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SHORT FORM ORDER

INDEX
NO.: 32541-11

SUPREME COURT - STATE OF NEW YORK
IAS PART 47 - SUFFOLK COUNTY

COPY

PRESENT: Hon. JERRY GARGUILO
Justice of the Supreme Court

x

BOARD OF DIRECTORS OF THE GREENS AT HAMPTON VISTAS HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

-against-

ROBERT J. TROISE; WELLS FARGO HOME MORTGAGE, INC.; CHASE BANK; TEACHERS FEDERAL CREDIT UNION; and

"JOHN DOE" and "JANE DOE", being fictitious names and intended to be tenants or persons in possession, and/or any other person who by bond, note, extension agreement or otherwise may be liable for deficiency judgment, if such deficiency judgment is desired and/or any party in possession of any part of the liened premises whose interest plaintiff desires to bar,

Defendants.

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MOTION DATE: 4-30-13
ADJ. DATE: 4-2-14
Mot. Seq. # 002-MotD

COHEN & WARREN, P.C.
Attorneys for Plaintiff
80 Maple Avenue
Smithtown, N. Y. 11782

ROBERT J. TROISE
215 South Walnut Street, Apt. 3C
Richland, Missouri 655556

"Jane Doe" and "John Doe"
Tenants/Occupants
5 Lakeview Drive
Manorville, N. Y. 11949

Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this unopposed motion by the plaintiff for, inter alia, an order: (1) pursuant to CPLR 3212 awarding summary judgment in its favor and against the defendant Robert J. Troise, striking his answer and dismissing the affirmative defenses therein; (2) pursuant to CPLR 3215 fixing the defaults of the non-answering defendants; and (3) pursuant to RPAPL § 1321 appointing a referee to (a) compute amounts due under the subject mortgage; and (b) examine and report whether the subject premises should be sold in one parcel or multiple parcels is granted solely to the extent set forth below; and it is

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ORDERED that the plaintiff shall submit with the proposed judgment of foreclosure, a certificate of conformity with respect to the affidavit of service upon the defendant Robert J. Troise, executed outside the State of New York (*see*, CPLR 2309[c]; ***U.S. Bank N.A. v Dellarmo***, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]); and it is further

ORDERED that the plaintiff is directed to serve a copy of this Order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

The Board of Directors of the Greens at Hamptons Vistas Homeowners Association, Inc. (the plaintiff) commenced this action to foreclose a notice of lien for, inter alia, unpaid assessments, late fees, and other related charges against the residential real property of the defendant Robert J. Troise (Troise) situate in Suffolk County, New York. By way of background, the plaintiff is the governing body of the Unit Owners (Unit Owners) of the Greens at Hamptons Vistas Homeowners Association, Inc. (the Greens), an unincorporated association located at Manorville, New York. The plaintiff was organized pursuant to a Declaration of Covenants, Restrictions, Easements, Charges and Liens (the Declaration) allegedly recorded on April 20, 1989 in the Office of the Suffolk County Clerk. In addition to the Declaration, the By-Laws for the Greens (the By-Laws) were also allegedly recorded on April 20, 1989.

Pursuant to the Declaration and the By-Laws (the Governing Documents), all sums determined by the plaintiff as assessments, but unpaid, together with interest thereon at the legal rate per annum, plus late fees and reasonable attorneys' fees, are chargeable to any Unit Owner in the Greens, and cause a lien on their unit. The Governing Documents also provide, inter alia, that the plaintiff is entitled to foreclose on the lien for unpaid assessments or bring suit to recover a money judgment for unpaid assessments. Pursuant to the Governing Documents, all Unit Owners have an absolute and unconditional obligation to pay the assessments.

Troise is allegedly the record owner of residential Unit No. 5 (the Unit) in the Association. Pursuant to the Governing Documents, each of the Unit Owners in the Greens, whether or not expressed in any deed or other conveyance, is deemed to covenant and agree to pay to the Greens such assessments as are fixed by the plaintiff. On August 19, 2011, the plaintiff filed a verified notice of lien dated August 8, 2011 (the lien) for the unpaid assessments in the amount of $2,210.00 in the Office of the Suffolk County Clerk, ostensibly pursuant to sections of the Condominium Act (Real Property Law §§ 339-z and 339-aa).

