

**Baxter St. Condominium v LPS Baxter Holding
Company, LLC**

2021 NY Slip Op 31461(U)

April 19, 2021

Supreme Court, New York County

Docket Number: 157071/2019

Judge: Barbara Jaffe

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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. BARBARA JAFFE PART IAS MOTION 12

Justice

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BAXTER STREET CONDOMINIUM, BY ITS BOARD OF MANAGERS,

Plaintiff,

- v -

LPS BAXTER HOLDING COMPANY, LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK STATE DEPARTMENT OF FINANCE, DESIGNERS MANAGEMENT AGENCY, INC., COLOR ME MINE ENTERPRISES, INC. D/B/A COLOR ME MINE TRIBECA, TD AMERITRADE, INC. D/B/A TD AMERITRADE CHINATOWN BRANCH, KUMON NORTH AMERICA, INC. D/B/A KUMON MATH AND READING CENTER OF CHINATOWN, ABC CORP. NO. 1, ABC CORP. NO. 2, ABC CORP. NO. 3, ABC CORP. NO. 4,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31-58, 60-72 were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73-95 were read on this motion to/for dismiss.

By notice of motion, plaintiff moves for the following relief (mot. seq. one):

- (1) pursuant to CPLR 3212, an order dismissing the defenses set forth in the answer of defendant LPS Baxter Holding Company, LLC (LPS) and granting summary judgment against it;
(2) pursuant to CPLR 3212, an order dismissing the defenses set forth in the answer of defendant TD Ameritrade, Inc. d/b/a TD Ameritrade Chinatown Branch (TD) and granting summary judgment against it;
(3) pursuant to CPLR 3215, an order granting a default judgment against defendants,

New York City Department of Finance, New York State Department of Taxation and Finance, Designers Management Agency Inc., Color Me Mine Enterprises, Inc. D/B/A Color Me Mine Tribeca and Kumon North America, Inc. d/b/a Kumon Math and Reading Center of Chinatown;

- (4) pursuant to CPLR 1321, an order appointing a referee to compute and ascertain the amount due to plaintiff on the lien to be foreclosed in this action and to report whether the premises should be sold in one or separate parcels; and
- (5) amending the caption to strike defendants "ABC Corp. No. 1," "ABC Corp. No. 2," "ABC Corp. No. 3," and "ABC Corp. No. 4" from the caption.

LPS opposes the motion.

By notice of motion, LPS moves pursuant to: (1) CPLR 3211(a)(1) and (7) for an order dismissing the complaint as the liens are invalid and violate the by-laws; (2) CPLR 6514(a) and (b) directing the clerk of the court to cancel the notice of pendency filed by plaintiff; and (3) CPLR 6514(c) awarding it costs and expenses incurred by the filing and cancellation of the notice of pendency. (Mot. seq. two). Plaintiff opposes.

The motions are consolidated for disposition.

I. BACKGROUND

A. Complaint (NYSCEF 2)

Plaintiff is a condominium association, situated at 123 Baxter Street in Manhattan. It possesses duly recorded written liens on various units in the building, including C-1, C-2, C-3, and C-4 (premises), all filed on January 22, 2019. LPS owns the premises.

Among the other defendants, defendant Designers Management Agency Inc. holds a New York County Civil Court judgment docketed on December 23, 2009 in the amount of \$25,778.64 against Baxter Street Development Company LLC, and defendants Color Me Mine Enterprises, Inc d/b/a Color Me Mine Tribeca, TD Ameritrade, Inc. d/b/a TD Ameritrade Chinatown Branch, and Kumon North America, Inc. d/b/a Kumon Math and Reading Center of Chinatown are

lessors of the premises or parts thereof.

As its first cause of action, plaintiff asserts that under the condominium's by-laws, all unit owners are liable for common expenses and assessments as determined by the Board of Managers, and that as LPS has not paid all common charges and assessments, as set forth in the liens, and in accordance with plaintiff's rights under the by-laws and Real Property Law (RPL) §§ 339-z and 339-aa, plaintiff is entitled to a judgment of foreclosure and to the appointment of a temporary receiver for the premises during the pendency of this action.

For its second cause of action, plaintiff alleges that LPS owes it \$24,062.93 in unpaid common charges and other charges for the period August 2018 through and including July 31, 2019 as follows: (1) C-1 common charges and assessments of \$1,170.00 and late fees of \$561.60; (2) C-2 common charges and assessments of \$4,725.00, late fees of \$3,119.63, and attorney fees of \$2,365.55; (3) C-3 common charges and assessments of \$3,795.00 and late fees of \$1,821.60; and (4) C-4 common charges and assessments of \$4,395.00 and late fees of \$2,109.60²³. Plaintiff thus seeks a judgment against LPS in that amount plus interest thereon at the annual rate of 24 percent.

In its third cause of action, plaintiff seeks attorney fees pursuant to the by-laws.

B. Answers

1. LPS (NYSCEF 27)

In its answer, LPS denies plaintiff's allegations and asserts the following affirmative defenses: (1) plaintiff lacks standing and does not establish that it is the proper party to sue; (2) plaintiff's claims are barred by its unclean hands; (3) plaintiff fails to state a claim; (4) plaintiff fails to allege that it or its predecessors provided LPS with required notices for the liens; (5) waiver; (6) estoppel; (7) statute of frauds; (8) claims not pleaded with particularity;

(7) claims are premature and invalid under the Real Property Tax Law; (8) laches; (9) plaintiff fails to join necessary parties; (10) defense based on documentary evidence; (11) election of remedies; and (12) claims are not ripe for adjudication.

2. TD (NYSCEF 29)

In its answer, TD admits that it is the assignee of a lease dated August 1, 2015 between LPS and Scottrade, Inc. As affirmative defenses, TD asserts that plaintiff fails to state a claim against it, that plaintiff is bound by the terms of TD's lease, that pursuant to the lease plaintiff has no claim for damages, costs or fees against TD, and that plaintiff's claims are subject to article 31 of the lease.

C. Undisputed facts

The condominium's by-laws require all unit owners to pay their share of expenses, or common charges, as assessed by the Board and at such time as determined by the Board. All common charges must be paid monthly. (NYSCEF 35).

All unit owners are liable for common charges related to the building's common elements, including "all costs and expenses in connection with the repair, maintenance, replacement, restoration and operation of and any alteration, addition or improvement to" the common elements, including limited common elements (common expenses). All maintenance and repairs of any common element are deemed common expenses. (*Id.*).

In the event of a unit owner's default in paying common charges or assessments as determined by the Board, the unit owner must pay interest at the maximum legal rate on the common charges or assessments from the date due thereof, together with a late charge of \$.06 for each dollar of such amounts as remain unpaid for more than 10 days after the due date, and all expenses, including attorney fees and disbursements, incurred by the Board in any proceeding

brought to collect unpaid amounts. (*Id.*).

The Board is also afforded the right and duty by the by-laws to attempt to recover any unpaid amounts in an action brought against a unit owner, or by foreclosure of the lien on such unit pursuant to RPL § 339-z as provided in § 339-aa. And, pursuant to article V, section 5.5 of the by-laws, the Board holds a lien on a unit for unpaid common charges plus interest. (*Id.*).

In or around June 25, 2018, the Board voted in favor of assessing all unit owners the sum of \$150,000 to: (i) fund the cost of various needed repairs to the building, including the repair to the lobby air conditioning, the roof exhaust fans that ventilate the entire building, the roof membrane and decking, and the deteriorated and dangerous sidewalk on the Hester Street side of the building, and (ii) fund the depleted capital reserve account (capital assessment). (NYSCEF 37).

LPS failed to pay the common charges, capital assessment, and late fees due for the premises since in or about August 2018 through May 2020. (NYSCEF 32).

In accordance with the requirements of RPL § 339-aa and pursuant to article V of the by-laws, on January 22, 2019, written notices of the liens on LPS's premises were duly filed and recorded. (NYSCEF 39-42).

II. PLAINTIFF'S MOTION

A. Contentions

1. Plaintiff's contentions (NYSCEF 33)

Plaintiff alleges that it is entitled to foreclose on its liens absent any dispute that LPS has failed to pay common charges and assessments as required. It also contends that LPS's affirmative defenses are boilerplate and meritless.

2. LPS opposition (NYSCEF 60)

LPS asserts that questions of fact exist as to whether the assessment was an “invalid and unauthorized assessment to pay for upgrades, additions, alterations and/or improvements to the building’s residential units, for which [LPS] bears no responsibility as per the Offering Plan and By Laws,” and whether LPS is being charged for services used exclusively by residential unit owners. It challenges the validity of the liens plaintiff placed on its units.

According to LPS, on June 25, 2018, plaintiff sent a memorandum to all unit owners, notifying them of the capital assessment. LPS was present at a board meeting in June 2018 at which the assessment was discussed and objected to it on the ground that it is not required to pay for condominium areas and elements used only by residential units.

Thereafter, LPS’s managing member emailed the Board’s managing agent about its concern that LPS was being improperly charged for areas it does not use. Between July and August 2018, the member and agent corresponded about the assessment, including the agent’s email dated August 30, 2018 stating that LPS should not be charged for the lobby air-conditioning system and that the cost of \$9,100 should be removed from LPS’s pro rata share.

By letter to LPS dated September 27, 2018, plaintiff demanded that it pay the assessed amounts, and on October 4, 2018, LPS wrote to the Board’s counsel about the allegedly improper charges included in the assessment. LPS received no response from counsel. Plaintiff filed liens on its units and commenced the instant action.

LPS denies plaintiff’s contention that LPS gave an invalid excuse for not paying the capital assessment, given LPS’s numerous communications with plaintiff to attempt to resolve the issue. Moreover, LPS remained current in paying its common charges.

According to LPS, the charges related to balcony railings were the subject of a prior

lawsuit by plaintiff against it and others, releasing it for any claimed damages to railings.

As the assessment improperly includes charges for which LPS is not liable, and as LPS objected to those charges, plaintiff improperly filed liens on its units, and thus, plaintiff is not entitled to attorney fees incurred in connection therewith.

Moreover, LPS asserts that the condominium's offering plan contains information related to its liability for certain elements, although LPS has no copy of it and has been unable to review it. Nor has any other discovery been exchanged, thus rendering the instant motion premature.

LPS also maintains that discovery is needed to address its second and third affirmative defenses; it does not address its other defenses.

3. Reply (NYSCEF 71)

Plaintiff argues that it is entitled to summary judgment absent any dispute that LPS has not paid the capital assessment and that LPS has no defenses to the action, and as LPS failed to challenge the assessment by a special proceeding commenced under CPLR article 78, it may not challenge it here.

While LPS believes it is not responsible for certain charges, plaintiff sent it a letter in November 2018 addressing each charge and LPS's responsibility for it, thereby rejecting LPS's challenge to it. (NYSCEF 72). Plaintiff denies that the prior settlement between them has anything to do with the current issue with the balcony railings.

And, despite LPS's argument that discovery is needed, it has served no discovery requests since the action was commenced. In any event, the offering plan is not a necessary document as the by-laws and proprietary lease set forth LPS's responsibilities.

According to plaintiff, the only pertinent inquiry is whether the Board's determination that an assessment was necessary was a valid exercise of its business judgment, and for LPS to

overcome that judgment, it must show that plaintiff engaged in fraud, self-dealing or some other breach of fiduciary duty, which it does not do.

As LPS's affirmative defenses are fatally conclusory and boilerplate, plaintiff asserts, they must be dismissed.

B. Analysis

1. Summary judgment against LPS

To prevail on a motion for summary judgment, the movant must establish, prima facie, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

The actions of a condominium's board of directors are governed by the business judgment rule, which provides that the board's determination should be accorded judicial deference if the board acted in good faith, within the scope of its authority under the by-laws, and to further a legitimate interest of the condominium. (*Pomerance v McGrath*, 124 AD3d 481 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [2015]).

Whether a condominium needs repairs and whether the repairs are subject to an assessment pursuant to the condominium's by-laws are the types of determinations protected by

the business judgment rule. (*Bd. of Managers of Apthorp Condominium v Apthorp Garage LLC*, 187 AD3d 632 [1st Dept 2020]).

LPS does not claim that plaintiff failed to act in good faith, within the scope of its authority, or to further a legitimate interest of the condominium. Rather, it objects to certain aspects of the assessment imposed on all unit owners on the ground that it should not have been charged for certain items, thereby challenging the propriety of the assessment as opposed to the authority to impose it. Thus, the decision reached by plaintiff, as challenged by LPS, is protected by the business judgment rule. (*Baxter Street Condominium v LPS Baxter Holding Co., LLC*, 126 AD3d 417 [1st Dept 2015], *lv dismissed* 26 NY3d 948 [2015] [Board's determination that assessment required for repair work governed by business judgment rule]).

In any event, plaintiff's November 18, 2018 letter details the basis of LPS's liability for the various charges comprising the assessment and demonstrates that plaintiff properly imposed it on LPS, that LPS failed to pay it, and that pursuant to the applicable by-laws, it is entitled to impose a lien on LPS's units to recover the amount of the assessment. (*See e.g. Bd. of Managers of Apthorp Condominium*, 187 AD3d at 633 [trial court properly granted summary judgment to Board on its cause of action to foreclose on lien arising from unpaid assessment]).

LPS raises no triable issue in opposition. Nor does it demonstrate that discovery is necessary absent an indication that the offering plan is relevant to liability for the assessment. In any event, that it has not sought discovery to date significantly undercuts its claimed need for it.

Additionally, LPS fails to demonstrate a factual or legal basis for its second and third affirmative defenses, the only ones it addresses in its opposition.

2. Summary judgment against TD

Even if there is a valid lease between TD and LPS, plaintiff's liens have priority over it.

(RPL § 339-z). And as plaintiff is not a party to the lease, it is not bound by its terms.

Plaintiff thus establishes that it is entitled to foreclose on the liens notwithstanding TD's lease of one of LPS's units. As TD did not oppose the motion, it raises no triable issue.

3. Default judgment against other defendants

Plaintiff submits proof of service on the other defendants, that they defaulted, and that it has a valid claim to foreclose on its liens.

IV. LPS'S MOTION

For all the reasons stated above, LPS's motion for an order dismissing the complaint as the liens are invalid and violate the by-laws, directing the clerk of the court to cancel the notice of pendency filed by plaintiff, and awarding it costs and expenses incurred by the filing and cancellation of the notice of pendency, is denied in its entirety.

V. CONCLUSION

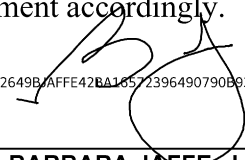
Accordingly, it is hereby

ORDERED, that plaintiff's motion (sequence one) is granted in its entirety; it is further

ORDERED, that summary judgment is granted in plaintiff's favor pursuant to the annexed order of reference; it is further

ORDERED, that the motion of defendant LPS Baxter Holding Company, LLC for summary judgment is denied; and it is further

ORDERED, that the clerk of the court is directed to enter judgment accordingly.


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4/19/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE