

**206 E. 124th St. Condominium v Brooklyn
Neighborhood Devs., LLC**

2024 NY Slip Op 31810(U)

May 17, 2024

Supreme Court, New York County

Docket Number: Index No. 651376/2022

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC

PART 36

Justice

-----X

INDEX NO. 651376/2022

206 EAST 124TH STREET CONDOMINIUM, BOARD OF MANAGERS,

MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION + ORDER ON MOTION

BROOKLYN NEIGHBORHOOD DEVELOPERS, LLC,
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for

SUMMARY JUDGMENT

The relevant facts in this case are detailed in the court’s decision and order dated January 3, 2024 (NYSCEF Doc. No. 51, *decision and order*). In summary, this case concerns allegations that defendant — the owner of five units (units A, B, C, D, and 4B) at the condominium of which plaintiff is the Board of Managers — has failed to pay common charges and assessments in violation of the terms and conditions of the condominium’s by-laws. Defendant allegedly collects rent from the tenants who occupy its units. Plaintiff asserts claims based on breach of contract and unjust enrichment against defendant (NYSCEF Doc. No. 2, *complaint*). In its answer, defendant asserts twenty (20) affirmative defenses (NYSCEF Doc. No. 7, *answer*).

Plaintiff now moves, pursuant to CPLR 3211(b), for an order dismissing defendant’s affirmative defenses; for an order, pursuant to CPLR 3212, granting plaintiff summary judgment on its complaint as against defendant, or, alternatively, an order, pursuant to Real Property Law Section § 339-kk (“RPL § 339-k”), permitting plaintiff to directly collect rent paid by defendant’s tenants to satisfy defendant’s ongoing common charge obligations or to offset defendant’s arrears pending the resolution of this action (NYSCEF Doc. No. 32, *notice of motion*). Plaintiff argues that defendant’s affirmative defenses should be dismissed insofar as they are bald allegations and merely conclusory. Specifically, plaintiff contends that even though the sixteenth and seventeenth affirmative defenses state that plaintiff committed a trespass violation and constructive eviction when it erected a pipe in Unit D, the condominium by-laws do not permit defendant to withhold payment of common charges under such circumstances (NYSCEF Doc. No. 33, *plaintiff’s memo*, ¶19-28). In addition, defendant’s eighteenth affirmative defense for breach of the warranty of habitability does not lie, asserts plaintiff, because such a defense is not extended to owners of condominium units. Concerning the common charges and assessment amount due and owing, plaintiff maintains that it has established defendant’s liability by way of unit ledgers submitted (NYSCEF Doc. No. 38, *unit ledgers*). Lastly, plaintiff contends that should the court deny summary judgment in its favor, the court should issue an order compelling defendant to direct his tenants to pay their rent directly to

the condominium pursuant to RPL § 339-k because defendant has outstanding common charges, assessments, and fees even after the grace period afforded to it expired. Plaintiff furnishes the affidavit of its managing agent, Hasan Mati (“Mati”), who avers that defendant was sent monthly invoices with respect to each of the five units for the amounts due, but that defendant is not current on the payments. Mati posits that although defendant paid the base common charge amount from June 2023 through October 2023, it did not include the special assessments, fines, and late fees for any of the units. According to Mati, defendant’s outstanding balance for common charges, special assessments, fines, and late fees for the units are as follows: \$47,322.62 (Unit A); \$26,305.97 (Unit B); \$42,448.25 (Unit C); \$26,742.82 (Unit D); and \$30,969.00 (Unit 4B), collectively, totals \$173,788.66 as of October 10, 2023 (NYSCEF Doc. No. 41, *Mati affidavit*).

In opposition, defendant argues that plaintiff’s motion is premature because there is outstanding discovery demands that plaintiff has yet to respond. Defendant also asserts that plaintiff constructively evicted it from its property by erecting a structure, including piping, that substantially interfered with its use and enjoyment of unit D.¹ Hence, it maintains that it is entitled to withhold rent and payment of other charges when actions undertaken by plaintiff are unlawful. Furthermore, defendant claims that there are disputed issues of material fact as to the outstanding common charges as it has been paying all common charges since April 2023, which Mati’s affidavit fails to reflect. Defendant set forth that relief pursuant to RPL § 339-kk is evaluated under the preliminary injunction standard, a standard plaintiff is unable to meet on this application; thus, defendant maintains that the request that its tenants pay rents directly to plaintiff should be denied (NYSCEF Doc. No. 43, *Seddio affirmation in opposition*). Lastly, defendant notes that the market value of the units is sufficient security for plaintiff’s lien, as the total value of the units should be approximately \$2,260,000.00. In support of this point, defendant submits an appraisal of the five units based on a comparative market analysis done by Corcoran, a real estate company (NYSCEF Doc. No. 50, *appraisals*).

Plaintiff does not submit a reply.

CPLR 3211(b) states that “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” The plaintiff bears the burden of showing that the affirmative defenses asserted by defendant is without merit as a matter of law when moving to dismiss them pursuant to CPLR 3211(b) (see *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed (see *Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015]).

It is well-settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

¹ Defendant asserts that it has learned that plaintiff has removed the pipes at issue from Unit D.

Once this showing has been 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 of the action or show that “facts essential to justify opposition may exist but cannot [now] be stated.” (CPLR 3212[f]; *see Zuckerman*, 49 NY2d at 562).

To prevail on a breach of contract claim, a plaintiff must establish each of the following four elements: existence of a valid contract; plaintiff’s performance of the contract; defendant’s material breach of the contract; and damages (*see Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303, 306 [1st Dept 2004]).

