

**Board of Mgrs. of the Heywood v Wozencraft**

2012 NY Slip Op 32323(U)

September 10, 2012

Supreme Court, New York County

Docket Number: 100359/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

BOARD OF MANAGERS OF THE HEYWOOD, ON  
BEHALF OF ALL ITS UNIT OWNERS,

INDEX No. 100359/11

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 002

STEVEN WOZENCRAFT,

MOTION CAL No. \_\_\_\_\_

Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits...

1-3

Answering Affidavits- Exhibits \_\_\_\_\_

4-6

Replying Affidavits \_\_\_\_\_

7, 8

CROSS-MOTION:  YES  NO

Upon the foregoing papers, it is ordered that this motion is:

**FILED**

SEP 10 2012

COUNTY CLERK'S OFFICE  
NEW YORK

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER

Dated: 9/5/12

*Donna M. Mills*  
J.S.C.

**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----x  
BOARD OF MANAGERS OF THE HEYWOOD,  
ON BEHALF OF ALL ITS UNIT OWNERS,

Plaintiff,

-against-

STEVEN WOZENCRAFT,

Defendant,  
-----x

DONNA MILLS, J. :

Index No.

100359/1  
**FILED**

**SEP 10 2012**

**COUNTY CLERK'S OFFICE  
NEW YORK**

Plaintiff moves for summary judgment; for an order striking defendant's affirmative defenses and counterclaims; for an order appointing a referee to assess charges; and for an order granting attorney's fees. Defendant cross-moves for partial summary judgment.

Plaintiff, the board of managers of a condominium located at 263 Ninth Avenue, New York, New York, brings this action against defendant, the owner of Apartment 9A (the Unit). In the complaint, plaintiff alleges that defendant has failed to pay common charges on the Unit for several years. Plaintiff alleges that defendant has not resided in the Unit on a regular basis. In February 2007, Wells Fargo Bank, N.A., the holder of the first mortgage on the Unit, commenced an action to foreclose its mortgage, claiming that defendant had failed to make payments due July 1, 2006 and thereafter. Plaintiff believes that this foreclosure action is still pending. Also, on July 31, 2009, defendant filed a petition for bankruptcy relief, under Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the Central District of California. According to court records, this proceeding was dismissed on November 15, 2010, based on defendant's failure to appear at a creditor's meeting. Following the dismissal, plaintiff commenced this suit.

Upon receipt of the summons and complaint, defendant responded with a pre-answer

motion to dismiss. Plaintiff cross-moved for denial of the motion and for summary judgment. On October 24, 2011, this court, by decision and order, granted defendant's motion only to the extent that it addressed claims for rent and the appointment of a receiver in plaintiff's complaint, and denied the cross motion for summary judgment as premature. Thereafter, defendant interposed an answer, which included ten affirmative defenses and six counterclaims.

Plaintiff moves for summary judgment again, on the ground that defendant is obligated to pay the common charges to plaintiff, that defendant does not deny nonpayment, and that he only disputes the amount of the unpaid charges.

Plaintiff also moves to dismiss all the affirmative defenses and counterclaims in the answer on the ground that they are lacking in merit. The first affirmative defense alleges that defendant has not received accurate monthly bills and was not sent monthly bills for the period in question. Defendant allegedly spends most of his time in California. Plaintiff states that it has sent said bills to defendant's representative in Irvine, California, and also states that these bills are accurate.

The second affirmative defense is based on laches, where defendant claims that plaintiff's alleged delay in commencing this action has prejudiced defendant. Plaintiff asserts that a delay was necessary due to the foreclosure action, where the mortgagee would have been given legal priority over plaintiff's lien for unpaid charges, and the bankruptcy proceeding, which would legally preclude this suit. Plaintiff contends that, since defendant allegedly owes five years of unpaid charges, there is no cause for prejudice.

The third affirmative defense and first counterclaim alleges that plaintiff is suing for fraudulent and inflated charges, as well as fees for which defendant is not liable. Plaintiff

contends that all the charges are proper, and that fees incurred in connection with the collection of charge arrears are authorized pursuant to the condominium by-laws (By-Laws).

The fourth affirmative defense alleges that plaintiff has breached its fiduciary duty to defendant. The fifth affirmative defense alleges that plaintiff breached its duty of fair dealing to him. The sixth affirmative defense alleges that he has been treated in a discriminatory way by plaintiff. Plaintiff argues that all of these defenses lack merit and have been raised because of defendant's refusal to pay the charges, and plaintiff's complaints of defendant's allegedly improper use of the Unit. Plaintiff denies that it has deprived defendant of certain services and amenities.

The seventh affirmative defense alleges unclean hands. Plaintiff denies any wrongdoing on its part, and claims only to be enforcing its rights under the By-Laws. The eighth affirmative defense alleges that the late fees charged to defendant are usurious. Plaintiff argues that the defense of usury has no application here because this is not a matter of interest charged on a loan or similar transaction, but one involving the agreed-upon payment of a penalty for nonpayment of charges.

The ninth affirmative defense alleges that plaintiff has wrongfully deprived defendant of services and amenities. The tenth affirmative defense alleges that plaintiff has created a nuisance in interfering with defendant's use and enjoyment of the Unit. Plaintiff denies the allegations and refers to defendant's improper use of the Unit, and his violations of the By-Laws.

As for the remaining counterclaims, which include an entitlement to attorney's fees for deceptive practices, and compensatory and punitive damages for discriminatory treatment and harassment, plaintiff seeks dismissal or severance. Noting the probable need of discovery to

resolve the matters raised by defendant, plaintiff claims that these matters could take years to adjudicate. Plaintiff avers that the main action is ripe for summary judgment and that the recovery for the charges should be treated separately from defendant's other claims.

Plaintiff seeks a referee to ascertain the proper amount of charges owed to plaintiff. Plaintiff argues that defendant's primary dispute is with the amount of the charges. Plaintiff also seeks attorney's fees, which are obtainable since the By-Laws provide for the granting of such relief for expenses incurred through litigation.

Defendant opposes this motion, claiming that he does dispute his liability, and contending that he should not be required to pay the charges. He argues that plaintiff has breached its obligations to him in failing to provide proper services to him, in violation of the charter and By-Laws. Some of the services that allegedly were denied to defendant were doorman services, service calls to his Unit, air conditioning, and receipt of packages and deliveries. Alternatively, defendant seeks a structural adjustment to the unpaid charges to compensate him for the alleged reduction of services over the years. Defendant also claims that he has been subject to steady harassment by members of plaintiff's board.

Defendant asserts that plaintiff failed to include a complete copy of the By-Laws, leaving out provisions which he claims favor his position. According to defendant, this failure is sufficient to deny the motion for summary judgment. Defendant states that plaintiff was obligated, pursuant to the By-Laws, to act promptly to collect unpaid charges, 30 days after the due date of payment. He claims that plaintiff waited for years before taking appropriate action, and should be precluded from suing him on the grounds of laches.

Defendant contends that plaintiff's records of the unpaid charges are derived from a self-

serving worksheet prepared solely for this litigation, and not a contemporaneous business record. It is defendant's position that the charges on record are inaccurate and excessive. He also contends that he had not received the monthly bills from plaintiff in violation of the By-Laws. Defendant asserts that all the claims he has asserted in response to the complaint raise issues of fact, precluding judgment. He states that there is a need for discovery to uncover the truth of this matter. Defendant also states that plaintiff brought the earlier motion for summary judgment only a year ago, which was denied. Defendant claims that the present motion is not based on any new evidence and is in violation of the court's preliminary conference order.

Defendant requests that this court deny plaintiff's motion to sever the claims in this action on the ground that there should be one trial herein in the interest of judicial efficiency. He also request that plaintiff's motion for a refrec's inquest be denied because he demands a trial by jury on all issues.

Defendant's cross motion is apparently based on his sixth and ninth affirmative defenses, and his fourth and fifth counterclaims, alleging failure of services and discrimination. In these counterclaims, he is seeking a reduction of the damages claimed by plaintiff with respect to the failure of services, and compensatory and punitive damages with respect to discrimination. However, he seeks summary judgment in the form of a declaratory judgment, declaring Rule 32 of plaintiff's house rules to be invalid. This rule allows plaintiff to deprive unit owners of certain nonessential services if they fail to pay their current charges. Defendant argues that this rule has been used unfairly against him and that this court should annul it.

Plaintiff, in reply and in opposition to the cross motion, states that defendant's affidavit is defective, in that it was notarized outside of New York, and lacks a certificate of authenticity

as mandated by CPLR 2309 (c). Plaintiff states that it is standard policy to deny certain non-essential services to Unit owners who fail to pay their charges. While defendant complains of a lack of services, plaintiff states that his dissatisfaction does not diminish the fact that he has not performed his obligation to pay.

Plaintiff states that the cross motion is seeking a declaratory judgment that is not pleaded in the answer. Plaintiff considers this attempt to invalidate an allegedly legitimate policy frivolous and improper.

Plaintiff attests to the validity of its summary judgment motion, holding that there is no dispute that defendant failed to pay the charges. Plaintiff dismisses most of the issues raised by defendant, including the failure to submit a full copy of the By-Laws, the claim of laches, the absence of discovery, except with respect to the counterclaims, the accuracy of the records, the failure to send monthly bills, the demand for a jury trial, and the fact that this is the second such motion. Plaintiff also claims that defendant fails to substantiate the allegations of discrimination and harassment, that defendant cannot expect an entitlement to all services and amenities, and that he lacks a ground to challenge plaintiff's actions pursuant to the business judgment rule.

In reply, defendant submits a certificate of authenticity of the Florida notary public who notarized his affidavit. He contends that he expressly seeks declaratory relief in his answer, relating to the denial of services he was meant to receive. He states that plaintiff's summary judgment motion must be denied because plaintiff failed to provide a complete copy of the By-Laws, and allegedly submitted an inadequate copy of the charges records. Defendant claims that his situation is sufficient to challenge plaintiff's reliance on the business judgment rule. He also asserts his right to have discovery completed and defends his right to a jury trial. Defendant



states that he did not receive the monthly charge bills allegedly sent to his representative and that he did not tell plaintiff to send the bills to that person.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Hous. Corp.*, 298 AD2d 224 (1<sup>st</sup> Dept 2002).

The court shall decide the cross motion for partial summary judgment first. In the ninth affirmative defense and fifth counterclaim of the answer, defendant refers to plaintiff’s alleged policy of denying certain services to unit owners, without specifically referring to Rule 32. Defendant requests that the court declare said policy null and void. Defendant claims that plaintiff cannot apply the business judgment rule here, because, through its policy, plaintiff has acted unfairly and not in the interest of unit owners.

“The business judgment rule is applicable to the board of directors of cooperatives and condominiums corporations.” *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 (1<sup>st</sup> Dept 2009). “[T]he business judgment rule does not apply [to decisions by a condominium board of managers] where the board fails to act within the scope of its authority

and in good faith.” *Board of Mgrs. of 229 Condominium v J.P.S. Realty Co.*, 308 AD2d 314, 316 (1<sup>st</sup> Dept 2003), citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990).

“So long as the board acts for the purposes of [the homeowners association], within the scope of its authority and in good faith, courts will not substitute their judgment for the board’s.”

*Strathmore Ridge Homeowners Assoc., Inc. v Mendicino*, 63 AD3d 1038, 1039 (2d Dept 2009), quoting *Levandusky* at 538.

Here, plaintiff has applied Rule 32 to those unit owners who have not paid their common charges. They are obviously being distinguished from those owners who are current in their payment of charges. However, since unit owners are obligated to pay their charges, their failure to do so constitute a violation of condominium policy. The court finds that Rule 32, if applied reasonably, should not be subject to annulment. Plaintiff clearly refers to nonessential services, and defines them in the rule. Once the owner pays his or her outstanding charges, these services are promptly resumed. The court does not find this policy, by nature, unfair or discriminatory, since it only applies to nonpaying unit owners. The court finds that the aforesaid rule is not in violation of the business judgment rule, and that, if applied reasonably, is not unfair. The court shall deny the cross motion.

Plaintiff’s motion for summary judgment appears to be partial, since plaintiff is willing to move on the issue of liability and accept a hearing to determine damages. Its position is straightforward, in that defendant is delinquent in paying charges, and there is no dispute as to the failure to pay. Defendant has raised a number of issues, though he does not actually claim to have paid any charges. He argues, on one hand, that he has not received the regular bills from plaintiff, or that he did not authorize the representative who allegedly received the bills, or that

the bills in question are highly inaccurate or excessive. On the other hand, he argues that he should only pay a reduced amount of the unpaid charges because he has been personally harassed by plaintiff's representatives and denied essential services and, therefore, his right to use and enjoyment as a unit owner, for no other reason than that he is the victim of personal discrimination.

Section 40-c (2) of the Civil Rights Law provides generally that all persons within the jurisdiction of this state are entitled to the equal protection of the laws of this state, and that no person can, because of race, creed, color, national origin, sex, marital status, sexual orientation, or disability, as such term is defined in the Executive Law, be subjected to any discrimination in his or her civil rights. Here, defendant does not define or explain the basis of his claim of discrimination, making his allegations vague. He fails to identify the particular protected category to which he belongs. Defendant fails to state a claim for discrimination, and the sixth affirmative defense and fourth counterclaim shall be dismissed.

The aforesaid Rule 32 provides for plaintiff's denial of nonessential services to those unit owners who are not current on their payments of charges. This is apparently the case with defendant. However, defendant has raised an issue as to whether plaintiff has overreacted to defendant's failure in making payments. Defendant alleges that services, such as access to deliveries, services and repairs to air conditioners, and concierge services, have been denied to him. He alleges that plaintiff failed to deliver important mortgage notices to him. Defendant also alleges that plaintiff's agents have accused him of unauthorized subletting and made physical threats to him. This is the basis for counterclaims based on breach of fiduciary duty, breach of fair dealing, unfair debt collecting practices, denial of services and nuisance.

The board of managers of a condominium has a fiduciary relationship with unit owners and a duty to act in good faith. See *Board of Mgrs. of Fairways at N.Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 327 (2d Dept 1993). Defendant raises issues of fact concerning plaintiff's conduct toward defendant as a unit owner that are not altogether conclusory, and this therefore precludes judgment at this time.

The remainder of plaintiff's motion concerns dismissal of the counterclaims and affirmative defenses. The court has already dismissed the sixth defense and fourth counterclaim sounding in discrimination. The first counterclaim alleges inflated charges and unfair debt collection. Defendant claims that plaintiff has not been fair in its efforts to collect outstanding charges on the Unit. This is also the crux of the third affirmative defense. The failure to send accurate bills, goes to the issue of the accuracy of the debt. Since there is a dispute as to amount of the charges owed, this counterclaim has merit and shall not be dismissed. The third affirmative defense shall also not be dismissed.

The second counterclaim alleges a breach of fiduciary duty. The fourth affirmative defense also alleges a breach of fiduciary duty. As stated earlier, plaintiff maintains a fiduciary relationship with defendant, in his capacity as a unit owner. One of defendant's contentions is that plaintiff's conduct constitutes a violation or misapplication of the terms of Rule 32. This supports his position that plaintiff's activities could represent a breach of fiduciary duty. The second counterclaim and the fourth affirmative defense shall not be dismissed.

The third counterclaim alleges a breach of the implied covenant of good faith and fair dealing. This is also the basis of the fifth affirmative defense. This covenant is implied in all contracts. "This covenant embraces a pledge that 'neither party shall do anything which will

have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002), quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995). Defendant alleges that plaintiff’s conduct had injured his contractual rights, including the implied right of fair dealing. The failure to provide services is related to a breach of contract claim. As defendant has already alleged breach of contract in his fifth counterclaim, a claim based on the breach of good faith and fair dealing is duplicative, if based on the same allegations. This is the case here. *See AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568-9 (1<sup>st</sup> Dept 2009). The third counterclaim is duplicative of the fifth counterclaim, and shall be dismissed. The fifth affirmative defense is duplicative of the ninth affirmative defense and shall also be dismissed..

The fifth counterclaim alleges lack of services. The ninth affirmative defense also alleges lack of services. Defendant has made out a claim based on a failure to provide essential services, which is, essentially, a breach of contract claim. The ninth affirmative defense is based on a similar theory. The counterclaim and affirmative defense shall not be dismissed.

The last counterclaim is based on a theory of nuisance. “[A] claim for nuisance requires an intentional interference with the right to use and enjoy property.” *Congregation B’nai Jehuda v Hiyee Realty Corp.*, 35 AD3d 311, 312 (1<sup>st</sup> Dept 2006). Nuisance can constitute the conduct of acting or failing to act. *See 61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 (1<sup>st</sup> Dept 2010), *aff’d as mod.* 16 NY3d 822 (2011). Defendant alleges that the failure to provide services, the failure to act, resulted in an interference of his right and enjoyment of his unit. The court finds that this in itself is insufficient to constitute nuisance. Defendant would have to allege that plaintiff’s conduct had undermined physical access to his property. The court shall

dismiss the sixth counterclaim. The tenth affirmative defense, which also alleges nuisance, shall be dismissed.

The remainder of the answer consists of a number of affirmative defenses. The first affirmative defense alleges plaintiff's failure to send accurate bills. This goes to the accuracy of the outstanding charges. Defendant has already raised an issue as to amount of the debt owed to plaintiff. The first affirmative defense shall not be dismissed.

The second affirmative defense, laches, is due to defendant's claim that plaintiff failed to seek payment in a timely fashion, pursuant to the By-Laws. Section 5.6 of the By-Laws provides that plaintiff shall take "prompt action to collect any Common Charge and/or other assessment previously imposed by the Board which remains unpaid for more 30 days from the due date for payment thereof." Apparently, plaintiff has not acted pursuant to the By-Laws. Plaintiff stated that a number of proceedings, particularly the mortgage foreclosure proceeding and the bankruptcy proceeding, had delayed this suit.

"A claim of laches requires a showing of unreasonable and inexcusable delay by plaintiff, resulting in prejudice to defendant. Delay alone, without prejudice, will not suffice [citations omitted]." *Macon v Arnlie Realty Co.*, 207 AD2d 268, 271 (1<sup>st</sup> Dept 1994). The court does not find a sufficient showing of prejudice despite an obvious delay in commencing this case. The court shall dismiss this defense.

The seventh affirmative defense alleges unclean hands. "The doctrine of unclean hands is only available where plaintiff is guilty of immoral or unconscionable conduct directly related to the subject matter, and the party seeking to invoke the doctrine is injured by such conduct." *Frymer v Bell*, 99 AD2d 91, 96 (1<sup>st</sup> Dept 1984). Here, the court finds that plaintiff's conduct as

alleged by defendant is not so extreme as to reach the level of unconscionable conduct. The court shall dismiss this defense.

The eighth affirmative defense alleges usury. This defense is not appropriate in this situation. "[W]here there is no loan, there can be no usury [internal quotation marks and citation omitted]." *Feinberg v Old Vestal Rd. Assoc.*, 157 AD2d 1002, 1003 (3d Dept 1990). Since defendant fails to allege any loan transaction, the eighth affirmative defense shall be dismissed.

Accordingly, it is

ORDERED that the part of plaintiff's motion seeking summary judgment is denied; and it is further

ORDERED that the part of plaintiff's motion to dismiss the affirmative defenses and counterclaims is granted to the extent that the second, fifth, sixth, seventh, eighth and tenth affirmative defenses and the third, fourth and sixth counterclaims in the answer are dismissed, and the remaining affirmative defenses and counterclaims are not; and it is further

ORDERED that the part of plaintiff's motion seeking the appointment of a referee, and the granting of attorney's fees, is denied; and it is further

ORDERED that defendant's cross motion for partial summary judgment is denied.

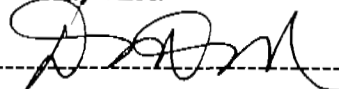
DATED: 9/15/12

**FILED**

**SEP 10 2012**

**COUNTY CLERK'S OFFICE  
NEW YORK**

ENTER:



J.S.C.

**DONNA M. MILLS, J.S.C.**