

**Board of Mgrs. of the 138-140 W. 17th St.
Condominium v Shelley & Donald Rubin Cultural
Trust**

2024 NY Slip Op 31831(U)

May 28, 2024

Supreme Court, New York County

Docket Number: Index No. 650933/2023

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

Justice

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BOARD OF MANAGERS OF THE 138-140 WEST 17th
STREET CONDOMINIUM,

Plaintiff,

INDEX NO. 650933/2023

MOTION DATE 05/04/2023

MOTION SEQ. NO. 001

- v -

THE SHELLEY & DONALD RUBIN CULTURAL TRUST,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22

were read on this motion by plaintiff to DISMISS COUNTERCLAIMS.

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff’s motion to dismiss counterclaims is granted in part and denied in part, in accordance with the following memorandum.

In this action for unpaid common charges and assessments, plaintiff, the board of managers of a condominium located at 138-140 West 17th Street, New York, New York, seeks to recover the arrearage from defendant, one of the unit owners of the building. The building is divided into Unit A and Unit B. Unit A consists of the third through tenth floors of the building and is divided into eight residential units. Unit B is occupied by defendant and may be used for commercial or residential purposes. Defendant currently operates Unit B as part of the Rubin Museum of Art, with no residential occupancy.

Two disputes between the parties are the subject of defendant’s counterclaims, as discussed hereinafter.

Dispute No. 1

The first dispute involves whether defendant must pay for an allocable share of the upkeep for the intercom and elevator in the building: defendant asserts that, as it makes no use of the intercom and elevator, it should not be required to contribute to their upkeep. The first counterclaim seeks a declaration that defendant is not required to contribute to the use of what it terms limited common elements of the building that it does not currently use or even have access to.

As a general matter, where a declaratory judgment is sought, the only question for the court on a motion to dismiss is whether “a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him” (*850 Third Ave. Owner, LLC v Discovery Communications, LLC*, 205 AD3d 498, 499 [1st Dept 2022]). Given that plaintiff seeks a declaration that defendant is required to pay common charges related to the elevator and intercom in its complaint, there is a “justiciable controversy” over the issue (CPLR 3001), and the court need not pass on the ultimate merits of the dispute at this stage. Plaintiff’s argument that the court should do so and dismiss the cause of action is unpersuasive.

The second counterclaim is related to the dispute regarding the elevator and the intercom, in that defendant claims that for the past six years it has been mistakenly paying common charges and assessments related to the intercom and elevator while believing that the charges and assessments were for other purposes. Plaintiff argues that this counterclaim should be dismissed under the voluntary payment doctrine, “which bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law” (*Dubrow v Herman & Beinin*, 171 AD3d 672, 673 [1st Dept 2019] [internal quotation marks and

citations omitted]). Defendant, however, alleges a mistake of material fact, namely, that it was mistakenly paying for elements of the building for which it was actually not obligated to pay. Accordingly, defendant has adequately alleged a counterclaim cause of action for breach of contract related to the mistaken payments.

Plaintiff argues further that defendant is a sophisticated party represented by counsel and should, therefore, be charged with knowing its rights and obligations under the condominium declaration and by laws. The sophistication of a party is not an issue that may be finally resolved on a motion to dismiss (*Mohinani v Charney*, 156 AD3d 443, 444 [1st Dept 2017] [“Thus, an issue of fact exists whether plaintiffs were sophisticated parties who can be charged with heightened due diligence obligations”]).

Dispute No. 2

The second dispute between the parties concerns who has the right to use the cellar of the building. Defendant alleges in its third counterclaim that it is entitled to the exclusive use of the southern portion of the cellar, and plaintiff is allowing other parties within the building to use it in derogation of defendant’s rights of possession. An agreement between the condominium and nonparty Preen Realty, Inc. (“Preen”), dated August 5, 1983, provides that Preen would buy the first floor Unit that is now owned by defendant and then lease it to nonparty Barney’s, Inc. (“Barney’s”) (Preen agreement, NYSCEF Doc. No. 14 at 1). As part of the purchase, the condominium granted Preen the use of the relevant portion of the cellar, “so long as such space is used in the business of Barney’s” (*id.*, ¶ 3). The condominium declaration confirms this, as it provides that “so long as Unit B (or any portion thereof) is used as part of the Barney’s Operation, . . . the southerly portion of the cellar . . . shall be a Limited Common Element reserved for the exclusive use of the Unit B owner” (Declaration, NYSCEF Doc. No. 15, ¶ 7[c]).

It is undisputed that Unit B is no longer being used by Barney's, and, therefore, the cellar space is no longer for the exclusive use of Unit B's owner. Defendant cannot meaningfully dispute this, as, upon purchasing Unit B, it signed a memorandum of understanding (the "memorandum") that provided, among other things, that "[t]he portion of the basement of the Premises shown in the Condominium Declaration as a limited common element for the exclusive use of Unit B shall be returned to the Condominium" (memorandum of understanding, NYSCEF Doc. No. 19, ¶ 1).

Plaintiff argues that the memorandum is merely an unenforceable agreement to agree, pointing to language that the terms of the memorandum were to be reduced to "final legal documentation" (*id.* at 3). But the status of the memorandum as an enforceable agreement or, as plaintiff argues, an unenforceable agreement to agree, is unnecessary for this court to determine in light of the condominium declaration's terms. The declaration clearly sets forth that the Unit B owner enjoys exclusive use of the southern portion of the cellar only for as long as it is being used by Barney's. Defendant does not argue, as indeed it cannot, that it is not bound by the condominium declaration. The documentary evidence, therefore, "utterly refute[s] defendant's factual allegations, conclusively establishing a defense as a matter of law" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021] [internal quotation marks and citation omitted]).¹

Accordingly, it is hereby

ORDERED that the motion to dismiss defendant's counterclaims is granted to the extent that the third counterclaim is severed and dismissed; and it is further

¹ Defendant's request for leave to replead this counterclaim is dismissed as futile in the face of the conclusive defense offered by the documentary evidence.

ORDERED that plaintiff is directed to serve a reply to defendant’s counterclaims within 20 days after the date of filing hereof; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on July 10, 2024, at 2:15 PM.

This constitutes the decision and order of the court.

ENTER:



<u>5/28/2024</u> DATE	<hr/> LOUIS L. NOCK, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE