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

PRESENT: DEBRA A. JAMES PART 59
Justice

11/08/07

Index No.: 603197/2008

Motion Date: 07/23/12

Motion Seq. No.: 02

Motion Cal. No.: _____

BOARD of MANAGERS of HONTO 88 CONDOMINIUM, RED APPLE CHILD DEVELOPMENT CENTER, A CHINESE SCHOOL A/K/A RED APPLE CHILD DEVELOPMENT CENTER,

Plaintiff,

- v -

RED APPLE CHILD DEVELOPMENT CENTER, A CHINESE SCHOOL, BANK of CHINA, NEW YORK BRANCH, XAIOPING FAN a/k/a JOANNA FAN PRESIDENT of RED APPLE CHILD DEVELOPMENT CENTER, A CHINESE SCHOOL, and INDIVIDUALLY, ZIMING SHEN, as TRUSTEE of RED APPLE CHILD DEVELOPMENT, A CHINESE SCHOOL, INDIVIDUALLY, THE BOARD OF MANAGERS OF HONTO 88 CONDOMINIUM, MING LAM, VICTOR WONG, SAN CHUEN HAU, LIN TEER LOO, PO ON WONG, YIN YING CHENG, TU GUANG YANG, BO JIN ZHU, KWAN TAT CHAN and NEW GOLDEN AGE REALTY, INC.,

Defendants.

FILED
JAN 28 2013
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

	PAPERS NUMBERED
Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5

Cross-Motion: ☐ Yes ☒ No

Plaintiff moves, pursuant to CPLR 3212 and CPLR 32111 (a) (7) and (b), for summary judgment dismissing defendants' affirmative defenses, claims and counterclaims.

Plaintiff Board of Managers of Honto 88 Condominium ("plaintiff") initially commenced this action in 2007 (Index

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

Number 110827/07 Action), which and was summarily dismissed because the Honto 88 Condominium, rather than its board of managers, was incorrectly named as plaintiff (Tolub, J.). There was no disposition of the counterclaims interposed by defendant Red Apple, in response to which plaintiff served a reply, in the 110827/07 Action. During the pendency of the 110827/07 Action, defendant Red Apple Child Development Center, a nursery school, kindergarten and day care center (Red Apple), commenced its own action (Index Number 111143/07 Action).

The plaintiff commenced the action at bar (Index Number 603197/08), and, by order of this court, dated January 27, 2009 (Edmead, J.), the three actions were consolidated under Index Number 603197/88.

Red Apple is the owner of 22 condominium units in the building known as 88 Honto Condominium, in which it operates the school. These 22 units were originally designated as medical units until Red Apple converted them into the school.

The main action seeks foreclosure of Red Apple's units for nonpayment of its share of the common charges. Red Apple, while not denying that it has not paid the common charges, asserts that it is entitled to a set-off against such unpaid common charges of the part of the electrical service charges attributable to the common elements of the condominium, which, it claims, is the obligation of the condominium, which it paid.

In this court's order of January 27, 2009, defendants were enjoined from withholding any part of the common charges or use and occupancy from plaintiff, pending resolution of this action.

In their answer to the complaint, defendants allege the following affirmative defenses: (1) plaintiff was unjustly enriched by defendants' payment of the common areas' electrical charges; (2) plaintiff has failed to maintain and/or repair the exhaust machines in the laundry room, causing excessive noise in defendants' units; (3) unlawful interference with defendants' use of its units; (4) breach of fiduciary duty; (5) failure to state a claim upon which relief can be granted; (6) plaintiff is barred from bringing suit by its own misconduct; (7) failure to mitigate damages; (8) laches; (9) estoppel; (10) unclean hands; (11) waiver, acquiescence and ratification; (12) unclean hands; (13) the instant action was not authorized by a duly constituted board, pursuant to Real Property Law (RPL) § 339-a; (14) the assessment of common charges violated RPL § 339-m; (15) lack of standing: (16) the claims are barred by documentary evidence; (17) the liens are legally insufficient; and (18) plaintiff agreed to offset the common charges by the electrical service to the common areas which was paid by defendants.

In addition, defendants have asserted two counterclaims: (1) annulling and/or vacating the liens in the

absence of a duly authorized meeting of the board; and (2) defamation as it appears in such liens.[1]

In support of its motion, plaintiff argues that defendant, as the owner of the 22 medical units, is responsible for paying for the electricity for such units, as well as for the general common elements. Plaintiff argues that defendants are responsible for those charges because: (1) when defendant Red Apple altered the medical units to create the space for the day care center, its alterations substantially changed the floor plan depicted in the condominium plan without proper authorization; (2) defendants have failed to provide evidence that it paid for any electricity attributable to the common elements, or that plaintiff has not paid such charges; and (3) defendants' claims are barred by the statute of limitations. Plaintiff also maintains that Red Apple has consistently prevented plaintiff from servicing the medical common areas, or accessing other

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[1]In the Index Number 11143/07 Action, wherein plaintiff, Ming Lam, Victor Wong, San Chuen Hau, Lin Teer Loo, Po On Wong, Yin Ying Cheng; Tu Guang Yang, Bo Jin Zhu Kwan tat Chan and New Golden Age Realty, Inc are named as party-defendants, Red Apple asserts nine causes of action against plaintiff: (1) breach of contract for failing to pay electricity charges; (2) declaratory judgment that defendants are not liable for electrical charges attributable to any areas other than the medical units; (3) unjust enrichment; (4) money had and received; (5) breach of contract for failing to repair and maintain the exhaust machines in the laundry room; (6) nuisance; (7) breach of fiduciary duty as asserted against the individual defendants, who are members of the board; (8) declaratory judgment annulling the 2007 annual unit owners' meeting; and (9) injunctive relief prohibiting the individual defendants from acting as members of the board.

common areas via the medical units, as mandated by the By-Laws. Plaintiff argues that all of defendants' affirmative defenses should be dismissed because they do not relate to plaintiff's claim. Moreover, plaintiff contends that defendants have failed to produce a single document that shows that they are paying for electricity for the common areas. Specifically, plaintiff asserts that defendants' claims for breach of contract should be dismissed because they are barred by the statute of limitations because Red Apple complains that plaintiff breached its contractual obligations in 1998 when Red Apple purchased the medical units.

According to Article VI, Section 6 of the By-Laws of the Condominium of the Premises Known as Honto 88 Condominiums ("the By-Laws)", all Unit Owners are required to pay common charges and assessments as determined by the Board of Managers, and the Board of Managers has the right and duty to collect any unpaid Common Charges and Assessments, together with interest thereon, and expenses of the proceeding, including attorneys' fees, in action to recover the same in an action brought against such Unit Owner, or by foreclosure of the lien on such Unit granted by Section 339-a of the New York State Real Property Law.

Article VI, Section 1 of the By-Laws also state that Medical Units Owners "alone shall pay for 100% of the electricity consumed to cool the Medical spaces," and that the "expense item

of the Medical Units shall be borne on the basis of percentage of Common Interest 'stepped up' so that for such purpose the aggregate percentage of Common Interest for all Medical Units equals 100%." Further, the By-Laws state that the Residential Unit owners are not responsible for the electricity attributable to the common elements pertaining to the Medical Units. Moreover, paragraph 9 of the Notes to Schedule B to the Offering Plan ("prospectus") states "All electricity for the Medical Units shall be separately metered and billed to the Medical Unit Owners."

In his examination before trial (EBT), Ziming Shen (Shen), a trustee of Red Apple who was also named as an individual defendant, testified that, the prospectus that he reviewed for the property showed the 22 medical units as an empty box. In his affidavit in opposition, Shen states that the approval for the conversion of the medical units to day care facilities by the New York City Department of Buildings occurred on May 22, 1998, and Red Apple's purchase of the units took place on December 23, 1998, thereby rendering invalid plaintiff's contention that the conversion was illegal.[2]

At her EBT, Xiaoping Fan (Fan), president of Red Apple, averred that she receives 22 electrical bills for the units which

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[2]The court notes that, although the application to effectuate the conversion was "approved" on May 22, 1998, the approval was not signed off on until December 28, 1999.

she pays on a monthly basis, issuing 22 separate checks therefore.

In opposition to the motion, defendants state that the current Board of Managers, whose authority they challenge, is refusing to honor an agreement reached with the prior Board of Managers that Red Apple's common charges would be offset by the electrical charges attributable to the common elements paid by Red Apple. In support of this assertion, defendants have submitted "Minutes taken for Meeting on Wednesday, July 28, 2004", which are unsigned or approved, that state, in pertinent part, "Mr. Shen argued that the building should pay the electric usage in the common area of red apple. The board agreed to it." The July 28, 2004 Minutes continue:

> According to Mr. Shen, building-offering plan mentioned that the building should pay partial of the electric use for Red Apple. The Board agreed to follow building's By-Law. They authorized the Managing Agent to hire an attorney to review the By-law in reference to this issue and also obtain a report from a license electrician for the electric usage. an unsigned

Also, attached to defendants' opposition papers are the Board of Managers minutes of meeting of June 17, 2005, which indicates a continuing dispute entitled "Red Apple Common Area Electric Charge Dispute".

Next attached to defendants' papers is a record purporting to be minutes of a Board of Managers meeting of February 14, 2006, with no notation as to as to any vote, under a

caption entitled "Open Discussion", wherein it states that the Board offers to Shen that "past years' electric charge in common area will be waived," and that "From now on, cooling and lighting electric charge in the corridor of Red Apple will be paid by the building", but also that "instead the building will not pay for cooling and lighting electric charge in the corridor of Red Apple."

Defendants have also provided the deposition testimony of Ming Lam (Lam), a member of plaintiff Board of Managers, and Candy Xia (Xia), an assistant property manager employed by defendant New Age Realty Inc., the board's managing agent, who both testified that the Board of Managers has been paying the electrical charges that are in dispute in this litigation, as well as a compendium of electrical bills in reverse chronological order from September 2009 to February 2003, which defendants' attorney totals in his affirmation and records of payments made by defendants that total $220,073.80.

Based on these depositions, and electrical bills paid by defendants, defendants assert that there is a factual question as to who is responsible to pay for such charges. Defendants also maintain that plaintiff has failed and refused to perform the required maintenance and repairs to the general common elements adjacent to Red Apple's units.

Plaintiff maintains that the electricity bills

submitted by defendants do not support the argument that Red Apple has been paying the electricity for the common elements, since they only refer to the individual medical units. Plaintiff also refers to the condominium declaration, which states that the maintenance and repair of common elements to which a Unit Owner is granted exclusive use are the responsibility of such Unit Owner, and that, hence, it is Red Apple, not plaintiff, that is responsible for the repairs that defendants are claiming entitle them to withhold common charges. Moreover, plaintiff maintains that, even if it were its responsibility to make such repairs, a unit owner is not entitled to withhold payment of common charges and assessments based on the failure of repairs.

At his deposition, Lam, member of plaintiff Board of Mangers, stated that the notices for the 2006 meeting, the notices in question, were prepared by a property manager who was not an officer of the condominium, and hand delivered to each Unit Owner. Defendants argue that the motion must be denied as plaintiff never sent a valid notice of the annual meeting in which the current Board of Managers was elected and, that election must be set aside and all assessments voted on by that Board of Managers vacated. They contend that such notices violate the by-laws, since the notice was not mailed to Red Apple, nor signed by an officer.

By-Laws Article II, Section 2 states that "(t)he

Managers shall be elected at the annual meeting of the members as set forth below." Article II, Section 4 of the By-Laws states, "It shall be the duty of the Secretary to mail a notice of each annual...meeting of the Unit Owners, at least ten (10) days but not more than thirty (30) days prior to the meeting". Finally, By-Laws Article V, Section 1 states that " it shall be construed to mean personal notice; but such notice *may* be given in writing, by mail, by depositing the same in a post office or letter box" (*italics supplied*).

As issue has been joined in this case, the standards for summary judgment pertain: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006).

On that basis:

(1) That branch of plaintiff's motion seeking to dismiss defendants' first affirmative defense for unjust enrichment is granted. Defendants consistently argue that there is a contract between the parties regarding the payment for the common element electric charges. The existence of a valid contract bars a cause of action in quantum meruit. Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1st Dept 2004); see also

Sheiffer v Shenkman Capital Mgt., 291 AD2d 295 (1st Dept 2002).

(2) That branch of plaintiff's motion seeking to dismiss defendants' second affirmative defense alleging a failure to repair is granted. "An individual unit owner cannot withhold payment of common charges and assessments in derogation of the by-laws of the condominium based on defective conditions in his unit or the common areas [internal quotation marks and citation omitted]." Schottenstein v Windsor Tov LLC, 2009 WL 1905162, 2009 NY Misc LEXIS 5933 *20, 2009 NY Slip Op 31407(U)(Sup Ct, NY County 2009), *affd* 85 AD3d 546 (1st Dept 2011). Therefore, this allegation does not constitute an affirmative defense to an action concerning the nonpayment of common charges and assessments.

(3) That branch of plaintiff's motion seeking to dismiss defendants' third affirmative defense based on unlawful interference with defendants' use of the units is granted. Plaintiff establish that there is no evidence of such interference and the defendants only offer conclusory allegations as to such defense. Layden v Boccio, 253 AD2d 540 (2d Dept 1998).