In the complaint filed on October 18, 2011, the plaintiff sets forth two causes of action. In the first cause of action, the plaintiff demands that a judgment of foreclosure and sale be entered with respect to the Unit. In the second cause of action, the plaintiff requests reasonable attorneys' fees incurred in connection with this action. In the complaint, the plaintiff alleges that Troise defaulted in the payment of assessments allotted to and due upon the Unit in the sum of $2,210.00 as of August 8, 2011. The plaintiff further alleges that Troise continued to fail to remit assessments allotted to and due upon the Unit in the sum of $2,210.00, plus interest and the expenses of sale and costs of this action, together with attorney's fees permitted pursuant to the Governing Documents.

By Order dated October 17, 2012 (Garguilo, J.), a prior motion by the plaintiff for an order of reference was denied with leave to renew as the plaintiff failed to demonstrate proper service on Troise pursuant to CPLR 308(4). Thereafter, the plaintiff allegedly re-served Troise by personal delivery upon him on January 31, 2013 pursuant to CPLR 308(1).

In response to the complaint, Troise interposed an unsigned document dated February 25, 2013 (*see*, CPLR 2101[a]; Uniform Rules Trial Cts [22 NYCRR §130-1.1A]), which is deemed to be an answer for the purposes of this determination. In his answer, Troise alleges that he does not reside in New York and that he has no knowledge of the lien. He also alleges that foreclosure of the lien would be a financial hardship to him and result in unjust enrichment to the plaintiff. The remaining defendants have neither answered nor appeared in this action.

The plaintiff's now moves for, inter alia, an order pursuant to CPLR 3212 awarding summary judgment in its favor against Troise and pursuant to RPAPL § 1321 appointing a referee to compute the amount due and owing the plaintiff. In support of the motion, the plaintiff has submitted, inter alia, the verified lien, the summons, the verified complaint, the Governing Documents and two affirmations from counsel. In her affirmation, counsel avers that the general denials and the affirmative defenses contained in the answer lack merit, and that Troise failed to pay the monthly assessments as required by the Governing Documents. No opposition has been filed in response to this motion.

To prevail on a breach of contract action, the plaintiff must establish an agreement between the parties, the performance by the plaintiff, the defendant's failure to perform and resulting damages (***Dee v Rakower***, 2013 NY Slip Op 07443 [2d Dept, Nov. 13, 2013]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). In such an action, "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability" is predicated must be established (***Matter of Sud v Sud***, 211 AD2d 423, 424, 621 NYS2d 37 [1st Dept 1995]).

The administration of an association'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 association will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the association's common elements (*see generally*, ***Schoninger v Yardarm Beach Homeowners' Assn., Inc.***, 134 AD2d 1, 523 NYS2d 523 [2d Dept 1987]; ***Glenridge Mews Condominium v Kavi***, 90 AD3d 604, 933 NYS2d 730 [2d Dept 2011]). Further, a purchaser of a unit in a homeowner's association enters into a binding relationship with every other unit owner by both contract and statute. One of the elements of that relationship is the obligation to pay assessments (*see generally*, ***Board of Mgrs. of Lido Beach Towers Condominium v Gartenlaub***, 27 Misc3d 1213 [A], 910 NYS2d 403, 2010 NY Slip Op 50729 [U] [Sup Ct, Nassau County 2010]).

In New York, the statutory scheme for planned subdivision/condominium developments requires that all unit owners comply with the by-laws, rules, regulations, resolutions and decisions adopted pursuant thereto (*see generally*, ***Board of Mgrs. of Lido Beach Towers Condominium v Gartenlaub***, 27 Misc3d 1213 [A], *supra*; *see also*, RPL § 339-x). Pursuant to § 1 and § 3 of the plaintiff's By-laws, all unit owners are obligated to pay assessments fixed by the plaintiff as well as additional charges. In the event of a default, unit owners are

obligated under § 5 to pay interest, attorneys' fees and expenses incurred by the plaintiff in collecting such charges. Thus, the obligation of a unit owner to pay assessments is, for the most part, absolute and cannot be avoided (*see generally*, ***90 E. End Ave. Condominium v Becker***, 2010 NY Misc LEXIS 3036, 2010 WL 2754086, 2010 NY Slip Op 31660 [U] [Sup Ct, New York County 2010]; ***Board of Mgrs. of Lido Beach Towers Condominium v Gartenlaub***, 27 Misc3d 1213 [A], *supra*; *see also*, Real Property Law § 339-x).

By its submissions, the plaintiff demonstrated its entitlement to judgment as a matter of law awarding it the amounts that it assessed against Troise for assessments, costs, disbursements and attorneys' fees (*see generally*, ***Board of Mgrs. of Brightwater Towers Condominium v Cheskiy***, 109 AD3d 944, 971 NYS2d 349 [2d Dept 2013]; ***Board of Directors of Squire Green at Pawling Homeowners Assn., Inc. v Bell***, 89 AD3d 657, 933 NYS2d 288 [2d Dept 2011]; ***Board of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb***, 72 AD3d 997, 900 NYS2d 145 [2d Dept 2010]; ***Board of Mgrs. of the Vil. Mall at Hillcrest Condominium v Dadon***, 29 Misc3d 1238 [A], 958 NYS2d 644 [Sup Ct, Queens County 2010]; ***Board of Mgrs. of Lido Beach Towers Condominium v Gartenlaub***, 27 Misc3d 1213 [A], *supra*; ***Board of Mgrs. of the Silk Bldg. Condominium v Levenbrown***, 2009 NY Misc LEXIS 5439, 2009 WL 3062467, 2009 NY Slip Op 32127 [U] [Sup Ct, New York County 2009]). The plaintiff submitted evidence of its authority to collect the assessments and charges set forth in the lien pursuant to the relevant sections of the Governing Documents. The plaintiff also demonstrated the validity of the lien (*see generally*, RPL §§ 339-aa and 339-z). It is undisputed that Troise agreed to be bound by the Governing Documents when he acquired title to the Unit. It is also undisputed that the Governing Documents require Troise, as a Unit Owner, to pay assessments, late charges, interest as well as the plaintiff's attorneys' fees and expenses incurred to collect such charges. Further, the plaintiff submitted the complaint verified by its President and a detailed account history demonstrating Troise's failure to pay assessments, related charges and expenses as required by the Governing Documents. Therefore, absent a valid defense, the plaintiff is entitled to judgment in its favor on the issue of liability as a matter of law (*see generally*, ***Board of Mgrs. of the Garden Terrace Condominium v Chiang***, 247 AD2d 237, 668 NYS2d 364 [1st Dept 1998]; ***90 E. End Ave. Condominium v Becker***, 2010 NY Slip Op 31660 [U], *supra*).

The plaintiff also submitted sufficient proof to establish, prima facie, that the affirmative defense set forth in Troise's answer is subject to dismissal due to its unmeritorious nature (*see*, ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Wells Fargo Bank Minn., N.A. v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Coppa v Fabozzi***, 5 AD3d 718, 773 NYS2d 604 [2d Dept 2004] [*unsupported affirmative defenses are lacking in merit*]; *see generally*, ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 178, 919 NYS2d 465 [2011];***Citibank N.A. v Walker***, 12 AD3d 480, 787 NYS2d 48 [2d Dept 2004], *abrogated on other grounds by* ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008] [*conclusory allegations that fail to establish unjust enrichment warrant dismissal*]).

As the plaintiff duly demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to Troise (*see generally*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon Troise to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see generally*, ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]]). In instances where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there

is, in effect, a concession that no question of fact exists (*see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012] ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Additionally, "uncontradicted facts are deemed admitted" (***Tortorello v Carlin,*** 260 AD2d 201, 206, 688 NYS2d 64 [1st Dept 1999] [internal quotation marks and citations omitted]).

Troise's answer is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see*, ***Board of Directors of Squire Green at Pawling Homeowners Assn., Inc. v Bell***, 89 AD3d 657, *supra*; ***Board of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb***, 72 AD3d 997, *supra*; ***Board of Managers of Windridge Condominiums One v Horn***, 234 AD2d 249, 651 NYS2d 326 [2d Dept 1996]). Further, the affirmative defense asserted by Troise is factually unsupported and without apparent merit (*see*, ***Becher v Feller***, 64 AD3d 672, *supra*). In any event, the failure by Troise to raise and/or assert his pleaded defense in opposition to the plaintiff's motion warrants the dismissal of same as abandoned under the case authorities cited above (*see*, ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, *supra*; *see also*, ***Madeline D'Anthony Enters., Inc. v Sokolowsky***, 101 AD3d 606, *supra*).

Under these circumstances, the Court finds that Troise failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment requested by it (*see*, ***Board of Managers of Windridge Condominiums One v Horn***, 234 AD2d 249, *supra*; *see generally*, ***Hermitage Ins. Co. v Trance Nite Club, Inc.***, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]). The plaintiff, therefore, is awarded summary judgment against Troise (*see*, ***Board of Mgrs. of Brightwater Towers Condominium v Cheskiy***, 109 AD3d 944, *supra*; ***Board of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb***, 72 AD3d 997, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, Troise's answer is stricken and the affirmative defense set forth therein is dismissed.

By its moving papers, the plaintiff further established the default in answering on the part of the defendants Wells Fargo Home Mortgage, Inc., Chase Bank, and Teachers Federal Credit Union as well as the alleged tenants/occupants sued herein as John Doe and Jane Doe (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). Accordingly, the defaults of all non-answering defendants are fixed and determined. Since the plaintiff has been awarded summary judgment against Troise, and has also established the default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts allotted to the Unit and due from Troise pursuant to the Governing Documents (*see*, RPAPL § 1321; *see also*, ***Board of Directors of Hunt Club at Coram Homeowners Assn., Inc., v Hebb***, 72 AD3d 997, *supra*; ***Board of Managers of Polo Club Condominium v Browne***, 2013 NY Misc LEXIS 3369, 2013 WL 3994729, 2013 NY Slip Op 31 747 [U] [Sup Ct, Suffolk County 2013]; ***Board of Mgrs. of Plaza E. Condominium, v Ezra Realty, LLC***, 2012 NY Misc LEXIS 1102, 2012 WL 893860, 2012 NY Slip Op 30588 [U] [Sup Ct, Nassau County 2012]).

The plaintiff's request, set forth in the wherefore clause of the complaint, whereby the plaintiff seeks a judgment declaring that the plaintiff's lien is entitled to priority over all other interests and liens herein is denied without prejudice, leave to renew granted upon proper papers (*see generally*, ***Valley Natl. Bank v Penna***, 91 AD3d 853, 936 NYS2d 688 [2d Dept 2012]). The plaintiff failed to set forth sufficient facts or evidentiary proof

in support of this relief in its moving papers.

Accordingly, this motion by the plaintiff is determined as indicated above and a referee shall be appointed to examine and compute the sums due the plaintiff, which shall include assessments, late charges, interest and costs, except for attorneys' fees, and shall submit a report regarding the same to this Court. The plaintiff is also entitled to prejudgment interest on the common charges and special assessments from August 19, 2011. Prejudgment interest shall accrue at the rate of .75% per month (*i.e.*, 9% per annum), as provided in Article VI of the By-Laws. The proposed order appointing a referee to compute pursuant to RPAPL § 1321, as modified by the Court, has been signed concurrently herewith.

Dated: April 2nd, 2014

Hon. JERRY GARGUILO, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**