

**Millenium Tower Residences v Kaushik**

2016 NY Slip Op 30410(U)

March 14, 2016

Supreme Court, New York County

Docket Number: 158530/2015

Judge: Carol R. Edmead

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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

**HON. CAROL R. EDMEAD**

PRESENT: \_\_\_\_\_ **J.S.C.**  
*Justice*

PART 35

Index Number : 158530/2015  
MILLENIUM TOWER RESIDENCES  
vs.  
KAUSHIK, VEKRUM  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/22/16  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

Defendant Vekrum Kaushik (“defendant”) moves for an order/judgment pursuant to CPLR § 3211(a)(1),(2),(7), RPL § 339-aa and RPAPL § 1303, (1) dismissing each cause of action in the complaint of plaintiff Board of Managers of the Millennium Tower Residences Condominium (“plaintiff”); (2) an order pursuant to CPLR § 6514(a),(b), directing that the Clerk of the County of New York cancel the Notice of Pendency filed in this action; and (3) an Order pursuant to CPLR § 6514(c), awarding defendant costs and expenses incurred by the filing and cancelling of the aforementioned Notice of Pendency, in addition to cost of the action.

In support, defendant contends that this is an action to foreclose on two liens against defendant’s condominium unit for unpaid common charges. As such, plaintiff must comply with Real Property Law (“RPL”) § 339-aa, which requires that such an action be commenced in the same manner as an action to foreclose on a mortgage, *to wit*: that a notice prescribed by Real Property Actions and Proceedings Law (“RPAPL”) § 1303 be served with the summons and complaint. As plaintiff failed to serve defendant with such notice, the first cause of action for foreclosure on the liens, and dependent cause of action for legal fees, must be dismissed. Defendant also requests that the Court likewise strike the Notice of Pendency filed in this action.

In opposition, plaintiff contends that RPAPL § 1303 notice was not required, and caselaw and statutory construction does not support defendant’s position. As such, defendant’s request to vacate the notice of pendency is premature. And, there is no contract or statute that authorizes defendants to recover legal fees from plaintiff. The Bylaws and Declaration only provides for

Dated: \_\_\_\_\_, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

such relief in favor of the Board, and RPL 234, applicable to landlord-tenant relationships, does not apply to the parties herein. However, in the event the Court finds that service of such notice was required, plaintiff cross moves for leave to serve an Amended Summons and Complaint by regular mail to defendant's counsel's office. There would be no prejudice to the granting of leave to amend.

In further support of the cross-motion, plaintiff points out that defendant failed to comply with the parties' stipulated motion submission schedule, and thus, the cross-motion for leave should be granted as unopposed. Plaintiff contends that it rejected defendant's request for additional time to serve opposition to the cross-motion and that such opposition has yet to be filed.

#### *Discussion*

Real Property Law § 339-aa, entitled, "Lien for common charges; duration; foreclosure" provides that, as to "The lien [for common charges] provided for in the immediately preceding section,<sup>1</sup> . . . "[s]uch lien may be foreclosed by suit . . . *in like manner as a mortgage of real property*, without the necessity however, of naming as a party defendant any person solely by reason of his owning a common interest with respect to the property." By expressly referencing suits for foreclosure of mortgages of real properties, the plain language of RPL § 339 incorporates the notice requirement contemplated by RPAPL § 1303(1) such that a foreclosure of common charge liens are to be foreclosed in the manner in which a foreclosure of a mortgage is initiated.

RPAPL § 1303(1) provides that "The foreclosing party in a mortgage foreclosure action, involving residential real property shall provide notice to: (a) any mortgagor if the action relates to an owner-occupied one-to-four family dwelling . . ." Subsection (3) thereunder sets forth the details required in and of the notice. As pointed out by defendant, RPAPL § 1303 was enacted as part of the Home Equity Theft Prevention Act ("HETPA"), in an effort "to afford greater protections to homeowners confronted with foreclosure" (*First Nat. Bank of Chicago v. Silver*, 73 A.D.3d 162, 899 N.Y.S.2d 256 [2d Dept 2010]). And, as noted, albeit in *dicta* in the case defendant cites, *Board of Directors of House Beautiful at Woodbury Homeowners Ass'n, Inc. v Godt* (96 A.D.3d 983, 984, 947 N.Y.S.2d 572 [2d Dept 2012]), the Legislature "Legislature has deemed it necessary to extend the applicability of mortgage foreclosure procedure to foreclosures of condominium liens for unpaid common charges through enactment of an entirely separate statute (see Real Property Law § 339-aa)." The Court declines to follow *Board of Managers of*

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<sup>1</sup> The preceding section § 339-z, provides:

The board of managers, on behalf of the unit owners, shall have a lien on each unit for the *unpaid common charges* thereof, together with interest thereon, prior to all other liens except only (i) liens for taxes on the unit in favor of any assessing unit, school district, special district, county or other taxing unit, (ii) all sums unpaid on a first mortgage of record, and (iii) all sums unpaid on a subordinate mortgage of record held by the New York job development authority, the New York state urban development corporation, the division of housing and community renewal, the housing trust fund corporation, the New York city housing development corporation, or in a city having a population of one million or more, the department of housing, preservation and development. (Emphasis added).

*the Villas on the Bay at East Moriches Condominium* (2013 WL 5957864, 2013 NY Slip Op. 32806 [Supreme Court, Suffolk County 2013]), which held that RPAPL § 1303 notice was not a condition precedent to foreclose on a condominium common charge lien. The Court in *Board of Managers* cited to Siegals' Practice Review, September 2012. However, Siegals, citing to Woodbury, noted:

RPAPL § 1303, do[es] not apply to actions to foreclose *unpaid assessments* levied by a homeowners association. Strictly construing the statutory language, the court limited the application of the Section to "mortgage foreclosures," as referenced in RPAPL § 1303[1][a], as well as in RPL § 265[a] and RPL § 339-aa, whereas the legislation never referenced homeowners' association liens *for unpaid assessments* which emanate from Declarations of Covenants, etc." (emphasis added).

Although the Home Equity Theft Prevention Act was enacted to afford greater protections to homeowners confronted with mortgage foreclosures, by expressly referencing "mortgage foreclosures," in the common charges foreclosure statute, the Legislature intended to expand the protections of HETPA to homeowners, such as condominium unit owners, confronted with losing their homes by virtue of failure to pay common charges. Therefore, as the scope of mortgage foreclosure procedures was made expressly applicable to foreclosures of condominium liens for unpaid common charges, defendants' motion to dismiss for plaintiff's failure to serve the RPAPL 1303 notice is warranted.

However, plaintiff's cross-motion for leave to serve the Summons and Complaint with such notice is granted. "It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1<sup>st</sup> Dept 2011] citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 A.D.3d 507, 868 N.Y.S.2d 612 [2008]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*Kocourek citing Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365, 841 N.Y.S.2d 277 [2007], quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 444 N.Y.S.2d 571, 429 N.E.2d 90 [1981]). There is no indication that permitting plaintiff to serve the RPAPL § 1303 notice at this juncture, and in light of the communications between counsel for the parties since the inception of this action, would result in any prejudice to defendant in his ability to defend this matter. Having cured its failure to serve the RPAPL § 1303 notice, dismissal of the Complaint is denied.

In light of the above, and based on the remaining arguments in the parties' papers, plaintiff's request for an order cancelling the Notice of Pendency filed in this action, and for costs and expenses incurred is denied.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Vekrum Kaushik for an order/judgment pursuant to CPLR § 3211(a)(1),(2),(7), RPL § 339-aa and RPAPL § 1303, (1) dismissing each cause of action in the complaint of plaintiff Board of Managers of the Millennium Tower Residences Condominium; (2) an order pursuant to CPLR § 6514(a),(b), directing that the Clerk

of the County of New York cancel the Notice of Pendency filed in this action; and (3) an Order pursuant to CPLR § 6514(c), awarding defendant costs and expenses incurred by the filing and cancelling of the aforementioned Notice of Pendency, in addition to cost of the action, is denied; and it is further

ORDERED that the cross-motion by plaintiffs to serve an Amended Summons and Complaint in the form attached to the cross-motion is granted; and it is further

ORDERED that by plaintiffs shall serve the Amended Summons and Complaint in the form attached to the cross-motion within 20 days of entry of this order; and it is further

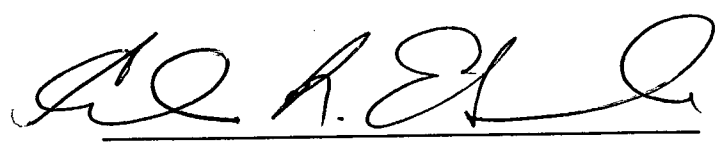
ORDERED that defendant shall serve his Answer to such Amended Summons and Complaint within 20 days of the date of plaintiff's service of same; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

J

DATED: 3/14/16



J.S.C.

**HON. CAROL R. EDMead**  
J.S.C.

1. CHECK ONE :  CASE DISPOSED  NON-FINAL DISPOSITION

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