

**Board of Mgrs. of Cont. Towers Condominium v
Monassebian**

2012 NY Slip Op 33113(U)

December 21, 2012

Sup Ct, NY County

Docket Number: 115367/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART 46

Index Number : 115367/2010
CONTINENTAL TOWERS
vs.
MONASSEBIAN, BIJAN
SEQUENCE NUMBER : 003
DISMISS

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

The following papers, numbered 1 to 3, were read on this motion to/for dismiss the complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1-2
Answering Affidavits — Exhibits _____ No(s). 3
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies defendant Bijan Monassebian's motion to dismiss the complaint or to stay this action pursuant to the accompanying decision. C.P.L.R. §§ 2201, 3211(a)(1), (7), and (10).

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

FILED
JAN 10 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/21/12

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 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 46

-----X
BOARD OF MANAGERS OF CONTINENTAL TOWERS
CONDOMINIUM acting on behalf of the
unit owners of CONTINENTAL TOWERS
CONDOMINIUM,

Index No. 115367/2010

Plaintiff

- against -

BIJAN MONASSEBIAN and DAVID MONASSEBIAN,

Defendants
-----X

DECISION AND ORDER

FILED

JAN 10 2013

COUNTY CLERK'S OFFICE
NEW YORK

LUCY BILLINGS, J.S.C.:

The court denies defendant Bijan Monassebian's motion to dismiss the complaint or to stay the action against this defendant and grants plaintiff's motion to confirm the Referee's Report dated June 4, 2012, and for a judgment of foreclosure and sale against both defendants. C.P.L.R. §§ 2201, 3211(a)(1), (7), and (10), 4403. This judgment is based on accrued common charges attributable to condominium unit # 37-R or PH-R at 301 East 79th Street, New York County. Bijan Monassebian admits that he is the legal owner of the unit and that common charges attributable to it have not been paid since May 2010. He claims that in October 2009 he executed a deed transferring ownership of the unit to his daughter Deborah Monassebian, but further admits that the deed was never recorded and that on December 23, 2009, his wife Homa Monassebian commenced a divorce action against him that automatically stayed the recording. N.Y. Dom. Rel. Law § 236, pt. B, subdiv. 2(b). In her divorce action, his wife claims

ownership rights to the unit.

As a basis for dismissing this action, the husband claims that Homa Monassebian and their daughter Deborah Monassebian are necessary parties to it. C.P.L.R. § 3211(a)(10). Their potential ownership rights, however, do not impair plaintiff's right to the common charges. If the wife or daughter is in fact an owner, she may be liable for the common charges, and plaintiff may seek to recover the charges from her, but neither family member is necessary to accord plaintiff relief in this action. C.P.L.R. § 1001(a); R.P.A.P.L. § 1311; Board of Mgrs. of Parkchester N. Condominium v. Alaska Seaboard Partners Ltd. Partnership, 37 A.D.3d 332, 333 (1st Dep't 2007); New Falls Corp. v. Board of Mgrs. of Parkchester N. Condominium, Inc., 10 A.D.3d 574, 576 (1st Dep't 2004). See TransGas Energy Sys., LLC v. New York State Bd. on Elec. Generation Siting & Emt., 65 A.D.3d 1247, 1250 (2d Dep't 2009); Spector v. Toys 'R' Us, Inc., 12 A.D.3d 258, 259 (2d Dep't 2004). Bijan Monassebian also may seek contribution or indemnification from his wife, in a third party action, her divorce action, or a separate action.

If plaintiff chooses not to join Homa Monassebian and Deborah Monassebian in this action, then it will not affect their rights. Board of Mgrs. of Parkchester N. Condominium v. Alaska Seaboard Partners Ltd. Partnership, 37 A.D.3d at 333; New Falls Corp. v. Board of Mgrs. of Parkchester N. Condominium, Inc., 10 A.D.3d at 576; Glass v. Estate of Gold, 48 A.D.3d 746, 747 (2d Dep't 2008). Therefore the relief plaintiff seeks will not

