Board of Mgrs. of the 233 E. 70th St. Condominium v Macarthur Props. I, LLC
2025 NY Slip Op 32445(U)
June 3, 2025
Supreme Court, New York County
Docket Number: Index No. 151850/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART** **36**

Justice

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BOARD OF MANAGERS OF THE 233 EAST 70TH STREET CONDOMINIUM,

Plaintiff,

- v -

MACARTHUR PROPERTIES I, LLC, TGD GROUP INC., NEW KO SUSHI II JAPANESE RESTAURANT INC., and JOHN DOES NOS. 1-20,

Defendants.

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INDEX NO. 151850/2021

MOTION SEQ. NO. 002; 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 53, 54, 55, 57, 58, 59

were read on this motion to/for **QUASH SUBPOENA, FIX CONDITIONS**.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 60, 61, 62, 63, 64, 66

were read on this motion to/for **AMEND CAPTION/PLEADINGS**.

This action concerns plaintiff's efforts to foreclose on a lien for unpaid common charges owed by defendant, Macarthur Properties I, LLC (hereinafter, "MacArthur"), the owner of the commercial units in the 233 East 70th Street Condominium (hereinafter, the "Condominium"). Plaintiff also seeks a money judgment in connection with the alleged outstanding amounts owed by MacArthur. Defendants New Ko Sushi Japanese Restaurant Inc., d/b/a Ko Sushi ("Ko Sushi"), and TGD Group Inc., d/b/a Bottega Restaurant ("Bottega") (hereinafter, "commercial tenants"), are MacArthur's commercial tenants pursuant to lease agreements with MacArthur.

In Mot. Seq. 002, MacArthur moves the court, pursuant to CPLR 2304 and 3103, for a protective order and/or an order quashing three separate subpoenas issued by plaintiff and addressed to MacArthur's commercial tenants (NYSCEF Doc. No. 37, *notice of motion*). With respect to Mot. Seq. 003, plaintiff seeks leave to amend the complaint to add claims of unjust enrichment and quantum meruit (NYSCEF Doc. No. 43, *notice of motion*).

The motions are consolidated for disposition.

As it relates to Mot. Seq. 002, according to MacArthur, the subpoenas are overly broad in time and scope, and they are irrelevant and immaterial to the claims and defenses asserted in this action. To the extent this action involves a dispute as to common charges allocation between plaintiff and the commercial unit owners, MacArthur asserts that the contractual relationship between itself and its commercial tenants has no bearing on the common charges dispute at issue (NYSCEF Doc. No. 38, *counsel's affirmation in support*). MacArthur furnishes a copy of the subpoenas and the correspondence between itself and plaintiff (NYSCEF Doc. Nos. 39; 40).

In opposition, plaintiff contends that the information sought in the subpoenas are necessary given potential undisclosed financial arrangements between MacArthur and its commercial tenants. Plaintiff posits that MacArthur is charging its commercial tenants while failing to pay the water charges and other common expenses. Therefore, the subpoenas will uncover whether MacArthur is misrepresenting its agreements with its commercial tenants and whether it is doing so at multiple locations, indicating a pattern and practice of malfeasance, claims plaintiff. Plaintiff notes that one of the subpoenaed parties, Green Kitchen, is a tenant of MacArthur at another building. Plaintiff asserts that despite the separate location, the financial and contractual relationship between MacArthur and Green Kitchen remains relevant to this proceeding and would reveal how MacArthur's business practices may extend across multiple properties, demonstrating a potential pattern of deceptive practices similar to those alleged in this case. Plaintiff insists that the requested records will shed light on MacArthur's questionable billing practices and methodology used with its commercial tenants to charge for water usage and confirm the veracity of MacArthur's excuse that its tenants' financial difficulties is the reason for nonpayment of the water usage bills. Next, plaintiff contends that MacArthur lacks standing to challenge the subpoenas insofar as it is neither the subpoenaed party nor has it demonstrated that it has a proprietary interest in the information sought. MacArthur being a party to these tenant agreements alone is insufficient to create standing to challenge the subpoenas and information sought therein, plaintiff contends. The information sought is crucial to understanding the expenses incurred and billed by MacArthur for actual water usage, as well as, discussions between MacArthur and its tenants concerning MacArthur's responsibility for payment of expenses to the Condominium.

Furthermore, respondents note that the subpoenas are instrumental in assessing the authenticity, accuracy, and comprehensiveness of contractual and financial agreements between MacArthur and its commercial tenants, as well as validating MacArthur's disclosures made thus far during the litigation. Plaintiff notes that, irrespective of MacArthur's share of the common charges, MacArthur bears the obligation to cover the entirety of the water usage charges from the commercial units occupied by the commercial tenants.

In reply, MacArthur sets forth that the discovery sought via the subpoenas are irrelevant to the claims as presently constituted in the complaint. Plaintiff's subpoenas impermissibly seek discovery based on the proposed amended complaint, which is not the operative pleading document. MacArthur notes that since the subpoenas attach to the original complaint to satisfy the notice requirements, the subject subpoenas are defective since they are based on the proposed amended complaint and should be quashed as a result.

MacArthur reiterates that plaintiff's demands are grounded on the unsubstantiated claim that MacArthur is obligated to pay all water and sewer charges based on consumption or metered use as opposed to paying its allocated share of all water and sewer charges as a common expense. Also, MacArthur insists that there is no authority in the Declaration and By-laws to charge water and sewer in a manner different from a common expense. In addition, MacArthur asserts that it has standing to challenge the subpoenas because its relationship with the commercial tenants is completely proprietary in nature. Lastly, MacArthur argues that the added causes of action for unjust enrichment/quantum meruit and account stated in the amended complaint should be dismissed because they are barred by the clear and unambiguous language of the Declaration and By-laws and Real Property Law § 339-m which governs how water and sewer is charged to the unit owners (NYSCEF Doc. 57, *reply*).

Concerning Mot. Seq. 003, plaintiff seeks leave to amend the complaint to expound on the provisions within the governing documents, specifically the By-laws and Declaration, that establish MacArthur's exclusive responsibility for water usage in the Commercial Unit. Plaintiff asserts that the amended complaint incorporates new information revealed during the litigation process, which demonstrates MacArthur's failure to fulfill its water charges and common charges payment obligations, including e-mails containing admissions of liability by MacArthur. Next, plaintiff articulates that the amended complaint contains additional legal claims encompassing unjust enrichment/quantum meruit and account stated claims, broadening the scope of legal remedies sought. The proposed Amended Complaint also includes detailed allegations that MacArthur is reimbursed by its tenants for the actual water usage, and as such, MacArthur has obtained a windfall. The unjust enrichment/quantum meruit and account stated claims should come as no surprise to MacArthur, claims plaintiff, given that they are based on the same underlying facts already pleaded in the original complaint. Plaintiff asserts that since discovery is ongoing, defendants will not be prejudiced by the amended pleadings. As well, plaintiff asserts that in addition to being timely pursuant to CPLR 3025, the proposed amended complaint is essential for detailing the facts at issue and uncovering further information necessary for a just resolution of this case (NYSCEF Doc. No. 52, *memo of law in support of motion for leave to amend the complaint*). Plaintiff submits a copy of the original complaint, a proposed amended complaint, and a redlined version of the original complaint with the proposed amended complaint (NYSCEF Doc. Nos. 45-47).

MacArthur, in opposition, asserts that plaintiff's motion for leave to amend the complaint is insufficient, devoid of merit and barred by documentary evidence. MacArthur contends that contrary to plaintiff's arguments, the manner and scope of his obligations to plaintiff are governed by the Declaration and By-laws and cannot be amended by email as plaintiff claims. Specifically, Section 15 of Article V of the By-laws provides that MacArthur is obligated to pay all water and sewer charges as a common expense. This is so, argues MacArthur, because Real Property Law §339-m specifies how common charges are to be allocated and disclosed. According to MacArthur, a review of the proof, in the form of e-mail correspondence, does not indicate that MacArthur agreed to pay water and sewer charges by metered consumption rather than as a common expense. Next, MacArthur posits that since its relationship with plaintiff is governed by a contract, the cause of action for unjust enrichment in the proposed amended complaint is precluded by documentary evidence. MacArthur further argues that since the e-mail at issue demonstrates that the amounts billed was disputed, the account stated cause of action in the proposed amended complaint is precluded as a matter of law. Also, MacArthur argues that, to the extent plaintiff seeks an account stated for alleged invoices between 2003 and December 2017, same is precluded by the applicable statute of limitations period of six years for contract claims. MacArthur insists that to the extent there is no provision in the Condominium's Declaration or By-Laws authorizing water and sewer charges to be paid on metered consumption, plaintiff's claims are, thus, prohibited by the By-Laws and statute. As such, MacArthur urges the court to deny the request for leave to amend the complaint finding that water and sewer must be charged as a common expense as expressly provided in Section 15 of Article V of the By-laws. Lastly, MacArthur asserts that it is prejudiced by plaintiff's application for leave to file an amended complaint over three years after the commencement of this action, and the continued delay has hindered MacArthur's ability to refinance the property at reasonable interest rates (NYSCEF Doc. No. 60, *Tzanides affirmation in opposition*). MacArthur attaches a copy of its correspondence with plaintiff and the Declaration and By-laws (NYSCEF Doc. Nos. 61-63).

