

Columbia Condominium v Ullah
2014 NY Slip Op 32583(U)
October 2, 2014
Supreme Court, New York County
Docket Number: 153517/13
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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THE COLUMBIA CONDOMINIUM, BY ITS
BOARD OF MANAGERS,

Plaintiff,

-against-

FARRIN ULLAH, et al.,

Defendants.
-----X

Index No. 153517/13

DECISION/ORDER

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced this action to foreclose on a lien for unpaid common charges. It now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on the ground that there are no triable issues of fact with respect to defendant Farrin Ullah's ("Ullah") liability for her admitted failure to pay common charges. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. This is a dispute between the plaintiff Board of Managers (the "Board") of the condominium building located at 275 West 96th Street, New York, NY (the "Condominium") and defendant Ullah, a unit owner of two-contiguous units ("Unit 25 E/F"), regarding past-due common charges. Plaintiff alleges that defendant Ullah is the owner of

condominium Unit 25E/F and that she has failed to pay any common charges since 2007. Based on Ullah's failure to pay common charges, plaintiff filed and recorded written notices of lien for unpaid common charges against the Unit (the "Lien") in the Office of the City Register, County of New York. According to plaintiff, no part of the Lien has been satisfied. Thus, it commenced the instant action to foreclose on the Lien. In her answer, Ullah does not dispute her non-payment of the common charges.

On the present motion, plaintiff seeks the following relief: (1) granting plaintiff summary judgment against Ullah for its lien foreclosure action; (2) appointing a referee to compute the amounts due to plaintiff on its lien for unpaid common charges recorded against the condominium, with interest thereon, including attorney' fees, costs and disbursements incurred in connection with this action; and (3) a default judgment against the defendants who were served but have not appeared and (4) an order dropping certain parties from the caption.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

It is well settled that the obligations of a unit owner to pay common charges and special assessments cannot be avoided and are, for the most part, absolute. *See Real Property Law § 339-x; Frisch v. Bellmarc Mgt.*, 190 A.D.2d 383 (1st Dept 1993). Indeed, "[a]n individual unit owner, such

as the plaintiff, cannot withhold payment of common charges and assessments in derogation of the by-laws of the condominium based on a defective condition in his unit or in the common areas, or based on his disagreement with actions lawfully taken by the Board of Managers. *Frisch*, 190 A.D.2d at 389 (internal citations omitted).

However, this “does not mean that a unit owner is precluded from interposing any defenses at all to an action for foreclosure.” *Residential Board of Managers of the Century Condominium v. Berman*, 213 A.D.2d 206 (1st Dept 1995). When an individual unit owner challenges a decision made by the condominium’s board of managers, the court will apply the business judgment rule. *Frisch*, 190 A.D.2d at 389. Under the deferential business judgment rule, the inquiry is limited to whether the board acted within the scope of its authority under the applicable by-laws and whether the action was taken in good faith to further a legitimate interest of the condominium. *Perlbinder v. Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 A.D.3d 985, 989 (1st Dept 2009). The business judgment rule, however, does not shield a board from fraud, self dealing or unconscionability. *Id.* Thus, to defeat plaintiff’s motion for summary judgment, defendant must raise a material issue of fact as to whether the Board acted outside the scope of its authority, acted in a way that did not legitimately further the purpose of the condominium or acted in bad faith. *See id*; *see also Frisch*, 190 A.D.2d at 389.

On the present motion, plaintiff has made out its prima facie entitlement to summary judgment by presenting evidence establishing that it was authorized under the Condominium’s by-laws to collect common charges and that Ullah has failed to pay such authorized charges. In opposition to plaintiff’s motion, Ullah has failed to raise an issue of fact sufficient to require a trial of this action. Ullah’s argument that summary judgment should be denied because it is unclear

whether she or her ex-husband is the unit owner of Unit 25F is without basis. All of the public records on file with the New York City Register's Office and the New York City Department of Finance confirm that Ullah, rather than her ex-husband, is the sole owner of Unit 25F. The certified deed for Unit 25F that is on file with the City Register's Office demonstrates that Ullah is the owner of record for Unit 25F. Moreover, First American Title Insurance Company performed a common charge lien foreclosure search on January 14, 2013 which revealed that Ullah is the owner of record for both Unit 25E and Unit 25F. The continuation search performed by First American Title Insurance Company in September 1, 2014 again showed that Ullah is the sole unit owner of Unit 25F.

The argument by Ullah that summary judgment should be denied because she was not served with a 90 day notice in accordance with Section 1304 of the Real Property Action & Proceedings Law is also without merit. The requirement in §1304 that a ninety day notice be provided does not apply to a condominium which is foreclosing on its lien for unpaid common charges—it applies where a lender, an assignee or a mortgage loan servicer commences a legal action against a borrower.

The other affirmative defenses asserted by Ullah are also without merit. The argument by Ullah that she was not properly served has been waived based on her failure to move on this ground within sixty days of serving the answer as required by CPLR § 3211(e). The argument by Ullah that this action should be stayed based on the existence of another lawsuit before another Supreme Court Justice is also without basis. Ullah has failed to establish that this action should be stayed while the other action is proceeding. Moreover, there is no basis for dismissing this action based on the fact that plaintiff commenced a prior foreclosure action against defendant which was discontinued without prejudice in 2013 pursuant to the stipulation of the parties.

Finally, Ullah's argument that she has a defense to the claim for common charges based on plaintiff withholding building privileges and amenities from her is without merit. Pursuant to a house rule passed by the Board in December 2011, which took effect on January 9, 2012, the Board had the authority to deny Ullah these services based on her failure to pay these common charges. Ullah has failed to establish that the Board did not have the authority to pass this house rule or that the Board acted in bad faith or in a way that did not further the legitimate interests of the Condominium.

Although not addressed in her opposition papers, the court also finds that the remaining affirmative defenses asserted by Ullah, including that she was not provided evidence of the amount owed, that she previously attempted to make a partial payment and that the action should be stayed pending her divorce proceeding, are without merit. The court also finds that there was no error on plaintiff's part in naming Ullah's children as parties to the action based on plaintiff's belief that the children reside in the units.

Based on the foregoing, plaintiff is granted summary judgment against Ullah, Ullah's affirmative defenses are stricken, the Board is entitled to a referee to compute and ascertain the amount due the plaintiff on the liens to be foreclosed and to report whether the subject premises should be sold in one or separate parcels, the plaintiff is granted a default judgment against the non-appearing defendants and Zahid Ullah, Zhald Ullah and Jane Doe are dropped from the caption and Neima Ullah is substituted in place of John Doe. Settle order.

Dated: 10/2/14

Enter: _____


J.S.C.
CYNTHIA S. KERN
J.S.C.