MacArthur Props. I, LLC v Galbraith
2018 NY Slip Op 31612(U)
July 12, 2018
Supreme Court, New York County
Docket Number: 651504/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **61**
Justice

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MACARTHUR PROPERTIES I, LLC,

Plaintiff,

- v -

CHRISTINA GALBRAITH, ROMAN KAZAN, BRIAN MCCONVILLE, and RONALD HOWARD, in their capacities as the Residential Members of the Board of Managers of such Condominium, and AKAM ASSOCIATES, INC.,

Defendants.

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INDEX NO. 651504/2018

MOTION DATE 4/18/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this application to/for DISMISSAL.

OSTRAGER, BARRY R., J.S.C.

Before the Court is defendants' pre-answer motion to dismiss this action pursuant to CPLR § 3211(a)(1) and (7) based on documentary evidence and failure to state a cause of action. The motion is granted in part and denied in part based on the papers submitted and extensive oral argument on the record on June 29, 2018.

Background

At issue in this action is the methodology for calculating certain Common Charges payable by the non-residential unit owners in this mixed-use condominium building located at East 54th Street and Lexington Avenue in Manhattan. The building consists of 141 residential apartments (the "Residential Units"), a "Commercial Unit" that includes eight retail stores on the

building's first floor, seven storage rooms in the basement, and one storage room on the first floor, and a "Professional Unit" that consists of six offices on the second floor. When the building was converted to condominium ownership in 1986, the Sponsor retained the Commercial and Professional Units (hereafter collectively referred to as "the Commercial Units"). Plaintiff is now and has been since 1998 the owner of the Commercial Units. Defendants are the managing agent Akam Associates, Inc., and the four individual members of the seven-member Board of Managers appointed by the Residential Unit owners; plaintiff holds two seats on the Board and the Sponsor continues to hold one.

The particular Common Charges at issue in this case are those payable by the Commercial Units related to Common Elements.[1] It is undisputed that the initial Condominium Offering Plan allocated 10.3% of the expenses for the Common Elements to the Commercial Unit and 6.9% to the Professional Unit for a total of 17.2%, allocating the remaining 82.8% to the Residential Units collectively (NYSCEF Doc. No. 13 at B-2, G-1). Included in the Offering Plan is the Condominium's first-year budget, which both sides agree allocated Common Element expenses to the Commercial Units based on the above percentages, which are less than their Common Interest percentages.

Plaintiff maintains that the first-year budget in the Offering Plan reflected a decision by the Condominium to charge based on the Commercial Units' relative usage of the Common Elements, rather than percent ownership. In response, the defendant Condominium maintains that the budget was designed for the first year of operation only and was subject to change thereafter in accordance with the Condominium Documents and the governing law.

[1] Capitalized terms in this decision correspond to the definitions in the Condominium Offering Plan discussed below, unless provided otherwise.

Nevertheless, and even though the Second Amendment to the Offering Plan explicitly increased the Common Elements percentage for the Commercial Units to 22% and decreased the residential share to 78% based on a negotiated agreement between the Sponsor and the Tenants Association (NYSCEF Doc. No. 15 at p 7), the Condominium acknowledges that it continued to charge the Commercial Units for Common Elements based on their historical relative usage of 17.2%, rather than the 22% interest ownership, for approximately thirty years.[2]

This lawsuit was triggered by the 2017/2018 Budget, wherein the Board for the first time allocated Common Element expenses to the Commercial Units based on the 22% percent common ownership interest expressly set forth in the Second Amendment, as opposed to the 17.2% in the Offering Plan based on usage. In addition to sending plaintiff the new budget, the Condominium prepared and sent to plaintiff invoices reflecting an adjustment to the Common Element charges dating back six years, and even filed a lien for a portion of that amount. These charges were based on the Condominium's assertion that it had been entitled to charge the Commercial Units the 22% at least as of the issuance of the Second Amendment and could certainly do so going forward, but was arguably limited by the statute of limitations in its ability to recover uncharged amounts above 17.2% for past years (NYSCEF Doc. Nos. 31-36).

In their First Cause of Action in the Complaint (NYSCEF Doc. No. 2), plaintiff seeks a declaratory judgment that defendants are barred by the Condominium Documents and the principles of waiver and estoppel from allocating Common Element charges between the

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[2] After the percent increase in the Second Amendment, the Offering Plan was declared effective on March 9, 1987 pursuant to the Third Amendment (NYSCEF Doc. No. 25). As of this date, there are at least 46 amendments. The Forty-Sixth Amendment is dated March 30, 2017 (NYSCEF Doc. No. 14), but the parties here discuss only the initial Offering Plan and the Second Amendment. RPL § 339-u requires that all Amendments be recorded, and plaintiff does not dispute the Condominium has done so.

Residential and Commercial Units according to the relative percent ownership interest, as opposed to relative percent usage. In the Second Cause of Action, plaintiff seeks to enjoin defendants from foreclosing on any existing liens, filing new liens, or otherwise seeking to enforce its decision to apply the 22 percent interest formula. In the Third Cause of Action, plaintiff seeks damages against the individual Board Members and the managing agent for breach of fiduciary duty. As indicated above, defendants have moved to dismiss the action in its entirety, asserting that its actions are authorized by the Condominium Act and the Condominium Documents.

Analysis

The analysis necessarily begins with the definition of the relevant terms, nearly all of which tend to support defendant's position that the Condominium is entitled to assess Common Charges for Common Elements based on percentage ownership interest, rather than relative usage. The Offering Plan (NYSCEF Doc. No. 13) defines "Common Charges" to include "Each Unit's proportionate share of the Common Expenses [defined as the "expenses of operation of the Property"] in accordance with its Common Interest." The term "Common Interest" directly refers to ownership interest:

> ***The proportionate undivided interest in fee simple absolute in the Common Elements appurtenant to each Unit***, as expressed in the Declaration. The percentage interest of each Unit in the Common Elements is based upon floor space, subject to the location of such space and the additional factors of relative value to other space in the Condominium, the uniqueness of the Unit, the availability of Comment Elements for exclusive or shared use, and the overall dimension of a particular Unit, in accordance with the provisions of Section 339-i(l)(iv) of the Condominium Act.

The term "Common Elements" is defined to include "The superintendent's apartment (Apt. No. 4H), the land and all parts of the Building, other than the Residential Units, the Commercial Unit, the Professional Unit and the Development Rights."

As defendants correctly assert, the Condominium's right to charge the Commercial Units for Common Elements based on Common Interest, that is, percent ownership interest in the Common Elements, finds support not only in the above terms in the Offering Plan but also in the Condominium Act and the Condominium Documents. Section 339-m of New York's Real Property Law, known as the Condominium Act, expressly provides for charges based on Common Interest, unless the controlling Condominium Declaration and By-Laws provide otherwise. Specifically, RPL § 339-m states (with emphasis added) that:

> The common profits of the property shall be distributed among, and the common expenses shall be charged to, the unit owners ***according to their respective common interests*** ... ***Notwithstanding any provision of this article, profits and expenses may be specially allocated*** and apportioned by the board of managers in a manner different from common profits and expenses, to one or more non-residential units ***where so authorized by the declaration and bylaws.***

Here, neither the Condominium Declaration nor the By-Laws authorizes the Condominium to specially allocate Common Element expenses in a manner different than respective Common Interest. On the contrary, both the Declaration and the By-Laws provide for allocation according to each Unit's respective Common Interest. For example, the Condominium Declaration filed with the Office of the City Register in May 1987 includes a Schedule that specifies the "Percentage Interest in Common Elements" for each unit in the building and allocates 15.1% to the Commercial Unit and 6.9% to the Professional Unit, for a total of 22%, the precise percentage amount defendants are seeking to charge today (NYSCEF Doc. No. 17).

Similarly, the By-Laws contain provisions that require charges for Common Elements to be based on percent of Common Interest, rather than usage, and empower the Board to determine those charges (NYSCEF Doc. No. 18). In particular, Article V entitled "Operation of Property"

directly addresses the point in Section 1, entitled "Determination of Common Expenses and Fixing of Common Charges." That Section provides (with emphasis added) that:

> The Board of Managers shall from time to time, and at least annually, prepare a budget of projected Common Expenses of the Condominium and determine the amount of the Common Expenses of the Condominium and determine the amount of Common Charges payable by the Unit Owners to meet the Common Expenses of the Condominium and allocate such Common Charges among the Unit Owners ***according to their respective Common Interests ...***[3]

Plaintiff cites cases such as *Borress & Borress LLC v CJS LLC*, 27 AD3d 287, 288 (1st Dep't 2006) for the rather basic principle that the Offering Plan, By-Laws and Declaration "might be considered part of integrated documents entered into at the same time and intended to be read together ...". Plaintiff further argues that the Offering Plan contains provisions "inconsistent" with the other Condominium Documents that should be controlling, citing, for example, Section G of the Offering Plan, which states that:

> The Common Charges payable by the owner of the Commercial Unit and by the owner of the Professional Unit are sufficient to cover the expenses fairly attributable to such Units and ***reflect special or exclusive use or availability or exclusive control of particular Common Areas.***

(NYSCEF Doc. No. 24 at G-6) (emphasis added). Plaintiff also points to the first-year budget in the Plan which appears to allocate expenses based on the Commercial Units' particular use or control of various areas. Additionally, plaintiff notes that the By-Laws include a usage-based allocation in requiring that individual Unit owners take responsibility for the repair and maintenance of Limited Common Elements available for the particular Unit's exclusive use. (NYSCEF Doc. No. 27 at 23-24).

In support of its position that the usage allocation in the Offering Plan controls, plaintiff cites *Lesal Associates v Board of Managers*, 2003 WL 25684179 (Sup. Ct., NY Co.), *aff'd* 309

[3] Capitalized terms in the By-Laws have the same definitions as set forth in the Offering Plan.

AD2d 594 (1st Dep't 2003). In *Lesal*, the commercial and professional unit owners sought a declaration that the defendant Board of Managers could not re-allocate common charges according to common interest, where the Board had previously allocated common charges based on the "exclusive use or control of common elements" by the respective unit owners. The motion court granted the requested declaratory relief based on certain language in the By-Laws, and the Appellate Division affirmed. Arguing that the *Lesal* dispute is analogous to the instant dispute, plaintiff urges this Court to reach the same result as the *Lesal* court and bar the Condominium from charging based on relative percent interest rather than usage.

Lastly, plaintiff claims that the Condominium waived its right to calculate Common Charges based on Common Interest due to its course of conduct over the years which calculated the Charges based on usage, and that the Condominium is estopped from changing its methodology. Counsel cites cases such as *Dice v Inwood Hills Condo.*, 237 AD2d 403, 404 (2d Dep't 1997) for the proposition that the "existence of a nonwaiver clause does not in itself preclude waiver of a contract clause."

The Court rejects plaintiff's claim that the defendant Condominium is barred from charging plaintiff for Common Element expenses based on Common Interest, at least beginning with the 2017/2018 budget and going forward. While plaintiff does not dispute the principle that the various Condominium Documents must be considered together, it vigorously and quite correctly disputes that the Offering Plan contains provisions that trump the above-quoted explicit language in the Real Property Law, the By-Laws and Declaration that support defendant's right to charge based on percent interest rather than usage.

What is more, but for the first-year budget in the Offering Plan which is necessarily subject to change as expenses and circumstances change, none of the provisions in the Offering

Plan truly support plaintiff's position. The provision in Section G (cited above at p. 6) applies to "Limited Common Elements" where use is restricted to a specific unit, and the intention is to confirm that the Unit Owner, as opposed to the Condominium, is responsible for the repair and maintenance of those areas. Even if the first-year budget and/or Section G of the Offering Plan did lend support to a usage allocation, the Second Amendment modified any such methodology when it clearly and unequivocally increased the percentage for Common Elements then in effect based on an agreement reached by the Sponsor and the Tenants Association before the Plan was declared effective and specified that the charges would be based on the 22% ownership interest attributable to the Commercial Units.

Nor does the holding in *Lesal* support plaintiff's position. As defendant notes in reply, *Lesal* in fact supports the Condominium's position that RPL § 339-m governs and requires the allocation of Common Expenses based on Common Interest unless the By-Laws and Declaration provide otherwise. The motion court in *Lesal* found that "the provisions of the Declaration and Bylaws which segregate expenses according to a unit's category are far more detailed and comprehensive than the provisions upon which defendants rely in arguing that all expenses are common charges to be divided according to the unit owners' respective common interests." 2003 WL 25684179. Based on this finding, the court held that the provisions fell within the exception to the general rule stated in RPL § 339-m that Common Expenses should be charged based on Common Interest unless the Declaration or Bylaws provide otherwise. The Appellate Division affirmed based on its finding that the bylaws were "not ambiguous" and had been "properly construed" by the motion court. 309 AD2d 594, 595.

Wholly without merit is plaintiff's claim that the Condominium waived its right beginning in 2017 and going forward to calculate Common Charges based on Common Interest

due to its course of conduct over the years which calculated the Charges based on usage. That argument is barred by Article IX of the By-Laws, which expressly protects the Condominium against waiver, stating in Section 5 that:

> No restriction, condition, obligation, or provision contained in these By-laws shall be deemed to have been abrogated or waived by reason of any failure to enforce the same, irrespective of the number of violations or breaches thereof which may occur.

What is more, the First Department has rejected a claim of waiver based on a prior course of conduct where, as here, the relevant document contained an explicit no-waiver clause. *Goldberg v Manhattan Mini Stor. Corp.*, 225 AD2d 408 (1st Dep't 1996) (the no-waiver clause in the parties' agreement barred plaintiff's claim that a prior course of conduct "lulled him into a belief that his property was not in danger of being sold").

Plaintiff's reliance on the Second Department's decision in *Dice* is misplaced. The clause quoted by plaintiff (p 7 above) was included in the court's general discussion of the law on waiver and was not the holding. The holding was limited to the court's denial of summary judgment based on issues of fact as to whether the Condominium could rely on a no-waiver provision in the By-Laws to enforce the no-pet provision in the Building's Rules and Regulations. *Dice* is readily distinguishable from the instant case where the Condominium is relying on a no-waiver clause in the By-Laws to assert rights that are secured not only by the Condominium By-Laws and Declaration but also the Real Property Law.[4]

Considering all the facts and circumstances presented here, including the language in RPL § 339-m and the various Condominium Documents, not the least of which is the language

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[4] The Complaint fails to allege facts to support a claim that the Board's inaction constituted the "voluntary abandonment or relinquishment of a known right" so as to support a claim of waiver or estoppel for the 2017/18 budget going forward. *Jefpaul Garage Corp. v Presbyterian Hosp. in N.Y.*, 61 NY2d 442, 446 (1984).

in the publicly recorded Second Amendment that expressly allows the Condominium to charge the Commercial Units 22% based on their Common Interest, the Court finds in favor of the movant Condominium in part. Specifically, the Court finds that the Condominium has the right, if not the obligation, to charge the Commercial Unit Owners for Common Elements based on Common Interest beginning with the 2017/2018 budget and going forward so that the Residential Unit Owners pay no more than the Real Property Law and Condominium Documents require. However, based on issues of fact relating to plaintiff's claims of waiver and estoppel and the Condominium's extended course of conduct charging and accepting lesser amounts, the Court declines to make a finding as a matter of law for past years, except that the Court hereby finds that the Condominium is barred by the statute of limitations from recovering from plaintiff Common Charges for Common Elements above amounts previously charged for any period of time older than six years. This conclusion is based in part on the recognition that this Court when determining a CPLR 3211(a)(7) pre-answer motion to dismiss "must accept as true the facts as alleged in the complaint and … accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001). As it does not appear that the Condominium is taking any steps at this time to enforce its existing lien or to file any additional liens, plaintiff's claims relating to liens will be addressed as the case proceeds. The breach of fiduciary duty claim is dismissed as this plaintiff does not possess such a claim.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss this action is granted to the extent of dismissing those claims related to the period of time from the Condominium's adoption of the 2017/2018 budget and going forward and the breach of fiduciary duty claim is dismissed, but is

otherwise denied without prejudice to renewal as a motion for summary judgment at an appropriate time. The parties are encouraged to meet and confer with a view toward reaching a consensual resolution of the remaining claims.

Defendant shall file its Answer to the Complaint by August 13, 2018, and all counsel shall appear in Room 232 for a discovery conference on August 28, 2018 at 9:30 a.m.

7/12/2018

BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER
JSC

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
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