

Board of Mgrs. of Gateway Condominium v Leonard
2012 NY Slip Op 31113(U)
April 24, 2012
Supreme Court, New York County
Docket Number: 105268/11
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 105268/2011
BD. MGRS. GATEWAY CONDOMINIUM
vs.
LEONARD, LAVERNE M.
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision out order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

APR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 24, 2012

HON. JOAN A. MADDEN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
THE BOARD OF MANAGERS OF GATEWAY
CONDOMINIUM, using on behalf of the unit owners,

INDEX NO. 105268/11

Plaintiff,

-against-

LAVERNE M. LEONARD and MARCO DEVEGLAIA,
and "JOHN DOE/JANE DOE," first and/or last name of
John Doe and/or Jane Doe Respondents being fictitious
and unknown to Petitioner, the persons intended being in
possession of the premises herein described,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED

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Plaintiff The Board of Managers of Gateway Condominium (the "Board of Managers")

moves (motion sequence no. 001) for an order pursuant to CPLR 3212 granting partial summary judgment on its causes of action for breach of contract (2nd cause of action), an account stated (5th cause of action) and attorney's fees (10th cause of action), against defendant Laverne M. Leonard, seeking unpaid common charges in the total amount of \$16,450.27 and an award of attorney's fees. Defendant Leonard opposes the motion.

The Gateway Condominium is a condominium apartment building located at 2098 8th Avenue in Manhattan, operated by plaintiff Board of Managers. Defendant Leonard is the owner of Units 3F and 3G, and defendant Deveglaia is the subtenant occupying Unit 3F. Plaintiff commenced the instant action on May 19, 2011.

The amended complaint asserts eleven causes of action: 1) breach of the condominium act and seeks a money judgment for common charges, late fees and fines totaling \$157,159.62; 2)

breach of contract – common charges and seeks a money judgment for \$11,199.62 in common charges, \$30,000 in “additional common charges,” and \$3,200 in late fees for a total of \$44,399.62, through March 31, 2011; 3) breach of contract – infractions and seeks a money judgment for “accumulated fines totaling \$56,380.00 on Unit 3F, and fines totaling \$56,380.00 on Unit 3G, for a total of \$112,760.00”; 4) unjust enrichment and seeks a money judgment in the amount of \$11,199.62; 5) account stated and seeks a money judgment for \$14,399.62 in common charges and late fees, and \$112,760.00 in “fines,” for a total of \$157,159.62, as of March 31, 2011; 6) preliminary and permanent injunctions (6th, 7th, 8th and 9th causes of action; 7) attorney’s fees (10th cause of action); and 8) foreclosure of plaintiff’s lien for unpaid common charges (11th cause of action).

Defendant Leonard answered asserting 20 affirmative defenses and one counterclaim for tortious interference and slander. Defendant Deveglaia did not timely answer.¹

Plaintiff is now moving for partial summary judgment against defendant Leonard on its second cause of action for breach of contract and its fifth cause of action for an account stated, and seeks unpaid common charges and interest for the two units in the total amount \$16,450.27 (\$8,033.45 for Unit 3F and \$8,416.32 for Unit 3G, for August 2009 - September 2011). Plaintiff also seeks summary judgment on its 10th cause of action for attorney’s fees.

As the proponent of a motion for summary judgment, plaintiff bears the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New

¹In a separate motion (sequence no. 002), plaintiff is seeking default judgment against defendant Deveglaia, who has appeared pro se in opposition to the motion and seeks leave to serve a late answer.

York University Medical Center, 64 NY2d 851, 853 (1985). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. See JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). As CPLR 3212(b) provides that a summary judgment motion “shall be supported by affidavit” of a person “having knowledge of the facts,” as well as other admissible evidence, a conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent’s prima facie burden. See Coleman v. Macjas, 61 AD3d 569 (1st Dept 2009); JMD Holding Corp. v. Congress Financial Corp., *supra* at 384-385; 127 Restaurant Corp. v. Rose Realty Group, LLC, 19 AD3d 172 (1st Dept 2005).

