

**Board of Mgrs. of the Normandie Condominium v
Lenox NY LLC**

2021 NY Slip Op 31813(U)

May 28, 2021

Supreme Court, New York County

Docket Number: 155900/2019

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS

PART 11

Justice

-----X

BOARD OF MANAGERS OF THE NORMANDIE
CONDOMINIUM, suing on behalf of the unit owners,

Plaintiff,

- v -

LENOX NY LLC,

Defendant.

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INDEX NO. 155900/2019

MOTION DATE 11/18/2019,
07/28/2020

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for

VACATE NOTE OF ISSUE

Upon the foregoing documents, the court grants in part Plaintiff Board of Managers of the Normandie Condominium, suing on behalf of the unit owners' ("Plaintiff") motion for summary judgment to the extent set forth herein under motion sequence number 001 and denies Defendant Lenox NY LLC's ("Defendant") motion to vacate the Note of Issue filed under motion sequence 002.

Plaintiff filed this summons and complaint and notice of pendency action against Defendant, the owner of six commercial units in Plaintiff's condominium building, seeking a money judgment and foreclosure of the Common Charge Lien for Defendant's failure to pay outstanding common charges, assessments, special assessments, late fees, administrative fees, legal fees, fines, other charges and interest in the amount of \$59,143.60 as of November 1, 2019.

Under motion sequence 001, Plaintiff moves for summary judgment 1) on its fourth cause of action for foreclosure of the Common Charge Lien and appointment of a referee to compute the amount due; 2) on its first, second and third causes of action for breach of contract, unjust enrichment and account stated, respectively, and a money judgment against Defendant in the amount of \$59,143.60, or an amount to be determined at inquest or trial; 3) on its fifth cause of action for legal fees, partial summary judgment on the issue of liability and a hearing or inquest to determine the amount of damages; and 4) for an order dismissing and striking Defendant's affirmative defenses.

Under motion sequence 002, Defendant moves to vacate Plaintiff's Note of Issue, dated June 30, 2020, based on incorrect material facts included in the Certificate of Readiness and because discovery remains outstanding.

Both parties opposed the other's motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

The elements of breach of contract are (1) the existence of a valid contract, (2) plaintiff's performance of its obligations under the contract, (3) defendant's breach, and (4) resulting damages (*see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]).

Unjust enrichment is a “quasi-contract claim” that contemplates “an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [internal quotation marks and citation omitted]).

Upon review of the documents submitted and applicable legal authority, the court determines that Plaintiff has met its initial burden of establishing a prima facie showing of its entitlement to judgment in its favor as against Defendant as a matter of law, however Defendant raised material issues of fact regarding the amount of the special roof assessment.

Therefore, the court grants in part Plaintiff's motion for summary judgment to the extent that the court grants Plaintiff partial summary judgment on the issue of liability only as to its first cause of action for breach of contract and fifth cause of action for legal fees, and orders an inquest on damages to be held before this court during the trial of the other causes of action or at a date to be determined by the court.

The court denies Plaintiff's summary judgment motion as to Plaintiff's third cause of action for account stated and fourth cause of action for foreclosure of the Common Charge Lien, as the amount owed remains disputed. Additionally, the court denies Plaintiff's second cause of action for unjust enrichment, as there appears to be a contract governing the obligations of the parties.

The court grants in part the portion of Plaintiff's motion seeking to strike Defendant's Affirmative Defenses and the court strikes Defendant's Affirmative Defenses, except those alleging a reduction in damages or Plaintiff's failure to mitigate the amount of damages sought in Defendant's Second, Third, Sixth and Twelfth Affirmative Defenses.

As to motion sequence 002, the court denies Defendant's motion to vacate Plaintiff's Note of Issue. However, the court will consider post-Note of Issue discovery on the issue of damages prior to the inquest in this matter at a virtual discovery conference at the date and time set forth below.

As such, it is hereby

ORDERED that as to motion sequence 001, the court grants in part Plaintiff Board of Managers of the Normandie Condominium, suing on behalf of the unit owners' motion for summary judgment in its favor as against Defendant Lenox NY LLC to the extent that:

- 1) the court grants Plaintiff partial summary judgment on the issue of liability only as to its first cause of action for breach of contract and fifth cause of action for legal fees and orders an inquest on damages to be held before this court during the trial of the other causes of action or at a date and time to be determined by the court;
- 2) The court denies Plaintiff's summary judgment motion as to Plaintiff's third cause of action for account stated and fourth cause of action for foreclosure of the Common Charge Lien;
- 3) The court denies Plaintiff's summary judgment motion as to Plaintiff's second cause of action for unjust enrichment; and
- 4) The court grants in part the portion of Plaintiff's motion seeking to strike Defendant's Affirmative Defenses and the court strikes Defendant's First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and Thirteen Affirmative Defenses and denies the motion seeking to strike Defendant's Second, Third, Sixth, and Twelfth Affirmative Defenses; and it is further

ORDERED that as to motion sequence number 002, the court denies Defendant Lenox NY LLC's motion to vacate Plaintiff's Note of Issue, dated June 30, 2020, however, the court will consider post-Note of Issue discovery on the issue of damages; and it is further

ORDERED that the parties are directed to appear for a conference before this court to discuss possible post-Note of Issue discovery and settlement of the remaining issues on July 13, 2021, at 11:30 a.m. via Microsoft Teams (link will be provided).

5/28/2021

DATE



ERIKA M. EDWARDS, 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