

**Board of Mgrs. of Honto 88 Condominiums v Red
Apple Child Dev. Ctr.**

2022 NY Slip Op 31930(U)

June 14, 2022

Supreme Court, New York County

Docket Number: Index No. 651890/2020

Judge: Francis A. Kahn III

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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. FRANCIS KAHN, III PART 32

Justice

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BOARD OF MANAGERS OF HONTO 88 CONDOMINIUMS,

Plaintiff,

INDEX NO. 651890/2020

MOTION DATE _____

MOTION SEQ. NO. 004 005 009

- v -

RED APPLE CHILD DEVELOPMENT CENTER, A
CHINESE SCHOOL, ZIMING SHEN, ZIMING SHEN, FEI
YUAN, EDWARD SHEN, GENXIAN ZHANG, EDWIN SHEN,
SHAO FAN, 25 MARKET STREET CORP.

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 140, 141, 142, 143, 144, 145, 146, 147, 148, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175 were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277 were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, the motions are determined as follows:

This is an action to foreclose on common charges liens under RPL §339-z on twenty-two [22] commercial condominium units located at 60 Henry Street, New York, New York - Unit Nos. A1, A2, A3, A4, A5, B6, B7, B8, C9, C10, C11, C12, D13, D14, D15, E16, E17, E18, E19, F20, F21 and F22. The units are owned by Defendant Red Apple Child Development Center, A Chinese School ("Red Apple"). On March 22, 2020, Plaintiff, Board of Managers of Hondo 88 Condominiums ("Hondo 88"), recorded with the Office of the New York City Register Notice of Liens against each unit in the amount of \$464,941.83. In addition to the above 22 units, which are all the commercial units at the premises, the condominium is also comprised of 74 residential units. Plaintiff commenced the action naming as Defendants Red Apple, seven individuals in their capacities as trustees/officers of Red Apple, and 25 Market Street Corp. ("Market Street"), a mortgagee of the units. Red Apple and all trustees/officers appeared and served separate answers, but all are represented by the same attorney.

Now, Plaintiff moves (Motion Seq. No. 4) to consolidate an action titled *Red Apple Child Development Center, A Chinese School v Board of Managers of Honto 88 Condominium, et al.*, NY Cty Index No. 160331/2021 with this action, for an order of protection pursuant to CPLR §3103, to strike Defendants' answers, to compel Defendants to produce documents and to direct Defendants appear for depositions. Defendants opposed the motion.

Red Apple moves (Motion Seq. No. 5) to strike Plaintiff's complaint for failure to provide discovery, to direct plaintiff to BATES stamp, or by other means, correlate the disclosed documents to each demand contained in Defendant's September 4, 2020 notice for discovery, to grant a protective order against certain discovery demands, to direct an *in camera* inspection by the Court of as to certain documents prior to disclosure and for a hearing on the issue of alleged frivolous conduct by Plaintiff's counsel. Plaintiff moves (Motion Seq. No. 9) for an order correcting the record as to Motion Seq. No. 5 and to designate NYSCEF Doc Nos. 229-231 as opposition thereto. Red Apple consents to this relief on condition that its reply papers (NYSCEF Doc. No. 276) are considered by the Court.

Motion Sequence Number 4

As to the branch of Plaintiff's motion for consolidation, "[a]lthough great deference is to be accorded to the motion court's discretion, it is well settled that there is a preference for consolidation in the interest of judicial economy where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right" (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]).

In the present action, Plaintiff seeks, *inter alia*, to foreclose on a lien for unpaid common charges and, if applicable, a deficiency judgment. Defendant Red Apple pleads eleven [11] counterclaims. Nine of these are plenary claims for declaratory judgment as to the viability of the liens, breach of fiduciary duty, breach of contract, promissory estoppel, abuse of process, injunctive relief and punitive damages. The eighth and ninth counterclaims seek production of Plaintiff's books and records, via declaratory judgment and CPLR Article 78, pursuant to RPL §339-w. In the action to be joined herein, Red Apple pleads two causes of action --for declaratory relief and a judgment pursuant to CPLR Article 78—which seek production of Hondo 88's records related to assessments it made against Red Apple in January and May 2021 which it paid allegedly under protest. Hondo 88 answered in that action. Red Apple's motion for the relief sought in its complaint was denied as premature by order of Justice Paul A. Goetz dated March 29, 2022.

Plaintiff is correct that in an action to foreclose on a lien for common charges it "is entitled to not only the amount claimed in the lien, but also the amount of unpaid common charges and fees that have accrued since the filing of the lien" (*Board of Mgrs. of the Netherlands Condominium v Trencher*, 128 AD3d 452, 453 [1st Dept 2015]). Here, however, since the assessments that are the issue of Red Apple's 2021 action were paid, Plaintiff's foreclosure action does not raise identical issues of fact and law, nor does it concern the potential of same. Further, Red Apple's 2021 action seeks disclosure of Plaintiff's records not invalidation of the charges and discovery is possible even if charges valid (*cf. Board of Mgrs. of*

the 1835 E. 14th St. Condominium v Singer, 186 AD3d 1477 [2d Dept 2020]). Assuming the 2021 action necessitated the assigned court to opine, even just tacitly, on the efficacy of those charges, those findings would have no effect in this action. For example, the charges are found valid, then they are paid. On the other hand, if the charges are found invalid, then they are not recoverable herein. In any event, the 2021 assessments are not, at present, part of Red Apple's counterclaims which were pled in August 2020 and Red Apple does not appear to be claiming continuing damages. As such, Plaintiff's assertion that a "strong possibility" exists of inconsistent rulings is unavailing and the branch of Plaintiff's motion for consolidation is denied.

As to the branches of the motion related to disclosure, in civil litigation in New York, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (see CPLR §3101[a]; *Forman v Henkin*, 30 NY3d 656 [2018]). In other words, discovery in New York is liberal and broad (see *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407 [1968]). This does not mean disclosure is limitless and courts are empowered to oversee discovery and set reasonable terms for its exchange (see generally *Diako v Yunga*, 148 AD3d 438 [1st Dept 2017]; *Elmore v 2720 Concourse Associates, L.P.*, 50 AD3d 493 [1st Dept 2008]). A court's discretion to regulate disclosure is wide (see CPLR §3126; *Forman v Henkin*, supra) and includes the power to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR §3103).

Plaintiff's argument in support of this branch of the motion is supported by exactly two conclusory statements contained in paragraphs ten and eleven. Plaintiff does not even cite boilerplate law in support of its claim that Red Apple's March 18, 2021, response to its demand is inadequate. The letter served by Plaintiff's counsel is equally lacking as it simply identifies which responses are purportedly deficient without explaining the legal basis therefor. The parties are free to chart their own procedural course in the litigation (see *Kass v Kass*, 91 NY2d 554, fn. 5 [1998]). In accordance with this maxim, parties often eschew formal discovery responses and reach amicable and acceptable outcomes. Where, the parties do not act congenially, the procedures under Article 31 of the Civil Practice Law and Rules control. Therefore, absent a formal objection from Plaintiff in proper and an affirmation explaining the precise deficiency in the response, the Court will not sift through copious pages of exchanged documents to determine whether the disclosure was responsive to the demand. It is not the obligation of this to discern Plaintiff's legal basis for its claims.

The branch of Plaintiff's motion for a protective order is supported by marginally more specific arguments but is nonetheless faulty as Plaintiff proffers neither Red Apple's objectionable demand nor any response to same.

Based on the foregoing, the branch of the motion to compel depositions is precipitous.

Motion Sequence Nos. 5 and 9

Plaintiff's motion to correct the record as to Motion Seq. No. 5 and to designate NYSCEF Doc Nos. 229-231 as opposition thereto is granted. Red Apple consented to the relief requested on condition the Court consider its reply to the incorrectly designated opposition.

Rather than declare victory and depart the field, Plaintiff opposed and posited the Court should exclude the reply. Plaintiff's argument is rejected as nonsensical and Red Apple's reply (NYSCEF Doc No 276) will be considered as part of Motion Sequence Number 5.

The branches of Red Apple's motion to dismiss Plaintiff's complaint for failure to disclose documents or produce a witness for deposition is denied. "The nature and degree of the penalty to be imposed pursuant to CPLR §3126 lies within the sound discretion of the Supreme Court" (*Kihl v Pfeffer*, 94 NY2d 118, 122-123 [1999]; *see also Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]). The striking of a pleading may be an appropriate sanction, but only upon a clear showing that the non-compliance was willful or contumacious (*see eg Ewa v City of New York*, 186 AD3d 1195 [2d Dept 2020]). "The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands and/or to comply with discovery orders" (*see Dank v Sears Holding Management Corp.*, 69 AD3d 557 [2d Dept 2010]). Here, no repeated recalcitrance or violation of this Court's orders has been demonstrated.

In the alternative, Red Apple seeks an order compelling Plaintiff to disclose documents that were objected to and to direct Plaintiff to produce a witness for deposition. As noted supra, full disclosure of "all matters material and necessary in the prosecution or defense" of this action is required by all parties (CPLR §3101[a]). The issues relevant in this case are apparent from examination of the parties' evidentiary burdens. For Plaintiff to obtain summary judgment on its foreclosure cause of action, it will be required to, *inter alia*, "submit . . . records to establish the manner in which the outstanding balance was calculated . . . [or] otherwise demonstrate the reliability of the amount it claims was due" (*see Board of Mgrs. of Natl. Plaza Condominium I v Astoria Plaza, LLC*, 40 AD3d 564 [2d Dept 2007]; *see also Board of Mgrs. of W. Amherst Off. Park Condominium v RMFSG, LLC*, 153 AD3d 1611 [4th Dept 2017]). If that burden is met, "defendant must raise a material issue fact as to one of the following: 1) plaintiff acted outside the scope of its authority; 2) plaintiff acted in a way that did not legitimately further the purpose of the condominium; or 3) plaintiff acted in bad faith" (*Board of Mgrs. of the Empire Condominium v Attwood*, ___ Misc3d ___, 2014 NY Slip Op 31279[U][Sup Ct NY Cty 2014]). Also ripe for discovery are issues related to Red Apple's counterclaims for declaratory judgment as to the viability of the liens, breach of fiduciary duty, breach of contract, promissory estoppel, abuse of process and injunctive relief.

Red Apple demonstrated that Plaintiff provided no response to its demands numbered 2, 6, 9, 12, 14, 15 - 24, 27 - 40, 42 - 46, as well as alleging that incomplete responses were provided to demands 47 - 49. Red Apple established that all the demands, except 14, 15, 22, 46 and 49, are relevant to the above claims and counterclaims and require complete responses. Plaintiff's claims of harassment, overreaching and lack of good faith are conclusory and unestablished. That demanded discovery may be voluminous and unwieldy is not a justification for non-disclosure. Plaintiff's claim that the allocation of common, utility and other charges to residential unit owners is not relevant is not explained. Further, the Court is unable to discern how this claim is viable if the commercial and residential unit owners are all part of the same condominium.

Notwithstanding the foregoing, Red Apple's demands numbered 14, 15 and 49 are overly broad. While the calculation of the allocation to other unit owners may be pertinent, the notices served on, cancelled checks received from and bank records related to unit owners, other than Red Apple, are unnecessary. Demand 22 regarding a 2014 action is irrelevant. Request 46 is also overly broad as it conceivably concerns every transaction by Plaintiff for eight years. That some of these records may ultimately be obtained by Red Apple because of an obligation created by some other applicable law (ie. Real Property Law) does not mean they should be turned over in discovery before the counterclaims for declaratory and other relief are adjudicated.

As to the branch of Red Apple's motion for a protective order, "[p]ursuant to CPLR §3103[a], the Supreme Court may issue a protective order precluding disclosure that is palpably improper in that it seeks irrelevant and/or confidential information, or is overly broad and burdensome" (*Arch Ins. Co. v Delric Constr. Co., Inc.*, 174 AD3d 560, 561 [2d Dept 2019] citing *Ural v Encompass Ins. Co. of Am.*, 158 AD3d 845, 847 [2d Dept 2018]). Red Apple posits that Plaintiff's document demands numbered 9, 11, 14, 21, 23 and 25 seek either partially or totally irrelevant records. Specific arguments are offered in support of each.

Red Apple demonstrated that demands 11, 23 and 25 are not relevant to any of the issues in this litigation. Red Apple's records concerning its finances, sharing of counsel between the corporate and individual defendants and familial relationships between Red Apple's trustees do not relate in any meaningful way to Plaintiff's foreclosure action and Red Apple's counterclaims relating to misconduct in the operation of the condominium (*see Helman v Haberman*, 288 AD2d 101 [1st Dept 2001]). Plaintiff's opposition to this branch of Red Apple's motion was entirely conclusory. No explanation of Plaintiff's claim that Red Apple's corporate structure has "significant impact" on the residential unit owners is offered. Demand 21 is potentially viable but is presently overbroad. Demand 9, while on its face is relevant, ceased to be so when the mortgage at issue was satisfied. Demand 14 is also relevant as the physical condition of the units is germane to their value. The market value of the units is related to the sale thereof as well as the extent of any deficiency judgment.

The branch of Red Apple's motion to direct plaintiff to BATES stamp, or by other means, identify the documents disclosed as to how they respond to defendant's September 4, 2020, discovery demand is granted.

The branch of Red Apple's motion that this Court direct an *in camera* inspection of Red Apple's tax returns is denied as moot based on the Court's determination supra.

Accordingly, it is

ORDERED that Plaintiff's motion (Motion Seq No 4) is denied, and it is

ORDERED that Plaintiff's motion (Motion Seq No 5) is granted and the Court's record is corrected to the extent that NYSCEF Doc No 229-231 as well as Document No 276 are designated, respectively, as opposition and reply to Motion Sequence No 5, and it is

ORDERED that Plaintiff shall provide responses to Red Apple's demands numbered 2, 6, 9, 12, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 47 and 48 within 30 days of e-filing of this order, and it is

ORDERED that Red Apple is granted a protective order as to Plaintiff's demands numbered 11, 21, 23 and 25, and it is

ORDERED that Plaintiff shall serve an amended response to Red Apple's document demands numbered 1, 3, 4, 5, 7, 8, 25 and 26, which identifies which documents are responsive to which demands, and it is

ORDERED that the branch of Plaintiff's motion for an *in camera* inspection is denied as moot, and it is

ORDERED that depositions of all parties shall be completed by September 30, 2022, and it is

ORDERED that all parties are to appear for a virtual status conference via Microsoft Teams on **October 27, 2021 at 10:00 am.**

6/14/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
I.S.C.