

**Department of Env'tl. Protection of the City of N.Y. v  
Board of Mgrs. of the 772 E. 8th St. Condominium**

2022 NY Slip Op 33826(U)

November 7, 2022

Supreme Court, New York County

Docket Number: Index No. 453264/2021

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 41

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

Plaintiffs

Index No. 453264/2021

-against-

DECISION AND ORDER

BOARD OF MANAGERS OF THE 772 EAST 8TH  
 STREET CONDOMINIUM, 774 PROPERTIES LLC,  
 SAMUEL J. SCHELLER, MARILYN SHCELLER,  
 ASHER LESHEM, and SHAYNA LESHEM,

Defendants

-----x  
 LUCY BILLINGS, J.S.C.:

Plaintiffs move for a default judgment against defendant Board of Managers of the 772 East 8th Street Condominium and against the owner of Unit 1 of the Condominium, defendant 774 Properties LLC, C.P.L.R. § 3215, and for summary judgment against the owners of Unit 2, defendants Samuel Scheller and Marilyn Scheller, and the owners of Unit 3, Asher Leshem and Shayna Leshem. C.P.L.R. § 3212(b). Plaintiffs seek \$40,100.55 plus interest and reasonable attorneys' fees against all defendants jointly and individually, for unpaid charges for water and sewage services to the Condominium building at 772 East 8th Street, New York County, from February 7, 2007, to August 13, 2021.

I. THE STATUTE OF LIMITATIONS

Plaintiffs commenced this action October 6, 2021, alleging the implied contractual claims of an account stated and unjust enrichment, to which a limitations period of six years applies. C.P.L.R. § 213(2). Assuming plaintiffs' claims accrued when the charges were billed, the statute of limitations would bar recovery of all charges from February 7, 2007, to October 6, 2015.

Plaintiffs' rate schedule allows customers to dispute water and sewage charges for four years after the date of plaintiffs' bill for the charges. If the court considers that plaintiffs' claims did not accrue until expiration of the dispute period, the statute of limitations still will bar recovery of all charges from February 7, 2007, to October 6, 2011. Then, if the court extends the statute of limitations on this basis, the last four years of charges will not have accrued. Plaintiffs seek charges through August 13, 2021, and also charges that have accrued from that date through entry of any judgment "as may be ascertained by the court," although plaintiffs present no evidence from which charges after August 13, 2021, are ascertainable. Aff. of William J. Cortellessa Ex. A, V. Compl. ¶ 22. Nor is the precise date of entry of the judgment ascertainable. The charges sought during the four years immediately preceding the date of this order awarding a judgment, however, between November 7, 2018, and

November 7, 2022, are ascertainable from November 7, 2018, to August 13, 2021.

While plaintiffs may fare no better according to this calculation in this action, this calculation allows them to commence a future action for the charges accruing after November 7, 2018, in contrast to the former calculation that cuts off the charges before October 6, 2015, and allows plaintiffs to commence a future action for the charges accruing only after August 13, 2021. Therefore the court denies plaintiffs' motion for a default judgment and for summary judgment on their claims for charges before October 6, 2011, and after November 7, 2018.

## II. LATE PAYMENT CHARGES

The individual defendants, who have answered, claim that late payment charges are unsupported, since these defendants never received any bill, despite their requests for bills. Plaintiffs' rate schedule permits plaintiffs to bill for services as long as they were provided to defendants' property, and a "billing transaction . . . was posted to the records" maintained by either plaintiff or by the New York City Department of Finance, even if:

a paper bill(s) was not provided, or . . . the U.S. Postal Service failed to deliver a bill(s), or . . . the owner's name or address was incorrectly recorded in the billing records with the result that the bill(s) was not received or was forwarded to an incorrect party or to an incorrect address.

Aff. of Kayetrina Murchison Ex. 3 pt. VI § 7, at 42. See

Thompson Third Co. v. City of New York, 279 A.D.2d 108, 114 (1st Dep't 2000). Plaintiffs' failure to transmit a bill to defendants thus does not relieve them of the obligation to pay the charges, but also does not necessarily justify plaintiffs' imposition of late payment charges. Bluebird Realty Corp. v. Department of Env'tl. Protection of City of N.Y., 300 A.D.2d 6, 7 (1st Dep't 2002). Defendants may not be expected to pay charges they are unaware of or be penalized for nonpayment of such charges.

Plaintiffs' witness establishes that plaintiffs posted the billing transactions to plaintiffs' records, but nowhere indicates that plaintiffs transmitted any bills to defendants. She attests neither that she mailed or otherwise delivered bills to defendants or that plaintiffs followed a regular business procedure for mailing or delivering the bills to defendants. Hess 936 St. Nicholas Judgment LLC v. 936-938 Cliffcrest Hous. Dev. Fund Corp., 206 A.D.3d 514, 514-15 (1st Dep't 2022); U.S. Bank Trust, N.A. v. Stewart, 193 A.D.3d 473, 473 (1st Dep't 2021); U.S. Bank Trust, N.A. v. Calhoun, 190 A.D.3d 625, 626 (1st Dep't 2021); Wells Fargo Bank, N.A. v. Merino, 173 A.D.3d 491, 491 (1st Dep't 2019).

In any event, plaintiffs calculate "Late Payment Charges" by multiplying the delinquent charges by an annual interest rate. Murchison Aff. Ex. 3 pt. VI § 3, at 41. Late payment charges

thus duplicate plaintiffs' request for and the court's award of interest on the water and sewage charges owed. Therefore the court limits the award to the water and sewage charges, exclusive of the late payment charges, between October 6, 2011, and November 7, 2018: an award of \$26,791.27.

### III. INTEREST AND JOINT AND INDIVIDUAL LIABILITY

The individual defendants maintain that they are not liable for late payment charges or interest because they always have shown their willingness to pay their share of these condominium common expenses ever since learning of the charges. Even if defendants never received a bill, they still admit that they received water and sewage services without paying for them, so that plaintiffs are entitled to interest from the time each expense was incurred or from a reasonable intermediate date. C.P.L.R. § 5001(a) and (b); Trumbull Equities LLC v. Mt. Hawley Ins. Co., 191 A.D.3d 587, 587 (1st Dep't 2021).

New York Real Property Law (RPL) §§ 339-e(5) and 339-1(2), moreover, provide that condominium unit owners hold an "undivided" proportionate interest in the condominium common elements, RPL § 339-e(5), such as building-wide water and sewage services, RPL § 339-e(3), and thus owe an undivided proportionate share of the common expenses for those services. RPL § 339-e(4)(a). See Jerdonek v. 41 W. 72 LLC, 143 A.D.3d 43, 47 & n.2, 49, 51 (1st Dep't 2016). This collective obligation pertains

particularly where, as here, it concerns each individual unit, Jerdonek v. 41 W. 72 LLC, 143 A.D.3d at 48, and, as the answering defendants acknowledged, no functioning and adequately capitalized board of managers has divested the unit owners of the responsibilities of ownership attendant to the common elements. Id. at 49-50, 51 & n.5. Real Property Law § 339-i(2) specifies that condominium "common elements shall remain undivided and no right shall exist to partition or divide any thereof . . . . Any provision to the contrary shall be null and void." If the unit owners' interests and liabilities related to those interests were divisible, the statutory term "undivided" would be meaningless. Therefore each unit owner is jointly and individually liable for the amount owed by the whole Condominium.

Nevertheless, the individual owners of Units 2 and 3 insist that these two sets of owners may cross-claim against the third unit owner, non-answering defendant 774 Properties, for 40% of the common charges, based on a written agreement among the unit owners that the owner of Unit 1 would pay 40%, and the owners of Unit 2 and of Unit 3 each would pay 30%. At the hearing on plaintiffs' motion September 9, 2022, the court granted the individual answering defendants permission to submit this written agreement, but instead the Scheller defendants alone submitted only their deed to their unit, which plaintiffs had submitted in support of their motion. The deed provides that the Schellers

own an "undivided 30% interest" in the Condominium building's common elements. Cortellessa Aff. Ex. E, at 9. This provision parallels RPL § 339-e(5) and the related statutory provisions cited above, which prohibit division of common elements and allow plaintiffs to seek the common expenses owed to plaintiffs from any one of the Condominium's unit owners. Since the other unit owners' deeds that plaintiffs also submitted provide similarly regarding the other units owners' percentage interests, these deeds, too, only support plaintiffs' right to seek the unpaid common expenses from any one of the unit owners.

Moreover, the answering defendants have not served any cross-claim on each other or on the non-answering defendants. Any defendant remains free to commence a separate action against other unit owners for their proportionate share of the amount for which that defendant has been held liable.

#### IV. ATTORNEYS' FEES

In requesting attorneys' fees pursuant to New York Public Authorities Law § 1045-j(5), plaintiffs fail to adhere to the "settled" rule that an award of attorneys' fees must be predicated on an affidavit of the services that the attorneys rendered in achieving their clients' success. Bankers Fed. Sav. Bank v. Off W. Broadway Developers, 224 A.D.2d 376, 378 (1st Dep't 1996). See Abe v. New York Univ., 190 A.D.3d 543, 543 (1st Dep't 2021); Zacharius v. Kensington Publ. Corp., 167 A.D.3d 452,

453 (1st Dep't 2018); 1199 Hous. Corp. v. Jimco Restoration Corp., 77 A.D.3d 502, 503 (1st Dep't 2010); Paganuzzi v. Primrose Mgt. Co., 268 A.D.2d 213, 213 (1st Dep't 2000). Otherwise the court does not possess an adequate basis to assess the reasonable value of the legal services rendered. See JK Two LLC v. Garber, 171 A.D.3d 496, 496-97 (1st Dep't 2019).

In determining reasonable attorneys' fees, the court must consider the time and labor required; the difficulty of the issues involved; the skill required to handle the issues presented; the responsibility involved; the attorneys' experience, ability, and reputation; the benefit to plaintiffs from the services; the results obtained; the customary fee charged for similar services; and the contingency or certainty of compensation. Matter of Freeman, 34 N.Y.2d 1, 9 (1974); JK Two LLC v. Garber, 171 A.D.3d at 496; Gordon v. Verizon Communications, Inc., 148 A.D.3d 146, 165 (1st Dep't 2017); Bankers Fed. Sav. Bank v Off W. Broadway Devs., 224 A.D.2d at 378. Plaintiffs present no account of the specific legal services rendered, time spent, or rates charged attributable to recovery of approximately 66% of the recovery sought, to support an award of reasonable attorneys' fees incurred by prevailing parties. See N.Y. Pub. Auth. Law § 1045-j(5).

V. CONCLUSION

For the reasons explained above, the court grants plaintiffs' motion for a default judgment against defendants Board of Managers of the 772 East 8th Street Condominium and 774 Properties LLC, C.P.L.R. § 3215, and for summary judgment against defendants Samuel Scheller, Marilyn Scheller, Asher Leshem, and Shayna Leshem, C.P.L.R. § 3212(b), jointly and individually, for \$26,791.27. The court awards interest on this amount at 9% per year from April 24, 2015, the midpoint between October 6, 2011, and November 7, 2018. C.P.L.R. §§ 5001(a) and (b), 5004; Trumbull Equities LLC v. Mt. Hawley Ins. Co., 191 A.D.3d at 587. The court otherwise denies plaintiffs' motion, without prejudice to a future action against defendants for water and sewage services since November 7, 2018.

DATED: November 7, 2022

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
**J.S.C.**