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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART

Index Number : 116701/2008
4260 BROADWAY CONDOMINIUM
vs
CABALLERO, ELISETTE A.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is determined as per decision/order dated 7/20/12.

FILED
JUL 24 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/20/12

MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

THE BOARD OF MANAGERS OF THE 4260 BROADWAY CONDOMINIUM ON BEHALF OF THE UNIT OWNERS,

Plaintiff,

- against -

ELISETTE A. CABALLERO, LUISA MARCELINO, ENVIRONMENTAL CONTROL BOARD, CRIMINAL COURT OF THE CITY OF NEW YORK,

Defendants.

Index No.: 116701-2008

DECISION/ORDER

In this action, plaintiff, The Board of Managers of the 4260 Broadway Condominium (Board of Managers or Board), moves for summary judgment foreclosing its lien for unpaid common charges on the condominium apartment (the apartment) of defendants Elisette A. Caballero and Luisa Marcelino (the Caballero defendants). Plaintiff also moves to strike the Caballero defendants' affirmative defenses and counterclaims, for appointment of a referee to compute, and for other relief. The Caballero defendants raise a counterclaim for a declaratory judgment that the Board breached the by-laws in approving assessments and undertaking other acts, and counterclaims for damages for the Board's alleged breach of the by-laws and of its fiduciary duty.

The Caballero defendants are the owners of apartment 607 at 160 Wadsworth Avenue, New York, New York, one of two buildings which comprise the condominium. (Aff. of Paul

Coppe [P.'s Attorney], ¶ 4.) Defendants have owned the apartment since February 19, 1998. (Id.) The Board of Managers has imposed various increases in common charges and assessments over the past six years: a 15% increase in monthly common charges effective April 1, 2006; a 10% increase in common charges effective October 1, 2006; an assessment of $85 per month per unit for seven months effective December 1, 2006, to pay the condominium's water and sewer bill; a $600,000 assessment effective September 1, 2007; and a $300,000 assessment effective November 17, 2008, to pay for allegedly necessary repairs to the roof, facade, and fire escapes, and to replace the boiler. (Id., ¶ 5.) The Caballero defendants' share of the assessments was $4,966.80 and $2,483.40, respectively. (Aff. of Natalie Fleming Nolan [Ds.' Attorney], ¶ 6.) The Caballero defendants stopped paying common charges in 2008 and did not pay either of the assessments, allegedly because of concerns regarding the Board's actions, including failure to comply with the by-laws and failure to keep correct books and records. (Caballero Aff., ¶ 29, 33-36.)

At issue here is interpretation of the by-laws, and whether unit owner consent is required before certain Board actions. The by-laws of the association require that the Board shall "operate, maintain, repair, restore, add to, improve, alter and replace the Common Elements . . . ." (By-laws § 2.4[A][i], Ex. J to P.'s motion.) Except as otherwise provided in the by-laws, "all painting, decorating, maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary; . . . (ii) in or to the Common Elements shall be performed by the Condominium Board as a Common Expense." (Id., § 5.1[A][ii].) The Board shall "determine the aggregate amount of Common Charges necessary to be charged to the Unit Owners in order to meet the Common Expenses." (Id. § 6.1[A].) The Board also "shall have the

right, subject, in all respects, to the strictures contained in Section 2.5 hereof, to levy Special Assessments to meet the Common Expenses." (Id., § 6.1[C].) None of these sections expressly requires unit owner consent.

The limitations in § 2.5 require, however, that the Board receive approval from 75% of the unit owners in order to "impose any Common Charges or Special Assessment for the purpose of making any capital or major improvements, alteration or addition to the Common Elements or to any Unit, unless required by Law or is necessary for the health and safety of residents. . . ." (§ 2.5[b][iii].) The by-laws further specify that "all necessary or desirable alterations, additions, or improvements in or to any of the Common Elements shall be made by the Condominium Board. . . . Notwithstanding the foregoing, however, whenever the cost and expense of any such alterations, additions, or improvements would, in the judgment of the Condominium Board, exceed $25,000 in the aggregate in any calendar year, such proposed alterations, additions, or improvements shall not be made unless first approved by the Unit Owners . . . owning a majority of the Common Interests at a duly constituted meeting of the Unit Owners. . . ." (Id., § 5.3.)

Before the $600,000 assessment was levied, the Board took the position that approval of the majority of the unit owners was required. Thus, it sent notice to the unit owners of a special meeting to vote on the assessment, stating that "approval by owners is needed for any major capital undertaking in excess of $25,000." (Letter, Ex. DD to Opp.) The minutes from this meeting state that a motion was proposed and approved. But the text of the motion is not attached and no mention is made of the subject of the motion. (Minutes from Special Unit Owners Meeting on May 29, 2007, Ex. T to P.'s motion.) By the time of the second assessment for $300,000, the Board apparently no longer believed owner approval was needed for

assessments, stating: "While much has been accomplished so far, it is clearly evident that we must continue to make major capital improvements throughout the building in order to keep the building running as efficiently as possible. This year we have determined that the building will require $300,000 to continue our major projects such as the roof. . . ." (See August 22, 2008 Letter to Owners, attached as part of Ex. B to P.'s motion.)

During discovery, former Board president (and current vice president) Andrew Quale testified on behalf of the Board. (Quale Dep. at 11, 24-25, Ex. GG to Opp.) He testified that the Board "does not consider the assessment to be tied with the expenditures. There is no connection between the two." (Id. at 182.) "[W]hen the board does a common charge or assessment or anything of that nature, that is not tied or allocated to a specific expenditure." (Id. at 183-4.) He stated that the basis for the $600,000 assessment was "extensive arguing" between Board members. (Id. at 183.) Mr. Quale wanted a $1.2 million assessment, while the sponsor wanted $300,000, and it is possible the Board ended up with $600,000 "because that seemed like the kind of a number, that, you know, we talked about a lot." (Id.) He "very clearly" remembers the property manager "just guesstimating that the roof and the facade work would be $600,000." (Id.) He does not "recall getting bids for it or anything like that." (Id.) A letter sent to owners stated that the Board would be engaging an engineering firm to "conduct an inspection of the building's facade and roof condition and provide a thorough report of their findings." (Id. at 191; Letter attached as part of Ex. B to P.'s motion.) The Board subsequently did not hire an engineering firm, deciding "the condominium could not afford it." (Quale Dep. at 191.) Mr. Quale stated that "no specific amount was approved" at the May meeting, and owners were not provided with information as to the specific amount of the assessment, although estimates were

discussed. (Id. at 201-202.) Owners "only approved the expenditure of more than 25,000 dollars on this item." (Id. at 201.) Mr. Quale further answered "no" when asked if unit owners are required to approve an assessment of more than $25,000. (Id. at 184.) He also stated that his understanding of the section of the by-laws regarding owner approval for alterations, additions, or improvements over $25,000 (hereafter alterations) is that it "does not relate to assessments." (Id. at 185.) Mr. Quale reiterated in his affidavit that special assessments "do not require prior approval of the unit owners; the board is required only to provide 15 days' prior notice of any assessment, setting forth 'in reasonable detail, the nature and purpose thereof.'" (Quale Dep., ¶ 14, attached to P.'s motion.)

Mr. Quale not only took the position that unit owner approval was not needed for assessments, but also stated that the Board could reallocate funds from the purpose approved by members "to another expense as long as that expense still complied with the restriction of $25,000 dollars per calendar year." (Id. at 190-191.) Mr. Quale clarified that he believed the Board could reallocate an expenditure previously approved by unit owners as long as the expenditure was under $25,000 per calendar year. (Id.) This statement apparently contradicts earlier testimony that unit owner consent was not needed for assessments, regardless of their nature or cost.

The current president of the Board, Bonnie Singer, also testified. She stated that she believes the Board needs approval from "the building" before implementing an assessment over approximately $25,000. (Singer Dep. at 101-102, Ex. OO to Opp.) She also testified that the Board "added a little bit to the total amount [of the assessment] . . . to make up for" the fact that the Board anticipated that certain owners would not pay the assessment. (Id. at 122.) She

estimated that the Board added $100,000 to the $600,000 assessment to account for this anticipated non-payment. (Id. at 123.)

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b]." (Zuckerman v City of New York, supra, at 562.)

It is further settled that the determination of whether a contract is ambiguous is one of law to be resolved by the court. (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157 [1990].) The court should determine from contractual language, without regard to extrinsic evidence, whether there is any ambiguity. (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986].) "[M]atters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument." (Id. at 572-573 [internal citation and quotation marks omitted].) Moreover, "[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency." (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) Thus, "where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect." (HSBC Bank USA v National Equity Corp., 279 AD2d 251, 253 [1st Dept

2001][internal quotation marks and citations omitted].)

Here, reading the by-laws as a whole, the court finds that they are unambiguous on their face. They require unit owner approval for "alterations, additions, or improvements" exceeding $25,000 per year (§ 5.3), but not for repairs or replacements (§ 2.4[A][i]). The Board's position that § 5.3 does not apply to assessments is patently without merit. Its attorney's broad assertion that "the by-laws grant the board free authority to assess for any condominium purpose" (Coppe Reply, ¶ 36) ignores the plain language of § 5.3.

The Board acknowledges that it did not seek unit owner approval for the second assessment for $300,000. Although the Board claims that unit owner approval was not required for either assessment, it further claims that it did call a special meeting to obtain approval for the first assessment of $600,000. (Coppe Aff., ¶¶47-48.) However, as noted above (see supra at 3), the minutes of that meeting do not identify the subject of the motion that was allegedly approved by unit owners. Moreover, Mr. Quale acknowledged (see supra at 4) that no specific amount was approved for the assessment.

On this record, the court finds as a matter of law that the Board fails to demonstrate that it obtained unit owner approval not only of the $300,000 assessment but also of the $600,000 assessment. The further issue for the court is therefore whether the assessment was made for a repair or replacement which did not require unit owner approval, or for an alteration, addition, or improvement which did require such approval.

Courts apply the business judgment rule when determining challenges to decisions of corporate directors, including the decisions of condominium boards. (Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 537 [1990].) This rule limits judicial inquiry into

actions of corporate directors to whether the actions are "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." (Id. at 537-538 [internal quotation marks and citations omitted].)

In two cases interpreting by-law provisions substantially similar to those at issue here, the Second Department found that a condominium Board of Directors did not need owner consent for certain repair projects. In Helmer v Comito (61 AD3d 635, 636-637 [2nd Dept 2009]), the court found that the Board had acted within its authority and in good faith when entering into a construction contract for roof repair, based on evidence that the condominium buildings had long-standing leaks, the Board had hired architectural and engineering firms to conduct inspections, and had received a determination from the local zoning authority that the work did not require a building permit. In Gennis v Pomona Park Bd. of Mgrs. (36 AD3d 661 [2nd Dept 2007]), the court found that the provision requiring consent was inapplicable because the project "essentially constituted the replacement of existing building components that had fallen into a state of disrepair." (Id. at 663.)

The instant case is distinguishable from Helmer and Gennis. In each of those cases, the Board had a basis in the evidence for its determination that the project in question was a repair or replacement that did not require unit owner approval, as opposed to an alteration or improvement that did require such approval. In addition, there is no indication in either case that the Board made the claim that it could undertake a project without first concluding that it was a "repair," rather than an alteration or improvement.

The testimony of Mr. Quale on behalf of the Board (see supra at 4-5) makes clear that the Board operated on the belief that assessments did not require unit owner approval, regardless of whether the assessment was for a repair, alteration, or other work. As noted above, Mr. Quale categorically stated that the Board did not believe that the section (5.3) of the by-laws regarding

alterations, additions, or improvements applied to assessments.

Moreover, there is no basis in the record that would support a determination that the Board had a good faith basis, at the time it approved the assessments, for treating the work as a repair or replacement that did not require unit owner approval. As to the $600,000 assessment, the Board stated in its June 25, 2007 notice of the assessment (annexed as part of Ex. B to P.'s motion) that it would hire an engineer to inspect the facade and roof condition. However, it failed to do so, or to obtain bids for the work, prior to levying the assessment. In addition, the notice by its terms refers to the work not as a repair but in terms applicable to an improvement. It is entitled "Major Capital Expenditures," and states: "It is clearly evident that we have to undertake major capital work on the building's roof and facade to ensure the long term maintenance of the building." As to the $300,000 assessment, the August 22, 2008 notice of the assessment (annexed as part of Ex. B to P.'s motion), is also entitled "Major Capital Expenditures," and by its terms specifically states that "we must continue to make major capital improvements. . . ." It refers to the roof as a "major project[]" and, with respect to the boiler, states that "it would definitely be to the building's benefit to have a more energy efficient system installed." Although the Board asserts on this motion that the assessments were made to fund "repairs" to the facade, roof, fire escapes, and boiler (Coppe Aff., ¶ 49; Quale Aff., ¶ 46), it also appears that funds were used for elevator work which, in a Management Report dated November 9, 2006 (Ex. S to P.'s motion) was referred to as an "upgrade." On this record, the court holds that the Board has wholly failed to demonstrate that the work for which the assessments were levied was repair work that did not require unit owner approval.

Apart from its failure to demonstrate that such approval was not required, the Board has failed to demonstrate the reliability of the amounts it claims due from the unit owners. Summary judgment has been denied in an action to foreclose condominium liens where the plaintiff Board

"failed to submit any records to establish the manner in which the outstanding balance was calculated, nor did it otherwise demonstrate the reliability of the amount it claims was due. . . ." (Board of Mgrs. of Natl. Plaza Condominium I v Astoria Plaza, LLC, 40 AD3d 564, 565 [2nd Dept 2007] citing Board of Mgrs. of the 229 Condominium v JPS Realty Co., 308 Ad2d 314 [1st Dept 2003].)

In the instant case, the Board's levying of the assessment in the amount of $600,000 is not supported by documentation obtained prior to the assessment, such as an engineer's report and contractors' bids, showing the scope of work and cost. The proposals for roof and facade work that the Board has submitted are from June 2, 2008 and July 22, 2008, one year or more after the notice of the assessment for these items, and are for significantly lower amounts than the $600,000 levied. (Mughal General Construction Proposal, Ex. E to P.'s motion.) An earlier roof proposal submitted by defendants, although one still obtained after the assessment was levied, was for the significantly lesser sum of approximately $181,000. (Mughal Proposal, dated Sept. 26, 2007, Ex. FF to Opp.) Further, the Board reallocated some of this assessment for a different item – elevator work. By letter dated September 21, 2007, the property manager, writing to the unit owners for the Board of Managers, stated: "Due to the constant breakdown of elevator service, monies assessed for facade work will be reallocated to modernization of the elevators. Repair costs exceed practicality." (Ex. HH to Opp.) As to the $300,000 assessment, again no bids or professional reports are submitted to substantiate the basis for the $300,000 amount. The Board has also failed to make any showing as to basis on which it allocated, or computed the allocation of, the assessments to the individual unit owners.

The court does not suggest that the Board did not use the assessments for work on the building, but notes that the Board admitted to levying these large assessments based on 'guesstimating" and negotiations between board members (Quale Dep. at 183), not based on

actual, necessary expenditures.

To the extent that the Board seeks unpaid common charges, it relies on its computer records of defendants' billing history. However, its managing agent, Hedda Lennon, merely states that the records are maintained in the regular course of business. (Lennon Aff., ¶ 7.) This wholly conclusory assertion is insufficient to authenticate the records, which are challenged by defendants. Nor are the records self-explanatory.

As the counterclaims are directly related to the Board's claims for unpaid charges and expenses, they should not be dismissed. (See Board of Mgrs. of the 229 Condominium, 308 AD2d at 317.) The Board also has not demonstrated the lack of merit of defendants' counterclaims, including their claims that the Board has breached the by-laws by, among other acts, failing to hire an independent certified public accountant to prepare annual reports as required by § 5.17(B), and making books and records regarding the finances and operation of the condominium available to unit owners, as required by Real Property Law § 339-w. (See also By-Laws, § 6.3.)

To the extent defendants seek damages for emotional distress, however, such damages are not available based on the pleaded allegations as to the Board's wrongdoing. (See Graupner v Roth, 293 AD2d 408 [1st Dept 2002] [landlord-tenant dispute did not involve conduct that supported cause of action for intentional infliction of emotional distress].)

Plaintiff also seeks a default judgment against the Environmental Control Board and Criminal Court. However, it fails to annex proof of service of the summons and complaint on these agencies.

The court has considered plaintiff's remaining contentions and finds them to be without merit.

It is accordingly hereby ORDERED that the motion of plaintiff The Board of Managers of

the 4260 Broadway Condominium for summary judgment is granted only to the extent of dismissing any claim, asserted in defendants' counterclaims, for damages for emotional distress.

This constitutes the decision and order of the court.

Dated: New York, New York
July 20, 2012

MARCY S. FRIEDMAN, J.S.C.