

**Board of Mgrs. of the Landings at Fresh Cr.  
Condominium v Latta**

2022 NY Slip Op 32362(U)

July 5, 2022

Supreme Court, Kings County

Docket Number: Index No. 521093/2021

Judge: Ingrid Joseph

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At an I.A.S. Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of July 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
THE BOARD OF MANAGERS OF THE LANDINGS  
AT FRESH CREEK CONDOMINIUM, on Behalf  
of All Unit Owners,

Index No.: 521093/2021

Plaintiff,

-against-

DOUGLAS LATTA,

Defendant.

-----X  
The following e-filed papers considered herein:

Notice of Motion/Affidavit/Affirmations/Exhibits A - C \_\_\_\_\_  
Opposing Affidavit/Affirmation \_\_\_\_\_

Papers Numbered  
NYSCEF Doc. 1; 1-4  
NYSCEF Doc. 5 - 12

In this matter, defendant, Douglas Latta (“defendant”), moves by notice of motion (Motion Seq. 1), for an order dismissing the complaint of plaintiff, The Board of Managers of the Landings at Fresh Creek Condominium, on Behalf of all Unit Owners (referred to interchangeably as “the Board” and “plaintiff”).

Plaintiff commenced the instant action by the filing of a Summons and Verified Complaint on August 17, 2021, as representative of all unit owners at Fresh Creek Condominiums, located at 556-630 Louisiana Avenue, Brooklyn, New York 11239 (“the Condominium”). In the Complaint, plaintiff asserts that the Condominiums were created pursuant to a Declaration of Condominium dated June 14, 1991, which encompasses the unit

owned by defendant at 596 Louisiana Avenue, Unit 3, Brooklyn, New York. Plaintiff further asserts that the by-laws of the Condominium provides for the imposition of certain monetary obligations on all unit owners, including the regular payment of common charges and special assessments as determined by the Board. The Complaint is without numbered causes of action; however, at paragraphs 19 and 20, plaintiff alleges that the Condominium unit owners “have been damaged” as a “direct and proximate result of the wrongdoing of [d]efendant,” and further, that the defendant is “liable to the Board in an amount to be determined at trial, but in no event less than the base amount of \$43,408.54” (Defendant’s Exhibit C).

Defendant seeks dismissal of the action pursuant to CPLR § 3211 (a)(1), (a)(5) and (a)(8), based upon documentary evidence, the statute of limitations, and for want of *in personam* jurisdiction, respectively. The defendant argues that the instant matter is duplicative of a residential foreclosure case that was fully litigated and settled as a result of a loan modification. Defendant contends that a predecessor judge endorsed an order discontinuing such foreclosure action on October 4, 2018, which provided, *inter alia*, for a notice of cancellation of lis pendens to be noted upon the margin of the record maintained by the Office of the County Clerk, Kings County. Additionally, defendant argues that he has tendered payments to the Board for common charges on a continuous basis since November 2, 2017, with additional sums ranging from \$100 to \$200 per month. Defendant also asserts that the court lacks jurisdiction, because plaintiff’s process server failed to deliver the pleadings to defendant in-hand, or leave the documents with a person of suitable age and discretion, before resorting to conspicuous service of the complaint. Defendant annexed the following lettered exhibits to his motion: Exhibit A: Order Discontinuing Action and Canceling Lis Pendens (*Nationstar Mortgage LLC v Douglas Latta, Sovereign Bank,*

*Board of Directors of Landings at Fresh Creek Condominium Homeowners Association, et al.*, Index No. 501719/2015, Dear, J.), Notice of Entry (dated 11/13/2018), Print Out: WebCivil Supreme Case Detail; Exhibit B: Payment History of Common Charges, from November 2, 2017 through September 2, 2021; Exhibit C: Copy of Summons and Verified Complaint.

Plaintiff, in opposition to the motion, argues that the defendant failed to state a basis for dismissal upon any of the above grounds. Plaintiff asserts that the 2015 foreclosure proceeding is unrelated to the instant matter and the documents annexed to the defendant's motion papers merely highlight the existence of triable issues of fact. Plaintiff contends that the defendant's arguments concerning personal jurisdiction are conclusory and fail to rebut the presumption of proper service afforded by the Affidavit of Service. Plaintiff also makes the point that the print-out of payments made by the defendant to the Board for common charges do not establish that the defendant made full payment of the amount owed. Plaintiff annexed the affidavit of Vernon Cooper, the General Manager of the Board's managing agent, Prestige Management, Inc., to corroborate the arguments presented in its counsel's affirmation in opposition. Mr. Cooper attests that the ledger provided by plaintiff is accurate and states that his records do not show that the parties entered into a settlement during the foreclosure action that resolved the issue of unpaid common charges and assessments.

Upon consideration, the court finds that the defendant has failed to demonstrate that dismissal is warranted under CPLR § 3211 (a)(1), (a)(5), or (a)(8). Dismissal pursuant to CPLR § 3211 (a)(1) may be granted only if the moving party submits documentary evidence that utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681 [2d

Dept 2017]; *Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]; *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314 [2002]). For evidence to qualify as “documentary,” it must be unambiguous, authentic, and undeniable (see *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]), and items such as judicial records, mortgages, deeds, and contracts, will qualify in the proper case (see *Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d at 682; *Eisner v Cusumano Constr., Inc.*, 132 AD3d 940, 941-942 [2d Dept 2015]).

In this case, the defendant’s purported payment history of common charges/assessments, since 2017, and the order of discontinuance and cancellation of notice of pendency from the foreclosure action, do not conclusively establish that the Board’s claims against him for non-payment were previously raised, litigated, and resolved. Defendant failed to annex a copy of the pleadings from the foreclosure action and consequently, this court is without sufficient documentary evidence to assess whether the Board even asserted a cross claim against the defendant for unpaid common charges/assessments, as both were co-defendants in the foreclosure proceeding. Moreover, the gravamen of a foreclosure action is the non-payment of mortgage installments, while the gravamen of the instant case is the defendant’s alleged failure to pay common charges/assessments in accordance with the By-laws applicable to Fresh Creek Condominium unit owners. In any event, the defendant’s loan modification agreement with his mortgagee, Nationstar, is not included with his motion and consequently, there is no showing that there exists a nexus between the foreclosure action and the issue of whether the defendant has satisfied his obligation to pay common charges and assessments to the Board.

Furthermore, the standard of review for a motion to dismiss requires the court to accept the facts as alleged in the complaint as true and resolve all inferences in favor of the plaintiff

(*Perez v Baez*, 185 AD3d 1062 [2d Dept. 2020]). In the Verified Complaint, plaintiff asserts that the defendant's outstanding balance for common charges and assessments is \$43,408.54. Since that factual assertion must be accepted as true, the defendant must establish that he has remitted payments equal to, or in excess of that amount. Therefore, the forty-seven (47) payments reflected in the defendant's payment history, totaling \$31,178.76, is insufficient as a matter of law.

Additionally, the court finds without merit the defendant's jurisdiction argument pursuant to CPLR § 3211 (a)(8). Under that section, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court has not jurisdiction of the person of the defendant" (CPLR § 3211 (a)(8)). The defendant's argument that the court lacks jurisdiction over him because plaintiff failed to effectuate service by personally delivering the pleadings to him, or by leaving the pleadings with a person of suitable age and discretion, before resorting to conspicuous service, is contradicted by the affidavit of plaintiff's process server.

In the affidavit, plaintiff's process server states that he delivered the notice of electronic filing, Summons and Verified Complaint to the defendant's address at 596 Louisiana Avenue, Unit 3, Brooklyn, New York 1139 to a person of suitable, age and discretion, described as a male, with black hair, of approximately 50 years of age, 5 feet 8 inches tall, and 210 pounds. The process server further states that the individual who accepted the documents refused to provide his full name at the time of service. Plaintiff's process server also states that on September 3, 2021, he mailed an additional copy of the pleadings to the defendant's address. Thus, plaintiff, who has the ultimate burden of proof on the issue of jurisdiction on a pre-Answer motion to dismiss, met its prima facie burden of establishing personal jurisdiction (*see Brandt v.*

*Toraby*, 273 AD2d 429, 430 [2d Dept 2000][ultimate burden of proof rests with plaintiff as the party asserting jurisdiction]). The defendant failed to rebut plaintiff's showing of proper service.

Based upon the foregoing, it is hereby

ORDERED, that the defendant's motion to dismiss (Motion Seq. 1) is denied without prejudice to any of the defenses that may be asserted in his Answer, and it is further

ORDERED, that plaintiff shall file and serve an Amended Complaint upon defendant via United States Postal Service, first-class mail, with certificate of mailing, setting forth the time frame for which plaintiff seeks to recover unpaid common charges and assessments from the defendant, and it is further

ORDERED, that such Amended Complaint, together with a copy of this order with notice of entry, shall be served upon the defendant within thirty (30) days of such entry, and it is further

ORDERED, that the defendant shall interpose an Answer to plaintiff's amended complaint within thirty (30) days of receiving a copy such order in accordance herewith.

This constitutes the decision and order of the court.

ENTER,



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**