

Terranova v 10 & 40 Shore Blvd. Condominium

2017 NY Slip Op 30516(U)

March 21, 2017

Supreme Court, Kings County

Docket Number: 507629/16

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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WILLIE MAE TERRANOVA,

Plaintiff,

-against-

**THE 10 & 40 SHORE BOULEVARD
CONDOMINIUM, GR-10 & 40, LLC., DELMAN
COMPANY, LLC., DELTA MANAGEMENT LLC.,
and THE BOARD OF MANAGERS OF THE 10
& 40 SHORE BOULEVARD CONDOMINIUM,**

Defendants.

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DECISION/ORDER

Index No. 507629/16

Submitted 3/9/17

Mot. Seq. # 1

HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for a default judgment.

Papers	Numbered
Notice of Motion, Affirmations, and Exhibits Annexed.....	<u>1-5</u>
Affirmation in Opposition and Exhibits Annexed.....	<u> </u>
Reply.....	<u> </u>

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Plaintiff moves for a default judgment against defendants "The 10 & 40 Shore Boulevard Condominium" and "The Board of Managers of the 10 & 40 Shore Boulevard Condominium." Despite the lack of opposition, the motion is denied for the reasons stated herein.

This is a personal injury action arising from an accident which took place on November 16, 2013 at 10 Shore Boulevard, one of several large adjacent buildings in Brooklyn owned by condominium owners. Defendant "The 10 & 40 Shore Boulevard

Condominium” is the name of the condominium itself, which is a name for convenience and not an entity of any sort, and therefore not a proper party. Defendant “The Board of Managers of the 10 & 40 Shore Boulevard Condominium,” is the board of managers of the condominium, elected by the owners, and is an unincorporated association also improperly named as a party. When a lawsuit is brought against a condominium, the applicable statute requires the named party to be the president or treasurer of the board of managers of the condominium. See, General Associations Law § 13.

The condominium form of ownership of real property is established by dividing a parcel of real property into individual units and their appurtenant common elements. A unit owner holds title in fee to his or her individual unit as well as to an undivided interest in the common elements. See, *Residential Comm. of Bd. of Managers of the Sycamore v 250 East 30th Street Owners, LLC*, 17 Misc 3d 1139[A] [Sup Ct, New York County 2007]; *Murphy v State of New York*, 14 AD3d 127 [2d Dept 2004]. A parcel of real property becomes a condominium, and is thus subject to the jurisdiction of the Condominium Act (Real Property Law Article 9-B, § 339-d et seq.), through the filing of a Declaration of Condominium (RPL § 339-n). Once created, the administration of the condominium's affairs is governed principally by its Declaration and 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 sets forth the respective rights and obligations of the unit owners concerning their units and the condominium's common elements. See, *Gennis v Pomona Park Bd. of Managers*, 36 AD3d 661, [2d Dept 2007]; *Schoninger v Yardarm Beach Homeowners' Assoc., Inc.*, 134 AD2d, [2d Dept 1987]. Every unit owner executes a Unit Owner Power of Attorney, which gives the board of managers the authority to represent the unit owner in accordance with the

terms of the Declaration and By-laws.

As a condominium is an unincorporated association, it must be sued by naming its president or treasurer in that capacity as the party defendant. Pursuant to New York General Associations Law § 13:

An action or special proceeding may be maintained against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

The plaintiff herein has improperly brought suit against the defendant board of managers, an unincorporated association, and has failed to name either the defendant's president or treasurer in his or her representative capacity, as a party to this action, as is required by General Associations Law § 13. However, that error, by itself, is not jurisdictional and can be corrected by amendment. See, *Montalvo v Bakery & Confectionary Workers International Union Local No. 3*, 137 AD2d 506, 508 [2d Dept 1988]; *Matter of Motor Haulage Co. [International Bhd. of Teamsters]*, 298 NY 208 [1948]; *Bohl Contr. Co. v IUE, AFL-CIO Dist. No. 3*, 73 AD2d 1023 [3d Dept], *lv dismissed* 51 NY2d 704 [1980]. The fact that the condominium's board of managers was sued without naming a proper officer in his or her capacity as such, in violation of Section 13 of the General Associations Law, is not a fatal defect but a correctable error. See *Bohl Contracting Co. v IUE, AFL-CIO*, 73 AD2d 1023, 1024.

As the court cannot grant a default judgment against defendants as sued, as they are improper parties, the motion for a default judgment must be denied with leave to renew on proper papers.

The court notes that while a complaint naming as a defendant an unincorporated association may be amended and corrected to instead name the president or treasurer, this can only be done if proper service was effectuated. See, *2166 Bronx Park East v Local 32E Bldg. Services Emp.*, 45 Misc2d 492 [Sup Ct Bronx Co 1965]. For instance, in a case where the complaint is actually served upon the president or treasurer of an association, the failure to designate that person in his representative capacity as the defendant in the caption is an irregularity which may be corrected in the absence of prejudice to a substantial right of any party. See, *Motor Haulage Co. v International Brotherhood of Teamsters*, 298 NY 208, 212; *Public Affairs Committee, Inc. v Wholesale & Dep't Store Union*, 15 AD2d 645 [1st Dept 1962].

The affidavits of service in the instant matter indicate that service of the summons and verified complaint were made on the condominium and the board of managers at the same time and place (“at 10 & 40 Shore Boulevard”) by “delivering thereat a true copy of each to MR. PAUL personally, deponent knew said Domestic Corporation so served to be the Domestic Corporation described in same as said recipient and knew said individual to be the managing/authorized agent of the Domestic Corporation, and said person stated that he/she was authorized to accept service on behalf of the Domestic Corporation.”

The court notes that there are a number of problems with the affidavits of service. The first is that 10 and 40 Shore Boulevard are two different buildings and the affidavit does not specify at which one service was made. Further, the process server states that he knew the person he served, a “Mr. Paul,” “to be the managing/authorized agent of the Domestic Corporation, and said person stated that he/she was authorized

to accept service on behalf of the Domestic Corporation.” However, neither the Condominium nor the Board of Managers are domestic corporations and “Mr. Paul” certainly could not accept service on behalf of corporations which do not exist. As such, the affidavits of service do not establish that service was made upon a person authorized to accept service on behalf of a proper party at an actual location.

The court grants plaintiff leave renew the motion for a default judgment with an affidavit from the process server clarifying where he served the process, and whether the person he served was someone authorized to accept service on behalf of the officers of the board of managers, along with an amended affidavit of service and a prayer requesting that it be filed nunc pro tunc, and a prayer to amend the caption to reflect the proper defendant, “_____ as [the president or treasurer] of the Board of Managers of the 10 & 40 Shore Boulevard Condominium.”

The compliance conference scheduled in the CCP Part on May 30, 2017 is hereby adjourned to September 7, 2017.

The foregoing constitutes the decision and order of the court.

Dated: March 17, 2017

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**