(4) That branch of plaintiff's motion seeking to dismiss defendants' fourth affirmative defense alleging a breach of fiduciary duty is granted. Although a condominium board is held to be in a fiduciary relationship to the unit owners,

defendants have failed to allege that the actions taken by the board were not taken in good faith, in the exercise of honest judgment or in the furtherance of legitimate corporate purposes. Matter of Levandusky v One Fifth Avenue Apartment Corp., 75 NY2d 530 (1990).

(5) That branch of plaintiff's motion seeking to dismiss defendants' fifth affirmative defense alleging a failure to state a claim upon which relief can be granted is denied since such defense is not the proper subject of a motion to dismiss. Riland v Todman & Co, 56 AD2d 350 (1st Dept 1977).

(6) That branch of plaintiff's motion seeking to dismiss defendants' sixth affirmative defense for misconduct, and tenth and twelfth affirmative defenses for unclean hands is granted. These affirmative defenses are duplicative, and the defense of unclean hands is insufficient as it does not allege that plaintiff engaged in the concealment of material facts. Compare Golden Eagle Capital Corp v Paramount Mgt Co, 88 AD3d 646 (2 Dept 2011).

(7) That branch of plaintiff's motion seeking to dismiss defendants' seventh affirmative defense alleging plaintiff's failure to mitigate damages is granted. Mitigation of damages is not a defense to a foreclosure action. La Jolla Bank, FSB v Whitestone Jewels, *LLC*, 2011 WL 6689859, 2011 NY Misc LEXIS 6067, 2011 NY Slip Op 33362U (Sup Ct, Queens County 2011).

(8) That branch of plaintiff's motion seeking to dismiss defendants' eighth affirmative defense of laches and ninth affirmative defense of estoppel is granted. Defendants allegations as to such defenses are conclusory and unsupported by any facts.

(9) That branch of plaintiff's motion seeking to dismiss defendants' thirteenth affirmative defense that the instant action was not authorized by a duly constituted board is granted. Defendants' argument is based on the fact that the notice of the meeting in question, in which the current board was elected, was neither mailed nor signed by an officer of the condominium. Such requirements are not mandated by the condominium's by-laws, and defendants have failed to articulate any argument as to how such notice violated RPL § 339-a. Moreover, as there has been no prompt application for the court to determine the defendant's right to vote at an election, this court sees no more reason to interfere in the internal affairs of plaintiff Condominium unless a clear showing is made to warrant such action, than if such condominium were incorporated. See Matter of Goldfield Corp v General Host Corp, 36 AD2d 125 (1st Dept 1971).

(10) That branch of plaintiff's motion seeking to dismiss defendants' fourteenth affirmative defense alleging that the assessment of common charges violated RPL § 339-m is granted.

RPL § 339-m states that the board may assess charges to non-residential unit owners in a manner different from the owner's respective common interests if so authorized in the by-laws. In the instant matter, the By-Laws state that the owners of the non-residential medical units are responsible for the electric service charges for the common elements and, hence, defendants have failed to show how such assessment violates RPL § 339-m.

(11) That branch of plaintiff's motion seeking to dismiss defendants' fifteenth affirmative defense alleging a lack of standing is granted. This consolidated action was brought by the condominium's board of managers who have such authority, pursuant to RPL §§ 339-dd and 339-z.

(12) That branch of plaintiff's motion seeking to dismiss defendants' sixteenth affirmative defense that the claims are barred by documentary evidence is granted. Plaintiffs show that defendants have provided no documentary evidence in admissible form to support this defense. The presumptive board minutes are both unauthenticated and therefore inadmissible as well as unpersuasive, the electric bills do not indicate charges for the common elements, and the By-Laws specifically contradict defendants' assertions.

(13) That branch of plaintiff's motion seeking to dismiss defendants' seventeenth affirmative defense that the liens are legally insufficient is granted. Plaintiffs come

forward and show that the record of liens of common charges recorded in the City Register's Office and which are attached to its motion papers, are legally sufficient, which defendants do not refute.

(14) That branch of plaintiff's motion seeking to dismiss defendants' eighteenth affirmative defense that plaintiff agreed to offset the common charges by the amount of electrical service charges assumed by defendants is granted. There is no admissible evidence to support this defense, and "[t]he burden was on [defendants] to reveal [their] proofs and show that [the] defenses were real and capable of being established. The conclusory assertions recited in that affidavit, even if believable, were simply not enough to meet that burden." Matter of Lefkowitz v McMillen, 57 AD2d 979, 979 (3d Dept 1977).

(15) The remaining two affirmative defenses are also asserted as defendants' first and second counterclaims. That branch of plaintiff's motion seeking to dismiss these affirmative defenses and counterclaims is granted. The nineteenth affirmative defense, and first counterclaim, asserts that the meeting in which the liens were authorized was not a duly authorized meeting of the board. As stated above, the notice of the meeting was valid.

(16) The twentieth affirmative defense and second counterclaim allege defamation as it appears in the liens. As

plaintiff points out the allegations are insufficient to state such a defense or cause of action. 392 CPW, LLC v Matwell Kates, Inc., 2011 WL 1480880, 2011 NY Misc LEXIS 1689, 2011 NY Slip Op 30927U, (Sup Ct, NY County 2011).

Based on the foregoing, all of defendants' counterclaims and affirmative defenses are dismissed.

The court must now address the nine claims alleged by defendants in their action.

That branch of plaintiff's motion seeking to dismiss Red Apple's first cause of action for breach of contract as it relates to the electrical charges for the common elements is granted. Red Apple has provided no evidence in admissible form that plaintiff is obligated, pursuant to the By-Laws, to pay for such charges. In fact, as previously discussed, all of the evidence states that such charges are the responsibility of Red Apple. Hence, this cause of action is dismissed.

That branch of plaintiff's motion seeking to dismiss Red Apple's second cause of action for a declaratory judgment that Red Apple is not liable for electrical charges attributable to any areas other than the medical units is granted, for the reasons stated above.

That branch of plaintiff's motion seeking to dismiss Red Apple's third cause of action for unjust enrichment is granted, since there is a valid contract covering this matter, as

discussed above.

That branch of plaintiff's motion seeking to dismiss Red Apple's fourth cause of action for money had and received is granted. There is no evidence in admissible form that Red Apple paid for any services that were the financial obligations of plaintiff.

That branch of plaintiff's motion seeking to dismiss Red Apple's fifth cause of action for breach of contract based on plaintiff's failure to repair the exhaust machines in the laundry room is granted, since there is no evidence that the exhaust machines were not working properly, aside from conclusory statements, which are insufficient to defeat a motion for summary judgment. Torelli v Esposito, 93 AD2d 747 (1st Dept 1983).

That branch of plaintiff's motion seeking to dismiss Red Apple's sixth cause of action for nuisance is granted. Defendants' private nuisance claim is dismissed because Red Apple has "failed to demonstrate that [plaintiff] engaged in intentional and unreasonable conduct or that it engaged in abnormally dangerous activities." Caldwell v Two Columbus Avenue Condominium, 92 AD3d 441, 441 (1st Dept 2012).

That branch of plaintiff's motion seeking to dismiss Red Apple's seventh cause of action for breach of fiduciary duty by the individual members of the board is granted. Such persons are protected by the business judgment rule, and Red Apple has

failed to demonstrate that these persons engaged in independent tortious acts directed against defendants that were not in furtherance of legitimate condominium purposes. Pelton v 77 Park Avenue Condominium, 38 AD3d 1 (1st Dept 2006).

That branch of plaintiff's motion seeking to dismiss Red Apple's eighth and ninth causes of action, seeking a declaration annulling the 2007 annual meeting and injunctive relief prohibiting the individual defendants from acting as members of the board, is granted, for the reasons above-stated.

Based on the foregoing, plaintiff's motion is granted in its entirety, and all of defendants' affirmative defenses, claims and counterclaims are dismissed. As a consequence, the only issues remaining are the causes of action asserted by plaintiff to foreclose on defendants' ownership interest in the medical units, for damages based on defendants' failure to pay their common charges, assessments, late fees and interest and to have a receiver appointed. Defendant Red Apple has admitted that it has failed to pay their common charges, late fees and other assessments, and therefore plaintiff is entitled to a judgment of foreclosure. Plaintiff's motion to appoint a referee shall be granted, and such referee shall compute the amount of the damages, which shall include outstanding charges, including interest, expenses and attorneys fees incurred in the prosecution of this action. St. James Condominium Bd v Newcorn, 179 AD2d 524

(1st Dept 1992).

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and all of defendants' claims, counterclaims and affirmative defenses are dismissed and partial summary judgment as to liability is determined against defendant Red Apple Child Development Center; and it is further

ORDERED that the issue of damages is referred to a Special Referee to hear and report with recommendations, except that, in the event or upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel seeking the reference or, absent such party, counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet,[3] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that the parties shall appear for the reference

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[3]Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

hearing, including with all witnesses and evidence they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter an the rules of evidence shall apply) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion, and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee0 shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules of the Trial Courts.

Dated: January 22, 2012 ***ENTER:***

FILED
JAN 28 2013
NEW YORK
COUNTY CLERK'S OFFICE

DEBRA A. JAMES
J.S.C.