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### Board of Mgrs. of Two Columbus Ave. v. Leschins

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[\*1]

<b>Board of Mgrs. of Two Columbus Ave. v Leschins</b>
2021 NY Slip Op 50658(U)
Decided on July 14, 2021
Supreme Court, New York County
Lebovits, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 14, 2021

Supreme Court, New York County

<p><b>The Board of Managers of Two Columbus Avenue, Plaintiff,</b></p> <p><b>against</b></p> <p><b>Eileen Leschins, PRESTON A. LESCHINS, and BENJAMIN LESCHINS, Defendants.</b></p>
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Index No. 657541/2019

Farber Schneider Ferrari LLP, New York, NY (Gina M. Carbone of counsel), for plaintiff.

No appearance for defendant Benjamin Leschins.

Gerald Lebovits, J.

Plaintiff is the Board of Managers of Two Columbus Avenue, a Manhattan condominium. Defendant Benjamin Leschins has for the past several years resided in a unit in the condominium that he does not own. [\[FN1\]](#) The Board's amended complaint in this action

asserts [\*2] claims against Leschins to recover unpaid common charges under unjust-enrichment and account-stated theories. Leschins did not respond to the amended complaint. The Board now moves for a default judgment under CPLR 3215 of \$153,705.09, plus interest running from May 2016, plus attorney fees. The motion is denied.

## DISCUSSION

The Board's motion papers establish service of the amended complaint on Leschins and his default, as CPLR 3215 (f) requires. In addition, the Board must provide proof of the facts constituting its claim. To do so, the Board relies principally on its verified complaint (which qualifies as an affidavit for this purpose) and on a document that the Board's attorney's affirmation represents to be an account ledger recording the unit's common-charge arrears.

A defaulting defendant is deemed to have admitted all the allegations in the complaint. (*See Rokina Optical Co. v. Camera King, Inc.*, 63 NY2d 728, 730 [1984].) The "legal conclusions to be drawn from such proof," though—and whether the facts deemed established demonstrate that the plaintiff has a viable cause of action—are reserved for the Supreme Court's determination." (*McGee v. Dunn*, 75 AD3d 624, 624 [2d Dept 2010] [internal quotation marks omitted].) If the allegations of the complaint do not establish a cause of action, the plaintiff's motion for default judgment must be denied. (*See Matter of Dyno v. Rose*, 260 AD2d 694, 698 [3d Dept 1999].) The Board's submissions on this motion do not establish that it has a cause of action against Leschins.

### I. Defects in the Board's Claims Against Benjamin Leschins as Pleaded

The Board seeks a default judgment against Leschins on two theories articulated in the amended complaint: (i) Leschins has been unjustly enriched by residing in the condominium unit without paying common charges; and (ii) Leschins owes an obligation to pay common charges through an account stated. Neither the verified complaint nor the other materials submitted on this motion establish a cause of action against Leschins on either theory.

#### A. The Board's Unjust-Enrichment Claim

The Board's unjust-enrichment theory is that Leschins has enjoyed the benefits of residence in the condominium without paying the corollary common charges necessary to support the building's maintenance and upkeep. But the Board has not alleged or otherwise

provided facts demonstrating that Leschins had an obligation to pay those common charges in the first place.

The Board relies on § 1.2 of the condominium by-laws. Section 1.2 provides that the by-laws apply to occupants of units in the condominium, as well as to unit owners or lessees of owners; and that occupancy of a condominium unit constitutes an implied agreement to accept and comply with the by-laws and their implementing rules. (*See* NYSCEF No. 104 at ¶¶ 14-a, 30 [amended complaint]; NYSCEF No. 122 at ¶¶ 11 [affirmation in support of default judgment]; [\*3]NYSCEF No. 37 at 9 § 1.2 [by-laws].) Relying on this provision merely begs the question of what obligations the by-laws in fact impose on Leschins as an *occupant* of the unit, rather than as an owner or lessee.

That is, § 6.4 of the by-laws imposes an obligation to pay building common charges on "Residential Unit Owners." (*See* NYSCEF No. 37 at 30-31 §§ 6.4.1, 6.4.2.) Similarly, §§ 6.6 and 6.7, which address defaults in payment of common charges and the condominium board's authority to bring actions to recover the amount of unpaid charges, both refer to the obligations and liability of a "Unit Owner." (*See id.* at 32-33 §§ 6.6, 6.7.) The definitions of these terms in the condominium's declaration provide that they mean what one would expect them to mean: a "Residential Unit Owner" is "any owner of a Residential Unit," and a "Unit Owner" is "any Residential Unit Owner or any Commercial Unit Owner." (NYSCEF No. 146 at 42, 43 [condominium declaration]. [FN2] ) But Leschins is not the owner of the unit in which he resides—Eileen Leschins is. Nor has the Board supplied any other basis to conclude that "unit owner" should be understood for these purposes to encompass a non-owning, non-leasing resident.

The Board does not address the apparent absence of any obligation on the part of Leschins—as opposed to the unit's owner Eileen Leschins—to pay the unit's common charges. And the Board has not provided authority for the proposition that Leschins may be *unjustly* enriched because he has resided in the unit without paying common charges that he does not owe. [FN3] The Board's motion papers thus do not establish that it has an unjust-enrichment cause of action against Leschins.

## **B. The Board's Account-Stated Claim**

The Board's account-stated claim against Leschins fares no better. A plaintiff asserting an account-stated claim must allege that defendant received mailed invoices and retained

them without objection. (*See LD Exch., Inc. v. Orion Telecom. Corp.*, 302 AD2d 565, 565 [2d Dept 2003].) Here, the amended complaint alleges that the "Condominium demands payment from *Defendants*," collectively, "by sending new invoices reflecting current common charges and [\*4]including the arrears, late fees and other charges," and that "*Defendants* have never disputed any of said invoices." (NYSCEF No. 104 at ¶¶ 19-20 [emphases added].) The amended complaint also alleges that the "Condominium has invoiced the Unit and therefore . . . [Leschins] on a monthly basis for payment of Common Charges," that "[b]y invoicing the Unit monthly, [p]laintiff provided communications to . . . Leschins as to what was due and owing with respect to " his "occupancy of the Unit," and that Leschins "did not timely object to amounts owed in these communications." (*Id.* at ¶¶ 33, 42, 43.)

None of these allegations, taken as true, establish that plaintiff mailed invoices to Leschins, in particular, rather than to the other defendants; that any such invoices reflected an obligation of Leschins, in particular, to pay common charges; or that Leschins, in particular, received and retained such invoices without objection. And the attorney affirmation in support of the Board's motion adds only the conclusory statement that Leschins "was aware of these Common Charges, from the monthly invoices, and despite that, failed to pay any amount of the outstanding Common Charges." (NYSCEF No. 122 at 3.) That statement, standing alone, is not sufficient.

This court did grant summary judgment to the Board against defendant *Preston* Leschins for unpaid common charges on an account stated theory (*See* NYSCEF No 91 ) The Board's papers in support of that motion, though, included evidence that Preston had acknowledged his obligation to pay invoiced common charges, had made partial payments on those charges, and had asked specifically that the invoices be addressed to him (*See* NYSCEF No 24 at ¶¶ 14 19 [affidavit of managing agent]; NYSCEF No 44 at 10 11 [memorandum of law, citing evidence]; NYSCEF No 42 at 10 [correspondence between Preston Leschins and managing agent] ) No comparable evidence or allegations have been submitted in support of the Board's account stated claim as to defendant Benjamin Leschins

## **II. Defects in the Board's Claim to a Default Judgment Against Benjamin Leschins for a Sum Certain**

Moreover, even if one were to set aside the pleading defects in the Board's claims against Leschins, the Board still has not established its entitlement to the particular default judgment

that the Board is seeking on this motion.

The Board is seeking the sum of \$153,705.09 in common-charge arrears (plus interest and attorney fees). It contends that these claimed damages "need not be sought at an inquest, but rather can be determined by a review of the arrears ledger itself" that is annexed to the motion. (NYSCEF No. 122 at ¶ 13; *see also* NYSCEF No. 131 [ledger].) But, unlike the Board's motion papers in support of summary judgment as against the other defendants (*see* NYSCEF No. 24), the motion papers here do not include an affidavit from the Board's managing agent to authenticate the ledger and attest to its accuracy. (*see* NYSCEF No. 24). Additionally, without context supplied by that kind of managing-agent affidavit, the ledger's contents are not sufficiently clear and self-explanatory to support awarding a six-figure default judgment without an inquest. And that lack of clarity is only exacerbated by the fact that the Board's motion is seeking judgment against Benjamin Leschins for an amount that differs both from the arrears alleged in the amended complaint *and* what the ledger appears to indicate is the sum in arrears at the time the Board filed this motion. (*Compare* NYSCEF No. 122 at ¶ 13 [attorney affirmation describing amount sought on motion, *with* NYSCEF No. 104 at 8-9 [amended complaint request [\*5] for relief], and NYSCEF No. 131 at 1 [most recent entry in ledger].)

The Board's evidentiary showing thus does not establish its entitlement to default judgment as against Benjamin Leschins without an inquest. Given the court's conclusion that the amended complaint does not establish that the Board has a claim against Benjamin Leschins, this court declines to grant default judgment on liability and direct an inquest. To the contrary, the court holds that, as currently pleaded and supported, the Board's claims against Benjamin Leschins are subject to dismissal.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the Board's motion for default judgment under CPLR 3215 as against defendant Benjamin Leschins is denied; and it is further

ORDERED that the Board's claims against Benjamin Leschins asserted in the amended complaint filed February 24, 2021, shall be dismissed unless the Board within 45 days from entry of this order either brings a renewed motion for default judgment that remedies the pleading defects described above, or moves for leave to further amend its complaint for that purpose; and it is further

ORDERED that the Board serve a copy of this order with notice of its entry on all parties.

DATE 7/14/2021

### Footnotes

**Footnote 1:** The unit is instead owned by defendant Eileen Leschins. Although Eileen Leschins and Benjamin Leschins are presumably related in some way, neither plaintiff's amended complaint (the operative pleading) nor plaintiff's papers on this motion specify the nature of that relationship.

**Footnote 2:** Although it is not included in the Board's papers on this motion, the parties submitted the condominium declaration to the court in connection with another motion in the action.

**Footnote 3:** This court's research has uncovered only one decision relevant to this particular issue. (See *Foxwood Square Condominium I v Albert*, 168 Misc 2d 587 [Civ Ct, Richmond County 1996].) In *Albert*, the owner of a condominium unit had leased the unit to another individual. After the unit's common charges had gone unpaid, the *Albert* court ordered the lessee to pay the charges "as a third party beneficiary for services rendered the tenant by the condominium." (*Id.* at 593.) *Albert*, though, addressed a materially different scenario. There, the unit owner "clearly walked away from [the] property," having declared Chapter 7 bankruptcy, stopped communicating with "any of the parties in this action," and taken "the benefit of bankruptcy and left his condo to be foreclosed by the bank." (*Id.*) Thus, in those circumstances, the lessee was, as a practical matter, the *only* party from whom the condominium could recover the common charges entailed by the building's operation and maintenance. Not so here.

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