

**Board of Mgrs. of the Divine Grace Condominium v
Ti Yan**

2018 NY Slip Op 31588(U)

July 12, 2018

Supreme Court, New York County

Docket Number: 152625/2013

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X INDEX NO. 152625/2013

THE BOARD OF MANAGERS OF THE DIVINE GRACE CONDOMINIUM,

Plaintiff,

- v -

TI YAN, GOLDEN KEY MANAGEMENT CORP., JOHN DOE 1 THROUGH 10 THE LAST,

Defendants.

DECISION AND ORDER

-----X

Arthur F. Engoron, J.S.C.

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiff's application for attorneys' fees in lieu of trial:

Papers Numbered:

- Application for Attorneys' Fees - Affirmation - Affidavit - Exhibits1
Affirmation in Opposition - Affidavit - Exhibits 2
Reply Affirmation - Exhibit..... 3

Upon the foregoing papers, (1) plaintiff's application for attorneys' fees, late fees, and interest in lieu of trial is hereby granted in part and denied in part; and (2) defendants' request for reciprocal attorneys' fees is hereby denied.

Background

Plaintiff, The Board of Managers of the Divine Grace Condominium, commenced this action to foreclose on a condominium unit ("the Unit") owned by defendant Ti Yan ("Yan") located in the subject building, located at 155 Henry Street in Manhattan ("the Condo"). Plaintiff names Golden Key Management Corp. ("Golden Key") as a defendant, as it alleges that Golden Key was the managing agent of the Condo until 2010. Yan, on the other hand, alleges that Golden Key is not a proper party, as it has never had any ownership interest in the Unit, but rather, is a company owned by Yan's wife, Mei Ling Chow.

Pursuant to Article VI, Section 4 of the Condo's bylaws ("Bylaws"), "All Unit Owners shall be obligated to pay the common charges assessed by the Board of Managers." Pursuant to Article VI, Section 6 of the Bylaws, "In the event of default by a Unit Owner in paying [common charges], [plaintiff] shall have the right and duty to attempt to recover such common charges or assessments, together with interest thereon, and the expenses of the proceeding, including attorneys' fees, in an action to recover the same brought against such Unit Owner."

It is undisputed that in November 2010, Yan ceased paying the Condo's common charges for the Unit. Yan alleges he in good faith withheld common charges because of plaintiff's failure to maintain the common elements of the Condo in a habitable and/or safe condition. Plaintiff subsequently filed with the New York City Registrar a Notice of Lien ("the Lien") for unpaid common charges on the Unit, in accordance with Real Property Law § 399-z. Plaintiff alleges that through December 31, 2013, Yan owed \$14,987.97, including late fees and interest. On November 26, 2014, Yan made a \$12,582.20 payment, which Yan alleges was the principal due, but failed to pay the late fees and interest he incurred. Yan also refused to pay plaintiff's attorneys' fees, which plaintiff estimates was approximately \$30,000 at the time.

Shortly thereafter, plaintiff commenced this action in Supreme Court, New York County. By order entered May 14, 2015, Justice Joan M. Kenney (1) denied a motion by defendants for summary judgment; (2) granted plaintiff's cross-motion for judgment on the issue of liability, as against both Yan and Golden Key; and (3) ordered the parties to proceed to trial on the issue of damages only. By order entered January 31, 2017, the Appellate Division, First Department, found (1) that the Supreme Court correctly granted plaintiff summary judgment on liability as against Yan, but (2) that plaintiff was not entitled to summary judgment on liability as against Golden Key, because Golden Key's interest in the Unit is unclear.

The Instant Application

Pursuant to the First Department's order, trial dates were set in this Court for April 27, 2018 and May 25, 2018 on the issue of damages, which were limited to the recovery of attorneys' fees, late fees, and interest, as the underlying common charges had already been paid. By letter dated April 19, 2018, plaintiff and Yan jointly submitted a request that the Court cancel the hearing dates and permit the parties to submit motion papers on the remaining issues. The Court agreed to the request.

Plaintiff argues that it is entitled to a total of \$102,616.58 from Yan and, additionally, asks this Court to issue a judgment allowing for the foreclosure of the Lien. Plaintiff provides the following breakdown: (1) \$79,196.71 in attorneys' fees; (2) \$5,500 for the appeal; (3) \$900 in costs and disbursements; (4) \$8,932.12 in interest and late fees owed to date; and (4) \$8,088.75 in additional fees for the cost of finalizing the application papers, of reviewing Yan's opposition papers, and of preparing reply papers. Plaintiff argues, inter alia: (1) that defendants forced its counsel to spend a great deal of attorneys' fees by filing unsuccessful motions, to which it was forced to respond; (2) that were it not for Yan's various motions and appeals, this case could have been resolved three years ago; (3) that four attorneys, whose rates range from \$225/hour to \$275/hour, spent time working on the matter, and that the firm's rates are relatively low compared to other New York firms and, thus, should be granted in full; and (4) that the Bylaws authorize and support the award of attorneys' fees, late fees, interest, costs and disbursements, and "fees on fees."

In opposition, Yan asks the Court to (1) limit the award of attorneys' fees to \$2,500; and (2) limit late fees and interest due to no more than \$3,304.01. Yan argues, inter alia: (1) that he does not owe any late fees or interest after November 2014, as he has since timely remitted common charges upon receipt of plaintiff's invoices; (2) that plaintiff's demand for attorneys' fees is unjustified, unreasonable, and unconscionable, as plaintiff did not satisfy its burden of demonstrating the reasonableness and necessity of the fees; (3) that this Court should not enforce the Bylaws' attorneys' fees provision, as plaintiff breached the Bylaws by failing to abide by its obligations thereunder; (4) that no fees should be awarded because of plaintiff's bad faith conduct in this litigation (i.e., attempting to frustrate settlement negotiations by demanding late fees, interest, and attorneys' fees); (5) that plaintiff's counsel did not need four attorneys working on a simple common lien foreclosure case; (6) that plaintiff's counsel is attempting to bill him for tasks unrelated to this foreclosure; (7) that plaintiff's counsel engaged in "block billing"; (8) that "fees on fees" are not permitted by the First Department; and (9) that plaintiff is not entitled to 16% interest, as plaintiff is not a lender and that the statutory 9% rate should be applied. Additionally, Golden Key seeks \$9,300 for reciprocal attorneys' fees. Pursuant to NCYRR § 130-1.1, the Court may award costs or impose sanctions against an attorney or law firm for frivolous conduct. Defendants claim (1) that plaintiff engaged in frivolous conduct by improperly suing Golden Key for four years with no basis other than malice; and (2) that after making Golden Key litigate a motion and an appeal, plaintiff abandoned its claim against it, resulting in its eventual dismissal.

In reply, plaintiff seeks additional fees in the sum of \$8,088.75, alleging that this was its cost to finalize the initial submission of its application and to respond to Yan's 53-page memorandum of law. Plaintiff argues, inter alia: (1) that Yan rehashes many issues which were already resolved pursuant to previous court orders or concern irrelevant issues; (2) that both Justice Kenney and the First Department have already ruled that plaintiff is entitled to attorneys' fees, late fees, and interest; (3) that the Court already established that alleged damages in the Condo are not a defense to Yan's obligation to pay common charges; (4) that it cannot be a surprise to Yan that a case which took five years to resolve would ultimately cost more attorneys' fees than defendants would have wished; (5) that it in good faith attempted settlement on multiple occasions; (6) that the submitted invoices fully and properly show that the attorneys' fees charged were reasonable; and (7) that Golden Key has no basis to demand reciprocal attorneys' fees, as the action against it was not frivolous. Plaintiff leaves to this Court to determine whether 16%, which is the highest legal rate of interest allowed on a forbearance of money, should be applied to the instant case. Additionally, plaintiff notes that it no longer seeks relief against Golden Key.

Discussion

The Court hereby (1) grants in part, and denies in part, plaintiff's application for late fees, interest, and attorneys' fees in lieu of trial; and (2) denies defendants' request for reciprocal attorneys' fees.

I. Late Fees and Interest

Plaintiff's entitlement to unpaid common charges brings with it a right to late fees, interest, and attorneys' fees, all of which are provided for in the Bylaws. See Cave v Riverbend Homeowners Ass'n, Inc., 99 AD3d 748, 750 (2d Dept 2012) ("the condominium's bylaws authorized the assessment of late fees for unpaid common charges"). Moreover, both Justice Kenney and the First Department have already held that, pursuant to the Bylaws, Yan is required to pay late fees and interest. See Board of Mgrs. of Divine Grace Condominium V Ti Ying Yan, 146 AD3d 734, 735 (1st Dept 2017) (Yan failed to pay "for interest, late fees, or attorneys' fees that plaintiff was entitled to pursuant to the condominium's bylaws").

However, plaintiff is only entitled to late fees and interest from December 1, 2010 – when Yan admittedly stopped paying common charges – to December 1, 2014 – when he made a \$12,582.20 payment, in full payment of the Lien's principal balance. Yan's argument that plaintiff waived late fees and interest that accrued before March 22, 2013, due to inaction, is unavailing. Yan inaccurately claimed that plaintiff failed to take action in this case for four years, but actually plaintiff filed the Lien 18 months after Yan's first missed payment. As Yan alleges, without opposition from plaintiff, that plaintiff is not entitled to late fees and interest after December 1, 2014, as since November 2014, he has timely paid his common charges.

Article VI, Section 6 of the Bylaws states that "in the event of a default in the payment of common charges, the Unit Owner is obligated to pay interest at the highest legal rate from the due date." Plaintiff argues that the highest legal rate of interest in the context of a loan is 16% per year, and that the 16% rate should be applied here. Yan argues that where the Bylaws do not specify a rate, the applicable rate is 9%. Certain case law states otherwise. New York courts have consistently held that the maximum interest rate per annum for a forbearance of money is 16% under New York's civil usury statute. See Blue Wolf Cap. Fund II, L.P. v American Stevedoring Inc., 105 AD3d 178, 182 (1st Dept 2013) ("The maximum per annum interest rate for a loan or forbearance of money is 16% under New York's civil usury statute"). Here, as the action relates to a forbearance of money, and as the Bylaws allow for plaintiff to collect the highest legal rate, plaintiff is entitled to collect interest at the 16% rate.

Plaintiff is not entitled to "interest on interest," as the Bylaws do not expressly authorize compound interest. See In re West Bushwick Urban Renewal Area Phase 2, 50 AD3d 695, 696 (2d Dept 2008) (agreement "did not include a provision expressly authorizing it to compound interest. Under such circumstances, compound interest is not recoverable"); see also Steinberg v Williams, 163 AD2d 516, 516 (2d Dept 1990) ("While it is true that the compounding of interest is not, by itself, usurious, it is also true that agreements to pay compound interest have not found favor with the courts") (internal quotations omitted). Thus, plaintiff is only entitled to interest from December 1, 2014 to December 1, 2014, the period during which Yan failed to timely pay common charges.

Thus, plaintiff is entitled to \$8,312.10 in late fees, which is the amount Yan owed as of December 1, 2014, plus 16% interest from December 1, 2010 to December 1, 2014. Accordingly, the Court hereby grants in part, and denies in part, plaintiff's application for late fees and interest in lieu of trial.

II. Attorneys' Fees

Plaintiff seeks a total of \$92,785.46 in attorneys' fees. In direct contradiction to what Yan argues in opposition, and as plaintiff points out on multiple occasions, plaintiff did in fact submit for the Court's consideration its counsel's invoices for attorneys' fees. See plaintiff's Exhibit M.

As a preliminary matter, Yan's argument that "fees on fees" are not permitted by the First Department is unavailing. It has long been held by the First Department, that "fees on fees" are appropriate when they are based on a statute or on an agreement. See 546-552 W. 146th St. LLC v Arfa, 99 AD3d 117, 120 (1st Dept 2012) ("In New York, an award of fees on fees must be based on a statute or on an agreement"). Here, plaintiff's request for "fees on fees" is provided for in Article VI, Section 6 of the Bylaws. Thus, plaintiff is entitled to collect upon it.

It is difficult for this Court to determine, based on plaintiff's submitted invoices, the reasonableness of the time spent and its attorneys' billable rates, as the invoices do not clearly state what work was performed and which attorneys performed what work. This has commonly come to be known as "block billing." See Freidman v Yakov, 138 AD3d 554, 556 (1st Dept 2016) (block billing "is common practice among law firms, and does not render the invoiced amounts per se unreasonable") (internal citations omitted). However, in toto, the firm's rates are reasonable, and the Court has a general sense of the work done. The work performed by plaintiff's counsel was sufficiently detailed in Paul Golden's affirmation submitted in support of plaintiff's application. In light of the above, the Court finds that an across-the-board 25% reduction in fees is warranted due to the use of block billing. See RMP Cap. Corp. v Victory Jet, LLC, 139 AD3d 836, 840 (2d Dept 2016) ("the Supreme Court's across-the-board 25% reduction in the hours expended by the plaintiff's attorneys on the case, due to the use of block billing, including vague and nonspecific billing entries, and the nature of this lawsuit, was a provident exercise of discretion"); see also Silverstein v Goodman, 113 AD3d 539, 540 (1st Dept 2014) (court upheld a recommendation wherein "the Special Referee awarded only 60% of the hours that [the attorney] spent on [his client's] failed motion[,] did not award all of the other hours that [the attorney] requested, [and] reduced the hours that he did award by 10% due to [the attorney's] block billing"). Thus, here, due to plaintiff's block billing, the Court hereby awards plaintiff \$69,589.09 in attorneys' fees. See Fox v Vice, 563 US 826, 838 (2011) ("The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time").

Defendants' request for \$9,300 in reciprocal attorneys' fees is hereby denied. The Court does not find that plaintiff engaged in frivolous conduct by naming Golden Key as a defendant in this action. Plaintiff alleges that Golden Key was the Condo's managing agent until 2010, and Yan concedes that the corporation is owned by his wife. Golden Key also does not deny in its answer that it has an interest or connection to the Unit. Furthermore, in its reply, plaintiff explains that Golden Key was named as a defendant to preemptively prevent Yan from claiming it is a necessary party and delaying the process further. As plaintiff alleges in its complaint that it believed Golden Key may have had a right to occupy the Unit, or that it may have had a claim to the premises itself, the action against Golden Key was not frivolous. Furthermore, Yan and Golden Key were jointly represented by defendants' counsel, and the legal bills defendants' counsel produced were for work conducted for both defendants, not just Golden Key. See Miller v Miller, 96 AD3d 943, 944 (2d Dept 2012) (the application was "not so completely without merit in law as to be frivolous, and [defendant] failed to demonstrate that they were filed to delay the proceedings, or to harass or maliciously injure him"); see generally id. at 945 ("A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(c) has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule, or that the action or proceeding was commenced or continued in bad faith").

Accordingly, the Court hereby (1) grants in part, and denies in part, plaintiff's application for attorneys' fees, late fees, and interest in lieu of trial; and (2) denies defendants' request for reciprocal attorneys' fees.

Conclusion

Plaintiff's application for attorneys' fees is granted in part and denied in part. Defendant Ti Yan's request for reciprocal attorneys' fees is denied. Plaintiff is entitled to (1) \$8,312.10 in late fees, plus interest, at the rate of 16%, from December 1, 2010 to December 1, 2014; (2) \$69,589.09 in attorneys' fees; plus costs and disbursements; plus statutory interest from the date of entry of judgment. The clerk is directed to enter judgment accordingly.

Furthermore, the Court notes that plaintiff may commence an action to foreclose on its lien, confirmed by this judgment.

7/12/2018
DATE

CHECK ONE: CASE DISPOSED

GRANTED DENIED

APPLICATION: SETTLE ORDER

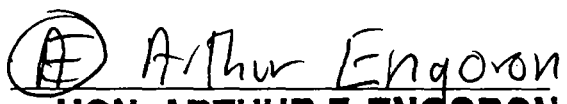
CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE


HON. ARTHUR F. ENGORON