Board of Mgrs. of the Alfred Condominium v Miller
2024 NY Slip Op 32520(U)
July 12, 2024
Supreme Court, New York County
Docket Number: Index No. 653433/2020
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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THE BOARD OF MANAGERS OF THE ALFRED CONDOMINIUM

Plaintiff,

- v -

JAMES MILLER,

Defendant.

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INDEX NO. 653433/2020

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

The plaintiff, Board of Managers of The Alfred Condominium, seeks injunctive relief and money damages against the defendant, James Miller, for his unauthorized or unlawful alterations to his unit, including removal of a wall and installation of fixtures that exceed the scope of the parties' Alteration Agreement without board approval. The complaint alleges three causes of action: (1) breach of the plaintiff's by-laws, seeking to enjoin and direct the defendant to correct, repair and remedy the unauthorized or unlawful alterations to the unit; (2) breach of the Alteration Agreement, seeking the same relief, and (3) breach of the Alteration Agreement, seeking money damages for the cost of legal, architectural and engineering fees and expenses incurred by the plaintiff. The defendant asserts five affirmative defenses and has one remaining counterclaim, seeking, in effect, a declaration that he did not breach the Alteration Agreement or applicable laws.[1] The plaintiff now moves pursuant to CPLR 3212 for summary judgment on all three causes of action and dismissal of the defendant's remaining counterclaim and affirmative defenses. The defendant opposes the motion and seeks sanctions against the plaintiff. The plaintiff's motion is granted. Sanctions are denied.

[1] The defendant's second, third, fourth, and fifth counterclaims were dismissed by an order dated April 6, 2022 (MOT SEQ 002).

II. DISCUSSION

A. Liability

On a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form sufficient to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. To successfully prosecute a cause of action for breach of contract, the party making the claim is required to establish (1) the existence of a contract, (2) the party's performance under the contract; (3) the opposing party's breach of the contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010).

There can be no dispute that the parties' Alteration Agreement is a contract. See Parc 56, LLC v Board of Managers of Parc Vendome Condo., 217 AD3d 416 (1st Dept. 2023). Furthermore, "[t]he violation of bylaws is akin to a breach of contract." Pomerance v McGrath, 124 AD3d 481, 482 (1st Dept. 2015); see Mason v Central Suffolk Hosp., 3 NY3d 343 (2004); Rosenthal v Board of Managers of Charleston Condo., 216 AD3d 442 (1st Dept. 2023). Board of Managers of Latitude Riverdale Condo. V 3585 Owner, LLC, 199 AD3d 441 (1st Dept. 2021). It is also well settled that "a board of managers of a condominium is statutorily empowered to enforce its by-laws, rules and regulations (see Real Property Law 339-dd, 339-j [citation omitted])." Board of Managers of Ocean Terrace Towne House Condo v Lent, 148 AD2d 408, 409 (2nd Dept.1989). In any such action, a court may grant injunctive relief prohibiting a unit owner from violating the by-laws. See Board of Managers of Village House v Frazier, 55 NY2d 991 (1982); Board of Mgrs. of Bond Parc Condominium v Broxmeyer, 62 AD3d 925 (2nd Dept. 2009); New School for Social Research v Sutton Space, Inc., 188 AD2d 431 (1st Dept. 1992). This includes a directive to restore the premises or perform repairs. See Shapiro v 350 E. 78th Street Tenants Corp., 85 AD3d 601 (1st Dept. 2011).

In support of its motion, the plaintiff submits, *inter alia*, the subject by-laws, the condominium's Declaration, which incorporates the by-laws, and the subject Alteration Agreement between the parties. These submissions establish the existence of the subject by-laws (and Declaration incorporating the by-laws) and Alteration Agreement, as well as the plaintiff's performance. Under Article 5.2(A) of the by-laws, the defendant was required to obtain the written approval of the plaintiff's board to make alterations to his unit, 3A. Under Article 5.2(C) of the by-laws, any alterations had to be made in compliance with any applicable laws. The Alteration Agreement incorporates every correspondence between the parties and their agents during negotiations, and demonstrates that, after the parties and their agents went through numerous rounds and revisions to the defendant's proposed plans for alterations, the board approved the defendant's plans on June 28, 2016, and the parties entered into the Alteration Agreement. The Alteration Agreement required the defendant to make only those alterations listed in Exhibit A of the agreement and approved by the plaintiff. Paragraph 4(g) of the Alteration Agreement prohibits the defendant from making alterations to any common areas of the building except as authorized within the agreement. Paragraph 4(b) prohibits alterations that shut off gas or water service without the plaintiff's consent.

To demonstrate that the defendant breached the by-laws and Alteration Agreement, the plaintiff principally relies on the findings of Michael Zenreich, a licensed architect who inspected the defendant's alterations in the unit on October 30, 2019, and October 2, 2022, pursuant to the court's order dated June 28, 2022 (MOT SEQ 003). Zenreich's findings are memorialized in his affidavit submitted by the plaintiff, which attaches a detailed report and photographs he prepared. The defendant's breaches are detailed in the Zenreich affidavit, which lists alterations the defendant made to his unit that violated various safety laws, including fire protection, energy conservation, soundproofing, and accessibility laws (which in turn violates Article 5.2(C) of the by-laws). Such alterations include, but are not limited to, the defendant's relocating the building's hot-water riser that services other units in order to enlarge his kitchen, installing non-fire-retardant wood in walls, installing glass guardrails that were too low, and building doors that were inaccessible. The defendant also made alterations that were expressly prohibited under the Alteration Agreement, including relocating the stove, gas line, and toilet from their original locations, which differed significantly from the plans approved by the plaintiff under the agreement. The defendant also misappropriated general common areas in violation of paragraph 4(b),(e), and (g) of the Alteration Agreement.

The defendant, in opposition, fails to submit proof sufficient to raise a triable issue of fact. He argues that the plaintiff and its agents conducted frequent inspections of the defendant's entire unit during the time the defendant made the alterations, and never made any complaints or alleged any violation of the by-laws or Alteration Agreement until two years after the defendant completed the alterations. Thus, the defendant argues, the plaintiff had knowledge of the defendant's breach, and, in essence, waived any claims for breach of contract. This argument is unavailing, as the Alteration Agreement contains a no-oral modification clause in Section 16(c), and Article 22 of the Declaration (which incorporates the by-laws) contains a no-waiver clause. See Walter Arnstein, Inc. v AX Trading Grp., Inc., 217 A.D.3d 644 (1st Dept. 2023); HOV Servs., Inc. v ASG Techs. Grp., Inc., 212 AD3d 503 (1st Dept. 2023). The defendant fails to show a "clear manifestation of intent" between the parties to waive these no-oral modification and no-waiver clauses. See HOV Servs., Inc. v ASG Techs. Grp., Inc., supra; Plotch v. 375 Riverside Dr. Owners, Inc., 92 AD3d 478 (1st Dept. 2012).

Furthermore, the defendant's submissions in opposition fail to raise an issue of fact as to Zenreich's findings. The defendant submits, *inter alia*, the affidavit of Sharon Lobo, a forensic architect, which disputes Zenreich's findings. However, Lobo's findings are primarily based on her review of the renovation plans, photographs of the unit before, during, and after the alterations, Zenreich's report, and conversations with Waclaw Stybel, the general contractor who did the alterations. Lobo avers that she made onsite and detailed field inspections of the unit, but unlike Zenreich, she does not specify the dates of these purported onsite inspections, nor does the defendant submit copies of her reports or photographs. In any event, Lobo only disputes a few of Zenreich's findings, namely alterations to the kitchen, hot water riser, demising walls, and third floor bathroom that violated various applicable laws. Lobo's affidavit is silent as to Zenreich's findings that the defendant's alterations misappropriated general common areas and other alterations that specifically differed from the approved plans under the Alteration Agreement. Thus, the defendant fails to raise an issue of fact as to the defendant's liability in breaching the by-laws and Alteration Agreement.

Therefore, the branch of the plaintiff's motion seeking summary judgment on its three causes of action is granted. The branch of the plaintiff's motion seeking to dismiss the defendant's first counterclaim and affirmative defenses is also granted. The defendant's counterclaim, which seeks a declaration that he did not breach the Alteration Agreement, is dismissed for the same reasons the court grants summary judgment to the plaintiff on its breach

of contract claims. The defendant's first affirmative defense, asserting that the complaint fails to state a cause of action, is dismissed as meritless for the same reasons. The second and third affirmative defenses, sounding in waiver and equitable estoppel, are dismissed, as discussed above, upon the existence of the no-oral modification clause in Paragraph 16(c) of the Alteration Agreement and the non-waiver clause in Article 22 of the Declaration. The defendant's remaining affirmative defenses are dismissed as they are asserted in a conclusory manner without any detail. See Commr. of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Mfrs. Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991).

B. Remedies

In its first and second causes of action, the plaintiff seeks an injunction directing the defendant to correct, repair, and remedy the unauthorized alterations and illegal conditions created in the unit at the defendant's sole expense. The plaintiff has demonstrated its entitlement to such relief. Paragraph 7 of the Alteration Agreement provides that "all work rejected by the Condominium as defective or as failing to conform to this Agreement . . . shall be promptly removed, corrected or repaired at [the defendant's] sole cost and expense." Further, Paragraph 15 of the Alteration Agreement provides that the defendant's "failure to comply with any provisions hereof shall be deemed a default under the By-laws[,]" and pursuant to Article 9, Section 9.2 of the by-laws, in the event of a breach, the "Board shall have the right to enjoin . . . any such violation or breach by appropriate proceedings either at law or in equity." Therefore, the defendant is directed to correct, repair, and remedy all unauthorized alterations and illegal conditions created in the unit within 90 days of the date of this order at the defendant's sole expense, and in accordance with all specifications of the plaintiff as previously provided or to be provided and subject to final approval by the plaintiff.

The plaintiff's third cause of action seeks legal and professional fees, as well as expenses incurred, in enforcing the Alteration Agreement. It is well settled that attorneys' fees are recoverable where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010). Under Paragraph 11(a) of the Alteration Agreement, the defendant is required to reimburse the plaintiff "for all legal, architectural, engineering or other fees and expenses which may be incurred by [the plaintiff] in connection with . . . the enforcement of" the agreement. However, the plaintiff's papers do not include proof detailing the amount it has incurred in damages. Therefore, the

amount of legal and professional fees incurred by the plaintiff in enforcing the contracts shall be determined by a Special Referee or Judicial Hearing Officer.

Finally, the defendant's request that the court sanction the plaintiff for bringing this motion is denied. As summary judgment is granted in favor of the plaintiff, logic dictates that there is no frivolous conduct on its part warranting sanctions. See 22 NYCRR § 130-1.1. The court has considered the defendant's remaining contentions and finds them unavailing. "As one court observed: 'Every man may justly consider his castle and himself the king thereof: nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less.' (Sterling Vil. Condo. V Breitenbach, 351 So.2d 685, 688 n.6 [Fla.Dist.Ct.App.])." Levandusky v One Fifth Ave. Apartment Corp., 75 NY2d 530, 537 (1990).

III. CONCLUSION

For the reasons set forth above, the plaintiff's motion is granted on all three causes of action, with injunctive relief granted and monetary damages to be determined by a Judicial Hearing Officer or Special Referee, and the defendant's application for sanctions is denied.

Accordingly, upon the foregoing papers, and after oral argument, it is

ORDERED that the motion of the plaintiff Board of Managers of The Alfred Condominium for summary judgment is granted on all three causes of action of the complaint, and it is further

ORDEED that, in regard to the first and second causes of action, the defendant, James Miller, is hereby directed to correct, repair, and remedy all unauthorized alterations and illegal conditions created in the unit within 90 days of the date of this order at the defendant's sole expense, and in accordance with all specifications of the plaintiff as previously provided or to be provided, and subject to final approval by the plaintiff, and it is further

ORDERED that, in regard to the third cause of action, money damages shall be determined by a Judicial Hearing Officer (JHO) or Special Referee, who shall be designated to

hear and report to this Court on the following individual issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose:

(1) The issue of the amount of legal and professional fees, including reasonable attorney's fees and disbursements, the plaintiff may recover from the defendant under the parties' Alteration Agreement; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) 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 at www.nycourts.gov/supctmanh at the "References" link), 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 shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212- 401-9186) or 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 plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendant shall serve objections to the proposed 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; and it is further

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 the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; 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 (22 NYCRR 202.44); and it is further

ORDERED that the defendant's application for sanctions is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the Court.

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7/12/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**		**NON-FINAL DISPOSITION**			
	X	**GRANTED**	**DENIED**	**GRANTED IN PART**		**OTHER**	
APPLICATION:		**SETTLE ORDER**		**SUBMIT ORDER**			
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**		**FIDUCIARY APPOINTMENT**		**REFERENCE**	