Board of Mgr. of the Villas on the Bay at E. Moriches Condominium v Merkle
2013 NY Slip Op 32806(U)
October 21, 2013
Sup Ct, Suffolk County
Docket Number: 20087-12
Judge: Arthur G. Pitts

SHORT FORM ORDER

INDEX
NO.: 20087-12

SUPREME COURT - STATE OF NEW YORK
IAS PART 43 - SUFFOLK COUNTY

PRESENT: HON. ARTHUR G. PITTS
Justice of the Supreme Court

x

BOARD OF MANAGERS OF THE VILLAS ON THE BAY AT EAST MORICHES CONDOMINIUM,

Plaintiff,

-against-

ROBERT ARTHUR MERKLE and "JOHN DOE #1" through "JOHN DOE #10", the last ten (10) names being fictitious and unknown to the Plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

x

MOTION DATE: 10-25-12
ADJ. DATE: _____
MOT. SEQ. # 001 MG
XM # 002 MD

SCHNEIDER MITOLA LLP
Attorneys for Plaintiff
666 Old Country Road
Suite 412
Garden City, N. Y. 11530

LIEB AT LAW
Attorneys for Defendant Merkle
376A Main Street
Center Moriches, N. Y. 11934

Upon the following papers numbered 1 to 30 read on this motion for summary judgment, an order of reference and other related relief ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers 19-25 ; Replying Affidavits and supporting papers 26-30 ; Other 0 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an Order; (1) directing the entry of summary judgment in favor of the plaintiff pursuant to CPLR 3212; (2) for the appointment of a referee to compute and report the amount due to plaintiff pursuant to RPAPL § 1321 or in the alternative CPLR 4311 and CPLR 4317; (3) striking "John Doe #1 " through "John Doe #10", and (4) together with such other and further relief which the Court may deem just, necessary and proper is granted; and it is further

ORDERED that the plaintiff shall serve a copy of this Order with Notice of Entry within ninety (90) days of the date the Order is signed by the Court upon counsel for the defendant, Robert Arthur Merkle, pursuant to CPLR 2103 (b), (1), (2) or (3) and thereafter file the affidavit of service with the Clerk of th Court; and it is further

ORDERED that a copy of this Order with Notice of Entry shall also be served upon the Calendar Clerk of this IAS Part 43, and the Clerk of the Court by first class mail with a certificate of mailing who are hereby directed to mark the Court's records to reflect excising the defendants "John Doe #1" through "John Doe # 10" as set forth in the Order of Reference and incorporated herein by reference. That all future submissions to the court under this Index number shall reflect the amended caption and it is further

ORDERED that the cross-motion by the defendant Robert Arthur Merkle is denied in its entirety.

The present action involves the foreclosure of a condominium lien based upon the defendant Robert Arthur Merkle's (hereinafter "Merkle ") failure to pay carrying charges on the condominium, located at 59 Watchogue Avenue, Unit 34, East Moriches, New York 11940 (hereinafter "Unit"). .

Issue was joined by the service of an answer by counsel for Merkel on or about July 23, 2012 consisting of general denials and eleven affirmative defenses.

Defendant Merkel opposes the motion and cross-moves to dismiss the foreclosure action and for attorneys' fees. Although Merkle has denominated his unlabeled motion as a cross motion to dismiss, the motion must be deemed one for summary judgment under CPLR 3212 since Merkle has answered and issue has thus been joined (*see* ***Nowacki v Becker,*** 71 AD 3d 1496, 897NYS 2d 560 [4th Dept 2010]; ***Kavoukian v Kaletta,*** 294 AD 2d 646, 742 NYS 2d 157 [3rd Dept 2002]; ***Tufail v Honas,*** 156 AD 2d 670, 549 NYS 2d [2nd Dept 1989]).

The plaintiff commenced this action to foreclose a notice of lien for unpaid common charges, late fees and other related charges on a residential condominium unit owned by Merkle. Merkle acquired tile to the Unit by deed dated April 28, 2004 and recorded in the office of the Suffolk County Clerk on May 12, 2004. The deed to the Unit contains a recitation that title held by Merkle is subject to a Declaration of the plaintiff. Article 9-B of the Real Property Law, known as the Condominium Act, permits the establishment of a lien for unpaid common charges in favor of the Board of Managers of a condominium complex (see RPL §§ 399–v; 339-z) and it permits the Board of Manager's to commence a foreclosure action to collect the monies owed to it as common charges. The plaintiff has complied with RPL §§ 339-z; 339-aa by filing a verified lien with the County Clerk and the lien has been perfected.

Plaintiff now moves for summary judgment (*see* CPLR 3212 [a] ; ***Myung Chun v North Am. Mtg. Co.,*** 285 AD2d 42, 729 NYS. 2d 716 [1st Dept 2001]) to dismiss the answer by Merkle and the asserted affirmative defenses and for the issuance of an order of reference. It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrated the absence of any material issue of fact " (***Alvarez v Prospect Hosp.*** 68 NY 2d 320, 508 NYS 2d 923 [1986]).

In support of the motion plaintiff has submitted the affidavit testimony of Patricia Whaley (hereinafter "Whaley"), the President of the Board of Managers of the Villas at East Bay Moriches Condominium (hereinafter "Villas"), a copy of the Condominium Declaration and By-Laws, supporting documentation of Merkel's ownership by deed of the condominium; the failure of Merkle to pay the common charges when they became due, the filing of the notice of lien, and a detailed account showing the sums due (*see e.g* ***Board of Mgrs. of the Vil. Mall at Hillcrest Condominium, v Dadon*** , 29 Misc. 3d 1238 [A]; 2010 N.Y. LEXIS 6127, 2010 N.Y. Slip Op 5219 U [Sup Ct Queens County 2010]).

Once created, " the administration of a condominium's affairs is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate and which sets forth the respective right and obligation of unit owners both with

respect to their own units and the condominium's common elements" (***Glenridge Mews Condominium v Kavi,*** 90 AD 3d 604, 605, 933 NYS 2d 730 [2nd Dept 2011] *internal citations omitted*).

A purchaser of a unit in a condominium enters into a binding relationship with every other unit owner by both contract and statute. One of the elements of the relationship is the obligation to pay common charges (***Bd of Managers of Lido Beach Towers Condominium v Grartenlaub,*** 27 Misc. 3d 1213A, 910 NYS 2d 403 [Sup Ct Nassau County 2010]). RPL § 339-e [2] defines common charges as each unit's proportionate share of the common expenses in accordance with the common interest. Common expenses are defined as [a] expenses of operation of the property, and [b] all sums designated common expenses by or pursuant to statute, the declaration or the by-laws (*see* RPL § 339-e [2] *supra*).

The obligation of a condominium unit owner to pay charges is for the most part absolute, and cannot be avoided (*see* ***90 E. End Ave. Condominium v Becker,*** 2010 WL 2754086 [Sup Ct New York County 2010]; *see also* RPL § 339-x). Consequently, absent a valid defense, the plaintiff is entitled judgment in its favor on the issue of liability as a matter of law (*see* ***Bd of Mgrs. of Garden Terrace Condominium v Chiang***, 247 AD 2d 237 668 N.S. 2d 364 [1st Dept 1998]; ***90 E. End Ave. Condominium v Becker,*** 2010 WL 2754086, *supra*).

The plaintiff has demonstrated its entitlement to judgment as a matter of law awarding it the amounts that it assessed against Merkel for common charges, costs and disbursements and attorneys fees (*see* ***Bd. of Directors of Squire Green at Paling Homeowners Assn. Inc. v Bell*** 89 AD 3d 657, 933 NYS 2d 288 [2nd Dept 2100]; ***Bd. of Directors of Hunt Club at Coram Homeowners Assn. Inc. v Heb.,*** 72 AD 3d 997, 900 NYS 2d 145 [2nd Dept 2010]; ***Bd. of Mgrs. of the Village Mall at Hillcrest Condominium v Dadn,*** 29 Misc. 3d1238A, 2010 WL 5173180 [Sup Ct Queens County 2010]; ***Bd. of Lido Beach Towers Condominium v Grartenlaub,*** 27 Misc. 3d 1213A, *supra*); ***Bd. of Mgrs. of the Silk Bldg. Condominium v Levenbrown***, 2009 Wl 3062467 [Sup Ct New York County 2009]). Plaintiff has submitted admissible evidence of its authority to collect those assessments pursuant to the relevant sections of the Governing Documents. The plaintiff has also demonstrated the validity of the lien (*see* RPL § 339-aa). Merkle agreed to be bound by the Condominiums' Governing documents when he purchased the unit in April 2004. The Governing documents require that Merkle, as a Unit owner, pay common charges, late charges, interest and attorneys' fees and expenses incurred to collect such charges. Merkle does not contest the affidavit testimony by Whaley, the President of the condominium board, wherein she sets forth a detailed account history demonstrating Merkle's failure to pay the common charges, and other related charges and expenses as required by the governing documents.

Since plaintiff has presented documentary evidence of its entitlement to summary judgment as a matter of law, it now becomes incumbent upon Merkle to come forward and lay bare his proof and demonstrate, by admissible evidence, and evidentiary facts showing the existence of a triable issue with regards to bona fide defenses to the action such as waiver, estoppel, bad faith, fraud, oppressive and/or unconscionable conduct on the part of the plaintiff (*see* ***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC,*** 70 AD 3d 882, 895 NYS 2d 199 [2nd 2010]; ***Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.,*** 203 AD2d 538, 611 NYS2d 34 [2nd Dept 1994]; ***Marton Assoc. v Vitale,*** 172 AD2d 501, 568 NYS2d 119 [2nd Dept 1991]; ***Andre v Pomery,*** 35 NY2d 362 NYS2d 131 [1974]), or the existence of a material issue of fact requiring a trial (*see* ***Grogg v South Road Assoc.,L.P.,*** 74 AD 3d 1021, 907 NYS 2d 22 [2nd Dept 2010]; ***Washington Mut. Bank v O'Conner ,*** 63 AD 3d 832, 880 NYS 2d 696 [2nd Dept 2009]: ***Aames Funding Corp. v Houston,*** 44 AD 3d 692, 843 NYS 2d 660 [2nd Dept 2007]; *lv app den* 10 NY3d 704, 857 NYS 2d 37 [2008]; *reargument den.*

10 NY 3d 916, 862 NYS 2d 222 [2008]; ***Charter One Bank v Houston,*** 300 AD 2d 429, 751 NYS 2d 573 [2nd Dept 2002]; *lv app dismissed* 99 NY 2d 651, 760 NYS 2d 104 [2003]).

Merkle's general denials and denial of information sufficient to form a belief, are insufficient, as a matter of law, and summary judgment will be granted when "the Answer proffers nothing more than general denials" (***Fairbanks Co. v Simplex Supply Co.,*** 126 AD2d 882, 511 NYS2d 171 [3rd Dept 1987]). Bare denials, such as those asserted by Merkle without more, is insufficient to defeat plaintiff's motion for summary judgment (*see* ***1130 Anderson Ave. Realty Corp. v Mina Equities Corp.***, 95 AD2d 169, 465 NYS2d 511 [1st Dept 1983]). "The denials in defendants answer are insufficient to defeat the motion for summary judgment" (***New York Higher Education Services v Ortiz,*** 104 AD 2d 864, 685, 479 NYS 2d 910 [3rd Dept 1984] *citation omitted*). A defendant cannot shelter himself behind general or specific denials, or denials of knowledge or information sufficient to form a belief. He must show that his denial or his defense is not false and sham, but interposed in good faith and not for delay (*see* ***Dwan v Massarene***, 199 AD 872, 192 NYS 577 [1st Dept 1922] *rev on other grounds*). Merkle's denials of information sufficient to form a belief are patently insufficient as a matter of law, and summary judgment will be granted when "the Answer proffers nothing more than general denials" (***Fairbanks Co. v Simplex Supply Co.,*** 126 AD2d 882, 511 NYS2d 171 [3rd Dept 1987]). "Where . . . the cause of action is based upon documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact" (***Gould v McBride,*** 36 AD2d 706, 319 NYS2d 125 [1st Dept 1971]; *affd* 29 NY2d 768, 326 NYS2d 565 [1971]).

"An affidavit from one who has no personal knowledge of the operative facts is without probative value and consequently is insufficient to defeat the motion" (***Bronson v Algonquin Lodge Ass'n, Inc.*** 295 AD 2d 681, 744 NYS 2d 220 [3rd Dept 2002] *citations omitted*); *see also* ***Sturtevant v Home Town Bakery,*** 192 AD 2d 904, 597 NYS 2d 176 [3rd Dept 1993]). It is also well settled as a matter of law that an attorney's affirmation of conclusory assertions not based upon personal knowledge, but hearsay, is legally insufficient to raise a material issue of fact to defeat a summary judgment motion (*see* ***Winter v Black,*** 95 AD 3d 1208, 943 NYS 2d 909 [2nd Dept 2012]; ***Currie v Wilhouski***, 93 AD 816, 941 NYS 2d 218 [2nd Dept 2012]; ***Iacone v Passanisi ,*** 89 AD 3d 991, 933 NYS 2d 373 [2nd Dept 2011]; ***Nicolia v Nicolia***, 81 AD 3d 1327, 924 NYS 2d 509 [2nd Dept 2011]; ***Groboski v Godfry,*** 74 AD 3d 1524, 903 NYS 2d 203 [3rd Dept 2010rd]; ***2 N. St. Corp. v Getty Saugerties Corp***., 68 AD3d 1392, 1395, 892 NYS2d 217 [3rd Dept 2009]; ***Lampkin v Chan,*** 63 AD 2d 727, 891 NYS 2d 113 [2nd Dept 2009];***Palo v Principo,*** 303 AD 2d 478, 756 NYS 2d 623 [2nd Dept 2003]; ***Zuckerman v City of New York,*** 49 NY 2d 557, 427 NYS 2d 595 [1980])

Merkel's allegations in his affidavit in support of the cross motion are consistently vague and are set forth in conclusory statements and are therefore without merit. The affidavit of the licensed process server, Thomas Burke dated July 16th, 2012 indicates that in addition to personally serving Merkel pursuant to CPLR 308 [1] at the condominium address, he also served a copy of RPAPL § 1303 on colored paper along with the RPAL § 1320 notice (*see* ***Aurora v Loan Services, LLC v Weibaum***, 85 AD 3d 95, 923 NYS 2d 609 [2nd Dept 2011]). In a Reply Affirmation, plaintiff has submitted a subsequent affidavit by licensed process server, Thomas Burke, wherein he reaffirms that he served Merkle with a copy of the RPAPL § 1303 notice which was printed on blue paper. Accordingly, the Court finds Merkel affidavit is insufficient to rebut the presumption of proper service created by the process server's affidavits (*accord* ***Deutsche Bank Nat. Trust Co. v Jagroop***, 104 AD 3d 723, 960 NYS 2d 488 [2nd Dept 2013]; ***Bank of New York v Espejo,*** 92 AD 3d 707, 939 NYS 2d 105 [2nd 2012]. Furthermore, the serving of a RPAPL § 1303 notice is not a condition precedent to foreclose on a condominium

lien for a failure to pay common charges (*see* Siegels' Practice Review, September 2012; 249 Siegel's Prac. Rev. 2; New York Law and Practice Real Property § 41:1, June 2013; ***Directors of House Beautiful at Woodbury Homeowners Association, Inc. v Godt,*** 96 AD 3d 983, 947 NYS 572 [2nd Dept 2012]).

Merkle's First Affirmative Defense alleges that the plaintiff lacks standing to maintain this foreclosure action and thus requires an inquiry by this Court (*see* ***Bank of New York v Silverberg,*** 86 AD 3d 274, 926 NYS 2d 532 [2nd Dept 2011]). Merkle's counsel in his affirmation contends that in order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage (*see* ***Wells Fargo Bank, N.A. v Marchione,*** 69 AD 3d 204; 923 NYS 2d 609 [2nd Dept 2011]). Contrary to counsel's assertions, plaintiff is not foreclosing on a mortgage. Plaintiff is foreclosing in an attempt to collect unpaid common charges allegedly owed by Merkel. The condominium form of ownership of real property may be described as a division of real property into individual units and common elements in which an owner holds title in fee to his individual unit as well as retaining an undivided interest in the common elements of the parcel (*see* ***Schoninger v Yardarm Beach Homeowners Ass'n, Inc.,*** 134 AD 2d 1, 523 NYS 2d 523 [2nd Dept 1987]). A purchaser of a unit in a condominium enters into a binding relationship with every other unit by both contract and statute. One of the elements of that relationship is the obligation to pay common charges irrespective of any dispute the individual unit owner may have with another unit owner, the board of managers, or third parties acting on behalf of the board of managers (see RPL § 339-e]). Once created, the administration of the condominium's affairs is governed principally by the by-laws, which, are in essence an agreement amongst individual unit owners as to the manner in which the condominium will operate and which sets forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements (*see* ***Murphy v State,*** 14 AD 3d 127, 787 NYS 2d 120 [2nd Dept 2004]; RPL § 339-v.). The obligation of a unit owner to pay common charges and special assessments cannot be avoided (see RPL § ; ***Board of Managers of First Avenue Condominium v Shandel,*** 143 Misc. 2d 1084, 542 NYS 2d 466 [NY City Civ. Ct. 1989]). RPL § 339-z provides that a condominium board of managers shall have a lien against a unit owner for unpaid common charges. Merkel does not deny the existence of the lien. Article 9-B of the Real Property Law, known as the Condominium Act, permits the establishment of a lien for unpaid common charges in favor of the Board of Managers of a condominium complex (see RPL §§ 399-v; 339-z), and it permits the Board of Managers to commence a foreclosure action to collect the monies owed to it as common charges. The plaintiff has complied with RPL §§ 339-z; 339-aa by filing a verified lien with the county clerk, and the lien has been perfected. Therefore the first affirmative defense is dismissed as a matter of law.

In opposition to the motion, Merkel has failed to submit any evidentiary proof to pursue or support any of his remaining pleaded defenses (*see*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 N.S. 2d 591 [2nd Dept 2010]; ***Citibank, N.A. v Souto Geffen Co.***, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *see generally,* ***Alvarez v Prospect Hospital,*** 68 NY2d 320, 508 NYS2d 923 [1986]). Merkle's affirmative defenses are conclusionary and lack any specific factual allegations to support them (*see* ***Fotiou v Goodman***, 74 AD 3d 1140, 905 NYS 2d 626 [2d Dept 2010]; ***Vittorio v U-Haul Co.,*** 52 AD 3d 823, 861 NYS 2d 726 [2nd Dept 2008]; ***Velasquez v Gomez***, 44 AD 3d 649 , 843 NYS 2d 368 [2d Dept 2007]; ***Restrepo v Rockland Corp.***., 38 AD 3d 742, 832 NYS 2d 272 [2nd Dept 2007]) and except for the first affirmative defense which is addressed herein they are not pursued in defendant's opposition papers. Therefore, inasmuch as Merkle has failed to demonstrate any triable issue of fact, or merit as to any defense in this lien foreclosure action (*see* ***Flagstar Bank v Bellafiore,*** 94 AD 3d 1044, 943 NYS 2d 551 [2nd Dept 2012]); as such, the remaining affirmative defenses are also dismissed as a matter of law.

In dismissing the answer and affirmative defenses the Court rejects the argument that the lack of discovery compromised Merkle's ability to adequately oppose the complaint. "It is well settled that a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence is insufficient to avoid the award of summary judgment" ***(Hariri v Amper,*** 51 AD 3d 146, 152, 854 NYS. 2d 126 [1st Dept 2009]; *citation omitted* ; *see also* ***Bank of America v Tatham,*** 305 AD 2d 183, 757 NYS 2d 55 [2nd Dept 2003]). Here, Merkle has not indicated any basis to conclude that relevant evidence to support his claims might be found through discovery. "[M]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient " to warrant denial of a motion for summary judgment (***Sasson v Setina Mfg. Co., Inc.,*** 26 AD 3d 487, 488, 810 NYS 2d 500 [2d Dept 2006]). The granting of a summary judgment motion should not be postponed to allow for discovery where the proponent of the additional discovery has failed "to demonstrate that the discovery sought would produce relevant evidence" (***Frith v Affordable Homes of Am.,*** 252 AD 2d 536, 537, 676 NYS 513 [2nd Dept 1998]); "and cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that the discovery may lead to relevant evidence" (***Bailey v New York City Tr. Auth.,*** 270 AD 2d 156, 704 NYS 2d 582 [2nd Dept 2000]; *see also* ***Freiman v JM Motor Holdings NR 125-139, LLC***, 82 AD 3d 1154, 920 NYS 2d 189 [2nd Dept 2011]; ***Dempaire v City of New York,*** 61 AD 3d 816, 817, 877 NYS 2d 224 [2nd Dept 2009]; ***Conte v Frelen Assoc., LLC,*** 51 AD 3d 620, 858 NYS 2d 258 [2nd Dept 2008]: ***Lopez v WS Distrib., Inc.,*** 34 AD 3d 759, 825 NYS 2d 516 [2nd Dept 2006]). Furthermore, Merkle did not move to compel discovery or show that he has had an inadequate opportunity to conduct discovery before submitting opposition papers to the plaintiff's instant motion for summary judgment (*see* ***Titian Communications , Inc., formerly known as Obio Telecom. Inc. v Diamond Phone Card, Inc.,*** 94 AD 3d 740, 941 NYS 2d 280 [2nd Dept 2012]).

Furthermore the Court finds that Merkle's attempt to dismiss plaintiff's motion based upon it submitted pleadings is without merit (see Siegel's NY Prac Chapter 9. Pleadings §§ 214, 217 [2013]; Mortgage Liens in New York , Ch. 17: § 17.3; Election of Remedies [2013). Merkel's reliance on ***Greystone Bank v 15 Hoover Street,*** 29 Misc 3d 1209(A) 958 NYS 2d 307 [Sup Ct Nassau County 2010]) is without merit (*see* CPLR 3014).

The assertions by Merkle's counsel that summary judgment is premature because discovery is ongoing and their demands have not been answered is rejected. CPLR 3212 [f] provides that " should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but that it cannot be then stated, a court may deny the motion or may order a continuance to permit affidavits or disclosure to be had and may make such other order as may be just." One seeking discovery " must offer an evidentiary basis to show that discovery may lead to relevant evidence and that essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." (***Martinez v Kreychmar,*** 84 AD 3d 1037, 923 NYS 2d 648 [2nd Dept 2011]; see ***Seaway Capital Corp. v 500 Sterling Realty Corp.,*** 94 AD 3d 856, 941 NYS 2d 871 [2nd Dept 2012]; ***Swedbank AB v Hale Ave. Borrower, LLC,*** 89 AD 3d 922, 540 [2nd Dept 2011]; ***McFadyen Consulting Group, Inc. v Puritan Pride,*** 87 AD 3d 620, 928 NYS 2 87 [2nd Dept 2011]; ***Urstadt Biddle Prop., inc. v Excelsior Realty ,*** 65 AD 3d 1135, 885 NYS 2d 510 [2nd Dept 2009]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion"(***Woodard v Thomas*** 77 AD 3d 738, 740, 913 NYS 2d 103 [2nd Dept 2010] *internal citations omitted*); *see also* ***Cajas-Romero v Ward,*** 106 AD 3d 850, 965 NYS 2d 559 [2nd Dept 2013]; ***Friendlander Org., LLC v Ayoride*** , 94 AD 3d 693, 943 NYS 538 [2nd Dept 2012]; ***Stoian v Reed,*** 66 AD 3 1278, 888 NYS. 2d 639 [3rd Dept 2009]). "In the absence of some evidentiary showing suggesting that discovery will yield material and relevant evidence, it is not an abuse of the court's

discretion to deny the request (***Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauler Dev.Group,*** 77 AD 3d 1219, 1222, 910 NYS 2d 571 [3rd Dept 2010] *internal citation omitted*). Furthermore, there is no court order requiring plaintiff to comply with discovery (*see* ***Emigrant Mtge. Co., Inc. v Beckerman,*** 105 AD 3d 895, 964 NYS 2d 548 [2nd Dept 2013]).

In view of the foregoing, the court finds that Plaintiff established a prima facie case for summary judgment based upon the submissions which evidence the failure of Merkle to pay the common charges due and owing in accordance with the by-laws (*see* RPL § 339-u; New York Jurisprudence, Second Edition, II Condominiums; § Foreclosures). The Court finds that in opposition, Merkle has failed to raise a factual issue vis-a-vis a viable defense to plaintiff's claim. Accordingly, plaintiff is awarded summary judgment striking Merkle's answer and affirmative defenses. Under these circumstances, Merkel has failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense, therefore the plaintiff is entitled to summary judgment (*see* ***Rossrock Fund II, L.P. v Commack Inv. Group, Inc.,*** 78 AD 3d 920, 912 NYS 2d 71 [2nd Dept 2010]; ***Matter of Augustine v Bank United FSB,*** 75 AD 3d 596, 905 NYS 2d 652 [2nd Dept 2010]: ***Fed. Home Loan Mtge. Corp.. v Karastathis,*** 237 AD 2d 558, 655 N.S. 2d 631 [2nd Dept 1996]).

Accordingly, the plaintiff's motion for summary judgment and for an Order of Reference is granted. The Order of Reference as modified is being contemporaneously signed with this Short Form Order. This constitutes the Order and Decision of the Court.

Dated: October 21, 2013
Riverhead, NY

J.S.C.

_____ FINAL DISPOSITION ___XX___ NON-FINAL DISPOSITION