

Board of Mgrs. of the Netherlands v Trencher

2013 NY Slip Op 31944(U)

August 12, 2013

Sup Ct, New York County

Docket Number: 102418/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JOAN A. MADDEN

J.S.C.

PRESENT: _____
Justice

FILED

PART 11

AUG 20 2013 INDEX NO. _____

Index Number : 102418/2012
BD. MGRS. THE NETHERLANDS
VS.
TRENCHER, MILDRED
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

MOTION DATE _____
COUNTY CLERK'S OFFICE
NEW YORK MOTION SEQ. NO. _____

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 *determined in accordance with the annexed decision and order.*

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

Dated: August 12, 2013

_____, 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: PART 11

-----X
BOARD OF MANAGERS OF THE NETHERLANDS INDEX NO. 102418/12
CONDOMINIUM, on its own behalf and on behalf of all
Unit Owners of The Netherlands Condominium,

Plaintiff,

-against-

MILDRED TRENCHER, JP MORGAN CHASE
BANK, N.A., NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, JOHN DOE and JANE
DOE, the names of the "JOHN DOE" and "JANE DOE"
being fictitious, and unknown to Plaintiff, the persons
and/or firms intended being those who may be in
possession of, or may have possessory, lien or other
interest in the premises herein described,

FILED
AUG 20 2013
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action to foreclose on a lien for unpaid condominium common charges, plaintiff moves for a default judgment against all defendants, except Mildred Trencher the unit holder, and for the appointment of a referee to compute the amount due on the lien and to determine whether the premises can be sold in one parcel. Defendant Trencher opposes the motion, and cross-moves for summary judgment dismissing the complaint, and seeks an order directing plaintiff to provide her with a discharge of lien pursuant to RPL 339-aa, and a declaration that plaintiff is not entitled to late or legal fees.

Plaintiff's motion for a default judgment against JP Morgan Chase Bank, N.A., New York City Environmental Control Board and New York City Transit Adjudication Bureau and

for the appointment of a referee to compute, based on said defendants' failure to appear and answer, is denied. While a motion for the appointment of a referee to compute is a preliminary step towards obtaining a judgment of foreclosure and sale, see Klein v. St. Cyrian Properties, Inc., 100 AD3d 711 (2nd Dept 2012), Home Savings of America, N.A. v. Gkanois, 230 AD2d 770 (2nd Dept 1996), such relief is appropriate only with respect to unit owner, as the person against whom the lien for common charges has been asserted. Such relief is not properly sought against the non-appearing defendants in this action, a bank and two governmental agencies. As alleged in the complaint and the exhibits annexed to the complaint, defendant JPMorgan Chase, N.A. is the holder of two mortgages on the premises, one in the amount of \$167,000 and another in the amount of \$225,000; defendants New York City Transit Adjudication Bureau and New York City Environmental Control Board are holders of "possible judgments against Mildred Trencher." Since those entities are merely named as nominal parties in the event they may have a lien or other interest subordinate or superior to plaintiff's lien against defendant Trencher, plaintiff is has no basis for seeking the appointment of a referee to compute based on their default in failing to appear and answer.

Citing Board of Directors of Hunt Club at Carom Homeowners Ass'n, Inc v. Hebb, 72 AD3d 997 (2nd Dept 2010), plaintiff argues that it is entitled to a referee to compute since defendant Trencher admits in her affidavit that she has "been withholding payments because there is a legitimate dispute as to Plaintiff's ability to collect late and legal fees." Plaintiff's reliance on that decision is misplaced as the Second Department reversed the lower court because the unit owner in her opposition to plaintiff's motion for *summary judgment against her*, effectively conceded that she had not paid the assessments and other charges underlying the lien.

Here, however, plaintiff is merely moving for a default judgment against the non-appearing defendants, and is not moving for summary judgment or any other relief against the unit owner, defendant Trencher. Plaintiff's motion is therefore denied.

Defendant Trencher's cross-motion for summary judgment is likewise denied. The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also JMD Holding Corp v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Ayotte v. Gervasio, 81 NY2d 1062 (1993). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to demonstrate that material issues of fact exist which require a trial. See Alvarez v. Prospect Hospital, supra at 324.

Here, defendant Trencher fails to make a prima facie showing that she is entitled to judgment as a matter of law dismissing the complaint, and a declaratory judgment as to satisfaction of the lien, and the late fees and legal fees issues. Defendant Trencher submits an affidavit that she is a senior citizen and has lived in the building for 40 years, before it was converted to a condominium, and has never a problem in all the time she has lived in the building. While asserting that she has satisfied the lien, she admits she is challenging plaintiff's authority under the bylaws to collect the late fees and legal fees included in plaintiff's lien for common charges.

Additionally, plaintiff has established the existence of material issues of fact sufficient to defeat defendant's cross-motion. Plaintiff submits a reply affidavit from the president of the condominium board, stating that since January 2011, defendant Trencher has not timely paid

common charges and capital assessment charges. He asserts that under section 6.4 of the bylaws, late charges, interest, fees and expenses shall be added to the common charges due from each unit owner and constitute common charges. He also asserts that on October 29, 2009, the board approved an amendment to the condominium's late fee policy and submits the board's minutes. He argues the lien was properly placed and should remain in full force and effect, since the condominium's ledger shows that defendant Trencher still owes common charges in the amount of \$20,597, and even if the late and legal fees were removed, the sums secured by the lien have not been paid.

Based on the foregoing, defendant Trencher is not entitled to summary judgment, as triable issues of fact exist as to whether she satisfied the lien, and plaintiff's authority to collect late fees and legal fees.

Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that the cross-motion by defendant Mildred Trencher is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a preliminary conference/settlement conference on August 22, 2013 at 3:00 p.m. in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: August 12, 2013

FILED ENTER:

AUG 20 2013

COUNTY CLERK'S OFFICE J.S.C.
NEW YORK

