

**Board of Mgrs. of 444 E. 57th St. Condominium v
Maccioni**

2023 NY Slip Op 31685(U)

May 18, 2023

Supreme Court, New York County

Docket Number: Index No. 156528/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

September 30, 2022, the Court denied Maccioni's motion to dismiss but granted his cross-motion seeking to extend his time to Answer (NYSCEF Doc. 45). Defendant then filed an Answer with counter claims.

On January 13, 2023, Plaintiff filed the instant motion for summary judgment (NYSCEF Doc. 49). Plaintiff seeks dismissal of Maccioni's affirmative defenses, dismissal of Defendant's counterclaims, default judgment against the John Doe and Jane Doe Defendants, and appointment of a referee pursuant to RPAPL § 1321 to compute the amount due from Maccioni to Plaintiff. Plaintiff argues summary judgment is appropriate because it is undisputed that Maccioni failed to pay his common charges and the by-laws authorize Plaintiff to foreclose on its statutory lien for unpaid common charges (NYSCEF Doc. 50 at ¶ 2). Plaintiff also argues that the affirmative defenses and counterclaims pled by Maccioni are conclusory, inapplicable, and without merit.

On February 3, 2023 Defendant Maccioni filed an affirmation in opposition (NYSCEF Doc. 57). Maccioni argues that Plaintiff has failed to meet its prima facie burden because the affidavit in support of its motion fails to lay a proper evidentiary foundation. Maccioni also argues that because there is another pending action for a money judgment against him, RPAPL § 1301(4) bars the commencement of a second action while a prior action is pending.¹

Plaintiff filed its reply on February 9, 2023 (NYSCEF Doc. 58). Plaintiff argues that Maccioni's arguments regarding the admissibility of its proofs is contrary to precedent. Plaintiff also argues that Maccioni's interpretation of RPAPL § 1301(4) is misplaced, as that statute only applies to foreclosing on mortgages, and this is an action which seeks to foreclose on a lien. Moreover, Plaintiff cites to RPL §339-aa, which permits an action to recover a money judgment for unpaid common charges without foreclosing or waiving the lien securing the same.

¹ The money judgment action is *Board of Managers of 444 East 57th Street Condominium v Mauro Maccioni*, Sup. Ct., New York Co., Index No: 155402/2020. That action remains unresolved as of the date of this Decision.

II. Discussion

A. Dismissal of Affirmative Defenses

The standard of review on a motion to dismiss pursuant to CPLR § 3211(b) is similar to that used under CPLR §3211(a)(7) (*87th Street Realty v Mulholland*, 62 Misc3d 213, 215 [Civ Ct, New York City 2018]). The movant bears the burden of establishing the defense or counterclaim is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). This burden is a heavy one (*Alpha Capital Anstalt v General Biotechnology Corporation*, 191 AD3d 515 [1st Dept 2021]). The allegations in the answer must be liberally construed and viewed in the light most favorable to the non-movant (*182 Fifth Ave v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]). However, conclusory and boilerplate affirmative defenses should be dismissed (*Bankers Trust Co. v Fassler*, 49 AD2d 855[1st Dept 1975]; *366 Audubon Holding, LLC v Morel*, 22 Misc.3d 1108[A] [Sup. Ct., NY County 2008]).

The first affirmative defense, which alleges improper service has been waived as Maccioni failed to raise it in a motion to dismiss pursuant to CPLR 3211(e). Indeed, Maccioni has not even raised it as a defense in opposition to the pending motion.

The second affirmative defense alleges unclean hands in incorrectly computing the amount owed. However, this affirmative defense is conclusory and boilerplate. Indeed, there are no substantiated allegations as to how the amount calculated is incorrect proffered in opposition to this motion. Moreover, to the extent the amount is in dispute, that is left to a referee to compute and to address, and is no bar to granting summary judgment. Therefore, this affirmative defense is dismissed.

The third affirmative defense claims that this action is barred by applicable state and federal law. However, Maccioni fails to address what state and federal law bar Plaintiff from commencing

this action. If Maccioni is referring to RPAPL § 1301, the express statutory language of this statute states it only applies to mortgage foreclosures, while this is an action to foreclose on a lien of unpaid common charges. Therefore, RPAPL § 1301 is no bar to commencement of this action (*see also Deutsche Bank Natl. Trust Co. v Gould*, 189 AD3d 576 [1st Dept 2020]). Indeed, all case law applying RPAPL § 1301 involves banks attempting to foreclose on mortgages, not the situation here, which involves a condominium board attempting to recoup common charges. Moreover, as Plaintiff argues, RPL §339-aa, which governs condominiums such as the one at issue here, expressly allows for maintenance of an action seeking a money judgment on a lien for common charges while also bringing an action to foreclose on that lien. That law states “[s]uit to recover a money judgment for unpaid common charges shall be maintainable without foreclosing or waiving the lien securing the same, and foreclosure shall be maintainable notwithstanding the pendency of suit to recover a money judgment.” Thus, as RPL §339-aa expressly renders RPAPL § 1301 inapplicable, and Maccioni has not raised any other statutes which bar this action, the third affirmative defense is dismissed as a matter of law.

The fourth affirmative defense alleges “Defendant’s actions were in all respects proper and same are a complete defense to the allegations.” However, Defendant does not explain in opposition to this motion how his failure to pay for common charges was at all proper. Defendant has not even submitted an affidavit in opposition. Therefore, this affirmative defense is dismissed as conclusory and boilerplate.

The fifth affirmative defense alleges “Plaintiff has breached any agreement between the parties and is therefore not entitled to recover any damages.” To sufficiently allege breach of contract, the specific provisions which were breached must be alleged (*Sud v Sud*, 211 AD2d 423

[1st Dept 1995]). Here, no such provisions are identified, nor were any identified in opposition to this motion, and therefore this affirmative defense is dismissed.

The sixth affirmative defense alleges a defense based upon res judicata, statute of frauds, usury, and collateral estoppel. The seventh affirmative defense claims Plaintiff violated New York State General Obligations Law and New York State General Business Law. The ninth affirmative defense claims that “[a] defense in founded [sic] upon documentary evidence, therefore the action must be dismissed in its entirety.” The tenth affirmative defense claims Plaintiff lacks standing. The eleventh affirmative defense asserts the statute of limitations bars this action. The twelfth affirmative defense alleges failure to state a claim. The fifteenth affirmative defense claims Plaintiff failed to mitigate its damages but does not explain how Plaintiff could have mitigated its damages which allegedly stem from Defendant’s failure to pay common charges. The sixteenth affirmative defense merely claims that Plaintiff failed to comply with contractual conditions precedent prior to commencing this action but does not state what conditions were not complied with. The seventeenth affirmative defense claims that Plaintiff failed to join a necessary party but does not state what party is necessary that is not joined. The eighteenth affirmative defense states in conclusory fashion that Plaintiff violated the New York State Lien Law and New York State Condominium Act but fails to state how Plaintiff violated those laws.

These defenses are all a mere sentence long and fail to provide any details. They are mere legal conclusions. Moreover, no details as to these defenses were asserted in opposition to the motion. Therefore, they are dismissed as boilerplate and conclusory (*366 Audubon Holding, LLC v Morel*, 22 Misc.3d 1108[A] [Sup. Ct., NY County 2008]). They are also abandoned as their dismissal has not been addressed in opposition (*Joon Song v MHM Sponsors Co.*, 176 AD3d 572

[1st Dept 2019]; *Wing Hon Precision Indus. Ltd. v Diamond Quasar Jewelry, Inc.*, 154 AD3d 550, 551 [1st Dept 2017]).

The thirteenth affirmative defense is not a defense but merely gives notice that Defendant may rely on other defenses that may become available during discovery. The fourteenth affirmative defense claims that Plaintiff violated the condominium declaration and by-laws by failing to give notice of the amounts due, however, an accounting was purportedly provided (NYSCEF Doc. 8) on July 12, 2021. Moreover, Maccioni has failed to provide any additional facts about Plaintiff's failure to provide notice in violation of the by-laws in opposition to the instant motion. Maccioni does not even submit a personal affidavit in opposition to the motion. Therefore, this affirmative defense can be considered abandoned.

B. Dismissal of Counterclaims

Dismissal of Maccioni's counterclaims is also appropriate. Maccioni's first counterclaim alleges he was not given a proper accounting of the amounts due prior to demanding payment. However, this is flatly contradicted by the monthly statements sent to Maccioni of amounts due (see e.g. NYSCEF Doc. 53). Moreover, the bylaws which Maccioni claims he requested but did not receive are (a) listed multiple times as exhibits on NYSCEF and (b) publicly recorded documents. Finally, while Defendant alleges he is unable to determine the legitimacy of Plaintiff's charges², at issue on this summary judgment motion is not the total amount owed by Defendant, but rather if there is any amount owed that warrants foreclosing on the lien. Indeed, as Plaintiff asserts, it is for the referee who may be appointed to determine the total amounts due and owing. Therefore, the counterclaim is dismissed and serves as no bar to a grant of summary judgment.

² The Court finds this allegation dubious at best considering Plaintiff was provided with monthly statements.

Finally, dismissal of Maccioni's claims for attorneys' fees is likewise appropriate. Not only has Maccioni failed to proffer any contractual provision, statute, or rule which would authorize an award of attorneys' fees, but as explained below, summary judgment is granted to Plaintiff, and therefore Maccioni is not the prevailing party in this action.

C. Plaintiff's Motion for Summary Judgment

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

Although Maccioni argues that Plaintiff has not met its burden of proof because the evidence submitted is inadmissible, the Court disagrees (*see Board of Mgrs. Of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]). Here, the affidavit of an officer of Plaintiff's property manager provided an adequate foundation to admit the monthly statement and ledger as business records (*see* NYSCEF Docs. 51 and 53-54). The Second Department cases, which Maccioni solely relies on, are not binding on this Court, and are otherwise distinguishable as those cases dealt with standing to foreclose on a mortgage, which is not at issue here. Maccioni's

remaining contentions regarding the admissibility of the Deed and the Condominium documents are likewise without merit.

As such, Plaintiff has met its prima facie burden on summary judgment. Plaintiff has shown that there is an underlying debt in the form of unpaid common charges which warrants foreclosure on the lien. Defendant has failed to even submit an affidavit in opposition. Summary judgment is therefore appropriate.

D. Default Judgment against John Doe and Jane Doe Defendants

The branch of Plaintiff's motion which seeks to enter default judgment against Defendants John Doe and Jane Doe is granted to the extent there is anyone living in the Premises other than Maccioni. The requirements of CPLR 3215, including proof of service and proof of acts constituting the claim have been met, therefore default as to these defendants is appropriate.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion is granted in its entirety, and Plaintiff is granted partial summary judgment on the issue of liability, with the full amount of damages to be determined by a referee, and the defendant's counterclaims and affirmative defenses are dismissed; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of the amount due to the plaintiff for unpaid common charges, assessments, late fees, interest, and attorneys' fees pursuant to RPL § 1321; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above;

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until

completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that the Defendants John Doe and Jane Doe are now in default, and Plaintiff is granted judgment as to liability to the John Doe and Jane Doe Defendants; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF and first-class mail.

This constitutes the Decision and Order of the Court.

<u>5/18/2023</u>		<u>Mary V Rosado JSC</u>	
DATE		HON. MARY V. ROSADO, J.S.C.	
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