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produce an inequitable effect on the wife or daughter, C.P.L.R. § 1001(a); Eclair Advisor Ltd. v. Jindo Am., Inc., 39 A.D.3d 240, 245-46 (1st Dep't 2007); Halliwell v. Gordon, 61 A.D.3d 932, 935 (2d Dep't 2009); Grasso v. Schenectady County Pub. Lib., 30 A.D.3d 814, 819 (3d Dep't 2006), or subject Bijan Monassebian to an order that conflicts with the automatic stay in the divorce action. Master v. Davis, 65 A.D.3d 646, 647 (2d Dep't 2009); Mayer's Cider Mill, Inc. v. Preferred Mut. Ins. Co., 63 A.D.3d 1522, 1523-24 (4th Dep't 2009); Fisher v. Sampson, 27 A.D.3d 560, 561 (2d Dep't 2006); O'Brien v. Seneca County Bd. of Elections, 22 A.D.3d 1036, 1037 (4th Dep't 2005). Homa Monassebian or Deborah Monassebian may protect any claimed ownership interest by paying the common charges or redeeming the unit at the foreclosure sale. R.P.A.P.L. §§ 1341, 1352; NYCTL 2005-A Trust v. Rosenberger Boat Livery, 96 A.D.3d 425, 426 (1st Dep't 2012); D & L Holdings v. Goldman Co., 287 A.D.2d 65, 69 (1st Dep't 2001). The judgment sought will not require Bijan Monassebian to transfer the unit or to take any action except, likewise, to pay the common charges to protect against the unit's sale. See N.Y. Dom. Rel. Law § 236, pt. B, subdiv. 2(b).

Bijan Monassebian further contends that plaintiff has violated the condominium by-laws by refusing to (1) permit him to rent his unit, so he could collect rental payments and use them to pay ongoing common charges; (2) permit unit occupants access to the building's gym; and (3) repair building common areas affecting the unit. He overlooks, however, that the by-laws

prohibit the rental of a unit when its common charges are in arrears. Reply Aff. of Jerry A. Montag (Aug. 1, 2012) Ex. 3, art. 8, § 11. The by-laws also authorize plaintiff's prohibition against use of the gym by a unit's occupants when its common charges are in arrears. Id. Ex. 3, art. 2, § 2-2.1, and Ex. 5. His claim regarding plaintiff's failure to repair common areas lacks any supporting evidentiary details and also rings hollow when he has not paid the charges for such maintenance.

Finally, Bijan Monassebian refers to plaintiff's promise or agreement to waive interest, late fees, fines, and attorneys' fees and expenses for six months following the last payment for common charges in May 2010. Yet nowhere does he alleges that plaintiff made such a promise or agreement, let alone any evidentiary details delineating its circumstances: who promised or agreed, when, or where, for example. E.g., Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010); Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007); Giant Group v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dep't 2003); Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dep't 2003). See Tutora v. Siegel, 40 A.D.3d 227, 228 (1st Dep't 2007); Prospect St. Ventures I, LLC v. Eclipsis Solutions Corp., 23 A.D.3d 213 (1st Dep't 2005). In fact, in support of his motion to dismiss the complaint and for a stay, he protests that, when he requested a payment plan from plaintiff for the accrued common charges, plaintiff "refused to act reasonably and in good faith and to accommodate the circumstances." Aff. of Bijan Monassebian ¶ 11

[* 6]
(July 18, 2012).

Therefore the court awards plaintiff a judgment against defendant Bijan Monassebian for the amount fixed by the Referee's Report, as qualified below, plus interest, late fees, and reasonable attorneys' fees and expenses that have accrued between the Report and the sale, to be calculated by the Referee. Under the bylaws, "such unpaid amounts" on which a unit owner is obligated to pay interest refers to "such amounts as remain unpaid for more than ten (10) days from their due date," which in turn refers to "Common Charges." Montag Reply Aff. Ex. 3, art. 6, § 4. Therefore the Referee shall clarify that her Report as well as her further calculation assesses interest only on common charges and not on late fees. Because plaintiff seeks interest on common charges, which are not a loan, New York General Obligations Law § 5-501(2)'s prohibition against usurious interest on loans is inapplicable. Seidel v. 18 E. 17th St. Owners, 79 N.Y.2d 735, 743 (1992); Protection Indus. Corp. v. Kaskel, 262 A.D.2d 61, 62 (1st Dep't 1999). See Borowski v. Fallerder, 296 A.D.2d 301 (1st Dep't 2002); Pemper v. Reifer, 264 A.D.2d 625, 626 (1st Dep't 1999); Russo v. Carey, 271 A.D.2d 889 (3d Dep't 2000).

DATED: December 21, 2012

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