

**Board of Mgrs. of Beechhurst Shores at Riverside
Dr. Condominium v Capote**

2012 NY Slip Op 32426(U)

September 19, 2012

Supreme Court, Queens County

Docket Number: 14541/2011

Judge: Robert J. McDonald

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- - - - - x

BOARD OF MANAGERS OF BEECHHURST SHORES
AT RIVERSIDE DRIVE CONDOMINIUM,

Plaintiff,

- against -

Index No.: 14541/2011

Motion Date: 06/14/12

Motion No.: 40

Motion Seq.: 2

MANUELA CAPOTE, LONG ISLAND SAVINGS
BANK a/k/a LONG ISLAND BANCORP INC.,
INTERNAL REVENUE SERVICE and "JOHN DOE
#1" through "JOHN DOE #10" the last 10
names being fictitious and unknown to
the Plaintiff, the person intended
being the persons or parties, if any,
having or claiming an interest in or
lien upon the mortgaged premises
described in the verified complaint,

Defendants.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by
the plaintiff for an order pursuant to CPLR 3212 granting summary
judgment in favor of the plaintiff on its action for foreclosure
of a Notice of Lien for Unpaid Charges and appointing a referee
to compute the total amounts due and owing to it by the defendant
MANUELA CAPOTE:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 10
Affirmation in Opposition.....	11 - 14
14Affirmation in Opposition to Cross-Motion.....	15 - 17

This is an action to foreclose on a lien, filed in the Office of the City Register against the defendant Manuela A. Capote's condominium unit, which was commenced by the plaintiff Board of Managers of the Beechhurst Shores at Riverside Drive Condominium by filing a summons, complaint and notice of pendency on June 17, 2011. The lien in the amount of \$8,410.04 dated March 18, 2011, which was filed on April 14, 2011 against the condominium unit located at 154-25A Riverside Drive, Unit 7B, Beechhurst, Queens County, New York is based upon unpaid condominium common charges. The complaint also asserts causes of action for breach of contract, counsel fees and for a money judgment in the amount of \$13,484.85 representing amounts due for unpaid condominium assessments, late charges, and interest. Defendant served a verified answer with affirmative defenses dated January 5, 2012.

The complaint asserts that the defendant acquired title to the premises by deed dated August 4, 1982. The complaint also asserts that since February 1, 2010 as a result of defendant Manuela Capote's continual failure to pay Condominium assessments and related expenses, she is presently in arrears in the amount of \$13,484.85. The complaint alleges that The Board notified the defendant that she was in arrears, however, defendant has failed to make the required payments.

In support of its motion for summary judgment, the plaintiff submits the affidavit of Arthur Alex, the president of the Board of Managers of Beechhurst Shores, dated September 27, 2011. In his affidavit, Mr. Alex states that the defendant is in arrears in payment of her common charges and that notices were sent to her notifying her of her default. Plaintiff also submits a tenant ledger detailing how the arrears in the amount of 13,484.85 were calculated. Counsel contends that the plaintiff has, therefore, demonstrated prima facie that the defendant has failed to make payment of her condominium dues (citing Board of Managers of Windridge Condos. One v Horn, 234 AD2d 249 [2d Dept. 1996]).

In her verified answer, the defendant raises certain affirmative defenses including the assertion that the lien is defective as the lien does not specify how the amount was calculated and does not provide the identity of the lienor. Defendant also contends that the amount of the lien is grossly exaggerated and contains sums which do not constitute condominium common charges. Defendant also asserts that the plaintiff has refused to accept payments tendered to it by the defendant. The answer also alleges that there is no written agreement for counsel fees which would entitle plaintiff to be reimbursed for same. Defendant also sets forth a counterclaim stating that the plaintiff has failed to file satisfaction for previous liens which

have been satisfied and remain an encumbrance on the property.

In opposition to the motion, Ms. Capote submits an affidavit stating that there are material issues of fact necessitating a trial of this matter. Firstly, she states that she tendered full and complete payment of the common charges owed through March 18, 2011, the date set forth in the plaintiff's Notice of unpaid common charges. She states, however, that the payment was unilaterally rejected by the plaintiff. Defendant also states that the notice of lien dated March 18, 2011 states that as of that date the defendant was in arrears in the amount of \$8,410.04 whereas the ledger of charges annexed to the plaintiff's motion indicates that in March 2010 she owed \$6,319.15. Further the defendant alleges that the amount requested in the complaint \$13,484.85, is also different than the amounts in the lien and the ledger. She states that the lien does not specify whether the amount due is for unpaid common charges, unpaid late charges, unpaid legal fees or unpaid assessments and she states that the Notice of Lien is "grossly and willfully exaggerated, improper and insufficient." Ms. Capote states that on June 3, 2011, prior to the commencement of the action, she sent two checks to the Board amounting in total to \$5,994.05 representing all outstanding common charges and assessments due through May 31, 2011. The checks were returned as the plaintiff indicated that the amount was incorrect.

Defendant also states that the Board has not responded to a demand for a bill of particulars and demand for discovery and inspection. In addition, defendant claims that the Board has not produced a representative for a pretrial deposition. Defendant also asserts that the plaintiff did not attach a copy of its reply to counterclaims in its motion.

Upon review and consideration of plaintiff's motion, defendant's affirmation in opposition and plaintiff's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

Here, the submissions of the plaintiff including the affidavit of Mr. Alex, indicating that defendant was in arrears, the tenant ledger form, indicating how the arrears were

calculated, and the Notices of Lien for the unpaid common charges which were sent to the defendant were sufficient to establish, prima facie, its entitlement to judgment as a matter of law awarding it the amounts that it assessed the defendant for common charges, costs and disbursements, and an attorney's fee. Plaintiff also submitted evidence of its authority to collect those assessments pursuant to relevant sections of the Declaration and Bylaws (see Board of Directors of Squire Green at Pawling Homeowners Assn. V Bell, 89 AD3d 657 [2d Dept. 2011]; Board of Directors of Hunt Club at Coram Homeowners Assn., Inc. v Hebb, 72 AD3d 997 [2d Dept. 2010]; Board of Managers of Windridge Condos. One v. Horn, 234 AD2d 249[2d Dept. 1996]). Plaintiff also demonstrated the validity of the lien and the proper verification thereof (see this court's prior decision dated 12/06/11, upholding the validity of the lien).

In opposition, the defendant has failed to raise a triable issue of fact sufficient to defeat plaintiffs' prima facie showing of entitlement to summary judgment. Here the defendant does not contest plaintiffs' allegations that she is in arrears for common charges, however, stating only that she attempted to pay a portion of the arrears and also that she contests the amount stating that the amounts assessed were wilfully exaggerated. However "the existence of a dispute as to the exact amount owed by defendant to the plaintiff does not preclude the award of summary judgment to the plaintiff on the issue of foreclosure (see Shufelt v Bulfamante, 92 AD3d 936 [2d Dept. 2012]; Long Is. Savings Bank of Centereach v Denkensohn, 222 AD2d 659 [2d Dept. 1995] [a dispute as to the exact amount owed by the mortgagor to the mortgagee may be resolved after a reference pursuant to RPAPL 1321, and the existence of such a dispute does not preclude the issuance of summary judgment directing the sale of the mortgaged property]). Thus, the dispute as to the amounts due and owed by the defendant does not raise an issue of fact. The amount due is a matter to be determined by the referee. In addition, this court finds that the affirmative defenses raised by the defendant with regard to the validity of the lien and the amount of arrears owed by the defendant failed raise a triable issue of fact.

Lastly, contrary to the defendants contention, the plaintiff's's motion for summary judgment was not premature as the defendant failed to offer a sufficient evidentiary basis to suggest that further discovery may lead to relevant evidence (see Woodard v Thomas, 77 AD3d 738 [2d Dept. 2010]; Conte v Frelen Assoc., 51 AD3d 620 [2d Dept. 2008]; Lopez v WAS Distrib., Inc., 34 AD3d 759 [2d Dept. 2006]; Ruttura & Sons Constr. Co. v Petrocelli Constr., 257 AD2d 614 [2d Dept. 1998]). The "mere hope or speculation that evidence sufficient to defeat a motion for

summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion (see Conte v Frelen Assoc., 51 AD3d at 621 [2d Dept. 2008]; Min Whan Ock v City of New York, 34 AD3d 542 [2d Dept. 2006]). What must be offered is "an evidentiary basis to show that discovery may lead to relevant evidence and that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the moving party (see Gasis v. City of New York, 35 AD3d 533 [2nd Dept. 2006]). Here, the defendant does not set forth a sufficient evidentiary basis demonstrating that further discovery would elicit any evidence supporting defendant's position (see CPLR 3212[f]; Hanover Ins. Co. v Prakin, 2011 NY Slip Op 1239 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Williams v D & J School Bus, Inc., 69 AD3d 617 [2d Dept. 2010]).

Accordingly, for all the above stated reasons, the defendant's affirmative defenses are stricken and plaintiff's motion for summary judgment on the within lien foreclosure action is granted. A Referee shall be appointed to examine and compute the sums due to plaintiff and shall submit a report regarding same to this Court.

Additionally, plaintiffs' request that the caption be amended to delete therefrom "John Doe #1 through John Doe #10," is also granted. Pursuant to CPLR 3212 plaintiffs motion for a default judgment is granted against those defendants who have failed to answer the summons and complaint. The defendant's counterclaim, which does not contain common factual or legal issues shall be severed (see Herskovitz v Klein, 91 AD3d 598[2d Dept. 2012]; Haber v Cohen, 74 AD3d 1281 [2d Dept. 2010]).

Settle order appointing a referee to compute.

Dated: September 19, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.