In support of its motion for summary judgment, plaintiff submits an affidavit of Arthur Langer, the Board President of Gateway Condominium. Specifically as to the breach of contract and account stated claims for Leonard’s unpaid common charges, Mr. Langer states as follows:

10. According to the account ledger associated with the Units [Units 3F and 3G], which reflects the Common Charges billed by the Condominium to Leonard, and the corresponding payment, Leonard failed to consistently make payments for Common Charges as it [sic] became due each month.

* * *

12. As of today’s date [September 6, 2011], the amount of Common Charges and interest due from Leonard which gave rise to this cause of action are as follows:

Unit 3F Common Charges and Interest from August 2009 - September 2011:	\$8,033.45
Unit 3G Common Charges and Interest from August 2009 - September 2011:	\$8,416.32
TOTAL	\$16,450.27

Although Mr. Langer references the “account ledger” for Units 3F and 3G, plaintiff’s motion papers do not include copies of those supporting documents.

In opposing the motion, defendant Leonard objects, *inter alia*, that plaintiff has not submitted its account ledger or any other documents to support its assertion as to the amount due and owing for common charges and interest. Defendant also objects that plaintiff provides no explanation for the amounts sought in the motion, which are considerably less than the amounts sought in the amended complaint. Defendant further asserts that summary judgment is premature since no discovery has been conducted. In its reply papers, plaintiff submits copies of the account ledgers for the two units owned by defendant Leonard.

Plaintiff’s motion is denied. Plaintiff fails to submit sufficient evidence in admissible form demonstrating as a matter of law the common charges for the two units which have not been paid by defendant Leonard. In the absence of plaintiff’s account ledgers for Units 3F and 3G, Mr. Langer’s conclusory affidavit is insufficient to satisfy plaintiff’s initial burden. While plaintiff submits the account ledgers with its reply papers, plaintiff is not entitled to use those documents to remedy the basic deficiencies in its prima facie showing. See Mejia-Ortiz v. Inoa, 89 AD3d 514 (1st Dept 2011); Those Certain Underwriters At Lloyds, London v. Gray, 49 AD3d 1 (1st Dept 2007); Scansarole v. Madison Square Garden, L.P., 33 AD3d 517 (1st Dept 2006); Migdol v. City of New York, 291 AD2d 201 (1st Dept 2002).

Moreover, to the extent plaintiff is moving for summary judgment on its 5th cause of action for an account stated, plaintiff submits no evidentiary proof to support such claim. Mr. Langer’s affidavit does not state that invoices were rendered to defendant Leonard, and that she retained those invoices without objection within a reasonable time, which are necessary elements

of an account stated claim. See Russo v. Heller, 80 AD3d 531 (1st Dept 2011); RPI Professional Alternatives, Inc. v. Citigroup Global Markets Inc., 61 AD3d 618 (1st Dept 2009); Rockefeller Group, Inc v. Edwards & Hjorth, 164 AD2d 830 (1st Dept 1990). Even though the amended complaint alleges that “invoices and statements of account” were sent to defendant Leonard for unpaid common charges, late fees and “fines,” plaintiff does not submit copies of any invoices or other correspondence addressed to defendant Leonard, as to any amounts due and owing.

Finally, the court notes that plaintiff provides no explanation as to why it is now seeking damages in the total amount of only \$16,450.27 on both the 2nd and 5th causes of action, which is significantly less than the amounts sought in the amended complaint on each of those claims, i.e. \$44,399.62 on the 2nd cause of action and \$157,159.62 on the 5th cause of action.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for partial summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on May 24, 2012, at 9:30 a.m., in Part 11, Room 351, 60 Centre Street..

DATED: April 24, 2012

ENTER:

APR 26 2012

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J.S.C.