical was in arrears for the two

capital assessment fees in the amount of \$5,950 (Doc 23). On September 27, 2018, the Board sent a letter to Vertical demanding that Vertical pay its balance of \$5,950 (Doc 38).

On October 01, 2018, Vertical was charged for the third capital assessment fee in the same amount of \$2,975.00 (Doc 23).

On October 4, 2018, Vertical emailed the Board, referencing the email exchange with Doran and demanding a revised assessment fee (Doc 37 at 6).

As of October 16, 2018, Vertical was in arrears for the three capital assessment fees. Since each of the three fees was in the amount of \$2,975.00, the balance totaled \$8,925 (Doc 23).

On November 21, 2018, the Board sent a letter to Vertical advising, in relevant part, that:

[T]he Board rejects [Vertical's] challenge to the propriety of the outstanding common charges and assessments that have been billed to the Commercial Units.

...

Commercial Unit employees, and in particular the garage staff, utilize the lobby and its services, including the restroom. At various times, the Commercial Units use the lobby to host meetings. Each of these areas are served by the lobby HVAC unit. Since at least one Commercial Unit owner therefore uses this equipment, the responsibility for repairing it must be shared by all unit owners as a Common Expense. The same holds true for the exhaust system on the roof.

...

Based upon the foregoing, demand is made for the owners of the Commercial Units to immediately pay all past due Charges, amounting to \$23,010.00 through November 30, 2018. The amounts are broken down as follows: Garage: \$8,925.00 ....

(Doc 65). The Board also warned Vertical that “if full payment [was] not tendered by November 30, 2018, the Board [was going to] pursue all its legal rights and remedies, including filing common charge liens against the Commercial Units and commencing common charge lien foreclosure actions or non-payment actions” and added that “[i]n that event, the Board [would] be entitled to all legal fees and expenses associated with such actions” (*id.*).

On December 17, 2018, Vertical was charged a late fee in the amount of \$535.50 (*id.*), raising its balance to 9,460.50 (Doc 23).

On January 1, 2019, Vertical was charged a monthly common fee in the amount of \$235.08, which brought its balance to \$9,695.58.

On January 9, 2019, Vertical paid the monthly common charge, reducing its balance to 9,460.50 (Doc 64).

On January 22, 2019, Plaintiff filed a notice of lien against Vertical with the City Register of New York in the amount of \$9,695.58 and submitted a ledger reflecting that, as of January 1, 2019, Vertical owed it the said amount for (1) its share of the unpaid capital assessment plus (2) the January monthly common charge (Doc 23 [“Plaintiff’s Ledger dated January 1, 2019”]). However, Plaintiff’s lien application did not reflect that Vertical had already paid the January monthly common charge on January 9, 2019 (Doc 85).

According to Matt Engel (“Engel”), the CEO of Langsam Property Services, Corp., which served as an agent for the commercial units in the condominium, as of January 1, 2019, Vertical had paid “the common charges every month [and that the] only line item [that was] not paid was the capital assessment because it included charges that were barred by the By-Laws” (Engel Affirmation in Supp of Defendants’ Motion to Dismiss [Seq 002], Doc 84 ¶ 14).

Plaintiff’s Ledger Dated May 1, 2020, which was submitted by Plaintiff, showed that, as of January 9, 2019, Vertical’s balance consisted of only the capital assessment fee (Doc 22 [“Plaintiff’s May 2020 Ledger”]).

According to the President of the condominium, Johan Schaltz (“Schaltz”), as of May 1, 2020, Vertical owed \$9,982.87 for common charges and the capital assessment, as well as \$9,190.58 in late charges and insufficient funds fees (Schaltz Affidavit in Supp of Plaintiff’s Motion for Summary [Seq 001], Doc 16 ¶ 14). Schaltz represented that, as of May 1, 2020, Vertical’s balance was \$19,173.45 (*id.*).

However, the amount of \$19,173.45 was not reflected in Plaintiff's May 2020 Ledger either for Vertical's balance as of May 1, 2020, or for any other time period (Doc 22). Rather, it showed that, as of May 1, 2020, Vertical's balance was \$20,369.35, which included unpaid monthly common charges for the months of March, April, and May 2020 (*id.*).

## II. The Parties' Contentions

Defendants contend, *inter alia*, that, in the Underlying Decision, this Court overlooked questions of fact and/or law as to whether Plaintiff properly provided its calculations to support the capital assessment charges and whether the Board had the authority to allocate certain special assessment charges to them, particularly relating to the lobby air conditioning and roof exhaust/decking. With respect to their motion to dismiss, they rely on Doran's email, Engel's affidavit, and Plaintiff's May 2020 Ledger to argue that the documentary evidence shows that the lien amount is willfully overstated and, thus, is void as a matter of law.

