

Board of Mgrs. of the 225 E. 57th St. Condominium v Campaniello
2016 NY Slip Op 32409(U)
December 8, 2016
Supreme Court, New York County
Docket Number: 158263/2012
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

THE BOARD OF MANAGERS OF THE 225 EAST 57TH
STREET CONDOMINIUM, ON BEHALF OF THE UNIT
OWNERS,

INDEX NO. 158263/2012
MOTION DATE 10/19/2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

Plaintiff,

-against-

THOMAS CAMPANIELLO and "XYZ CORP.," the last name
being fictitious and unknown to the Plaintiff, the entity
intended being the entity or party, if any, having or
claiming an interest in or lien upon the encumbered
premises described in the complaint,

Defendants.

The following papers, numbered 1 to 8 were read on this motion for summary judgment, referral to referee and appointment of a receiver.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7 - 8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion is granted to the extent of dismissing the action as against Defendant "XYZ Corp." on consent, the remainder of the relief requested is denied.

Plaintiff is the Board of Managers for 225 East 57th Street Condominium (herein "the Condo"), a "Cond-Op" building that contains a total of six units: Commercial Units A-D, a Garage Unit, and a Residential Unit that is organized as a cooperative housing corporation and contains a number of cooperative apartments. The Residential unit is a Condominium Unit with an 89.1% common interest ownership and is referred to in the First Amendment to the Declaration of Condominium as the "Apartment Corporation." (Reply Aff. Exh. A). Defendant Thomas Campaniello (herein "Campaniello") is the owner of Commercial Units B and C. (Mot. Exhs. B & C).

Plaintiff brought two separate foreclosure actions pursuant to R.P.L. 339-aa, one for each of Campaniello's Units, to foreclose on liens filed against each Unit for Campaniello's failure to pay the full amount of the monthly common charges and

special assessments. (Mot. Exhs. D & E). The parties stipulated to consolidate the two actions for a "joint trial" only, and agreed that separate foreclosure judgments may issue for the Units. (Mot. Exh. A). For Unit B the first lien dated December 2, 2010 was for the sum of \$52,840.22 (Mot. Exh. O), and the second lien dated October 24, 2012 was for the sum of \$66,958.27 (Mot. Exh. P). For Unit C the first lien dated November 29, 2010 was for the sum of \$61,939.91 (Mot. Exh. Q), and the second lien dated October 24, 2012 was for the sum of \$71,579.20 (Mot. Exh. R). Plaintiff annexes copies of the Condo's account ledgers reflecting Campaniello's partial payments for the monthly common charges, the unpaid special assessments, and the remaining unpaid monthly common charges for Unit B and Unit C. (Mot. Exhs. M and N respectively).

Plaintiff contends that Section 6.2 of the By-Laws provides that all Unit owners have an obligation to pay common charges and special assessments, that in accordance with Section 6.1 of the By-Laws, it allocated and assessed the common charges and special assessments due among all Condo Unit owners based on their respective interests in the Condo. That based on Campaniello's non-payment, Plaintiff caused the liens against the Units to be filed in accordance with Section 6.4(A) of the By-Laws and R.P.L. 339-z. That pursuant to Section 6.4(a), Campaniello is obligated to pay interest at the highest rate chargeable under the law computed from the due date until paid in full together with all costs and expenses including reasonable attorney's fees, and that Campaniello has failed to satisfy the debt due since the liens were filed. The Declaration of Condominium and the Condo's By-Laws are annexed to the motion as exhibits K and L respectively.

Plaintiff argues that it has set forth prima facie proof of its claim, but that at the very least a Referee should be appointed to ascertain and compute the amounts due.

Plaintiff also argues that pursuant to R.P.L. 339-aa and Section 6.4(B) of the By-Laws it is entitled to the appointment of a Receiver to collect reasonable rent for the use of a defaulting Unit Owner's Unit. Also, that Unit B is vacant, and that a receiver should be appointed to lease the vacant Unit, collect rent from the tenant, and apply such rental income to Campaniello's common charge and assessment arrears.

Plaintiff contends that Campaniello's seven affirmative defenses and counterclaim for attorney's fees do not present issues of fact barring summary judgment. That the Condo has the power to levy special assessments, and that the Resolutions passed by the Condo levying the special assessments according to the By-Laws shows that Campaniello's first affirmative defense (that the Condo acted outside the scope of its authority in assessing Campaniello for the residential cooperative's expenses) has no merit. That each Resolution levying special assessments was assessed according to each Unit owner's proportional ownership of the common elements, and that none of the special assessments sought to have Campaniello pay the Residential Unit Owner's expenses. (Mot. Exh. X).

Plaintiff further contends that the second affirmative defense alleging the Condo exceeded its authority in altering the methodology of how to assess the Common Charges is without merit because the By-Laws grant the Condo the powers to establish the means and methods of the common charges and special assessments (By-Laws Section 2.4). That the Condo approves its annual budget and calculates the common charges based on a Unit Owner's proportionate ownership interest in the common elements. That the third affirmative defense challenging the Condo's authority to levy the special assessments for reserve funds its without merit because there is no current applicable restriction against the Condo's right to levy a special assessment to fund a reserve fund.

Plaintiff argues that the fourth affirmative defense challenging the special assessments for repair to the roof and balconies of the building are also without merit. That the roof is specifically identified as a common element and any repair/replacement is the responsibility of all Unit owners. That balconies are limited common elements which are the responsibility of the Unit owner who enjoys the use of the balcony, and that this building has numerous setbacks that are roofs also used as balconies. That the Condo determined the dual purpose of these setbacks as balconies and roofs would be classified as a common element, and that such determination is protected by the business judgment rule which should not be disturbed, and that if the Court were to find the setbacks were only limited common elements, such a determination would result in only a nominal reduction in Campaniello's arrears.

Plaintiff does not address Campaniello's fifth affirmative defense as to the assessment for elevators including the northwest elevator which only services the Residential Unit and is not the responsibility of Campaniello in anyway.

The sixth affirmative defense alleges that the Resolution dated October 13, 2009, changed the methodology as to how common charges were assessed, and that prior to this resolution common charges were classified as "Share Expenses." Plaintiff argues that "Shared Expenses" is the correct term, and that it is a term of art defined in Section 6.1(A)(ii) of the By-Laws. That the Condo collects common charges and special assessments from all Unit Owners in order to produce revenue to pay common expenses pursuant to By-Laws Section 6.2. That additionally the Residential Unit Owner pays for building services and facilities which benefit other Unit Owners, upon which the Residential Unit owner can seek reimbursement. That By-Laws Section 6.1(A)- "Shared Expenses" provides for the Residential Unit Owner's right to recover for these services and facilities, and that the Apartment Corporation paid for all of these services and facilities and then sought payment for the "Shared Expenses" from the Commercial Units and the Garage Units. Plaintiff contends that Campaniello has a history of not paying these Shared Expenses which led to arbitration.

Plaintiff contends that the October 13, 2009 Resolution was passed in order to minimize the "Shared Expenses" so that the Condo would pay all of the building's common expenses rather than placing that burden on the Residential Unit Owner who would have to collect the money from Campaniello, because these are expenses that the Condo should have be paying according to the By-Laws. Plaintiff argues that it is not seeking to recover "Shared Expenses", and that it is only seeking to recover common charges and special assessments. That "Shared Expenses" are not common charges, and that Campaniello's allegation that prior to the Resolution being passed common charges were assessed against a Unit Owner based on defined "Share Expense" items according to the owner's percentage interest is not accurate because "common charges" and "Shared Expenses" are different terms that are defined in the By-Laws and are not synonymous. Also, that the allegation that undertaking this Resolution was contrary to the By-Laws is meritless because the Resolution specifically provides that it is subject to any restrictions in the By-Laws.

The seventh affirmative defense alleges that the methodology for calculating the Common Charges is based on a By-Law amendment, and Plaintiff contends that the By-Laws have not been amended to charge common charges. Further, that the Condo has the power through By-Laws Section 6.1 to set the amount of common charges and charge each Unit owner according to their percentage ownership of the common interests. Lastly, Plaintiff argues that Campaniello's counterclaim for attorney's fees should be dismissed because such a claim is not available to the Unit owners under the By-Laws.

Plaintiff also states that it wishes to dismiss the complaint as to Defendant "XYZ Corp." because there is no such corporation, Campaniello does not oppose this relief.

Defendant Campaniello does oppose the remainder of the motion arguing that Plaintiff has not made a prima facie case because it did not submit records establishing the manner in which the common charges were calculated, and that merely attaching the ledgers without explanation as to its calculations is not sufficient, especially when the ledgers do not take into account a prior settlement between the parties in 2009. Campaniello also argues that the common charges are contrary to the criteria set forth in the By-Laws, that the calculations were required to be based upon a "Shared Expense" methodology involving arbitration rights which was previously confirmed by the Courts in two prior litigations between the parties, that the calculations were done according to an improper resolution, that a disproportionate amount of the Residential Unit owner's expenses are being shifted to the Commercial Units, that the Plaintiff's are fraudulently trying to evade the By-Law's restrictions on common charge calculations, and that the special assessments are not Campaniello's responsibility.

Campaniello contends that the By-Laws provide for a "Shared Expense" methodology upon which a Unit owner is responsible for a percentage of the expenses pertaining to certain enumerated items shared by the condominium and co-op. That the October 13, 2009 Resolution provided Plaintiff with the power to calculate common charges in a manner other than as provided for in the By-Laws, such that the "Shared Expense" formula providing for Unit owners to be responsible for only certain matters shared between the Residential Unit and the Commercial and Garage Units, and the availability of arbitration for any challenges to such charges is now negated by the Resolution. That a strict percentage-wise allocation of expenses is inappropriate, and that by Plaintiff improperly and unlawfully changing the method of calculation for these "Shared Expenses", Commercial Unit owners, such as Campaniello who is the largest such owner and the largest percentage owner of the entire complex, are being charged with a disproportionate share.

Campaniello further argues that this Resolution to change the methodology to have the Condo pay all of the expenses, then allocate his share on a strict percentage basis without any regard as to his actual responsibility under the "Shared Expense" method in the By-Laws deprives him of his right to adjustment and/or arbitrate disputes of disproportionate charges. Campaniello contends that if there were an issue of consistency in following the By-Laws use of the term "Shared Expenses" then an amendment, rather than a Resolution, should have been sought.

The special assessments are another issue, as Campaniello argues that nowhere in the Complaint or in Plaintiff's moving papers are the specifics of the special assessment claims explained. That a prima facie case has not been made as to how the special assessment calculations were determined, and that by the removal of the "Shared Expense" methodology, Campaniello is being disproportionately charged for assessments that do not relate to his use, or lack of use, of the common or limited common elements.

Campaniello also argues that Plaintiff has failed to support its claim for late fees, and that Section 6.4(B) of the By-Laws provides for either interest or late fees, but not both. Lastly, Campaniello contends that his counterclaim for attorney's fees should not be dismissed because Section 9.4 does provide for costs and expenses incurred in remedying or enjoining a breach of the By-Laws.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the

evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is “issue finding” not “issue determination” (Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

Plaintiff provides the account ledgers showing past due balances for both of Campaniello’s Units. However, Defendant Campaniello states in his Affidavit that he has continuously paid the undisputed amount of common charges that are correct, and is ready to pay any of Plaintiff’s claims if they are correctly calculated, but recovery is impermissible because of Plaintiff’s unlawful and inappropriate actions. Campaniello has raised an issue of fact as to whether or not the common charges and special assessments were proportionately attributed to him, and what sums, if any, are due Plaintiff. Therefore, those portions of the motion seeking summary judgment and the appointment of a Referee must be denied. In addition, Plaintiff has failed to state a basis entitling it to the appointment of a Receiver, therefore this relief is also denied.

Accordingly, it is hereby ORDERED that Plaintiff’s motion is granted to the extent of dismissing this action as against Defendant “XYZ Corp.”, on consent, and it is further,

ORDERED, that the Complaint as against Defendant “XYZ Corp.” is hereby severed and dismissed, and it is further,

ORDERED, that the Complaint as against Defendant Thomas Campaniello remains in effect, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

THE BOARD OF MANAGERS OF THE 225
EAST 57TH STREET CONDOMINIUM, ON
BEHALF OF THE UNIT OWNERS,
Plaintiff,

-against-

THOMAS CAMPANIELLO
Defendant,

and it is further,

ORDERED, that within twenty (20) days from the date of this Order Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendant, on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at, genclerk-ords-non-mot@nycourts.gov, who shall amend their records accordingly, and it is further,

ORDERED, that the remainder of the relief sought is denied.

ENTER:

Dated: December 8, 2016



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST X REFERENCE