Real Property Law § 339-kk(b) states that “[i]f a non-occupying owner rents any dwelling unit to a rental tenant and then fails to make payments due for common charges, assessments or late fees for such unit within sixty days of the expiration of any grace period after they are due, upon notice in accordance with subdivision (c) of this section, all rental payments from the tenant shall be directly payable to the condominium association.”

Addressing first that branch of the motion seeking to dismiss the affirmative defenses, the court grants that portion of plaintiff’s motion seeking to dismiss the affirmative defenses except as to the seventeenth affirmative defense of trespass as it relates to Unit D. “Trespass is the invasion of a person’s right to exclusive possession of his land and includes the entry of a substance onto land” (*Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012]). Defendant has alleged that plaintiff trespassed when it installed an obstructive pipe in Unit D, despite repeated requests that it not be done. Plaintiff does not oppose or rebut the allegation that the said piping was installed in Unit D. Concerning the constructive eviction claim (sixteenth affirmative defense), it has been held by the Court of Appeals that “... constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord’s wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises” (*Barash v Pennsylvania Terminal Real Estate Corporation*, 26 NY2d 77, 83 [1970]). It has also been held that there is no landlord-tenant relationship between the condominium board of managers and a condominium unit owner (*see Frisch v Bellmarc Management, Inc.*, 190 AD2d 383, 389 [1st Dept 1993]), and a constructive eviction claim can only be asserted against a landlord (*see 905 5th Assoc., Inc. v 907 Corp.*, 47 AD3d 401, 403 [1st Dept 2008]). There is no allegation that there is a landlord-tenant relationship between the parties, and defendant does not reside in Unit D as a tenant, but rather rents the unit out to prospective tenants. Therefore, the constructive eviction affirmative defense is not viable.

In addition, defendant’s claim that it is entitled to withhold payment of common charges based on a purported violation of the warranty of habitability (eighteenth affirmative defense), is unavailing. “The statutory warranty of habitability prescribed by Real Property Law § 235-b does not extend to condominium unit owners” (*Hyman v Able & Ready Appliance Repair Corp.*, 193 AD3d 509, 510 [1st Dept 2021], citing *Frisch*, 190 AD2d at 390 [1st Dept 1993]; *Linden v. Lloyds Planning Serv.*, 299 AD2d 217, 218 [1st Dept 2002]). Insofar as defendant has not addressed that branch of plaintiff’s motion seeking dismissal of the remaining affirmative defenses, they are deemed abandoned (*see Wing Hon Precision Indus. Ltd. v Diamond Quasar*

Diamond Quasar Jewelry, Inc., 154 AD3d 550, 551 [1st Dept 2017]; *Carey & Assoc. LLC v 521 Fifth Ave. Partners, LLC*, 130 AD3d 469, 470 [1st Dept 2017]). Furthermore, those affirmative defenses asserted by defendant are conclusory statements and bald allegations without recitation of any facts as required by CPLR 3018[b] and 3013 (see *Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453, 453 [1st Dept 2009]).

Next, as to the breach of contract causes of action (one through five), plaintiff has met its *prima facie* entitlement to summary judgment by submitting, among other things, copies of the condominium by-laws, rent demand, unit ledgers, and Mati's affidavit explaining how the outstanding amounts were calculated for the units. Specifically, Article VI, § 4 of the condominium by-laws entitled "collection of common charges and assessments" states that plaintiff shall assess common charges and take prompt action to collect any common charges due from a unit owner which remains unpaid for more than thirty (30) days. In addition, Article VI, § 3 states, in relevant part, that "all unit owners shall be obligated to pay common charges assessed by the Board" (NYSCEF Doc No. 34, *Condominium By-laws*). As the burden shifts, defendant fails to provide any proof in support of its claim that there are disputed issues of material fact as to the outstanding amounts as listed in the unit ledgers, except as to Unit D. While defendant does not adduce proof that any of its payments are not reflected in the unit ledger or that the unit ledger was not properly calculated, it has been found above that there is an issue of fact as to the amount sought in connection with Unit D since plaintiff allegedly installed a pipe therein without consent. Plaintiff sought \$26,742.82 as the amount due and owing in connection with Unit D. The total amount sought of \$173,788.66 less \$26,742.82 equals \$147,045.84. Therefore, the court grants that branch of the motion seeking breach of contract, except as to Unit D, in the amount of \$147,045.84.

Given the above, that branch of the motion seeking unjust enrichment (causes of action six through ten) and alternatively, relief pursuant to section 339-kk of the Real Property Law, are denied as moot.

Next, that branch of the motion seeking attorneys' fees and expenses shall be determined at the time of trial insofar as issues remain with respect to Unit D. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant seeking common charges and assessment is granted only as to units A, B, C, and 4B in the amount of \$147,045.84; and it is further

ORDERED that that branch of the motion asserting unjust enrichment causes of action and seeking relief pursuant to Real Property Law § 339-kk(b) are denied as moot; and it is further

ORDERED that the affirmative defenses are dismissed except as to the seventeenth affirmative defense of trespass; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of plaintiff and against defendant in the amount of \$147,045.84, plus prejudgment interest at the statutory rate from December 21, 2020, together with costs and disbursements; and it is further

ORDERED that that branch of plaintiff's motion seeking attorney fees shall be determined at the time of trial; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as upon the Clerk of the Court, who shall enter judgment accordingly; and it is further; and it is further

ORDERED that service upon the Clerk of the Court 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).

This constitutes the decision and order of this court.

May 17, 2024

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE