Board of Mgrs. of Waverly Estates Condominium v Yerk
2013 NY Slip Op 33527(U)
December 17, 2013
Supreme Court, Suffolk County
Docket Number: 36114/12
Judge: Paul J. Baisley
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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BOARD OF MANAGERS OF WAVERLY ESTATES CONDOMINIUM,

Plaintiff,

-against-

GEORGE H. YERK, JR., BENEFICIAL HOMEOWNER SERVICE CORPORATION, NICB, and "JOHN DOE" and "JANE DOE", being fictitious names and intended to be tenants or persons who by bond, note, extension agreement or otherwise may be liable for deficiency judgment, if such deficiency judgment is desired and/or any party in possession of any part of the liened premises whose interest plaintiff desires to bar,

Defendants.

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INDEX NO.: 36114/12
MOTION DATE: 4/8/13
MOTION NO.: 001 MOT D

PLAINTIFF'S ATTORNEY:
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80 Maple Avenue
Smithtown, New York 11787

DEFENDANTS' ATTORNEY:
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Upon the following papers numbered 1 to 12 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-12 ; ~~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 unopposed motion (motion sequence no. 001) of plaintiff for, *inter alia*, an order pursuant to CPLR R. 3212 awarding summary judgment in its favor against defendant George H. Yerk, Jr., striking his answer and dismissing the affirmative defenses therein; and pursuant to RPAPL §1321 appointing a referee to compute the amount due and owing plaintiff is determined as set forth below; and it is further

ORDERED that plaintiff is directed to serve a copy of this Order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR R. 2103(b)(1), (2) or (3) within thirty days of the date hereof, and to promptly file the affidavits of service with the Clerk of the Court.

The Board of Managers of Waverly Estates Condominium commenced this action to foreclose a notice of lien for unpaid common charges, late fees, and other related charges on a residential condominium unit situate in Suffolk County. Plaintiff is the governing body of the Unit Owners ("Unit Owners") of Waverly Estates Condominium located at Holtsville, New York (the "Condominium"), an unincorporated association. Plaintiff was created pursuant to a Declaration of Condominium (the "Declaration") allegedly recorded on June 6, 1988 in the Office of the Suffolk County Clerk. In addition to the Declaration, the By-Laws for the Condominium (the "By-Laws") were also allegedly recorded on June 6, 1988.

Pursuant to the Declaration and the By-Laws (the "Governing Documents"), all sums assessed by 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 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. Pursuant to the Governing Documents, all Unit Owners have an absolute and unconditional obligation to pay the common charges.

Defendant George H. Yerk, Jr. ("Yerk") is the record owner of Unit No. 27 (the "Unit") in the Condominium. Yerk acquired title to the Unit by deed dated December 5, 1998 and recorded in the Office of the Suffolk County Clerk on February 23, 1999. The legal description attached to the deed for the Unit contains a recitation that title held by Yerk as a tenant in common in the Condominium is subject to the Declaration of plaintiff.

In the complaint filed on November 30, 2012, plaintiff sets forth two causes of action. In the first cause of action, plaintiff demands that a judgment of foreclosure and sale be entered with respect to the Unit. In the second cause of action, plaintiff requests reasonable attorneys' fees incurred in connection with this action. In the complaint, plaintiff alleges that Yerk defaulted in the payment of common charges allotted to and due upon the Unit in the sum of $11,435.46 as of September 23, 2012. On October 16, 2012, plaintiff filed a verified notice of lien dated September 23, 2012 for unpaid common charges in the amount of $11,435.46 in the Office of the Suffolk County Clerk pursuant to Real Property Law §339-Z. Plaintiff further alleges that Yerk continued to fail to remit common charges allotted to and due upon the Unit in the sum of $11,435.46, plus interest and the expenses of sale and costs of this action, together with attorney's fees permitted pursuant to the Governing Documents.

In response to the complaint, Yerk interposed a verified answer sworn to on January 7, 2013. In his answer, Yerk generally denies some of the allegations in the complaint and admits other allegations, including his ownership of the Unit, the lien and the amount due plaintiff. In the answer, Yerk also asserts three affirmative defenses, alleging, among other things, that the complaint fails to state a cause of action and that the action is barred by the doctrine of the election of remedies as well as the statute of limitations. The remaining defendants have neither answered nor appeared in this action.

Plaintiff's now moves for, *inter alia*, an order pursuant to CPLR R. 3212 awarding summary judgment in its favor against Yerk and striking his answer and the affirmative defenses therein; and pursuant to RPAPL §1321 appointing a referee to compute the amount due and owing plaintiff. In support of the motion, plaintiff has submitted, inter alia, the summons and complaint, the Governing Documents, an affidavit from plaintiff's President, Thomas Lowe, and an affirmation from counsel. In his affidavit, Lowe alleges that plaintiff caused a notice of lien to be filed against the Unit due to Yerk's failure to pay common charges and related fees in the sum of $11,435.46 as of September 23, 2012. In her affirmation, counsel avers that the general denials and the affirmative defenses contained in the answer lack merit, as Yerk admits his ownership in the Unit as well as the validity of plaintiff's lien. No opposition has been filed in response to this motion.

When moving to dismiss an affirmative defense, plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*see*, CPLR 3211 [b]; *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). In reviewing a motion to dismiss an affirmative defense, this court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (*see*, *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 869 NYS2d 597 [2d Dept 2008]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (*see, id.*). In order for a defendant to successfully oppose such a motion, defendant must show his or her possession of a bona fide defense, *i.e.*, one having "a plausible ground or basis which is fairly arguable and of substantial character" (*Feinstein v Levy*, 121 AD2d 499, 500, 503 NYS2d 821 [2d Dept 1986]). Self-serving and conclusory allegations do not raise issues of fact (*see*, *Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]), and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*Charter One Bank, FSB v Leone*, 45 AD3d 958, 959, 845 NYS2d 513 [3d Dept 2007]).

To prevail on a breach of contract action, plaintiff must establish an agreement between the parties, the performance by plaintiff, defendant's failure to perform, and resulting damages (*Dee v Rakower*, 2013 NY Slip Op 07443 [2d Dept, Nov. 13, 2013]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). In such an action, "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability" is predicated must be established (*Matter of Sud v Sud*, 211 AD2d 423, 424, 621 NYS2d 37 [1st Dept 1995]).

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] [*internal citations omitted*]).

"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...." (*Board of Mgrs. of Lido Beach Towers Condominium v Gartenlaub*, 27 Misc3d 1213 [A], 910 NYS2d 403, 2010 NY Slip Op 50729 [U] [Sup Ct, Nassau County 2010, 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 obligation of a condominium unit owner to pay common charges is, 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 31660 [U] [Sup Ct, New York County 2010, slip op at 10]; *see also*, Real Property Law §339-x). Further, RPL §339-aa provides, in part, that a condominium may commence suit for a money judgment and commence a foreclosure action, without waiving its lien, if the amounts securing the lien have not been paid as the lien continues

until the earlier of all sums secured thereby have been paid, or six years (*see generally*, *Board of Mgrs. of Highview Condominium, v Mahland*, 177 Misc2d 502, 676 NYS2d 721 [Civ Ct, Richmond County, New York 1997]).

By its submissions, plaintiff demonstrated its entitlement to judgment as a matter of law awarding it the amounts that it assessed against Yerk for common charges, costs and disbursements, and attorneys' fees (*see*, *Board of Directors of Squire Green at Pawling Homeowners Assn., Inc. v Bell*, 89 AD3d 657, 933 NYS2d 288 [2d Dept 2011]; *Board of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb*, 72 AD3d 997, 900 NYS2d 145 [2d Dept 2010]; *Board of Mgrs. of the Village Mall at Hillcrest Condominium v Dadon*, 29 Misc3d 1238 [A], 958 NYS2d 644 [Sup Ct, Queens County 2010]; *Board of Mgrs. of Lido Beach Towers Condominium v Gartenlaub*, 27 Misc3d 1213 [A], *supra*; *Board of Mgrs. of the Silk Bldg. Condominium v Levenbrown*, 2009 NY Misc LEXIS 5439, 2009 WL 3062467, 2009 NY Slip Op 32127 [U] [Sup Ct, New York County 2009]). Plaintiff submitted evidence of its authority to collect those charges and assessments pursuant to the relevant sections of the Governing Documents. Plaintiff also demonstrated the validity of the lien (*see*, Real Property Law §339-aa). It is undisputed that Yerk agreed to be bound by the Condominium's Governing Documents when he purchased the Unit in December 1998. It is also undisputed that the Governing Documents require Yerk, as a Unit Owner, to pay common charges, late charges, interest and plaintiff's attorneys' fees and expenses incurred to collect such charges. Further, plaintiff submitted an affidavit from its president and a detailed account history demonstrating Yerk's failure to pay common charges, and other related charges and expenses as required by the Governing Documents. Therefore, absent a valid defense, plaintiff is entitled to judgment in its favor on the issue of liability as a matter of law (*Board of Mgrs. of the Garden 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 31660 [U], *supra*, slip op at 10]).

Plaintiff also submitted sufficient proof to establish, *prima facie*, that the affirmative defenses set forth in Yerk's answer are subject to dismissal due to their unmeritorious nature (*see*, *Becher v Feller*, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; *Wells Fargo Bank Minn., N.A. v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *Coppa v Fabozzi*, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [*unsupported affirmative defenses are lacking in merit*]; *see also*, *Chemical Bank v Levine*, 91 NY2d 738, 741, 675 NYS2d 583 [1998] [*RPL §339-aa provides that a properly filed common charge lien "shall continue in effect until all sums secured thereby, with interest thereon, shall have been fully paid or until expiration six years from the date of filing, whichever occurs sooner"*]; *compare* RPL §339-aa, *with* CPLR 213[2] [*the applicable statute of limitations with respect to contractual obligations is six years*).

As plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Yerk (*see*, *HSBC Bank USA v Merrill*, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Yerk to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]). 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*, *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88

[1st Dept 2012]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012] *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (*Tortorello v Carlin,* 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

Yerk's answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (*see*, *Board of Directors of Squire Green at Pawling Homeowners Assn., Inc. v Bell*, 89 AD3d 657, *supra*; *Board of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb*, 72 AD3d 997, *supra*; *Board of Managers of Windridge Condominiums One v Horn*, 234 AD2d 249, 651 NYS2d 326 [2d Dept 1996]). To the contrary, Yerk concedes, in his answer, the amount of the common charges and assessments claimed to be due plaintiff in the lien (*see*, CPLR 3018[a]). Further, the affirmative defenses asserted by Yerk are factually unsupported and without apparent merit (*see*, *Becher v Feller*, 64 AD3d 672, *supra*). In any event, the failure by Yerk to raise and/or assert each of his pleaded defenses in opposition to plaintiff's motion warrants the dismissal of the second and third affirmative defenses as abandoned under the case authorities cited above (*see*, *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, *supra*; *see also*, *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, *supra*).

By his first affirmative defense, Yerk asserts that the complaint fails to state a cause of action, however, he has not cross moved to dismiss the complaint against him on this ground (*see*, *Butler v Catinella*, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]). Also, as indicated above, plaintiff has established its *prima facie* entitlement to summary judgment. Therefore, the first affirmative defense is surplusage, and the branch of the motion to strike such defense is denied as moot (*see, Old Williamsburg Candle Corp. v Seneca Ins. Co.*, 66 AD3d 656, 886 NYS2d 480 [2d Dept 2009]; *Schmidt's Wholesale, Inc. v Miller & Lehman Constr., Inc.*, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

Under these circumstances, the Court finds that Yerk failed to rebut plaintiff's *prima facie* showing of its entitlement to summary judgment requested by it (*see*, *Board of Managers of Windridge Condominiums One v Horn*, 234 AD2d 249, *supra*; *see generally, Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007])). Plaintiff, therefore, is awarded summary judgment against Yerk (*see*, *Board of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb*, 72 AD3d 997, *supra*; *see generally*, *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, Yerk's answer is stricken; the second and third affirmative defenses set forth in Yerk's answer are dismissed.

By its moving papers, plaintiff further established the default in answering on the part of defendants, Beneficial Homeowner Service Corporation, NICB, John Doe and Jane Doe (*see*, RPAPL §1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of the above-noted remaining defendants are fixed and determined. Since plaintiff has been awarded summary judgment against Yerk, and has established the default in answering by the remaining defendants, plaintiff is entitled to an order appointing a referee to compute amounts allotted to the Unit and due from Yerk pursuant to the Governing Documents (*see*, RPAPL §1321; *see also*, *Board of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb*, 72 AD3d 997, *supra*; *Board of Managers of Polo Club Condominium v Browne*, 2013 NY Misc LEXIS 3369, 2013 WL 3994729, 2013 NY Slip Op 31 747 [U] [Sup Ct, Suffolk

County 2013]; *Board of Mgrs. of Plaza E. Condominium, v Ezra Realty, LLC*, 2012 NY Misc LEXIS 1102, 2012 WL 893860, 2012 NY Slip Op 30588 [U] [Sup Ct, Nassau County 2012]).

Accordingly, this motion by plaintiff is granted and a referee shall be appointed to examine and compute the sums due plaintiff, which shall include common charges, special assessments, late charges, interest and costs, except for attorneys' fees, and shall submit a report regarding the same to this Court. Plaintiff is also entitled to prejudgment interest on the common charges and special assessments from September 23, 2012. Prejudgment interest shall accrue at the rate of .75% per month (*i.e.*, 9% per annum), as provided in Article VI of the By-Laws. The proposed order appointing a referee to compute pursuant to RPAPL §1321, as modified by the Court, has been signed concurrently herewith.

Dated: December 17, 2013

PAUL J. BAISLEY. JR.

J.S.C.