In opposition, Plaintiff argues, *inter alia*, that the Board corrected Doran's mistake in its November 21, 2018 letter (Doc 65); it sufficiently substantiated its lien calculations by submitting the June 2018 Board minutes and assessment letter (Doc 21), as well as Plaintiff's Ledgers dated January 1, 2019, and May 01, 2020 Ledger; and that, based on Schaltz's affidavit, as of May 1, 2020, Vertical owed \$19,173/45 to Plaintiff (Doc 16).

In further support of their motion, Defendants' counsel argues, *inter alia*, that Vertical employees did not use the lobby, roof tiles, and/or the roof exhaust.

## III. Standards of Review

CPLR 2221 (d) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR § 2221

(d) [2]). A motion for leave to reargue “is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*William P. Pahl Equip. Corp. v Kassiss*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted], *Iv denied in part, dismissed in part*, 80 NY2d 1005 [1992], *rearg. denied*, 81 NY2d 782 [1993]).

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). “The proponent must do so by tender of evidentiary proof in admissible form” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853 [internal citations omitted]).

#### IV. Legal Conclusions

Defendants establish that, in deciding the underlying motions, this Court overlooked or misapprehended the facts and/or the law in holding that Plaintiff sufficiently demonstrated the manner in which the capital assessment fees were calculated. In order to establish its prima facie entitlement to judgment, a plaintiff moving for summary judgment in an action to foreclose a lien must submit admissible proof of its authority to collect the unpaid charges and demonstrate the manner in which such amounts were calculated (*Bd. of Managers of 229 Condominium v J.P.S. Realty Co.*, 308 AD2d 314, 315 [1st Dept 2003]; *Board of Mgrs. of Natl. Plaza Condominium I v. Astoria Plaza, LLC*, 40 AD3d 564 [2d Dept 2007]; *Board of Mgrs. of W. Amherst Off. Park Condominium v RMFSG, LLC*, 153 AD3d 1611 [4th Dept 2017]). Here, neither Plaintiff’s Ledgers, Schaltz’s affidavit, nor the June 2018 Board minutes and assessment letter provide any

breakdown of the amounts charged to Vertical as part of the capital assessment fees (*Bd. of Managers of 229 Condominium*, 308 AD2d at 315-16; *Board of Mgrs. of Natl. Plaza Condominium I*, 40 AD3d at 564; *Board of Mgrs. of W. Amherst Off. Park Condominium*, 153 AD3d at 1611). Plaintiff's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853).

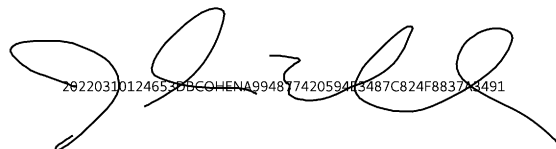
Lien Law § 39 authorizes the court to declare a lien void upon finding that it has been willfully exaggerated (*see* Lien Law § 39-a). The burden is on the defendant to establish that the lien filed by the plaintiff was willfully exaggerated (*see On the Level Enterprises, Inc. v 49 E. Houston LLC*, 104 AD3d 500 [1st Dept 2013]). “[T]he issue of willful or fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition” (*see id.*; compare *Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 393 [1st Dept 2006]). Here, Defendants failed to establish conclusively that Plaintiff willfully exaggerated any part of its lien and, thus, upon reargument, their motion to dismiss is denied as premature (CPLR 3211[a][1]; *On the Level Enterprises, Inc.*, 104 AD3d at 500).

The parties' remaining arguments are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion for reargument by Defendants 125 Vertical Parking Group, LLC and Automotion Parking Systems, LLC is granted and, upon reargument, Plaintiff's motion for summary judgment is denied and Defendants' motion to dismiss is also denied, and this Court's June 25, 2021 order is modified accordingly, and Defendants' motion for reargument is otherwise denied; and it is further

ORDERED that the parties are to appear for a preliminary conference via Microsoft TEAMS on March 15, 2022 at 3:00 PM, with a link to the conference to be sent via a subsequent court notice unless, prior to that day, the parties complete a bar coded preliminary conference form, to be provided by the Part 58 Clerk, and return the same by email to SFC-Part58-Clerk@nycourts.gov at least two business days prior to the scheduled appearance, in which case the conference will be cancelled.



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DAVID B. COHEN, J.S.C.

3/10/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE