

**Board of Mgr. of Foundry at Washington Park
Condominium v Foundry Dev. Co., Inc.**

2012 NY Slip Op 33701(U)

July 7, 2012

Supreme Court, Orange County

Docket Number: 4484/2010

Judge: Paul I. Marx

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF ORANGE
HON. PAUL I. MARX, J.S.C.

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

-----X
**THE BOARD OF MANAGERS OF
FOUNDRY AT WASHINGTON PARK
CONDOMINIUM, AS AGENT FOR ALL
UNIT OWNERS,**

DECISION AND ORDER

Index No.: 4484/2010

Plaintiff,

-against-

Motion Date: April 18, 2012

**FOUNDRY DEVELOPMENT CO., INC.
PAUL & JOSEPH MANAGEMENT
COMPANY, INC., POLONIA VENTURES
LLC, GERARDO SANCHEZ, NIRVA
SANCHEZ, JOSEPH SUAREZ and "JOHN
DOE" and/or "JANE DOE" the last 2 names
being fictitious and unknown to plaintiff, the
person or parties intended being the persons or
parties, if any, having or claiming an interest in
or lien upon the mortgaged premises described
in the complaint,**

Motion Sequence # 14

Defendants.
-----X

The following papers numbered 1 through 6 were read on the motion of Defendant Paul & Joseph Management Company Inc. ("P&J") seeking (1) dismissal based upon documentary evidence, pursuant to CPLR §3211(a)(1), and (2) a declaratory judgment that the liens against Defendant's properties are null and void on the basis of waiver, laches and equitable estoppel, pursuant to CPLR §3001:

Notice of Motion-Affidavit of Joseph E. Suarez-Affirmation of	
Reginald H. Rutishauser, Esq.-Exhibits 1 - 17	1-3
Affidavit in Opposition by Gardiner S. Barone-Exhibits A - C	4

Reply Affidavit of Joseph E. Suarez-Reply Affirmation of
 Reginald H. Rutishauser, Esq.-Exhibits 1 - 3 5-6

Upon reading the foregoing papers it is ORDERED that the branch of the motion for dismissal of the claims against Defendant is denied. The branch of the motion for a declaratory judgment is denied.

This action by the Board of Managers of Foundry at Washington Park Condominium seeks to recover all of the unpaid common charges related to the unsold units owned at different times by Defendants Foundry Development Co., Inc. ("FDC"), Polonia Ventures LLC, and Paul & Joseph Management Co. (collectively "Defendant Companies"). Plaintiff alleges that Defendants Nirva Sanchez, Gerardo Sanchez, and Joseph Suarez (collectively "Individual Defendants") were principals of, or had a financial interest in, one or all of the Defendant Companies. As such, Plaintiff claims that the Individual Defendants acted in bad faith and violated their fiduciary duties to the Plaintiff as board members by failing to assess and collect common charges owed by Defendant Companies. Plaintiff alleges that Defendant Companies improperly sold or transferred their units to avoid paying said common charges. Plaintiff also alleges that Defendant Companies and the Sanchez and Suarez defendants acted against the interests of the condominium by improperly exercising control over the condominium board, causing the board to amend the Declaration and By-Laws for their personal benefit, and causing Plaintiff to take over FDC's obligation as a sponsor to complete the pool, garage and other common elements.

Defendant P&J moves to dismiss the Second, Third and Sixth Causes of Action in the First Amended Complaint "on the grounds that no common charges were assessed, and owing, against the units owned by said Defendant at the time of their acquisition; that good and valuable consideration was provided for the units conveyed to said Defendant; [and] that the transfer was made for good reasons in the ordinary course of business." Notice of Motion at p. 1. In support of its motion, P&J submits the affidavit of Joseph E. Suarez, its president, which provides a detailed recitation of Mr. Suarez's history and involvement with Plaintiff, and Mr. Suarez's formation of P&J to manage the condominium units currently owned by him. P&J also supports its motion with numerous documents: minutes of the condominium board meetings, a treasurer's report written by Joseph Suarez, written observations of board member Peter Devito about a board meeting, a

memorandum written by Suarez interpreting the voting clause in the By-Laws, an email from Peter Devito on the history of the condominium, a list of the owners who supported an amendment to the voting clause in the By-Laws, the affidavit of the Director of Housing and Community Renewal for the City of Newburgh, a legal memorandum from Newburgh corporation counsel to the city manager regarding common charges, and an affidavit of the Director of Economic Development and Administrative Director of the City of Newburgh Industrial Development Agency.

Notably absent from the above collection of documents is a copy of the amended complaint against which P&J seeks relief. In opposition to the instant motion, Plaintiff requests that the motion should be denied because the failure to include the pleading on a motion to dismiss is fatal to the motion. *See 344 E. 72 Limited. Partnership v Dragatt*, 188 AD2d 324, 324, 591 NYS2d 28 [1st Dept 1992]. Plaintiff places particular emphasis on the fact that, unlike the self-represented defendants who committed the same oversight in their original motion papers, P&J is represented by counsel. The Court certainly does not approve of such careless practice by counsel. Nonetheless, a copy of the first amended complaint was subsequently submitted with the reply papers. The Court finds, as it did with regard to the motions by the self-represented parties, that neither Plaintiff nor the Court has been prejudiced by the omission of the first amended complaint from the original motion papers. *See Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008, 1008, 864 NYS2d 554 [2nd Dept 2008]. Therefore, the Court will proceed to consider Defendant's motion.

Defendant's motion to dismiss on CPLR §3211(a)(1) grounds is woefully inadequate. First, the materials submitted by P&J are documentary in nature but they are not "documentary" for purposes of CPLR §3211(a)(1). In order for the Court to grant a motion to dismiss based upon documentary evidence, "the documents alone [must] 'definitively dispose of plaintiff's claim.'" *Carroll v The Charles House Condominium*, 33 Misc. 3d 1214A, 939 NYS2d 739 [N.Y. Sup. Ct. 2011] (quoting *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 808 NYS2d 214 [1st Dept 2006], citing *Bronxville Knolls Inc. v Webster Town Center Partnership*, 221 AD2d 248, 634 NYS2d 62 [1st Dept 1995]). As an initial matter, the documents must be "unambiguous and of undisputed authenticity" to be deemed "documentary" for purposes of CPLR §3211(a)(1). *Fontanetta v John Doe 1*, 73 AD3d 78, 898 NYS2d 569 [2nd Dept 2010]. The types of documents submitted by Defendant in support of its motion do not qualify as "documentary." Affidavits, emails, and letters

have been held to not qualify as documentary evidence, as have any other written documents that raise issues of credibility for the jury to decide. *Id.* at 85-87.

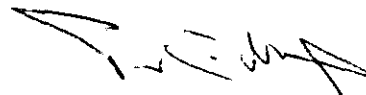
Second, “[d]ocuments that can be characterized at best as letters, summaries, opinions, and/or conclusions ... do not pose an ‘essentially undeniable’ defense and therefore do not qualify as ‘documentary’ under CPLR § 3211[a][1].” *Carroll*, 33 Misc. 3d at 1214A (citing *Fontanetta*, 73 AD3d 78). Apart from the ambiguous nature of the documents, none of them establish P&J’s defense that no common charges had ever been assessed against the units owned by it. In fact, P&J has not supplied a single document related to its acquisition of condominium units from FDC, either to show that those units were acquired for valuable consideration, or to show that the transfer was not subject to a lien or other evidence of outstanding common charges. Therefore, the branch of P&J’s motion for CPLR §3211(a)(1) relief is denied.

The branch of Defendant’s motion seeking a declaratory judgment, in essence, seeks summary judgment declaring the liens on its property null and void. In fact, Defendant has requested that the Court “treat this motion as one for summary judgment,” “pursuant to CPLR 3211(c).” Notice of Motion at p. 2. CPLR §3211(c) provides that “[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment.” The Court declines to treat the motion as a motion for summary judgment. Even if the Court were to do so, and Defendant’s current submissions were judged by the standard applicable to such motions, the motion papers are wholly insufficient to warrant the grant of such relief. Much of what has been provided is simply irrelevant to the claims being asserted. The Court finds that the parties will benefit from the kind of focused inquiry that comes with preparation of an answer, bills of particulars and other forms of discovery. Indeed, discovery is needed to flesh out the facts underlying the parties’ dispute. Therefore, this branch of Defendant’s motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: July 7, 2012
Goshen, New York

ENTER



HON. PAUL I. MARX, J.S.C.