Slip Copy, 23 Misc.3d 1139(A), 2009 WL 1652849 (N.Y.Sup.), 2009 N.Y. Slip Op. 51198(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2009 WL 1652849 (N.Y.Sup.))

Supreme Court, Kings County, New York.
WASHINGTON MUTUAL BANK, FA, Plaintiff,
v.
The CITY OF NEW YORK, et al., Defendants.
No. 42671/07.

June 8, 2009.

Debra L. **Wabnik**, Esq., for Plaintiff.

Michael A. Cardozo, Esq., Corporation Counsel of the City of New York by, Jacqueline Hui, Esq., for Defendants.

ROBERT J. MILLER, J.

***1** Defendants the City of New York and the City of New York Department of Environmental Protection ("DEP") (collectively the "City defendants") move, pursuant to CPLR 3211, to dismiss the amended complaint of Washington Mutual Bank, FA ("WAMU"), on the grounds that plaintiff has failed to state a cause of action and to exhaust its administrative remedies. WAMU cross-moves for an order, pursuant to CPLR 3212,[FN1] granting summary judgment in its favor against the City defendants.

FN1. WAMU's Notice of Motion also erroneously seeks summary judgment pursuant to CPLR 3126,.

This action concerns outstanding water and wastewater charges under DEP accounts at Flatlands Garden Condominium (the "Condominium"). DEP is authorized to act as billing agent on behalf of the Water Board, which promulgates rules and regulations, and fixes and collects water, wastewater charges, and revenue related to the use of the City's water system (*see* Public Authorities Law § 1045-a, *et seq.*). The "Condominium" consists of 18 individual condominium units located in six three-story, three-family attached buildings at 901-911 East 106th Street, in Brooklyn.[FN2] DEP Account Number xxx8001 ("the subject Account") reflects water and wastewater charges for five meters installed in each of the buildings, covering fifteen of the units. DEP Account Number xxx7001 reflects water and wastewater charges for the meter installed in the remaining building, which covers three units, 7A, 7B and 7C.[FN3] A review of the prior litigation involving the Condominium is instructive. In 2004, Consolidated brought on a proceeding to stay DEP and the Water Board from terminating the water supply to the Condominium. The Court by J. Hubsher granted the stay to give the parties an opportunity to "continue to negotiate in good faith." Apparently those negotiations failed and the Court by J. Hinds-Radix vacated the stay on July 15, 2005. Inexplicably, other than filing a lien, the City has taken no steps in the past four years to either terminate water service or attempt to collect on its lien. Instead, the City wants WAMU to bear the burden of the entire lien, notwithstanding its failure to remedy this long standing problem with the Condominium.

FN2. According to public records, eight of the eighteen Condominium units were purchased by individual owners, with the remaining ten units owned by co-defendant Consolidated Development of Canarsie, Inc. ("Consolidated"). On or about September 20, 1994, Consolidated was dissolved by proclamation.

FN3. There is a separate lien on the Condominium based on its failure to pay the DEP account. On October 13, 2004 the Court (Hubsher, J.) granted Consolidated's Order to Show Cause to stay the DEP and the Water Board from terminating the water supply to the Condominium, and instructed Consolidated to pay $25,000 to DEP by October 15, 2004 and $10,000 by November 15, 2004. The Court dismissed Consolidated's petition by decision dated July 15, 2005.

The City defendants currently hold a $228,324.03

water lien (the "lien") against the Condominium for its failure to pay the water and wastewater charges due under the subject Account since 1995. They assert that, since the first bill on the subject Account was issued on October 2, 1995, the Condominium has only paid DEP $180.00 in November, 2003, $25,000 in October, 2004; and $10,000 in November, 2004.

WAMU's complaint alleges that the prior mortgagors of the Condominium's Unit 1A ("the Unit") [FN4] at 905 East 106th Street defaulted on their payments, and WAMU subsequently obtained a judgement of foreclosure and sale; the judgment of foreclosure provided that all delinquent water charges were to be paid directly from the proceeds of the foreclosure sale. On or about November 20, 2007, WAMU brought a Summons and Complaint against the City defendants seeking either cancellation, or equitable apportionment, of the lien on the subject Account on the grounds that the lien, its late fees and penalties are "unjust, inequitable and improper." Specifically, WAMU contends that the City defendants failed to properly apportion the water charges among the unit owners, and instead placed the entire lien on Unit 1A ("the Unit") of the Condominium. According to WAMU, the lien exceeds the value of the Unit, rendering WAMU unable to hold the foreclosure sale. It also alleges that the City defendants made no attempts to resolve the water lien for 13 years, yet placed more than $90,000 in "late charges" on the subject Account. WAMU maintains that the City defendants should not be permitted to hold WAMU hostage to an improperly placed lien, and at the same time gain financially from their inaction.

> FN4. The City defendants contend that, according to public records, WAMU most likely purchased Unit 5A, at East 106th Street, instead of Unit 1A.

***2** The City defendants seek dismissal of WAMU's complaint for failure to state a cause of action against them. They argue that the Water Board and DEP have no legal authority or equitable power to apportion the lien among unit owners of the Condominium. In support, they refer to Article 9-B of the New York Real Property Law, referred to as the Condominium Act (the "Condominium Act") §§ 339-e.3 and 339-i.3, which provides that (1) "common elements" in condominiums, such as "hot and cold water," cannot not be divided and generally "no right shall exist to partition or divide any thereof;" and (2) the common interest "shall not be altered without the consent of the all unit owners affected, expressed in amended declaration." Specifically, the City defendants note that unit owners agreed, pursuant to the Condominium Act and the subject condominium's by-laws, to be jointly and severally liable for common charges such as water and wastewater services provided to the entire subject condominium,. The City defendants also contend that there is no language in the Rate Schedule or Public Authorities Law giving them authority to apportion the lien on the Condominium among the individual units.

In addition, the City defendants argue that WAMU has no standing to challenge the lien or the Condominium's collective water and wastewater charges accrued under the subject Account. The parties both agree that plaintiff is a mortgagee holding a judgment of foreclosure and sale and is not a current property owner of the Unit. Even if WAMU had standing to bring this action, the City defendants (inconsistently) argue that (1) WAMU should have brought the requisite Article 78 Proceeding in order to challenge the lien and DEP's water and wastewater charges; and (2) WAMU failed to exhaust its administrative remedies set forth in the Rate Schedule's three-tiered complaint resolution process before seeking judicial review.[FN5]

> FN5. The Rate Schedule implements a three-step appeal and review procedure to challenge of a water and wastewater bill. A customer commences the challenge with a written complaint of the disputed bill filed within four years of the billing date. If the decision is non-favorable, the customer may appeal to the Bureau of Customer Services Deputy Commissioner. A customer may commence a final appeal in writing to the Executive Director of the Water Board within 30 days of the Deputy Commissioner's denial letter.

WAMU opposes the City defendants' motion, and cross-moves for summary judgment removing the lien. At the outset, it contends that it is not required to commence an Article 78 proceeding, or exhaust its

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administrative remedies, because it is not challenging any determination by the City defendants, such as the water rate, the water charges themselves or any penalties imposed. It argues that, since it is solely seeking to cancel the lien or apportion the charges equitably to each unit owner, an Article 78 proceedings would not be appropriate. In addition, WAMU argues that any "administrative remedies" did not apply to it, since as a mortgagee rather than an owner, it was not subject to the City defendants' complaint requirements. Specifically, it argues that WAMU is not a "customer" under the Rate Schedule, and therefore it could not file a written complaint of the disputed bill.[FN6]

> FN6. The "Rate Schedule" defines "customer" as "a current property owner or Authorized Representative of a property owner," and "Authorized Representative" as any individual or organization who has an original Letter of Authorization' on file with DEP.

WAMU also alleges that it has standing to bring this action because its pecuniary and property interests are being harmed as a result of the lien. WAMU argues that it is not challenging any "determination" by the City defendants, such as the water rate, and it is not a "customer or authorized representative" who can file a written complaint of a disputed bill by the City defendants. It maintains that it is a mortgagee holding a judgment of foreclosure and sale, and notes that a mortgagor's interests and rights in the property do not extinguish until the foreclosure sale.

***3** WAMU maintains that the document provided by the City defendants which covers the lien at issue indicates that the account is under the customer name of "M.S. Klein," rather than the name of the Condominium, the Unit or the Unit owner. According to WAMU, there is no proof as to the validity of the lien, the affirmation submitted by the attorney for the City defendants is not sufficient to connect the subject Account to the Condominium, and dismissal of the complaint would be premature.

At a minimum, WAMU seeks to apportion the lien among the unit owners, and argues that the water used by unit owners and wastewater does not fall under "common elements" and each unit owner can be charged. It maintains that, under the Condominium Act, "common elements" covers the "installations" for services, and not the services themselves. Similarly, WAMU cites to the Declaration of the Condominium, which states that "common elements" covers the "installations" for the services, and not the services themselves. WAMU also cites to the Declaration of the Condominium, which states that the "common elements of the Community will consist of ... all utility or other pipes and material located outside of the Homes, driveways, grass areas, walks, hallways, stairways and utility areas." To the extent that the charges are "common elements," WAMU argues that they may be apportioned among the unit owners. It cites to the Condominium Act's purported provision for the apportionment of the common expenses among the unit holders based on their common interest:

> [e]ach unit shall have appurtenant thereto a common interest as expressed in the declaration. Such interest shall be (I) in the approximate proportion that the fair value of the unit at the date of the declaration bears to the then aggregate fair value of all the units ...

