

**Board of Mgrs. of 105 Neptune Ave. Condominium v  
Moms Smile, LLC**

2025 NY Slip Op 32109(U)

February 4, 2025

Supreme Court, Kings County

Docket Number: Index No. 511803/2019

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, 11201 on the 4th day of February, 2025.

P R E S E N T:

HON. DEREKIM B. NECKLES,  
Acting Justice.

-----X  
THE BOARD OF MANAGERS OF 105 NEPTUNE  
AVENUE CONDOMINIUM,

Plaintiff,

- against -

Index No. 511803/2019

MOMS SMILE, LLC,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavits (Affirmations) Annexed	<u>74-78</u>
Notice of Cross-Motion/Affidavits (Affirmations) Annexed	<u>81-124</u>
Opposition to Cross-Motion	<u>125-127</u>
Reply to Opposition to Cross-Motion	<u>129</u>
Supplemental Affirmation	<u>130-133</u>

Upon the foregoing papers in this proceeding, plaintiff moved (under mot. seq. 3) for an order (1) confirming the referee’s report of computation, and (2) granting a judgment of foreclosure and sale. Defendant Moms Smile LLC (“defendant”) and proposed-intervenor, Vadim Komissarchuk (“Komissarchuk”) cross-move (under mot. seq. 4) for an order granting (1) intervention pursuant to CPLR §§1012 and 1013, (2) vacating the order of reference and default judgment dated July 1, 2022, pursuant to CPLR §5015, and (3) dismissing the instant action.

### *Background*

Plaintiff commenced the instant action on May 28, 2019, to foreclose on a lien of unpaid common charges against the property located at 105 Neptune Avenue, Unit 1, Brooklyn, New York. On July 30, 2020, plaintiff moved for an order granting a default judgment against the non-answering defendants, and an order of reference. Komissarchuk then cross-moved for dismissal of the action as abandoned, pursuant to CPLR §3215(c). By order dated June 23, 2022, the court (J. Partnow) granted plaintiff's motion for an order of reference, finding that plaintiff has "established its entitlement to a default judgment" and denied Komissarchuk's cross-motion finding that plaintiff provided sufficient explanation for its delay in moving for a default judgment, and defendant failed to demonstrate a reasonable excuse for its default. The court further held the papers submitted by the alleged president of Moms Smile LLC, Vadim Komissarchuk, would not be considered given that he is not a named defendant, and his papers are a violation of CPLR 321[a].

Plaintiff now files the instant action to confirm the referee's report and for an order granting a judgment of foreclosure and sale. Defendant cross-moves to vacate the order of reference dated July 1, 2022, and dismissal of this action because the court lacked jurisdiction to rule on plaintiff's motion while a surrogates proceeding was pending to appoint an administrator to the estate of the sole member of Moms Smile LLC. Furthermore, Komissarchuk alleges that following a September 15, 2021 meeting of the condominium shareholders, a new board was designated, and plaintiff did not have the authority to act in this action.

In a related action (index #508073/2022), the Board of Managers of 105 Neptune Avenue Condominium move to foreclose on a condominium lien of unpaid common charges, by defendant Artur Tveritnev, whom Komissarchuk alleges to be the new president of the condominium board. Defendant in the related action makes similar arguments stating that the Board lacked standing to commence the action because a new board was allegedly designated. By order dated October 31, 2024, the court denied defendant's cross-motion holding that "defendant failed to raise an issue of fact regarding being in default of common fees."

### *Discussion*

#### **I. Motion to Intervene**

CPLR 1012 (a) (3) provides that a party may intervene as of right "when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely." CPLR 1013 provides that a court has discretion to permit a person to intervene "when the person's claim or defense and the main action have a common question of law or fact" and, in exercising its discretion, "the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." A Party may be entitled to intervene in an action, if it established that the representation of its interest by the parties would be inadequate, that the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale (*see* CPLR 1012 [a] [2], [3]; *ABM Res. Corp. v. Doraben, Inc.*, 89 A.D.3d 773, 774, 933 N.Y.S.2d 296 [2011]).

Here, the proposed-intervenor, Vadim Komissarchuk, has failed to establish it has an interest in the property that would warrant intervention in this proceeding. It is undisputed that Moms Smile LLC remains the owner of the subject property, and while proposed-intervenor is now the sole owner of Moms Smile LLC, he is not the owner of the subject property in his individual capacity. The court finds that proposed-intervenor's interests are adequately represented by Moms Smile LLC.

## II. Vacatur of the Order of Reference

“The doctrine of the ‘law of the case’ is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned” (*Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 [1975]). The doctrine “applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision” (*Baldasano v. Bank of N.Y.*, 199 A.D.2d 184, 185; see *Gay v. Farella*, 5 A.D.3d 540, 541; *D'Amato v. Access Mfg.*, 305 A.D.2d 447, 448; *Flatbush Two, LLC v. Morales*, 190 A.D.3d 826 [2d Dept 2021]).

Here, the court previously held in its June 23, 2022 decision, that “to successfully oppose a facially adequate motion for leave to enter a default judgment...on the failure to appear or serve an answer, a defendant must demonstrate a reasonable excuse for the delay and a potentially meritorious defense to the action” and defendant failed to demonstrate both a reasonable excuse and a meritorious defense. The doctrine of law of the case precludes the court from reconsidering these issues in opposition to plaintiff's

motion to confirm the referee's report and for a judgment of foreclosure and sale (*U.S. Bank Tr., N.A. v. Longo*, 227 A.D.3d 1122, 1123 [2d Dept 2024]).

Furthermore, pursuant to CPLR 5015(a)(1), a motion to vacate a default upon the ground of an excusable default, must be made within one year of entry of the default judgment. Here, the court granted plaintiff's motion for a default judgment by order dated June 23, 2022, and entered on July 11, 2022. Therefore, defendant had until July 11, 2023, to move to vacate its default, but did not bring this instant motion until October 16, 2023. Accordingly, defendant's motion is untimely.

### III. Plaintiff's Standing

An argument that a plaintiff lacks standing, if not asserted in the answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e) (*see U.S. Bank, N.A. v. Sharif*, 89 A.D.3d 723, 723; *JP Morgan Chase Bank, N.A. v. Strands Hair Studio, LLC*, 84 A.D.3d 1173, 1173; *HSBC Bank USA, NA v. Halls*, 136 A.D.3d 752, 753 [2d Dept 2016]). Here, defendant failed to raise the issue of standing in its answer or in a pre-answer motion to dismiss. Accordingly, defendant has waived the argument.

### IV. Admissibility of the Referee's Report

In opposition to plaintiff's motion to confirm the referee's report, defendant contends that the report is not substantially supported by the record. Defendant asserts that plaintiff failed to proffer any documents concerning the alleged unpaid common charges during the time period of December 2010 through December 2016, which is relevant time period of the subject lien. Upon review of the referee's report, plaintiff only

submitted an account statement from March 2017 through September 2022. Plaintiff has failed to proffer a tenant ledger or account statement from the relevant time periods, that would allow the referee to properly compute the amount owed to plaintiff. Accordingly, the referee's report is not substantially supported by the record.

Accordingly, it is

**ORDERED** that plaintiff's motion for a judgment of foreclosure and sale (mot. seq. 3) is denied with leave to renew and the referee is directed to issue a new report based on documents that support the computation; and it is

**ORDERED** that defendant and Komissarchuk's cross-motion (mot. seq. 4) is denied in all respects.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES  
A. J. S. C.

KINGS COUNTY CLERK  
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