

Board of Mgrs. of the 1200 Fifth Condominium v 1200 Fifth Assoc., LLC
2025 NY Slip Op 33334(U)
September 3, 2025
Supreme Court, New York County
Docket Number: Index No. 161779/2023
Judge: Nicholas W. Moyne
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NICHOLAS W. MOYNE **PART** **41M**

Justice

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BOARD OF MANAGERS OF THE 1200 FIFTH
CONDOMINIUM,

Plaintiff,

INDEX NO. 161779/2023

MOTION DATE 12/23/2024

MOTION SEQ. NO. 001

- v -

1200 FIFTH ASSOCIATES, LLC, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, JOHN DOE NO. 1
THROUGH JOHN DOE NO. 10

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10
were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, it is

Plaintiff, the Board of Managers of the 1200 Fifth Condominium (the “Condominium”),
commenced the underlying action against defendants to foreclose on a lien and to recover
amounts owed by defendant, 1200 Fifth Associates, LLC, due to a breach of contract and
involving the failure and/or refusal to timely pay common charges owed for certain units.
Plaintiff now moves for an order, pursuant to CPLR § 3215 and RPAPL § 1321, granting a
default judgment against defendant 1200 Fifth Associates on the first cause of action for lien
foreclosure, appointing a Referee to determine the amounts due to plaintiff on the lien to be
foreclosed and to report whether the premises should be sold as one or separate parcels, and/or to
exclude “Jane Doe” and “John Doe” from the caption (NYSCEF Doc. No. 5). The plaintiff’s
motion is granted in part and denied in part, as discussed hereinbelow.

The relevant facts are as follows. Plaintiff is the duly appointed Condominium Board and, acting on behalf of all unit owners which collectively own the building located at 1200 Fifth Avenue, New York, commenced this action against 1200 Fifth Associates, “Sponsor” of the building where, upon filing an “Offering Plan” with the New York State Attorney General’s Office to convert the subject building to Condominium ownership, was the record owner of all units of the Condominium at the time of its creation and remained the record owner of such units until the same were sold to the public (complaint ¶¶ 3-5). However, residential units 2B, 15C, and 15D, have never been sold by the Sponsor, the Sponsor still remains the record holder for said units, and the Sponsor did not create or record separate deeds for each of these units at the time of the Condominium’s creation (complaint ¶¶ 5-7).

Pursuant to the governing Condominium by-laws, all unit owners, including the Sponsor for any unsold units, are obligated to pay common charges and other related or applicable charges when due, and upon a failure to pay, the Condominium may file and record liens for all sums due and owing (complaint ¶¶ 17-20). The Sponsor has failed to pay the common charges allocable to units 2B, 15C, and 15D, and the plaintiff, upon defendant’s default, on or around October 11, 2023, filed and/or recorded liens with the City Registrar’s Office against the subject units in the amount of the unpaid charges and fees (complaint ¶¶ 22-26). The Sponsor has failed to make such payments. Thereafter, on or around December 2023, plaintiff commenced this action via summons and complaint with the first cause of action seeking a foreclosure judgment of the subject units, adjudgment of the amounts due under the liens as valid, appointment of a referee to determine the sums due plaintiff, and an auction of the subject units to collect the same. Additionally, the second cause of action is for breach of contract, seeking judgment

against defendant, 1200 Fifth Associates, based on the failure to pay the common charges and for costs in connection with this action.

Now, in Motion Sequence 001, the Condominium moves for entry of a default judgment against the Sponsor in the amount of the unpaid charges and for a judgment of lien foreclosure. Additionally, in the motion, the Condominium seeks an order of reference based on the defendant's default, pursuant to RPAPL § 1321, directing the referee to compute such an amount due. A party seeking a default judgment must submit proof of service of the summons and complaint, proof of the facts constituting the claim, the default and the amount due (CPLR § 3215[f]).

Plaintiff effected service of the commencement papers on defendant, 1200 Fifth Associates, by delivery to the Secretary of State on December 20, 2023, and by mail on October 22, 2024 (NYSCEF Doc. No. 7). As such, plaintiff argues defendant 1200 Fifth Associates failed to timely answer or appear (*see* CPLR § 320[a]), so default judgment is proper. On December 24, 2024, the notice of motion for default judgment was mailed to defendant 1200 Fifth Associates (NYSCEF Doc. No. 10). On January 10, 2025, a notice of appearance was filed for 1200 Fifth Associates (NYSCEF Doc. No. 11), and on January 13, 2025, a stipulation was filed, adjourning the motion for a default judgment on consent until January 27, 2025 (NYSCEF Doc. No. 12). However, such notice of appearance by 1200 Fifth Associates was untimely, and to date, the defendant has failed to file an answer or otherwise oppose the motion (*see Deutsche Bank Natl. Tr. Co. v Hall*, 185 AD3d 1006, 1009 [2d Dept 2020]). Accordingly, plaintiff has submitted sufficient proof of the service of the summons and complaint and defendant's default.

However, plaintiff has not met its burden as to proof of the facts constituting the claim to warrant entitlement to a default judgment (*see Gaviola v City of New York*, 234 AD3d 525, 526

[1st Dept 2025]), nor an order of reference. “To demonstrate facts constituting the claim, the movant need only proffer proof sufficient to enable a court to determine that a viable cause of action exists (*Bigio v Gooding*, 213 AD3d 480, 481 [1st Dept 2023] [internal citations omitted]). “The movant may do so either by submission of an affidavit of merit or by verified complaint, if one has been properly served” (*Id.*).

The creation and administration of condominiums in New York is governed by the provisions of Real Property Law Article 9-B, the Condominium Act, and a building becomes subject to the Condominium Act by executing and filing a declaration of condominium (see *Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 46 [1st Dept 2016]). A condominium is a hybrid form of real property ownership where, pursuant to the Condominium Act, each owner holds a real property interest in the unit and its appurtenances, which consists of an exclusive possessory interest in the unit and an undivided interest in the common elements of the condominium (*Eastbrooke Condominium v Ainsworth*, 33 NY3d 139, 144 n 2 [2019]).

Once created, however, the administration of the condominium’s affairs is governed principally by its bylaws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium’s common elements” (*Schoninger v Yardarm Beach Homeowners Ass'n, Inc.*, 134 AD2d 1, 5 [2d Dept 1987] [internal citations omitted]; see generally *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 536 [1990] [“Like a municipal government, [condominium] boards are responsible for running the day-to-day affairs . . . and to that end, often have broad [financial] powers...”]). Further, the violation of condominium by-laws is akin to a breach of contract (*Pomerance v McGrath*, 124 AD3d 481, 482 [1st Dept 2015]).

Under RPL § 339-j, 1200 Fifth Associates, as owner of the subject units, is obliged to “comply strictly with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto” and any “[f]ailure to comply with any of the same shall be ground for an action to recover sums due . . . maintainable by the board of managers. . .”. Further, Real Property Law §§ 339-aa and 339-z authorizes the Condominium to file, and ultimately foreclose on, liens for the units based on the accrued and unpaid common charges, together with interest thereon, subject to certain exceptions.

Here, the Condominium asserts that the governing by-laws require unit owners to pay common charges (Section 6.2[A]), permit the Condominium to institute collection actions and file liens (Section 6.4[A]) in the amount of the unpaid common charges, as well as impose late fees, notice fees, and costs incurred in these collection actions, to be included in the amount of said liens (*see Heywood Condo. v Wozencraft*, 148 AD3d 38, 46 [1st Dept 2017] [holding that under the governing by-laws and RPL § 339-z, the plaintiff was entitled to file a lien on each unit in the amount of unpaid common charges, attorneys’ fees, late fees, and interest thereon]).

Although the complaint specifies an amount allegedly owed under the liens, and the governing bylaws specify the late fees and interest be applied to unpaid common charges (Section 6.4[B]), computation is not feasible at this stage by the fact that the City of New York holds a superior lien against these same units (*see Admin. Code § 19-152[e]*). The complaint merely alleges that “New York City Department of Transportation, holds a sidewalk lien against the Units pursuant to the New York City Administrative Code § 19- 152(e), and as such has a lien that is superior to the lien of the Condominium” (complaint ¶ 11). Pursuant to RPAPL § 1354, the proceeds from a foreclosure sale of the subject units must first be paid to the city agency with a priority lien on the properties (*see Bd. of Managers of 235 E. 22nd St. Condo. v*

Lavy Corp., 233 AD2d 158, 160 [1st Dept 1996]). Notably, the record does not show the amount of the sidewalk lien held by defendant, New York City Department of Transportation, nor provides any further information or details regarding the existence of such liens.

Additionally, although plaintiff submitted an affirmation from its attorney with the moving papers, the Condominium has failed to provide any supporting documentation establishing a breakdown of the assessments or substantiating the balance of the unpaid common charges (*see Bd. of Directors of Squire Green at Pawling Homeowners Ass'n, Inc. v Bell*, 89 AD3d 657, 658 [2d Dept 2011]; *Bd. of Managers of Two Columbus Ave. v Leschins*, 72 Misc 3d 1207[A] [Sup Ct 2021]; *c.f. Cipriani Club Residences at 55 Wall Condominium by Bd. of Managers v 55 Wall St. HC 905 LLC*, 80 Misc 3d 1226[A] [Sup Ct 2023]). Nor has the Condominium established entitlement to foreclose on a lien, as plaintiff has not offered any proof or supporting documentation to establish defendant's ownership or requirement to pay, the existence or validity of said liens, as required under RPL § 339-aa, and/or that such common charge liens were duly recorded and/or the priority to other liens, under RPL § 339-z (*80P2L LLC v U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr.*, 194 AD3d 593, 594 [1st Dept 2021]; *Bd. of Managers of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569, 570 [1st Dept 2019]; *Bank of New York v Resles*, 78 AD3d 469, 471 [1st Dept 2010]; *Bank of New York v Shurko*, 50 Misc 3d 1208[A] [Sup Ct 2015]).

Accordingly, there is no documentation or submissions establishing plaintiff's entitlement to an order of reference (*see Bd. of Managers of 229 Condo. v J.P.S. Realty Co.*, 308 AD2d 314, 315–17 [1st Dept 2003]; *Aurora Loan Services, LLC v Colleluori*, 170 AD3d 1097, 1098 [2d Dept 2019]; *c.f. HSBC Bank USA, N.A. v. Alexander*, 124 AD3d 838, 839–40 [2d Dept 2015] [holding an appointment of a referee to compute the amount due and amending the caption

was proper where plaintiff submitted documentary proof showing plaintiff was the holder of the mortgage and note, as well as proof of the default of the defendant mortgagor]). These defects are fatal to the motion to the extent it seeks foreclosure, a judgment of the amounts due under the liens as valid, appointment of a referee to determine the sums due plaintiff, and/or an auction of the subject units. Therefore, the Condominium's motion is denied as to the portion seeking entry of a default judgment and an order of reference.

As to the extent plaintiff seeks leave to amend the pleadings, since it does not appear this would prejudice the named defendants, leave to amend is properly granted (*see generally Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1st Dept 2003]).

Accordingly, it is hereby

ORDERED that plaintiff's motion is GRANTED IN PART; to the limited extent leave to amend the caption herein to exclude "JOHN DOE NO. 1 THROUGH JOHN DOE NO. 10" and is otherwise DENIED; and it is further

ORDERED that the denial of plaintiff's motion for a default judgment is without prejudice to renewal within 60 days and upon the submission of proper proof in accordance with this decision and order; and it is further

ORDERED that the caption be amended to reflect this amendment and that all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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); and it is further

This constitutes the decision and order of the court.


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<u>9/3/2025</u> DATE		<u>NICHOLAS W. MOYNE, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
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