

Board of Mgrs. of 50 W. 127th St. Condominium v Kidd
2019 NY Slip Op 33620(U)
December 12, 2019
Supreme Court, New York County
Docket Number: 151386/2015
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: <u>HON. ARLENE P. BLUTH</u>	PART	IAS MOTION 32
	<i>Justice</i>	
-----X	INDEX NO.	<u>151386/2015</u>
THE BOARD OF MANAGERS OF 50 WEST 127TH STREET CONDOMINIUM,	MOTION DATE	<u>N/A</u>
	MOTION SEQ. NO.	<u>008</u>
Plaintiff,		

- v -

CHEKESHA KIDD, CHRISTINA TRUST, UNITED GUARANTY RESIDENTIAL INSURANCE, COMPANY OF NORTH CAROLINA, OLD REPUBLIC INSURANCE COMPANY,

Defendant.

DECISION + ORDER ON MOTION, ORDER OF REFERENCE

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 237

were read on this motion to/for JUDGMENT - SUMMARY

The motion by plaintiff for summary judgment is granted and the cross-motion by defendant Kidd is denied.

Background

In this common charge lien foreclosure case, plaintiff claims that Kidd began making only sporadic common charge payments since July 2013 and that no payments have been made in over three years. It claims it is now owed over \$78,000. In opposition and in support of her cross-motion for summary judgment dismissing this case, Kidd claims that any missed payments were the result of management's failure to process automatic payments. She contends that any defaults were "inadvertent" and not her fault.

Kidd claims that after receiving notice that she had missed payments throughout 2013, 2014 and 2015 she obtained a certified check for the purported amount due (\$16,592.57) from

her bank on August 25, 2015 but “due to [her] heavy travel schedule” she did not send the check to plaintiff until September 21, 2015 and this check was apparently cashed. She claims that amount is more than the Referee (who was previously appointed) found was due to plaintiff. Kidd claims she made other payments as well. Subsequent to the appointment and computation of the referee, Kidd moved to vacate her default and the First Department upheld vacatur of the judgment thereby compelling plaintiff to move again for an order of reference.

Kidd claims that as of the October 2016 foreclosure sale, the common charges should have been paid by the purported purchaser (City West) of the property. She claims that “It was not until the First Department’s affirming this Court’s vacatur order in February 2019 that it was not clear who—me or the purported purchaser—was to the owner of the Unit. While I am fully ready, willing and able to pay any and all common charges that are due (as I have always been), I should not be compelled to pay the Condo Board’s attorneys’ fees” (NYSCEF Doc. No. 220, ¶ 29).

In reply, plaintiff points out that Kidd admits she owes something and emphasizes that the by-laws permit it to recover for late fees, interest and attorneys’ fees regardless of the fact that she claims she can now pay what is due. Plaintiff acknowledges that although Kidd made some sporadic payments in 2015 and 2016, she has not raised an issue of fact that she paid everything that was due. Plaintiff also points out she has not made a single payment in over 3 years.

Discussion

The Court grants the motion. Plaintiff clearly established that Kidd owes common charges and Kidd admits she has not paid some amount. The Court observes that Kidd’s claim that City West (the purchaser at the foreclosure sale) should have paid the common charges is

meritless. The fact is that Kidd sought to vacate her default and the sale was eventually nullified. Kidd cannot successfully vacate a sale and then expect the third-party purchaser (who is now out of the case) to be on the hook for her unpaid common charges. After all, the vacatur of the sale is a finding that she is the owner of the property.

Moreover, both Kidd and her attorney claim she has tried to work with plaintiff to pay what is due. That is not a defense to a common charge lien foreclosure case. And there is no question that plaintiff is entitled to reasonable attorneys' fees under the bylaws, although the precise amount is yet to be determined. Kidd's claim that plaintiff should not be entitled to recover legal fees for plaintiff's unsuccessful endeavors (such as opposing Kidd's motion to vacate) is not a ground to bar recovery of attorneys' fees. How much of those fees are reasonable is a matter to be resolved; Kidd has no basis to claim that plaintiff cannot recover any attorneys' fees.

Summary

The papers on this record evidence only one clear result: that plaintiff is entitled to some amount of common charges and that amount is to be determined by a referee. Kidd did not establish (or raise an issue of fact) that she paid everything that is due; in fact she claims she is ready to pay. Therefore, both plaintiff and Kidd will have the chance to submit documents concerning how much plaintiff is owed. But there is no basis to deny plaintiff's motion or to grant Kidd's cross-motion.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the answer and affirmative defenses of defendant Chekesha Kidd are severed and dismissed; and it is further

ORDERED that plaintiff is awarded a default judgment against all non-appearing defendants; and it is further

ORDERED that the cross-motion by defendant Kidd is denied; and it is further ORDERED that Roberta Ashkun, Esq. with an address of 300 East 42nd St, 14th Floor, NY NY 10017 is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that the Referee shall hold no hearing and take no testimony or evidence other than by written submission; the Court is the ultimate arbiter and the Referee's report is merely an advisory finding; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for

himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: April 21, 2020 @ 2:15 p.m. If a motion for judgment of foreclosure and sale has been filed, plaintiff may seek an adjournment of the conference. Please consult this

part's rules for information on how to obtain an adjournment. If a motion has been made, then a conference is required to explore the reasons for the delay.

12/12/19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE