

Board of Mgrs. of the Cocoa Exch. Condominium v Angeles
2017 NY Slip Op 31509(U)
July 14, 2017
Supreme Court, New York County
Docket Number: 156557/16
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

THE BOARD OF MANAGERS OF THE COCOA
EXCHANGE CONDOMINIUM,

Plaintiff,

-against-

VANESSA ANGELES, RUPERTA UHLER,
INTERNAL REVENUE SERVICE, AND "JOHN
DOE" NO.1 through "JOHN DOE" No. 15, the
true name of said defendants being unknown to
plaintiff, the parties intended to be those persons
having or claiming an interest in the liened
premises described in the complaint by virtue of
being tenants, or occupants, or judgment-
creditors, or lienors or any type or nature in all or
part of said premises,

Defendants.

Index No.: 156557/16
DECISION/ORDER
Motion Sequence No. 002

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing (1) plaintiff's motion (i) to strike defendants Angeles and Uhler's answer and for summary judgment; (ii) to dismiss defendants Angeles and Uhler's affirmative defenses; (iii) for a default judgment against defendant Internal Revenue Service; (iv) to dismiss defendants "John Doe" No.1 through "John Doe" No.15 as party defendants and delete the omnibus clause from the caption; (v) appoint a referee to compute and ascertain the amount due on the lien; and (2) defendants Vanessa Angeles and Ruperata Uhler's cross-motion to preclude plaintiff and to dismiss plaintiff's complaint.

Papers	Numbered
Plaintiff's Notice of Motion.....	1
Defendants Angeles and Uhler's Notice of Cross-Motion	2
Plaintiff's Affirmation in Opposition to Defendants' Cross-Motion and in Further Support of Plaintiff's Motion.....	3

Belkin Burden Wenig & Goldman, LLP, New York (Cristina Simanca-Proctor of counsel), for plaintiff.

The Law Offices of Walter Jennings P.C., New York (Walter Jennings of counsel), for defendants Vanessa Angeles and Ruperta Uhler.

Gerald Lebovits, J.

Plaintiff moves for various relief: (i) to strike defendants Vanessa Angeles and Ruperta Uhler's answer and for summary judgment under CPLR 3212; (ii) to dismiss defendants Angeles and Uhler's affirmative defenses under CPLR 3211 (b); (iii) for a default judgment against

defendant Internal Revenue Service (IRS) under CPLR 3215 (a); (iv) to dismiss defendants "John Doe" No.1 through "John Doe" No. 15 as party defendants and delete the omnibus clause from the caption under CPLR 3025 (b); and (v) to appoint a referee to compute and ascertain the amount due on the lien under Real Property Actions and Proceedings Law (RPAPL) § 1321. Defendants Angeles and Uhler cross-move to preclude plaintiff under CPLR 3042 and CPLR 3126 and to dismiss plaintiff's complaint under CPLR 3211(a) (4).

Plaintiff filed this foreclosure action on a lien against a real property, a condominium apartment, located at 82 Beaver Street a/k/a 1 Wall Street Court, unit 402, in New York County (the Property), demanding reasonable attorney fees as provided in the condominium by-laws (the by-laws) § 6.6 together with the costs and disbursements of this action. Defendants Angeles and Uhler are the Property's recorded owners. (Plaintiff's Notice of Motion, Affidavit in Support of Motion, at ¶ 5 & Exhibit A.) Plaintiff's lien was recorded on October 5, 2015, for unpaid common charges of \$27,026.14 against the Property, with the Office of the City Register, New York County (the lien). (Plaintiff's Notice of Motion, Exhibit F.)

Plaintiff claims that defendants Angeles and Uhler have carried a balance for common charges for the Property since August 2012 and thus have been in default under the by-laws. Plaintiff claims that under the by-laws § 6.6, in the event defendants Angeles and Uhler fail promptly to pay common charges plaintiff is entitled to charge defendants Angeles and Uhler late charges and interest on all unpaid sums, and plaintiff is entitled to recover costs and expenses, including attorney fees incurred in any proceedings brought to collect unpaid common charges. (Plaintiff's Notice of Motion, Affidavit in Support of Motion, at ¶ 8.)

Before this foreclosure action, plaintiff brought a plenary action against defendants Angeles and Uhler on June 11, 2013 seeking a money judgment for unpaid common charges in the Civil Court, New York County under index No. CV-041028-13/NY (the plenary action). (Plaintiff's Notice of Motion, Affidavit in Support of Motion, at ¶ 11.) The plenary action was settled by stipulation dated September 19, 2013. In the stipulation, defendants Angeles and Uhler acknowledged owing plaintiff \$20,448.94, which included common charges, electric charges, late charges, surcharges, and attorney fees as of September 12, 2013; plaintiff agreed to waive some late charges and surcharges, and reduced the amount to \$13,926.48; defendants Angeles and Uhler agreed to pay at least \$750 each month. (Plaintiff's Notice of Motion, Exhibit D.) According to the stipulation, in the event of default, previous waived charges and surcharges shall become due and payable and all arrears due shall become immediately due.

Plaintiff claims that defendants Angeles and Uhler defaulted in making the payments under the stipulation and the amount defendants Angeles and Uhler owe is \$48,487.98, as of January 11, 2017. (Plaintiff's Notice of Motion, Affidavit in Support of Motion, at ¶ 19 & Exhibit C.) Plaintiff also claims that there is no dispute that defendants Angeles and Uhler have failed to pay the common charges under the by-laws and the stipulation; therefore, summary judgment is appropriate.

I. Plaintiff's Motion

(i). Motion for summary judgment and appointment of a referee

Plaintiff's summary- judgment motion on the lien foreclosure action under CPLR 3212, and motion to appoint a referee to compute and ascertain the sums due to plaintiff on the lien under RPAPL § 1321 is granted.

On a summary-judgment motion, a movant must establish its cause of action sufficiently to warrant the court as a matter of law in directing judgment in its favor; to defeat a motion for summary judgment, the nonmoving party must show facts sufficient to require a trial of any issue of fact. (*Zuckerman v New York*, 49 NY2d 557, 561 [1980].)

In the stipulation, defendants Angeles and Uhler acknowledged that they owned plaintiff \$20,448.94, which included common charges, electric charges, late charges, surcharges and attorney fees as of September 12, 2013. No dispute exists that defendants Angeles and Uhler are owners of the Property and defaulted in its common charges. Also, no dispute exists that defendants Angeles and Uhler are required under the by-laws § 6.6 to pay plaintiff's expenses, including, without limitation, attorney fees incurred in any proceeding brought by plaintiff to collect unpaid common charges or in action to foreclose the lien of the Property arising from unpaid common charges. (Plaintiff's Notice of Motion, Exhibit B.) Plaintiff also submits the lien and a report indicating details of the unpaid charges and fees, including late charges, interest and legal fees, from January 1, 2011, to January 11, 2017, for a total amount outstanding of \$48,487.98. (Plaintiff's Notice of Motion, Exhibit F & Exhibit C.) This evidence is sufficient to establish, prima facie, plaintiff's entitlement to judgment as a matter of law against defendants Angeles and Uhler for common charges, interests, costs and disbursements, including attorney fees.

Defendants Angeles and Uhler fail to raise a triable issue of fact sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment.

Defendants' arguments in opposition are unpersuasive. In opposition to plaintiff's motion for summary judgment, defendants argue that the late charges, \$150 per month constitute 28% of the common charges, are unenforceable. Defendants Angeles and Uhler argues that late fees of 5% on monthly rental has been found as unenforceable. (*943 Lexington Ave., Inc. v Niarchos*, 83 Misc 2d 803, 804 [1st Dept 1975].) Defendants Angeles and Uhler also dispute the amount owed to plaintiff; they allege that plaintiff confirmed their payment of \$1,800 in an email dated January 30, 2015, and that some part of late charges was waived according to the stipulation. (Defendants Angeles and Uhler's Notice of Cross Motion, Affidavit in Support of Cross Motion and in Opposition to Motion for Summary Judgment, at ¶¶ 4, 5.) Defendants, however, do not say whether plaintiff credited them for this payment.

Although defendants Angeles and Uhler dispute the exact amount owned to plaintiff, the existence of a dispute does not preclude summary judgment. (*Shufelt v Bulfamante*, 92 AD3d 936, 937 [2d Dept 2012].) A dispute about the exact amount owed to plaintiff may be resolved

after a reference under RPAPL §1321. (*Board of Mgrs. of Beechhurst Shores at Riverside Dr. Condominium v Capote*, 2012 NY Slip Op 32426 [U], *4, 2012 WL 4472293, at *4 [Sup Ct Queens County 2012].)

Plaintiff's failure to respond to defendants Angeles and Uhler's demand for a bill of particulars does not preclude this court from granting summary judgment to plaintiff. (*See Board of Mgrs. of Beechhurst Shores at Riverside Dr. Condominium*, 2012 NY Slip Op 32426 [U], *4, 2012 WL 4472293, at *4.) Defendants argue that they served plaintiff's attorney a demand for bill of particulars on October 12, 2016, but plaintiff has failed to respond. (Defendants Angeles and Uhler's Notice of Cross-Motion, Affirmation in Support of Cross-Motion and in Opposition to Motion for Summary Judgment, at ¶¶ 3, 4, & Exhibit C.) Defendants Angeles and Uhler demand details of the defaulted common charges, legal fees and every payment plaintiff alleges in its complaint. Defendants Angeles and Uhler argue that plaintiff's failure to provide a bill of particulars precludes this court from granting summary judgment. But plaintiff's motion for summary judgment is not premature because defendants Angeles and Uhler fail to offer any evidence to suggest that further demand of a bill of particulars may lead to relevant evidence. (*Board of Mgrs. of Beechhurst Shores at Riverside Dr. Condominium*, 2012 NY Slip Op 32426 [U], *4, 2012 WL 4472293, at *4.) In any event, plaintiff provides a report detailing the unpaid charges and fees, including late charges, interest and legal fees, from January 1, 2011, to January 11, 2017, in support of its motion. (Plaintiff's Notice of Motion, Exhibit C.) Therefore, Plaintiff's motion to strike defendants' answer and for summary judgment, and motion to appoint a referee to compute and ascertain the sums due to plaintiff on the lien is granted.

(ii). Motion to strike defendants' answer

Plaintiff's motion to dismiss defendants Angeles and Uhler's first defense is granted. Defendants Angeles and Uhler's answer raise four defenses: (1) plaintiff fails to name a necessary party to this action — the first mortgagee; (2) the sums sought in the foreclosure proceeding are incorrect and are not due and owing to plaintiff; (3) plaintiff lacks personal jurisdiction over defendants due to improper service of the summons and complaint; and (4) some of the charges and sums constituting the alleged lien and basis for the foreclosure proceeding are barred by the doctrine of collateral estoppel.

Plaintiff argues that defendants Angeles and Uhler's four defenses are devoid of merit. For the first defense, plaintiff alleges that under RPL § 339-z, the lien is subordinate to the first mortgage — Wells Fargo Bank, N.A. on the Property, and that under RPL § 1311(3), Wells Fargo Bank, N.A., is not a necessary party to this action because its mortgage is not subordinate and subject to the lien. For the second defense, plaintiff argues that the disputed amount plaintiff seeks is no impediment to obtain a summary judgment, and the issue of the amount due should be addressed by the referee under RPAPL § 1321. For the third defense, plaintiff provides this court's decision entered on January 11, 2017, in which this court found that service of process on defendants Angeles and Uhler had been proper. (Plaintiff's Notice of Motion, Exhibit K.) For the fourth defense, plaintiff argues that it is entitled to sue defendants for a money judgment while simultaneously suing to foreclose the Lien under RPL § 339-aa and by-laws § 6.7.1.

RPL § 339-z provides:

“The board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon, prior to all other liens except only . . . (ii) all sums unpaid on a first mortgage of record,”

RPL § 1311(3) provides:

“Each of the following persons, whose interest is claimed to be subject and subordinate to the plaintiff’s lien, shall be made a party defendant to the action: . . . 3. Every person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff.”

No dispute exists that Wells Fargo Bank, N.A. is the first mortgage of record. As Wells Fargo Bank, N.A., is not subordinate to plaintiff’s lien under RPL § 339-z, it is not a necessary defendant in this action. Therefore, defendants Angeles and Uhler’s first defense — plaintiff’s failure to name a necessary party to this action — is dismissed.

Plaintiff’s motion to dismiss defendants’ second defense is granted to the extent that a referee will compute the amount. The dispute on the amount sought by plaintiff does not preclude this court from granting summary judgment to plaintiff. The issue of the amount due should be addressed by a referee under RPAPL § 1321.

Plaintiff’s motion to dismiss defendants’ third defense is granted. This court found on January 11, 2017 that the service of process on defendants Angeles and Uhler had been proper. (Plaintiff’s Notice of Motion, Exhibit K.) Therefore, defendants’ third defense about personal jurisdiction is dismissed.

Plaintiff’s motion to dismiss defendants’ fourth defense is granted. Defendant does not explain how the doctrine of collateral estoppel applies in this foreclosure action. No prior court decision exists on an issue of fact or law that precludes plaintiff from bringing this foreclosure action. Therefore, defendants’ fourth defense based on the doctrine of collateral estoppel is dismissed.

(iii). Motion for a default judgment

Plaintiff’s motion for a default judgment under CPLR 3215 (a) against defendant IRS is granted. Plaintiff shows that defendant IRS has failed to appear, answer, or otherwise move with respect to the complaint. No party opposes plaintiff’s motion.

(iv). Motion to amend the caption

Plaintiff's motion to dismiss defendants "John Doe" No.1 through "John Doe" No.15 as party defendants and delete the omnibus clause from the caption under CPLR 3025 (b) is granted. No party opposes plaintiff's motion. Plaintiff shall settle order.

II. Defendants Angeles and Uhler's Cross-Motion

(i). Motion to preclude

Defendants Angeles and Uhler argue that because plaintiff failed to respond to their disclosure demand for a bill of particulars, plaintiff should be precluded under CPLR 3042 and CPLR 3126. Defendants Angeles and Uhler do not specify what plaintiff should be precluded from doing.

In any event, plaintiff submits a report in support of its own motion, detailing defendants' default for the unpaid charges and fees, including late charges, interest and legal fees from January 1, 2011, to January 11, 2017, for a total amount of \$48,487.98. (Plaintiff's Notice of Motion, Exhibit C.) Defendants Angeles and Uhler argue only that they do not owe some of this amount, about \$1,800 less, and some part of late charges was waived under the stipulation. (Defendants Angeles and Uhler's Notice of Cross Motion, Affidavit in Support of Cross Motion and in Opposition to Motion for Summary Judgment, at ¶¶ 4, 5.) Defendants, thus, concede that they owe some, if not most, of the money. Even though plaintiff did not respond to defendants' bill of particulars, plaintiff is not precluded from bringing its summary-judgment motion. Nor is plaintiff precluding from seeking the amount that defendants owe. Therefore, defendants' cross-motion to preclude is denied.

(ii). Motion to dismiss plaintiff's complaint

Defendants Angeles and Uhler move to dismiss plaintiff's complaint under CPLR 3211(a) (4) because the plenary action is still pending between the same parties for the same cause of action in the Civil Court, New York County. In opposition, plaintiff argues that it is entitled to sue defendants Angeles and Uhler for a money judgment in the plenary action while simultaneously suing to foreclose the lien.

Defendants' cross-motion to dismiss plaintiff's complaint under CPLR 3211(a) (4) is denied. CPLR 3211(a) (4) provides the following:

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires;"

Defendants Angeles and Uhler do not explain how the plenary action in New York County is still pending. The plenary action was resolved by a stipulation of settlement. After defendants Angeles and Uhler defaulted under the stipulation, plaintiff moved for a money judgment against defendants Angeles and Uhler in September 2015. (Plaintiff's Notice of Motion, at ¶ 14.) Plaintiff states that it withdrew the motion on June 28, 2016. (Plaintiff's Notice of Motion, Affidavit in Support of Motion, at ¶ 14 & Exhibit E.) As far as this court can tell based on the parties' moving papers, no action is pending.

Even if the plenary action were pending, plaintiff has the right to maintain this foreclosure action. RPL § 339-aa provides the following:

"Suit to recover a money judgment for unpaid common charges shall be maintainable without foreclosing or waiving the lien securing the same, and foreclosure shall be maintainable notwithstanding the pendency of suit to recover a money judgment."

Therefore, plaintiff may maintain this foreclosure action while a plenary action for a money judgment is pending. Therefore, defendants' cross-motion to dismiss plaintiff's complaint under CPLR 3211 (a) (4) is denied.

Accordingly, it is

ORDERED that plaintiff's motion is granted. Plaintiff shall settle order; and it is further

ORDERED that defendants Vanessa Angeles and Ruperta Uhler's cross-motion is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order on defendants and on the County Clerk's Office; and it is further

ORDERED that the August 10, 2017, conference in Part 7 at 10:00 a.m. is vacated.

Dated: July 14, 2017



J.S.C.

HON. GERALD LBOVITS
J.S.C.