In reply, plaintiff contends that the proposed amendment is neither palpably insufficient nor devoid of merit because there is proof in support of the claims. Plaintiff asserts that common elements are only those which are commonly shared, and since the water and utilities exclusively service the commercial units, they therefore cannot be a common element. Furthermore, plaintiff maintains that while the By-laws designate water and sewer expenses as common expenses, it is solely to prevent liens against the entire building. Plaintiff contends that the proposed amended complaint clarifies the meaning of the Condominium documents and the allocation of expenses between the residential and commercial units. Plaintiff insists that the proposed amended complaint seeks to enforce how the Condominium documents authorize the allocation of expenses, which is based on the proportion of tenants' usage. Next, plaintiff sets forth that New York courts have consistently permitted parties to assert an unjust enrichment claim as an alternative to a breach of contract claim if the contract is deemed unenforceable or if the conduct of the parties gives rise to an equitable claim. Further, plaintiff argues that to the extent the proposed amendment seeks to address, in the alternative, an inequity stemming from the alleged misallocation of water usage and payment, the unjust enrichment claim should be permitted if the inequity cannot be fully remedied through a breach of contract claim alone.

With regards to the e-mail correspondence, plaintiff notes that the plain language of the letters make clear that MacArthur admitted owing a sum certain and therefore, it has a colorable account stated claim. Plaintiff also notes that the account stated claim is not barred by the statute of limitation because the correspondence exchanged between plaintiff and MacArthur indicates MacArthur's awareness of the outstanding debt related to water and utility usage, the amount of the debt, as well as, its intention to make payments toward settling the entire amount due and owing. Thus, the correspondence serves as an acknowledgment which sufficiently meets the criteria necessary to revive a potentially time-barred account stated claim. Plaintiff further contends that insofar as the MacArthur has made partial payments for water charges, same constitutes an acknowledgement that a debt is owed and revives the statute of limitations. Plaintiff also claims that even though this action was commenced in 2021, the invoices and correspondence dating back to 2015 are relevant to the case and should not be restricted by any potential statute of limitations issue. Lastly, plaintiff asserts that in addition to MacArthur not being prejudiced by the proposed amended complaint, the proposed amended complaint is grounded in the same governing documents and addresses the same issues concerning the water usage and payment obligations of the commercial units (NYSCEF Doc. No. 66, *reply*).

Pursuant to CPLR 3025, a party may amend a pleading "at any time by leave of court" (CPLR 3025 [b]). "While it is true that on a motion for leave to amend [a pleading] the movants need not establish the merit of [their] proposed new allegations, they must show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Sahmanovic v Kingsbridge Realty Assoc., LLC*, 197 AD3d 1077, 1077 [1st Dept 2021]). Claims that contain only bare legal conclusions without supporting facts are subject to dismissal (see *Comm'rs of the State Ins. Fund v Ramos*, 63 AD3d 453, 453 [1st Dept 2009]). Otherwise, leave to amend "should be freely granted, absent prejudice or surprise resulting therefrom" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]).

An account stated is an agreement between parties to an account based upon "prior transactions between them with respect to the correctness of the account items and balance due. An account stated assumes the existence of some indebtedness between the parties, or an agreement to

treat the statement as an account stated" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250-251 [1st Dept 2007]).

In New York, the elements of a cause of action for an unjust enrichment claim are "that the other party was enriched, at that party's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Addressing the proposed amended complaint first (Mot. Seq. 003), the account stated claim fails insofar as the e-mail correspondences evince that the account items and balance due were disputed by MacArthur (see *Dragonetti Bros. Landscaping Nursery & Florist, Inc. v. Verizon N.Y., Inc.*, 208 AD3d 1125, 1126 [1st Dept 2022]). Specifically, MacArthur disputed the amounts owed claiming that there were errors in billing. The unjust enrichment claim in the proposed amended complaint also fails because it is undisputed that the parties' relationship is governed by a contract (see *FM Cost Containment, LLC v +42 W. 35th Prop. LLC*, 203 AD3d 426, 427 [1st Dept 2022]). Thus, plaintiff's request for leave to file an amended complaint is denied insofar as plaintiff claims are barred by law.

"It is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding" (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]).

"An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry" (*Kapon v Koch*, 23 NY3d 32, 38 [2014] [internal citations and quotation marks omitted]). Section 3101(a)(4) does not require the subpoenaing party to demonstrate that it cannot obtain the requested disclosure from any other source (*id.*). If the subpoena complies with the notice requirements, and the disclosure sought is relevant to the prosecution or defense of an action, the motion to quash the subpoena should be denied (*id.*). "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant" (*Forman v Henkin*, 30 NY3d 656, 661, 70 [2018] [quoting CPLR 3101 [a]). "Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (*Gertz v Richards*, 233 AD2d 366, 366 [1st Dept 1996]).

Turning now to the motion to quash (Mot. Seq. 002), plaintiff's contention that MacArthur lacks standing to challenge the subpoena is unavailing. "'A person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications'" (*Matter of Radio Drama Network, Inc.*, 214 AD3d 461, 463 [1st Dept 2023], quoting *Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186, 195 [2d Dept 2013]). MacArthur has a proprietary interest in its private contracts with its commercial tenants. MacArthur has demonstrated to the court's satisfaction that the subpoena served upon its commercial tenant Green Kitchen is irrelevant to any inquiry insofar as Green Kitchen is located in a different building and has no relationship to the subject condominium at issue. The Court of Appeals has consistently held that a subpoena *duces tecum* "may not be used for the purpose of discovery or to ascertain the existence of evidence," but rather "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding" (see *Matter of Terry D.*, 81 NY 2d 1042, 1044 [2015]). Thus, the

subpoena served upon Green Kitchen is hereby stricken (see *Brook v Peconic Bay Med. Ctr.*, 162 AD3d 503, 504 [1st Dept 2018]).

Further, item #14 in the subpoenas served upon Ko Sushi and Bottega is stricken as it is overbroad. Communications and documents between MacArthur's counsel and Ko Sushi and Bottega may include information that are not related to payment of water usage at issue here. Next, pursuant to CPLR 2304, the court modifies the responsive period of the subpoena from "January 1, 2004, to present" to January 1, 2004, through December 31, 2019, as reflected in the lien for common charges (NYSCEF Doc. No. 2) as the end date of the accrued and unpaid period. The court also modifies that branch of the subpoena seeking tax returns insofar as petitioner has not made a strong showing of necessity and an inability to obtain the information from other sources (see *Weingarten v Braun*, 158 AD3d 519, 520 [1st Dept 2018]). Petitioner does not identify the particular information sought in the tax returns and its relevance to the claims raised. Thus, to the extent petitioner seeks to determine the subpoenaed parties' ability to pay rent and water usage, petitioner has not demonstrated that the financial statements, general ledgers, bank account statements, and profit and loss statements sought will not suffice for such purposes. (See *Demurjian v Demurjian*, 184 AD3d 505, 506 [1st Dept 2020]). All other arguments have been considered and are without merit. Accordingly, it is hereby

ORDERED that Mot. Seq. 003 seeking to amend the complaint is denied; and it is further

ORDERED that Mot. Seq. 002 is granted to the extent that the subpoena served upon Green Kitchen is stricken; and it is further

ORDERED that item #14 of the subpoenas served upon defendants New Ko Sushi Japanese Restaurant Inc., d/b/a Ko Sushi ("Ko Sushi"), and TGD Group Inc., d/b/a Bottega Restaurant ("Bottega") is stricken; and it is further

ORDERED that the portion of the subpoenas served upon defendants New Ko Sushi Japanese Restaurant Inc., d/b/a Ko Sushi ("Ko Sushi"), and TGD Group Inc., d/b/a Bottega Restaurant ("Bottega") seeking tax returns is stricken, i.e., Item # 4, and it is otherwise denied; and it is further

ORDERED that the responsive period of the subpoena is hereby modified as indicated above; and it is further

ORDERED that, within fifteen (15) 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 respondents.

This constitutes the decision and order of this court.

June 3, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:							
	CASE DISPOSED		DENIED	X	NON-FINAL DISPOSITION		
	GRANTED			X	GRANTED IN PART		OTHER