

**Board of Mgrs. of Montauk Manor Condominium v
Lavenas**

2012 NY Slip Op 33086(U)

December 3, 2012

Sup Ct, Suffolk County

Docket Number: 34208-11

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

PRESENT: Hon. RALPH T. GAZZILLO
Acting Supreme Court Justice

MOTION DATE 5-25-12
ADJ. DATE _____
Mot. Seq. # 001 - MotD

THE BOARD OF MANAGERS OF MONTAUK
MANOR CONDOMINIUM

Plaintiff,

SCHNEIDER Mitola llp
Attorneys for Plaintiff
666 Old Country Road
Suite 412
Garden City, N. Y. 11530

-against-

**O'SHEA, MARCINCUK &
BRUYN, LLP**
Attorneys for Defendant
Suzanne Lavenas
250 North Sea Road
Southampton, N. Y. 11968

SUZANNE LAVENAS individually as an
Administrator and Distributee of the Estate
of Wesley First, KAREN LEE WHITTLESEY,
Distributee of the Estate of Wesley First,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., as nominee of Countrywide
Home Loans, Inc. INTERNAL REVENUE
SERVICE and "JOHN DOE #1" through "JOHN
DOE #10", the last ten (10) names being
fictitious and unknown to the Plaintiff, the person
or parties intended being the persons or parties,
if any, having or claiming an interest in or lien
upon the premises described in the complaint,

Defendants.

X

Upon the following papers numbered 1 to 14 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers _____;
Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other
_____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the plaintiff's unopposed motion for, inter alia, an order pursuant to CPLR 3212
awarding it summary judgment against the defendant Suzanne Lavenas; striking the answer of the
defendant Suzanne Lavenas; amending the caption; fixing the defaults of the non-answering defendants;
and pursuant to RPAPL § 1321 appointing a referee to compute the amount due and owing the plaintiff,
is determined as set forth below.

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The Board of Managers of Montauk Manor Condominium (“the plaintiff”) commenced this action to foreclose an amended notice of lien dated September 4, 2011 for unpaid common charges, special assessments and other related charges and expenses on a condominium unit situate in Suffolk County by the filing of a summons and verified complaint on November 4, 2011.

By way of background, the plaintiff is the governing body of the Unit Owners (Unit Owners) of Montauk Manor Condominium at Montauk of 236 Edgemere Street, Montauk, New York 11954 (the Condominium), an unincorporated association. The plaintiff was created pursuant to a Declaration of Condominium (the Declaration) allegedly recorded on December 11, 1986 in the Office of the Suffolk County Clerk and amended thereafter on December 22, 2011. In addition to the Declaration, the By-Laws (the By-Laws) for the Condominium were also allegedly recorded on December 11, 1986 and amended thereafter.

Pursuant to the Declaration and the By-Laws (the Governing Documents) of the plaintiff, all sums assessed by the plaintiff as common charges and assessments, but unpaid, together with interest thereon at the legal rate per annum plus late fees and reasonable attorneys’ fees, are chargeable to any Unit Owner in the condominium, and cause a lien on their unit. The Governing Documents also provide, inter alia, that the plaintiff is entitled to foreclose on the lien for unpaid common charges or bring suit to recover a money judgment for unpaid common charges or assessments.

The defendant Suzanne Lavenas (Lavenas) is the record owner of Unit No. 413 in the Condominium (the Unit) as well as the Voluntary Administrator and Distributee of the Estate of Wesley First (First) who died testate on November 29, 2000. The defendants, Michael First and Karen Lee Whittlesey, are distributees of the Estate of First. Lavenas and First acquired title to the Unit by deed dated October 26, 1990 (the deed) and recorded in the Office of the Suffolk County Clerk on November 1, 2009. The deed for the Unit contains a recitation that title held by Lavenas and First is subject to the Governing Documents of the plaintiff.

The complaint includes three causes of action. In the first cause of action, the plaintiff demands that a judgment of foreclosure of sale be entered with respect to the Unit. In the second cause of action, the plaintiff requests that a judgment be entered against Lavenas in an amount to be proven at trial or determined by the Court for costs, including reasonable attorneys’ fees incurred by the plaintiff in connection with this action, plus interest, but not less than \$5,000.00. In the third cause of action, the plaintiff demands a money judgment which includes arrears, interest, costs and legal fees incurred by the plaintiff in an amount believed to be in excess of \$38,000.00.

In the complaint dated November 2, 2011, the plaintiff alleges that the defendant Suzanne Lavenas (Lavenas) defaulted in the payment of common charges allotted to and due upon the Unit in the amount of \$15,020.23 as of July 26, 2011. Thereafter, on September 13, 2011, the plaintiff filed a verified notice of lien for unpaid common charges in the amount of \$22,513.55 in the Office of the Suffolk County Clerk pursuant to Real Property Law § 339-Z. The plaintiff further alleges that Lavenas has continued to fail to remit common charges allotted to and due upon the Unit from and including April 1, 2011, plus interest

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and late fees from April, 2011 totaling \$56,054.41, together with attorneys' fees permitted pursuant to the Governing Documents.

In response to the complaint, Lavenas filed served an answer on or about November 29, 2012. In her answer, Lavenas denies some of the allegations in the complaint and admits other allegations, but does not assert any affirmative defenses. None of the other defendants have answered or appeared in this action. By stipulation dated March 5, 2012, this action was discontinued as against the defendant Mortgage Electronic Registration Systems, Inc. (MERS).

The plaintiff's now moves for, inter alia, an order pursuant to CPLR 3212 awarding it summary judgment against Lavenas; striking the answer of Lavenas; amending the caption; fixing the defaults of the non-answering defendants; and pursuant to RPAPL § 1321 appointing a referee to compute the amount due and owing the plaintiff. No opposition has been filed in response to the motion.

Once created, "the administration of a 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" (*Glenridge Mews Condominium v Kavi*, 90 AD3d 604, 605, 933 NYS2d 730 [2d Dept 2011]; citing *Schoninger v Yardarm Beach Homeowners Assn., Inc.*, 134 AD2d 1, 6, 523 NYS2d 523 [2d Dept 1987]).

"A purchaser of a unit in a condominium enters into a binding relationship with every other unit owner by both contract and statute. One of the elements of that relationship is the obligation to pay common charges...." (*Bd. of Mgrs. of Lido Beach Towers Condominium v Gartenlaub*, 27 Misc3d 1213A, 910 NYS2d 403, 2010 NY Slip Op 50729U [Sup Ct, Nassau County, Apr. 8, 2010, Palmieri, J. slip op, at 2]). Real Property Law § 339-e (2) defines common charges as each unit's proportionate share of the common expenses in accordance with the common interest. Common expenses are defined as (a) expenses of operation of the property and (b) all sums designated common expenses by or pursuant to statute, the declaration or the by-laws (*see*, Real Property Law § 339-e [2]).

The obligations of a unit owner to pay common charges and special assessments cannot be avoided, and are, for the most part, absolute and cannot be avoided (*90 E. End Ave. Condominium v Becker*, 2010 NY Misc LEXIS 3036, 2010 WL 2754086, 2010 NY Slip Op 31660U [Sup Ct, New York County, June 29, 2010, Wooten, J., slip op at 10]; Real Property Law § 339-x). Therefore, absent a valid defense, the plaintiff is entitled to judgment in its favor on the issue of liability as a matter of law (*Bd. of Mgrs. of Gerden Terrace Condominium v Chiang*, 247 AD2d 237, 237, 668 NYS2d 364 [1st Dept 1998]; *90 E. End Ave. Condominium v Becker*, 2010 NY Slip Op 31660U, *supra*, slip op at 10]).

By its submissions, the plaintiff demonstrated its entitlement to judgment as a matter of law for foreclosure and breach of contract as the answer filed by Lavenas is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see*, *Bd. of Mgrs. of Madison Med. Bldg. Condominium v Rama*, 249 AD2d 140, 671 NYS2d 246 [1st Dept 1998]; *Bd. of Mgrs. of the 200 West 109 Condominium v Baker*, 244 AD2d 229, 644 NYS2d 40 [1st Dept 1997]; *Bd. of Mgrs. of Plaza E. Condominium, v Ezra*

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Realty, LLC, 2012 NY Misc LEXIS 1102, 2012 WL 893860, 2012 NY Slip Op 30588U [Sup Ct, Nassau County, Feb. 29, 2012, Parga, J.]; *Bd. of Mgrs. of the Village Mall at Hillcrest Condominium v Dadon*, 29 Misc3d 1238A, 2010 NY Misc LEXIS 6127, 2010 WL 5173180 [Sup Ct, Queens County, Dec. 20, 2010, Markey, J.]; *Bd. of Mgrs. of the Silk Bldg. Condominium v Levenbrown*, 2009 NY Misc LEXIS 5439, 2009 WL 3062467, 2009 NY Slip Op 32127U [Sup Ct, New York County, Sept. 16, 2009, Edmead, J.]). It is undisputed that Lavenas agreed to be bound by the Condominium's Governing Documents when she purchased the Unit in October 1990. It is also undisputed that the Governing Documents require, Lavenas, as a Unit Owner, to pay common charges, special assessments, late charges, interest and the plaintiff's attorneys' fees and expenses incurred to collect such charges. Further, the plaintiff submitted an affidavit from its president and a detailed account history demonstrating Lavenas' failure to pay common charges, special assessments and other related charges and expenses as required by the By-laws.

In any event, in instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists (*see generally, Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *Madison Park Invs., LLC v Atlantic Lofts Corp.*, 33 Misc3d 1215A, 941 NYS2d 538 [Sup Ct, Kings County, Oct. 18, 2011, Cutrona, J.]). Under these circumstances, the Court finds that Lavenas failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see, Bd. of Mgrs. of Madison Medical Building Condominium v Rama*, 249 AD2d 140, 671 NYS2d 246 [1st Dept 1998]; *Bd. of Mgrs. of the 200 West 109 Condominium v Baker*, 244 AD2d 229, 644 NYS2d 40 [1st Dept 1997]). The plaintiff, therefore, is awarded summary judgment against Lavenas striking her answer (*see, Bd. of Mgrs. of Plaza E. Condominium, v Ezra Realty, LLC*, 2012 NY Slip Op 30588U, *supra*; *Bd. of Mgrs. of Lido Beach Towers Condominium v Gartenlaub*, 27 Misc3d 1213A, *supra*; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR 1024 amending the caption by substituting Richard Pelitonen also known as Richard Hutton for John Doe # 1, and by excising the fictitious named defendants, John Doe # 2-10, is granted (*see, Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for this relief. All future proceedings shall be captioned accordingly.


By its moving papers, the plaintiff further established the default in answering on the part of the newly substituted defendant, Richard Pelitonen also known as Richard Hutton, as well as the defendants Michael First, Karen Lec Whittlesey and Internal Revenue Service, since these defendants never interposed answers to the complaint (*see, RPAPL § 1321; HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; *Financial Freedom Acquisition LLC v Malloy*, 2012 NY Misc LEXIS 2037, 2012 WL 1576472, 2012 NY Slip Op 31160U [Sup Ct, Suffolk County, Apr 25, 2012, Pastorella, J.]). Accordingly, the defaults of all such defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against Lavenas and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts allotted to the Unit and due from Lavenas pursuant to the Governing Documents (*see, RPAPL § 1321; Bd. of Mgrs. of Plaza E. Condominium, v Ezra Realty, LLC*, 2012 NY Slip Op 30588U, *supra*).

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Accordingly, the motion is granted, and a referee shall be appointed to examine and compute the sums due the plaintiff, which shall include common charges, special assessments, electric charges, cable TV service charges, HVAC repairs, late charges, interest and costs, except for attorneys' fees, and shall submit a report regarding the same to this Court. The plaintiff is also entitled to prejudgment interest on the common charges and special assessments from April 1, 2011. Prejudgment interest shall accrue at the rate of .75% per annum (i.e., 9% per annum), as provided in Section 5 of the amended By-Laws.

The proposed order appointing a referee to compute, as modified by the Court, has been signed simultaneously herewith.

Dated: 12/3/11
Riverhead, NY


Hon. Ralph T. Gazzillo, A.S.C.J.

FINAL DISPOSITION NON-FINAL DISPOSITION