WAMU also cites to §§ 339-e(2), which defines "common charges" as "each unit's proportionate share of the common expenses in accordance with its common interest." Further, WAMU notes that, since the Unit comprises 8.5% of the Common interest, the most it should responsible for is 8.5% of the charges. Specifically, WAMU cites to the Condominium's Declaration where it states that "[e]ach Home Owner shall have such percentage interest in the common elements as is set forth in Schedule B ... and shall bear such percentage of the common expenses of the Condominium," and to Schedule B, which indicates the percentage of the community interest for each unit. WAMU asserts that (1) the five meters are easily attributable to each building it services, and can be divided equally among the respective units in each building; or alternatively, (2) the entire bill may be divided equally among the 15 units.

In response, the City defendants contend that the remedy that plaintiff seeks should not be against them; instead, it should be against the other members of the subject condominium. They maintain that, pursuant to the Condominium Act and the subject Condominium's

by-laws, the unit owners agreed to be jointly and severally liable for common charges. According to the City defendants, there is no legal authority for the apportionment of the liens without the presence of the Condominium's Board of Managers. They argue that apportionment of the liens will essentially change the contractual obligations agreed upon between the Condominium and shift the burden of the Condominium's obligation to pay for water and wastewater to the City defendants to pursue each and every individual unit owner for its share of the liens.

***4** On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction, accept all facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). Bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action (*Id.*). When the moving party offers evidentiary material, the court is "required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one" (*Meyer v. Guinta*, 262 A.D.2d 463, 464 [1999]).

The Court denies the City defendants' motion to dismiss the complaint, finding that WAMU's complaint states a cognizable claim against the City defendants. WAMU has demonstrated that the subject lien exceeds the value of the Unit, clearly encumbers WAMU's security interest, and prevents it from transferring title to the Unit. WAMU alleges that its pecuniary and property interests are being harmed as the result of the subject lien, and accordingly seeks to cancel the lien or apportion the charges equitably rather than enforcing the entire lien against each individual unit owner. In support of their motion, the City defendants' cite to the summary for the subject Account in the name of "M.S. Klein," which names neither the Condominium or unit owner, and fails to establish the City defendant's entitlement to enforce the entire lien against the Unit. The Court also finds that the City defendants' procedural arguments are without merit. WAMU was not required to commence an Article 78 proceeding because it is not challenging any determination made by the City defendants. Similarly, WAMU was not required to exhaust administrative remedies. WAMU is neither a "customer" or "authorized representative," and was therefore unable to file a written complaint of the disputed bill, and adhere to the City defendants' complaint requirements.

The Court grants that aspect of WAMU's motion for summary judgment seeking an apportionment of the lien on the grounds that the DEP, as billing agent for the Water Board, has improperly placed the lien against the Unit for the entire amount of thirteen-years worth of water usage for all the individual condominium units. The subject Account upon which the lien is based upon does not identify the unit owners and covers five buildings and fifteen units, despite the fact that each of the five buildings covered by the Account have their own separate meters. WAMU's pecuniary and property interests are clearly being harmed as a result of the lien, as the judgment of foreclosure and sale provides that all delinquent water charges must be paid from the proceeds of the foreclosure sale. WAMU is therefore unreasonably encumbered from selling the unit.

***5** The Court finds that the City defendants have failed to rebut WAMU's contention that water charges are not "common expenses," and that such charges cannot be simply apportioned among each unit owner. The Condominium Act defines common elements as "installations" for water, and the Condominium's Declaration, which defines said elements as utility material outside of the Units. Moreover, the DEP, as billing agent for the Water Board, clearly has the authority to equitably apportion the water and wastewater charges according to each unit holders' respective interest. Here, WAMU is not challenging the rates or charges of the Water Board; it simply seeks equitable apportionment of the lien. The New York City Municipal Water Finance Authority Act, Public Auth. L. § 1045-j(5). provides that fees or other charges related to water "shall constitute a lien upon the premises served and charges against the owners thereof." The City defendants can readily obtain readings for each of the buildings based on their separate, individual meters, and likewise apportion such charges equally among the three unit owners in the building. WAMU would thus be responsible for a third of the charges for the building meter.

Accordingly, the Court denies the City defendants' motion to dismiss. The Court grants that aspect of WAMU's summary judgment motion against the City defendants seeking equitable apportionment of the $228,324.03 lien.

The Court schedules a conference for June 25, 2009 at 10:00 a.m. for the purpose of establishing a hearing date to determine the exact allocation of the lien as and between WAMU and the other interested parties.

The foregoing constitutes the decision and Order of the court.

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