

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Bransten
Justice

PART 3m

The Residential Board et al

INDEX NO. 650324/08

MOTION DATE 4/16/09

MOTION SEQ. NO. .002

MOTION CAL. NO. _____

- v -

Lev Goldberger et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
Sep 02 2009
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
SEP 1 2009
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Handwritten signature/initials

Dated: 8-28-09

Eileen Bransten
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X

THE RESIDENTIAL BOARD OF MANAGERS OF THE
VANDERBILT CONDOMINIUM,

Plaintiff,

Index No. 650324/08

Motion Date: 4/16/09

Motion Seq. No.: 002

-against-

LEV GOLDBERG and ELEANOR GOLDBERG,

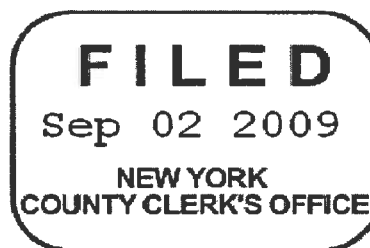
Defendants.

-----X

BRANSTEN, J.:

Defendants Lev Goldberg (“Goldberg”) and Eleanor Goldberg (collectively, “Defendants”) move, by order to show cause, for an order dismissing the cause of action for attorneys’ fees (third cause of action), a stay preventing the foreclosure and enforcement of a lien filed by the Residential Board of Managers of the Vanderbilt Condominium (“Vanderbilt”), a declaration that the lien for attorneys’ fees against the unit is improper, and a declaration that Defendants do not have to pay the costs of the flagman and the \$1,800 for covering the floors during work that was performed on the terrace appurtenant to their unit.

Vanderbilt cross-moves, pursuant to CPLR 3212, for partial summary judgment on the issue of Defendants’ liability for attorneys’ fees incurred by Vanderbilt in prosecuting this action, and an order scheduling an inquest to determine the amount of attorneys’ fees for which Defendants are liable.



BACKGROUND

This action was commenced by Vanderbilt to enforce its right to access the terrace appurtenant to Defendants' condominium unit (the "Terrace") in order to perform certain repair work and to remediate a potentially unsafe condition, as required by Local Law 11. Although Defendants acknowledged that they had an obligation to pay for such repairs, and to permit it to be done, they refused to allow Vanderbilt's contractor access to the Terrace, and despite Defendants' repeated assurances that they would arrange to have the work done, failed to do so. Thus, in August 2008, well over a year after the work on the rest of the building had been completed, Vanderbilt sought judicial intervention to enable it to perform the work. Goldberg had previously stated unequivocally that he did not grant Vanderbilt or its workers permission to enter the Terrace, and that if they attempted to do so, he would take legal action (Ex. P, Notice of Cross Motion).

At a hearing held on September 4, 2008, this court ordered Defendants to allow Vanderbilt and its agents access to the Terrace, and to allow them to perform all required repair and reconstruction work. The court held that Defendants were obligated to bear the cost of the repair and reconstruction of the Terrace, and that if they did not provide access to the Terrace through their apartment, those costs would include the cost of dropping a scaffold off the roof over the side to reach the Terrace, including the cost of hiring a flagman

to insure pedestrian safety below (Order to Show Cause, Ex. C, at 2-3). The prior order did not address the question of attorneys' fees.

It appears from the record that the work on the Terrace was performed. Vanderbilt included the charges for the work in Defendants' monthly common charges statement, including legal fees that resulted from seeking judicial intervention, which was required to gain access to the Terrace. Defendants did not pay for either the work performed or the attorneys' fees. Vanderbilt filed a Notice Under the Condominium Act of Lien for Unpaid Common Charges. Defendants brought this motion, seeking, among other things, a temporary restraining order ("TRO") preventing Vanderbilt from foreclosing on the lien. The request was denied.

The by-laws of the condominium ("By-Laws"), as well as the declaration ("Declaration"), provide that a residential unit owner must grant a right of access to his or her unit for purposes of making inspections of, or removing violations in, the unit or in any part of the general or limited common elements (By-Laws § 6.17-1; Declaration § 15.1). The Terrace is a limited common element, meaning that Defendants do not own it, but have exclusive right to use it. The By-Laws further provide that, if a unit owner does not perform needed repairs within five days of a notice of default, Vanderbilt may perform such repairs. Under such circumstances, "[a]ll sums expended and all costs and expenses incurred in

connection with the making of any such ... maintenance, repair or replacement ..." are chargeable to the unit owner as a residential common charge (By-Laws, § 6.10).

Defendants do not dispute their obligation to pay for the cost of the repair, with the exception of the cost of the flagman and the floor covering, which they claim that they should not have to pay. They also dispute the charges for attorneys' fees. They have not paid any of the charges for the work or the attorneys' fees to date.

ANALYSIS

Summary Judgment

Defendants contend that Vanderbilt cannot seek summary judgment at this time, because they have not yet served an answer. They argue that, at most, Vanderbilt should have sought a default judgment under CPLR 3215.

At the initial hearing, in September 2008, Defendants were not represented by counsel. Goldberg appeared, and orally asserted his defenses. Defendants concede that they "appeared and answered in court" (Def. Opp. Mem., at 2). In this motion, they moved for declaratory relief, not only dismissal of the complaint. Further, the parties have addressed this motion and cross motion as if they were for summary judgment. Thus, the court will address both the motion and cross motion.

Attorneys' Fees

Defendants contend that they are not obligated to pay attorneys' fees because, under the American Rule, a litigant must pay his own fees unless an award of attorneys' fees is authorized explicitly by an agreement between the parties. Defendants contend that neither the By-Laws nor the Declaration authorize the collection of attorneys' fees in this matter. They rely on the fact that there is no explicit mention of attorneys' fees, merely a statement that the unit owner will be liable for all sums expended and all costs and expenses incurred in connection with the work being performed. They maintain that the By-Laws would have explicitly included attorneys' fees in this context if the intent was to allow for such recovery as is the case in § 6.6, which governs collection of default in payment of common charges.

Defendants' position is not compelling. Their refusal to allow access to the Terrace resulted in Vanderbilt being obligated to bring court proceedings to gain access to the Terrace, in order to have the work, which was mandated by Local Law 11, completed. Thus, Defendants caused Vanderbilt to incur this extra expense in order to complete the repairs, and it constitutes a cost and expense "incurred in connection with the making of ... [the] repair" (By-Laws, § 6.10).

The cases cited by Defendants are distinguishable. For example, in *Dupuis v 424 E. 77th Owners Corp.* (32 AD3d 720 [1st Dept 2006]), the Court denied attorneys' fees because the proprietary lease section, upon which the co-op board relied, limited attorneys' fees to

applications for default under the lease, and there was no allegation that the plaintiff was in default (*see also Board of Mgrs. of Stewart Place Condominium v Bragato*, 54 AD3d 791 [2d Dept 2008] [attorneys' fees denied because plaintiff could not establish what portion of the fees were recoverable under the terms of the by-laws]; *Board of Mgrs. of Bedford Mews Condominium v Nasr*, 37 AD3d 506 [2d Dept 2007] [res judicata limited the award of attorneys' fees]; *Devlin v 645 First Ave. Manhattan Co.*, 229 AD2d 343 [1st Dept 1996] [attorneys' fees denied where there was no contractual basis for such an award]).

The Appellate Division, First Department concluded that attorneys' fees are included in a clause that provides for a condominium board to recover "[a]ll sums of money expended and all costs and expenses incurred," by the board in performing a permitted or required function includes recovery of attorneys' fees (*Board of Mgrs. of Amherst Condominium v CC Ming (USA) Ltd. Partnership*, 17 AD3d 183 [1st Dept 2005]). Defendants' attempt to distinguish *Amherst* is unavailing. The fact that *Amherst* involved a commercial unit, rather than a residential unit, does not alter the meaning of the language. Nor does the fact that the tenant's particular failure to meet an obligation was different. The operative language, "all costs and expenses incurred," is identical, and the provision was construed to include attorneys' fees. Consequently, Vanderbilt is entitled to the attorneys' fees incurred in order to gain access to the Terrace to perform necessary repairs.

In their reply papers, Defendants contend that Vanderbilt should not be permitted to collect attorneys' fees because the issue was not raised at the hearing in September 2008, even though it was explicitly stated that Defendants would be responsible for the work being performed. Defendants cannot raise this issue as a basis for obtaining a declaration that the lien for attorneys' fees is improper. Arguments raised in reply are not considered by the court; the movant must present its arguments in the moving papers unless the arguments are raised in response to matters raised in opposition, which is not the case here (*Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626 [1st Dept 1995]).

In any event, the hearing in September 2008 was to determine whether Vanderbilt would be granted an injunction directing Defendants to allow access to the Terrace. The third cause of action in the complaint was for damages, to be determined at trial. This issue was not disposed of at the hearing. Rather, the action was ongoing. Thus, it would not be appropriate to preclude Vanderbilt from presenting its evidence regarding its costs and expenses.

Flagman and Floor Covering

Defendants maintain that, in the September 2008 order, this court required them to pay the costs of the work, less the cost of the flagman. That is not accurate. The court stated that Defendants would be required to pay the costs of a flagman if a scaffolding were used. That

was not meant to relieve Defendants of such an expense were a flagman required even without a scaffolding. All expenses attributable to the work are Defendants' responsibility, in accordance with the terms of the By-Laws.

Defendants do not specify the reason that they dispute the costs of covering the floors. Inasmuch as the record contains no information about what that involved, what the purpose was, or even which floors were covered, the court declines to address the specifics at this time. This issue will be addressed at the hearing on attorneys' fees.

Accordingly, it is

ORDERED that Defendants' motion is denied; and it is further

ORDERED that plaintiff's cross motion is granted and partial summary judgment on the third cause of action as to liability for attorneys' fees is granted; and it is further

ORDERED that the issue of the amount of attorneys' fees, as well as the question of whether the flagman and covering the floors were necessary to the performance of the work on the terrace, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the cross-motion is held in abeyance to the extent of the amount of the fees due pending receipt of the report and recommendations of the Special Referee and

*The Residential Board of Managers
of the Vanderbilt Condominium v Goldberg*

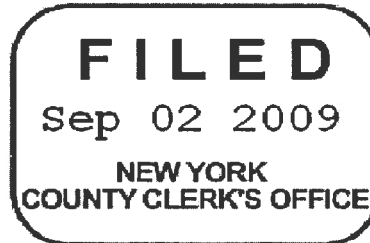
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a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that plaintiff's counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,* upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 28, 2009



ENTER:


Hon. Eileen Bransten

* Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website at <http://www.courts.state.ny.us/supctmanb/SRP 7-09no2.pdf>.