

**Board of Mgrs. of the 491-497 Greenwich St.
Condominium v Inchauspe**

2023 NY Slip Op 32739(U)

August 2, 2023

Supreme Court, New York County

Docket Number: Index No. 153737/2022

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III **PART** **32**

Justice

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INDEX NO. 153737/2022

THE BOARD OF MANAGERS OF THE 491-497
GREENWICH STREET CONDOMINIUM, SUING ON
BEHALF OF THE UNIT OWNERS,

MOTION DATE _____

MOTION SEQ. NO. 001

Plaintiff,

- v -

GABRIEL INCHAUSPE, BRIGITTE BRANCONNIER,
WELLS FARGO BANK NA, ANTONIO INCHAUSPE, NEW
YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, JEREMY SISTO, JOHN DOE, JANE DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGEMENT – ORD. OF REF.

Upon the foregoing documents, the motion is determined as follows:

Plaintiff commenced this action to foreclose on a lien for common charges encumbering a condominium unit located at 491 Greenwich Street, Unit #4 (2C), New York. Defendant Wells Fargo Bank NA, an alleged lienor, answered and pled eighteen affirmative defenses. Defendants Gabriel Inchauspe and Brigitte Branconnier, the unit owners, answered and pled six affirmative defenses.

Now, Plaintiff moves for summary judgment against the appearing parties, a default judgment against the non-appearing parties, striking the appearing parties’ answer and affirmative defenses, appointing a referee to compute, and amending the caption. Defendants Gabriel Inchauspe and Brigitte Branconnier opposed the motion. Defendant Wells Fargo also opposed the motion and cross-moved to dismiss the complaint as against it. Subsequently, that motion was withdrawn, and the action discontinued as to Wells Fargo (NYSCEF Doc Nos 54-55).

With respect to the cause of action for foreclosure of the lien for common charges, Real Property Law §339-aa provides that such a claim “may be foreclosed by suit authorized by and brought in the name of the board of managers, acting on behalf of the unit owners, in like manner as a mortgage of real property” (*see Board of Mgrs. of the Parkchester N. Condominium v. Alaska Seaboard Partners Ltd. Partnership*, 37 AD3d 332 [1st Dept 2007]). In a foreclosure action, a Plaintiff moving for summary judgment, must establish a *prima facie* case exists to foreclose (*see U.S. Bank, N.A., v James*, 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]) with proof in evidentiary form (*see CPLR §3212[b]*; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]).

In an action to foreclose on a common charge lien, Plaintiff must submit proof of its “authority to collect common charges from the owners of units and, in the event of nonpayment, to add late fees, interest, attorneys’ fees and other costs of collection to the assessment” (*Board of Mgrs. of W. Amherst Off. Park Condominium v*

RMFSG, LLC, 153 AD3d 1611 [4th Dept 2017]). In addition, Plaintiff must demonstrate the reliability of or how the amounts were calculated (*see Board of Mgrs. of Natl. Plaza Condominium I v. Astoria Plaza, LLC*, 40 AD3d 564 [2d Dept 2007]).

Here, Plaintiff demonstrated with the affidavit of Ashley Brun (“Brun”), the Assistant Secretary of Plaintiff, its authority to collect common charges and that its method of calculation was reliable. As such, Plaintiff demonstrated, *prima facie*, its entitlement to summary judgment on its foreclosure cause of action.

In opposition, Defendants’ claim the lien is invalid is without merit. Brun’s endorsement on the lien is entitled to a presumption of regularity (*see generally JPMorgan Chase Bank, Natl. Assn. v Newton*, 203 AD3d 902, 905 [2d Dept 2022]) and Defendants have not proffered anything other than speculation to support that Brun was without authority to act on behalf of Plaintiff. In any event, Plaintiff submitted evidence of Brun’s status as Assistant Secretary when the lien was signed. Defendants’ argument concerning the amount due is not a defense to summary judgment and can be addressed during the reference (*see 1855 E. Tremont Corp. v Collado Holdings LLC*, 102 AD3d 567 [1st Dept 2013]). Further, Defendants’ reliance on section 202.8-g of the Uniform Rules for Trial Courts [22 NYCRR] is misplaced as that section was amended effective July 1, 2022, some four months before this motion was filed, to state that “the court *may* direct” the submission of a statement of material facts, which was not done here.

As to the branch of the motion to dismiss Defendants’ affirmative defenses, as pled, all the affirmative defenses are entirely conclusory and unsupported by any facts in the answer. As such, these affirmative defenses are nothing more than unsubstantiated legal conclusions which are insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that specific legal arguments were not proffered in support of any affirmative defense, those defenses were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

The branch of Plaintiff’s motion for a default judgment against the non-appearing parties is granted (*see* CPLR §3215; *SRMOF II 2012-1 Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff’s motion to amend the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff’s motion for a summary judgment against the appearing Defendants is granted; and it is further

ORDERED that the branches of the motion for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that the cross-motion is denied as moot; and it is

ORDERED that **Elaine Shay, Esq., 800 3rd Avenue, Ste. 2800, New York, New York 10022 (212) 520-2690** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that they are in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee’s usual and customary hourly rate; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff’s submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff’s failure to move this litigation forward; and it further

ORDERED that the caption of this action shall be amended by striking therefrom the names “John Doe” and “Jane Doe” as unnecessary party Defendants herein, and amending the caption to reflect same, all without prejudice to the proceedings already had herein; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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THE BOARD OF MANAGERS OF THE 491-497 GREENWICH
STREET CONDOMINIUM, suing on behalf of the unit owners,

Index no: 153737-2022

Plaintiff,

-against-

GABRIEL INCHAUSPE, BRIGITTE BRANCONNIER, WELLS
FARGO BANK NA, ANTONIO INCHAUSPE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, JEREMY SISTO

Defendants.
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and it is further

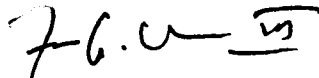
ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **December 7, 2023, at 10:00 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

8/2/2023
DATE


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

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED
<input checked="" type="checkbox"/>	GRANTED
<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE: