

**Board of Mgrs. of Downtown Club Condominium v
Stiles**

2013 NY Slip Op 31652(U)

June 26, 2013

Supreme Court, New York County

Docket Number: 100747/2012

Judge: Milton A. Tingling

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING
J.S.C. Justice

PART 44

Index Number : 100747/2012
BD. MGRS. DOWNTOWN CLUB
vs.
STILES, NATASHA V.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 100747/12
MOTION DATE 4/4/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with
the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
JUL 24 2013
NEW YORK
COUNTY CLERKS OFFICE

Dated: 6/26/13

maif, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

The Board of Managers of the Downtown Club
 Condominium,

Plaintiff,

-against-

Natasha V. Stiles, Wells Fargo Bank, N.A. and U.S.
 Bank, National Association, as Trustee for Mastr
 Alternative Loan Trust 2007-HF1,

Defendant(s)

DECISION AND ORDER
 Index No. 100747/12

FILED

JUL 24 2013

**NEW YORK
 COUNTY CLERK'S OFFICE**

The Defendants Wells Fargo Bank, N.A. and Citibank, N.A. as successor Trustee to U.S. Bank, National Association, as Trustee for MASTR Adjustable Rate Mortgages Trust 2007-HF1, Mortgage Pass-Through Certificates, Series 2007-HF1 (sued herein as U.S. Bank National Association, as Trustee for MASTR Alternative Loan Trust 2007-HF1) move to dismiss the action pursuant to CPLR §3211 (a)(7). The Board of Managers of the Downtown Club Condominium (hereinafter Plaintiff) opposes this motion.

This motion arises from an action in which the Plaintiff seeks a mandatory injunction compelling the owner and the banks (Defendants in this decision) to restore the unit to its original condition; a mandatory injunction compelling the owner and banks to permit the Plaintiff and/or its agents, employees, contractors or representatives to enter the Unit and restore it to its original configuration, the cost of which to be borne by the owner and the banks; to enjoin the owner from renting out the Unit, except in compliance with the Bylaws and applicable law; and for monetary fees in the amount not yet known. The owner, Natasha V. Stiles, acquired condominium unit 19J (hereinafter "Unit") located at 20 West Street, in Manhattan. The owner acquired the Unit on February 12, 2007. Defendants are the servicer and holder of the mortgage

on the Unit. Sometime after the owner purchased the Unit, she converted it from a one (1)-bedroom unit to a four (4) to six (6) bedroom unit, allegedly without approval from Plaintiff. In December of 2007, the owner requested permission from the sponsor or the Plaintiff to make certain alterations and improvements to the Unit. After submitting the 2007 request, the owner made alterations and improvements to the Unit before receiving requisite approval. Plaintiff alleges the owner neglected to obtain permits from the New York City Department of Buildings for the alterations. Plaintiff commenced this action, alleging that pursuant to the By-laws no residential unit owner of the condominium may make structural alterations, additions, improvements or repairs to a residential unit without the prior written approval of the condominium sponsor or the Plaintiff. All alterations, additions, improvements and repairs to a residential unit must comply with applicable law. Plaintiff may require an owner of a residential unit to sign an alteration agreement, satisfactory to the Plaintiff, setting forth the terms and conditions under which an alteration, addition, or improvement may be made to a residential unit. In July of 2011, the Plaintiff requested access to the Unit in order to examine and record the condition of the Unit, due to planned repairs to the exterior of the Building. The owner refused to provide access to the Unit. Plaintiff alleges that due to the owner's refusal, it was compelled to seek a court order requiring the owner to grant access to the Unit. In an order dated September 29, 2011, the owner was directed to provide the Plaintiff with access to the Unit for inspection. At same, the representatives of the Plaintiff discovered the owner made alterations and improvements different and more extensive than those described in her 2007 alteration request. They also learned the Unit did not comply with applicable law, and represented a threat to the health, safety and property of the occupants of the Unit and the Building. Prior to the Defendants filing of this motion, the apartment was inspected by the New York City Department of

Buildings and the Fire Department and found to be “imminently perilous to life.” The New York Department of Building ordered the Unit to be vacated until it was properly restored.

Pursuant to NY CPLR §3211, a pleading that fails to state a cause of action may be dismissed. On a motion to dismiss under NY CPLR §3211 the allegations of a complaint and any supplemental documents submitted must be given their most favorable intendment. *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268 (1987).

In a decision out of the New York State Supreme Court 1st Department, the court granted Bovis Lend Lease LMB, Inc. (Bovis), motion for summary judgment against The Condominium Boards and dismissed the claims. *Caldwell v Two Columbus Ave. Condominium*, 2010 N.Y. Misc. LEXIS 5598, 20-21 (N.Y. Sup. Ct. Oct. 12, 2010). In the case plaintiffs (owners of a condominium unit) sought to sue The Condominium Boards for property damage and the personal injuries suffered by owner, Clara Caldwell. *Caldwell, Supra* 1. The defendants in the action, The Condominium Boards, in turn, brought a third-party action against Bovis for contractual and common-law indemnity. *Caldwell, Supra* 1-2. Bovis argued that it contracted with Two Columbus Associates, the sponsors of the residential condominium, to serve as construction manager for the construction of the 40-story building. *Caldwell, Supra* 21. Within the contract Bovis agreed to indemnify the sponsor in connection with any claims, damages, losses and expenses arising out of its work with the construction of the building. *Caldwell, Supra*. Bovis contends the Condominium Boards were not a party to this contract, and therefore lack privity of contract to sue. *Caldwell, Supra* 22. The Condominium Boards did not contest any of Bovis' assertions, and were not able to show that they were a party to the contract, or that they were an intended third party beneficiary to the contract. *Caldwell, Supra* 22-23. The court cited to *Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291

AD2d 40, 57, 735 N.Y.S.2d 83 (1st Dept 2001), stating that “a third party seeking to enforce a contract has to establish that it was an intended beneficiary to the contract rather than merely an incidental beneficiary,” if said third party was not a party to the contract.

The Plaintiff in this case has not alleged any wrongdoing by Defendants banks, nor have they alleged or asserted that they were parties to the contract (mortgage contract). Plaintiff has not shown it was a party to the contract, or that it was an intended beneficiary of the contract, and therefore it lacks privity of contract to join the Banks as a party. Plaintiff contends the Banks are proper parties to their claim on the grounds the apartment stands as collateral for the Banks’ loan. This contention fails.

Accordingly, Defendants’ Wells Fargo Bank, N.A. and Citibank, N.A. as successor Trustee to U.S. Bank, National Association, as Trustee for MASTR Adjustable Rate Mortgages Trust 2007-HF1, Mortgage Pass-Through Certificates, Series 2007-HF1 (sued herein as U.S. Bank National Association, as Trustee for MASTR Alternative Loan Trust 2007-HF1) motion to dismiss the cause of action pursuant to CPLR §3211(a) (7) is **GRANTED**. Plaintiff’s complaint as to the aforementioned Defendants is dismissed. Clerk is directed to enter judgment solely to that extent.

FILED

JUL 24 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

6/26/13

Dated:

M. A. TROUBLE

**MON. MILTON A. TROUBLE
J.S.C.**