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Board of Mgrs. of the 207-209 E. 120th St. Condominium v. Dougan

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**Board of Mgrs. of the 207-209 E. 120th St.
Condominium v Dougan**

2022 NY Slip Op 31491(U)

May 4, 2022

Supreme Court, New York County

Docket Number: Index No. 159009/2020

Judge: Margaret Chan

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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. MARGARET CHAN PART 49M

Justice

-----X

<p>THE BOARD OF MANAGERS OF THE 207-209 EAST 120TH STREET CONDOMINIUM</p> <p style="text-align: right;">Plaintiff,</p>	<p>INDEX NO. <u>159009/2020</u></p> <p>MOTION DATE <u>03/15/2022</u></p> <p>MOTION SEQ. NO. <u>006</u></p>
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- v -

KWAME DOUGAN,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 94, 95, 96, 97
were read on this motion to/for JUDGMENT - DEFAULT

In this action plaintiff Board of Managers of the Condominium (the Board) alleges that defendant Kwame Dougan, the fee owner of Unit 1F (the Unit) at the condominium at 207-209 East 120th Street (the Condominium) wrongfully used the Unit as a short-term rental such as an Airbnb, moves to renew its motion for a default judgment with regard to its sixth cause of action for costs and expenses of this action, including reasonable attorney's fees and disbursements, together with the interest. There is no opposition to the motion.

Background

This action was commenced on October 23, 2020, when plaintiff filed the verified complaint (NYSCEF # 2) and an order to show cause for a preliminary injunction and a temporary restraining order (TRO) against defendant, alleging that defendant did not use the Unit as his residence but rented it out for short terms as advertised in the Airbnb or similar websites. The complaint contains six causes of action including a claim for injunctive relief seeking to restrain defendant from renting the Unit in violation of the law and the By-Laws and House Rules of the Condominium (collectively, the Governing Documents).

On or about November 4, 2020, this court granted the TRO and scheduled a hearing on the preliminary injunction for December 3, 2020. Defendant appeared by counsel and opposed the motion. Upon the arguments made by both parties, By decision on the record, this court granted the motion and directed settlement of an order (NYSCEF # 35 at 20-21). Plaintiff submitted a proposed order (NYSCEF # 36), and defendant submitted a counterorder (NYSCEF # 37).

By Decision and Order dated February 25, 2021, which was filed on March 1, 2021 ("February Order") (NYSCEF # 38), this court granted the Board injunctive relief, and directed Dougan to answer by March 26, 2021. Dougan failed to answer the Complaint and has not responded or sought an extension of the time to answer.

On or about April 14, 2021, the Board moved for a default judgment on all causes of action in the Complaint (NYSCEF #s 41, 42). By Decision and Order dated July 20, 2021 (NYSCEF # 53), this court granted the Board's motion for a default judgment on the first, second, third, and fourth causes of action but denied the motion with respect to the fifth and sixth causes of action, finding that the Board had not sufficiently demonstrated the merits of those claims. The denial was without prejudice to renewal upon proper proof.

The Board now moves for a renewal of its request for a judgment on default with respect to the sixth cause of action seeking attorney's fees, costs, and expenses incurred in this action. In support of its renewal motion, the Board submits the Affirmation of Joanna C. Peck, Esq., the affidavit of its Treasurer, Thomas Lopez, and an exhibit containing portions of the relevant By-Laws (NYSCEF #s 95-97). In his affidavit, Lopez avers that he has personal knowledge of the attorney's fees and expenses incurred by the condominium as a result of this action and that the \$37,741.85 incurred in prosecuting his action (NYSCEF # 97, ¶ 4). According to Lopez, this amount is exclusive of attorney's fees and expenses previously sought in in the contempt motion and in his November 23, 2021 affidavit relating to violation issued by New York City Department of Buildings with respect to the Unit (NYSCEF #s 89, 93). A redacted invoice for the amounts sought is annexed to Lopez's affidavit (NYSCEF # 97).

In support of its argument that Dougan is liable for attorney's fees and expenses incurred in this action arising out of his failure to abide by the Governing Documents, the Board relies on the two sections of Article VI of the By-Laws.

Section 10 provides, in relevant part, that:

The violation of any rule or regulation adopted by the Board of Managers, or the breach of any By-Law contained herein, or the breach of any provision of the Declaration, shall give the Board of Managers the right, . . . : (a) upon reasonable notice to the Unit Owner, to enter the Unit in which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Unit Owner, any structure, thing or condition that may exist therein contrary to the intent and meaning of the provisions hereof . . . or (b) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach.

(NYSCEF # 96, at F18; Article VI, § 10).

Section 12(d) provides that:

No improper, offensive, or unlawful use shall be made of the property or any part thereof, and all valid laws, zoning ordinances and regulations of all governmental bodies having jurisdiction thereof shall be observed. Violations of laws, orders, rules, regulations or requirements of any governmental agency having jurisdiction thereof, relating to any portion of the property, shall be eliminated, by and at the sole expense of the Unit Owners, or the Board of Managers, whichever shall have the obligation to maintain or repair such portion of the property.¹

(*id.* at F20, Article VI, § 12[d]).

Discussion

In accordance with CPLR 3215(f), a movant seeking default judgment must submit the following: (1) proof of service of the summons and complaint or summons with notice; (2) an affidavit of the facts or other proof constituting the claim and the amount due; and (3) an affidavit showing the default in answering or appearing (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]). Although there is no dispute that the Board has met these prerequisites (regarding proof of service of the Complaint and submission of affidavit showing Dougan's default in answering or otherwise responding), a meritorious claim must be established for a default judgment to be granted. At issue here is whether the merit of the sixth cause of action has been sufficiently established.

"Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule (*Hooper Assocs., Ltd. v AGS Computs., Inc.*, 74 NY2d 487, 491 [1989][internal citations omitted]; *see also Hunt v. Sharp*, 85 NY2d 883, 885 [1995]["[U]nder the 'American rule,' to which [New York] State adheres ... the prevailing litigant ordinarily cannot collect its reasonable attorney's fees from its unsuccessful opponents"). Moreover, since New York follows the common law rule disfavoring an award of attorney's fees to the

¹ Section 12(d) is the fourth subsection of 12 but is erroneously identified in the bylaws as 12(b) (NYSCEF # 96, at F20, at 4). Furthermore, the efiled document included as an exhibit to the motion (NYSCEF # 96) does not include the Section 12 in its entirety. However, the Verified Complaint quotes the entire Section 12 and lists the subsection as 12(d) (NYSCEF # 2, at 4).

prevailing party in litigation, a party's entitlement to attorney's fees should be narrowly construed (*Gottlieb v Kenneth D. Laub & Co., Inc.*, 82 NY2d 457, 464 [1993]).

At issue here is whether the provisions relied on by the Board in the Condominium's By-Laws provide a sufficient basis for requiring Dougan to pay the attorney's fees and litigation expenses incurred by the Condominium in this action. In this regard, the court notes that "[t]he bylaws of [a condominium] and its declaration of covenants, restrictions, easements, and liens . . . are contracts [between unit owners and the condominium] and, thus, are governed by the principles of contract interpretation" (*Weiss v Bretton Woods Condo. II*, 151 AD3d 905, 906 [2d Dept 2017][internal citations omitted]; see also *Bd. of Mgrs. of the 28 Cliff St. Condo. v. Maguire*, 191 AD3d 25, 29 [1st Dept 2020 ["The condominium by-laws are in essence, an agreement among all of the individual unit owners. ."] [internal citation and quotation omitted]). Furthermore, bylaws of a condominium which provide for the payment of attorney's fees have been enforced by New York courts (see *Bd. of Mgrs. of the Peregrine Tower Condo. v NYC 2014 LLC*, 194 AD3d 403, 404 [1st Dept 2021]; *Glenridge Mews Condo. v Kavi*, 96 AD3d 604, 605 [2d Dept 2011]).

At the same time, courts only permit recovery of attorney's fees and expenses arising out of litigation involving condominiums where the right to such recovery is specifically stipulated by the Condominium's bylaws (*Bd. of Mgrs. of the 25th Charles St. Condo. v Seligson*, 126 AD3d 547, 548 [1st Dept 2015] [vacating award of attorney's fees awarded to residential unit owner where bylaws provided for recovery of attorney's fees only by condominium board]; *Bd. of Managers of Fishkill Woods Condo. v Gottlieb*, 184 AD3d 785, 790-91 [2d Dept 2020] [holding that the Board is entitled to attorney's fees solely in connection with the causes of action and counterclaims for recovery of the unpaid fine imposed on the appellants as specifically stipulated in the bylaws]).

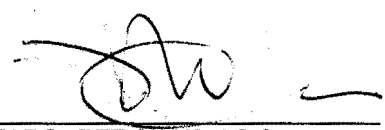
Here, the provisions of the Condominium's By-Laws relied on by the Board, do not refer to attorney's fees or expenses, and therefore cannot be said to indicate an intent to require the unit owner pay the Condominium's attorney's fees and other expenses of litigation arising out of breach of the Governing Documents or the violation of governmental laws, rules or regulations. Specifically, in the event of a breach by the unit owner of the Governing Documents, Article VI Section 10(a) of the By-Laws gives the Condominium the right to enter a unit upon reasonable notice and to "summarily abate and remove at the expense of the defaulting Unit Owner the structure, thing or condition" at issue. However, while this section can be read to require the unit owner to pay the expenses incurred by the Condominium in remedying the condition resulting from the unit owner's breach, such as the cost of removing a structure or eliminating a condition, it evinces no intent to impose liability on the unit owner for attorney's fees and expenses incurred in litigation. As

for Article VI, section 10(b), this section permits the Condominium to bring legal proceedings to enjoin, remedy or abate a breach, but is silent as to any obligation of the unit owner to pay the expenses or attorney’s fees incurred in such proceedings. Additionally, although Section 12(d) requires a unit owner who is responsible for violations of government laws, regulations and requirements related to the property to pay the expense of eliminating such violations, it cannot be read as mandating the payment of attorney’s fees and other litigation expenses (*compare Bd. of Managers of the Peregrine Tower Condo. v. NYC 2014 LLC*, 194 AD3d at 403, 404 [affirming the award of attorney’s fees to plaintiff condominium where bylaws permitted condominium to address violations of the bylaws via “appropriate legal proceedings,’... and to abate ‘the continuance of any breach at the expense (including attorney’s fees) of the breaching Unit Owner”][emphasis added]).

As the provisions relied on by the Board cannot be construed to constitute an exception to the general rule precluding the recovery of legal fees to the prevailing party, the Board’s motion for a default judgment on the sixth cause of action for legal fees and expenses must be denied (*see also Horwitz v 1025 Fifth Ave. Inc.*, 34 AD3d 248, 249 [1st Dept 2006]) [“ a provision in an agreement allowing the recovery of attorney’s fees that are incidents of litigation should be strictly construed”] [internal citations and quotation omitted]).

In view of the above, it is

ORDERED that motion by plaintiff Board of Managers of the 207-209 East 120th Street Condominium to renew its motion for an order of default judgment on its sixth cause of action is denied.



MARGARET CHAN, J.S.C.

5/4/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

OTHER

APPLICATION: