

Board of Mgrs. of Plaza E. Condominium v Ezra Realty, LLC

2012 NY Slip Op 30588(U)

February 29, 2012

Supreme Court, Nassau County

Docket Number: 8963/11

Judge: Anthony L. Parga

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SHORT FORM ORDER

NEW YORK STATE-SUPREME COURT-NASSAU COUNTY

**PRESENT: HON. ANTHONY L. PARGA
JUSTICE**

-----X **PART 6**

**THE BOARD OF MANAGERS OF PLAZA
EAST CONDOMINIUM and THE BOARD
OF MANAGERS OF ONE BARSTOW
CONDOMINIUM,**

Plaintiffs,

INDEX NO. 8963/11

-against-

**MOTION DATE: 01/06/12
SEQUENCE NO. 001**

**EZRA REALTY, LLC and "JOHN DOE #1 "
through "JOHN DOE #10", the last ten (10)
names being fictitious and unknown to the
Plaintiff, the person or parties, if any, having
or claiming and interest in or lien upon the
premises described in the complaint,**

Defendants.

-----X

Notice of Motion, Affs & Exs.....	<u>1</u>
Memorandum of Law.....	<u>2</u>
Affidavit in Opposition & Exs.....	<u>3</u>
Reply Affirmation & Exs.....	<u>4</u>

Upon the foregoing papers, plaintiffs' motion for summary judgment, pursuant to CPLR §3212, and for the appointment of a Referee to examine and compute the sums due to plaintiffs, pursuant to RPAPL §1321, is granted to the extent directed below.

This action was brought by plaintiffs to foreclose common charge liens which had been filed against two (2) commercial condominium units owned by defendant Ezra Realty, LLC (hereinafter "Ezra"), due to Ezra's failure to pay its common charges. Plaintiffs allege that the arrearage owed by defendant Ezra for the units is \$19,486.39 and \$6,632.61, exclusive of late fees, attorneys' fees, and interest, which plaintiffs contend are recoverable under the

condominium's governing documents in the event of a default.

In support of its motion, plaintiffs submit the affidavit of Richard Rush, Secretary of plaintiffs since 1995. Mr. Rush sets forth the merits of plaintiff's action and attests to the above-noted amounts of common charges which the defendants presently owe. In addition, plaintiffs submit the By-Laws for the Condominium, which govern the operation of the condominium. The By-Laws set forth the powers and duties of the Condominium Board, including the power to determine common charges, collect common charges from unit owners, and enforce the obligations of unit owners. Additionally, pursuant to the By-Laws, all unit owners are obligated to pay common charges assessed by the Board of Managers, which are payable monthly, in advance, on the first day of each month. The By-Laws also state that unpaid monthly common charges payable to the condominium shall be a continuing lien in favor of the condominium upon the applicable unit. Further, the By-Laws authorize the imposition of late fees, interest, and attorneys' fees in the event of an owner's default in the payment of the common charges or Professional Unit charges. The plaintiffs also submit the Open Item Statements sent to Ezra regarding the outstanding common charges, as well as its Notices of Lien against Ezra's units.

The plaintiffs have made a prima facie showing of entitlement to summary judgment, as the plaintiffs have established through admissible evidence the provisions of the By-Laws which authorize the collection of monthly common charges and obligate all unit owners to pay same, Ezra's default in payment of the monthly common charges for its units, and the filing of verified Notices of Lien for the unpaid common charges. (*See, e.g., Board of Directors of Hunt Club at Coram Homeowners Ass'n, Inc. v. Hebb*, 72 A.D.3d 997, 900 N.Y.S.2d 145 (2d Dept. 2010); RPL §§ 339-z, 339-aa, 339-j). The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

In opposition, defendant Ezra, through an affidavit duly executed by one of its members,

Yossi Shai, contends that there was a “massive fire” caused “by the negligence of the plaintiffs and its management company during the performance of illegal and unlicensed roof repairs to the building.” Defendant submits no further documentary evidence concerning the fire. Defendant contends that as a result of the fire, the residential and commercial building was vacated by the Fire Marshall for several months, causing Ezra’s tenants to cancel their leases. As a result of the lost income, defendant contends that plaintiff began harassing it in order to limit Ezra’s financial ability to prove plaintiffs’ liability to Ezra. Mr. Shai attests that the plaintiffs has added approximately \$11,000 in attorney’s fees to the common charges which it is seeking to foreclose, and defendant contends that said fees were incurred in connection with “good faith negotiations to compensate Ezra for its losses arising from the fire.” He also attests that the ceiling tiles in its units were damaged because of a water leak and have not been repaired by the plaintiffs, despite Ezra’s complaints.

Lastly, Mr. Shai attests in his affidavit that “Ezra is mindful that it certainly has an obligation to pay common charges” and that “Ezra will consent to its obligation to be current with all common charges for the units which are the subject of this action.” He further attests that Ezra “has been paying its common charges,” but fails to state that Ezra has paid same in full or that Ezra is not in default. Ezra also offers no documentary evidence to demonstrate that it has paid its common charges to date.

Defendant Ezra has failed to raise a triable issue of fact sufficient to defeat plaintiffs’ prima facie showing of entitlement to summary judgment. Defendant does not contest plaintiffs’ allegations that it owes common charges and has failed to pay same in violation of the By-Laws. A condominium unit owner “cannot withhold payment of common charges and assessments in derogation of the By-Laws of the condominium based on defective conditions in his unit or in the common areas.” (*Frisch v. Bellmarc Mgmt.*, 190 A.D.2d 383, 597 N.Y.S.2d (1st Dept. 1993); *Matter of Abbady*, 216 A.D.2d 115, 629 N.Y.S.2d 6 (1st Dept. 1995); *Board of Managers of the 200 West 109 Condominium v. Baker*, 244 A.D.2d 229, 664 N.Y.S.2d 40 (1st Dept. 1997); RPL §§339-j, 339-x)). Once created, the administration of the condominium’s affairs is governed principally by its by-laws, 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 A.D.2d 1, 523 N.Y.S.2d 523 (2d Dept. 1983)). Article 6.3-1 of the By-Laws herein requires payment of common charges by unit owners, and the defendant has not contested that it owes overdue common charge payments or raised a triable fact sufficient to defeat plaintiffs' motion. (See, *Matter of Abbadly*, 216 A.D.2d 115, 629 N.Y.S.2d 6 (1st Dept. 1995)). As such, plaintiffs are entitled to summary judgment on the within lien foreclosure action.

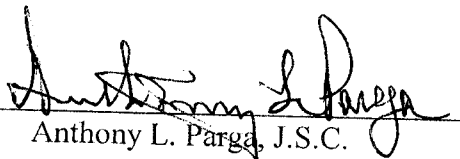
Lastly, defendant Ezra's request that this Court join the instant action with the action entitled, *Ezra v. Board of Managers*, bearing Nassau County Index number 4983/11, is denied, as the defendant has failed to submit a copy of the pleadings for said action, has failed to set forth the commonality between the two actions, and has failed to properly request said relief by filing either a motion or a cross-motion.

Accordingly, plaintiffs' motion for summary judgment is granted, and a Referee shall be appointed to examine and compute the sums due to plaintiffs and shall submit a report regarding same to this Court. Movant is directed to submit an **Order of Reference** on notice within twenty (20) days.

Additionally, plaintiffs' request that the caption be amended to delete therefrom "John Doe #1 through John Doe #10," is also granted. Movants are directed to serve a copy of this Order upon the Clerk of the Supreme Court of Nassau County within twenty (20) days. Upon receipt of this Order, the Nassau County Clerk is directed to amend the caption as directed above.

This constitutes the decision and Order of this Court.

Dated: February 29, 2012


Anthony L. Parga, J.S.C.

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