

**Board of Mgrs. of St. Nicholas Ct. Condominium v
Smith**

2020 NY Slip Op 30164(U)

January 23, 2020

Supreme Court, New York County

Docket Number: 156446/2019

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 156446/2019

BOARD OF MANAGERS OF ST. NICHOLAS COURT
CONDOMINIUM,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION AND ORDER

ADRIENNE SMITH, JOHN DOE and JANE DOE,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for JUDGMENT - DEFAULT

In this lien foreclosure action, plaintiff Board of Managers of St. Nicholas Court Condominium ("the condominium") moves, pursuant to CPLR 3215, for a default judgment against defendants and, upon entry of such default, directing that a referee be appointed to ascertain and compute the amount due to the condominium for common charges, interest and other applicable charges, and to take all other required steps in order to foreclose on the lien (Doc. 10). After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is granted.

PROCEDURAL HISTORY:

In November 2005, defendant Adrienne Smith ("Smith") obtained ownership by deed of unit 2F within the condominium ("the premises"), which is located at 66-72 St. Nicholas Avenue, New York, New York (Doc. 3). The deed was recorded in the Office of the City Register of the City of New York ("the City Register") in December 2005 under City Register

File No. (“CRFN”) 2005000685379 (Doc. 3). As relevant here, the deed, and the declaration of the condominium and its by-laws (“the condominium documents”), directed unit owners to make monthly common charges as assessed by the condominium (Docs. 5). The Declaration provided, in pertinent part, that:

“[a]ll present and future owners, tenants, subtenants and occupants of Units shall be subject to and shall comply with the provisions of this Declaration, the By-Laws, the Rules and Regulations and the Regulatory Agreement (including, without limitation, the provisions concerning sales, leasing and mortgaging), as they may be amended from time to time. The acceptance of a deed or conveyance or the entering into of a lease or the entering into occupancy of any Unit shall constitute an agreement that the provisions of this Declaration, the By-Laws, the Rules and Regulations, as they may be amended from time to time, and the Regulatory Agreement are accepted and ratified by such owner, tenant or occupant, and all of such provisions shall be deemed and taken to be covenants running with the land and shall bind any person having at any time any interest or estate in such Unit, as though such provisions were recited and stipulated at length in each and every deed or conveyance or lease thereof” (Doc. 4, Article 17).

“All sums assessed as Common Charges by the Board of Managers of the Condominium but unpaid, together with interest at the maximum legal rate thereon chargeable to a Unit Owner, shall constitute a lien on his or her Unit . . . [and s]uch lien may be foreclosed by the Condominium when past due in accordance with the laws of the State of New York, in like manner as a mortgage on real property, and the Condominium shall also have a right to recover interest thereon and all costs and expenses incurred including reasonable attorneys' fees . . . Every Unit Owner shall pay the Common Charges assessed against him or his or her Unit when due and no Unit -Owner may exempt himself or herself or the Unit from liability for the payment of Common Charges assessed against him or her or the Unit by waiver of the use of any of the Common Elements or by the abandonment of the Unit. In addition to any other remedies available hereunder and at law, the Board of Managers shall have the right to bring an action against any Unit Owner, who fails to pay, when due, any Common Charges or Assessments levied by the Board of Managers against a Unit. The Unit Owner will be personally liable for the Common Charges or Assessments, including interest thereon and any costs or expenses incurred by the Board of Managers in connection with the collection of amounts due, including reasonable attorneys' fees. Said costs shall also become a lien on the Unit which must be paid to the Board of Managers prior to any sale or financing of the Unit” (Doc. 4, Article 20).

The by-laws included similar provisions, stating that:

“The Board of Managers shall assess Common Charges against the Unit owners from time to time and at least annually and shall take prompt action to collect any Common Charges due from any Unit Owner which remains unpaid for more than 30 days from the due date for payment thereof” (Doc. 5, Article V, Section 5).

“In the event of a default by any Unit Owner in paying to the Board of Managers, the Common Charges or any assessment as determined by the Board of Managers, such Unit Owner shall be obligated to pay interest at the maximum legal rate on such Common Charges or assessments from the date thereof, together with a "late charge" of \$.04 for each dollar of such amounts as remain unpaid for more than ten (10) days after the due date, and all expenses, including attorneys' fees, incurred by the Board of Managers to collect such unpaid Common Charges or assessments. The Board of Managers shall have the right and duty to attempt to recover such Common Charges or assessments, together with interest thereon, and any expenses, including attorneys' fees, in any action or proceeding to recover the same brought against such Unit Owner, or by foreclosure of the lien on such Unit granted by Section 339-z of the Real Property Law of the State of New York, in the manner provided in Section 339-aa thereof, or both” (Doc. 5, Article V, Section 6).

On June 18, 2018, after Smith allegedly failed to comply with the terms, covenants and conditions of the condominium documents, the condominium filed a common charge lien against the premises in the amount of \$22,572.07, which was duly filed in the City Register under CRFN No. 2018000333342 (Doc. 6). On June 28, 2019, the condominium commenced this lien foreclosure action against Smith, defendant John Doe, and defendant Jane Doe, by filing a summons and a lien foreclosure verified complaint (Doc. 1).¹ A notice of pendency was filed on July 8, 2019 (Doc. 9). The summons and lien foreclosure verified complaint, together with the “help for homeowners in foreclosure,” notice of e-filing, and the notice of pendency were served on, “Jane Doe,” an unidentified individual of suitable age and discretion at the premises on July 17, 2019, and additional copies of the summons and verified complaint were mailed to the premises on August 8, 2019 in accordance with CPLR 3215 (g) (3) (Doc. 13-14).² The condominium’s counsel avers that, to date, defendants have not appeared in this action (Doc. 11

¹ In the complaint, the condominium alleged that defendants “‘John Doe’ and/or ‘Jane Doe’ may be persons or parties in possession of the [p]remises or persons who hold a claim, lien or mortgage against the [p]remises and their identities could not be ascertained by the condominium prior to the commencement of this action” (Doc. 12 at 9).

² As reflected in the affidavit of service, Jane Doe refused to give her name (Doc. 13).

at 2). As reflected in the affidavit of service dated October 29, 2019, copies of the instant motion were also mailed to defendants by Federal Express overnight delivery to the premises (Doc. 17).

LEGAL CONCLUSIONS:

“It is well settled that on a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing” (*The Bd. Of Managers of 255 Hudson Condominium v Esen*, 2018 WL 2081905, *1 [Sup Ct, NY County 2018] [internal quotation marks, brackets and citations omitted]; *see* CPLR 3215 [f]; *Gantt v North Shore-LIJ Health System*, 140 AD3d 418, 418 [1st Dept 2016]).

Here, the facts constituting the claim are established by, *inter alia*, the complaint, which is verified by the president of the condominium, Joan Henry, who is fully familiar with the facts and circumstances relating to the matter (Doc. 12). Additionally, the lien and the document titled “Schedule A” set forth Smith’s defaulting payments since December 2005, totaling \$90,019.22 as of May 2019 (Docs. 6-7). Her obligation to make common charge payments is evidenced by the condominium documents and deed as they also reflect condominium’s right to enforce these payments (Docs. 4-5). Moreover, despite being properly served with the complaint and accompanying documents in this matter, defendants have failed to answer or otherwise appear in this action. Thus, the motion is granted (*see* Real Property Law § 339-z; *The Bd. Of Managers of 255 Hudson Condominium v Esen*, 2018 WL 2081905 at *1; *compare Mortgage Elec. Registration Systems, Inc. v Levin*, 63 AD3d 890, 891-892 [2d Dept 2009]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff Board of Managers of St. Nicholas Court Condominium for a default judgment against defendant Adrienne Smith is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against Adrienne Smith; and it is further

ORDERED that the claims against “John Doe” and “Jane Doe” are deemed discontinued, without prejudice; and it is further

ORDERED that the action is referred to Steven B. Shapiro, Esq., having an office at 340 W 57th Street, Apt 3G, New York, New York 10019, telephone number: (212) 315-0518, email: sbs@compuserve.com, as Referee, to compute the amount due to plaintiff for common charges, interest, assessments, late charges, disbursements, and attorneys' fees, as provided for in the verified complaint and in the by-laws, and to report whether the unit should be sold in parcels, and that the Referee make his report to this Court no later than sixty days after the date of this order and that, except for good cause shown, plaintiff shall move for judgment no later than sixty days after the date of the Referee's Report; and it is further

ORDERED that upon submission of the Referee's report, plaintiff shall pay \$500 to the Referee as compensation for his services, which sum may be recouped as a cost of litigation; and it is further

ORDERED that the Referee's hearing be held in the County of New York; and it is further

ORDERED that the Referee appointed herein is subject to the requirements of Rule 36.2 (c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment pursuant to the provision of that Rule, the Referee shall notify the Appointing Judge forthwith; 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 Section 36.2 (e) ("Disqualifications from appointment") and Section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that plaintiff shall, within 10 days after this order is uploaded to NYSCEF, serve a copy of this decision upon all parties having interest in the Unit, by overnight mail and, by that same date, shall provide a copy of this order to the County Clerk; and it is further

ORDERED that this constitutes the decision and order of the court.

1/23/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: