

DOCKET NO. DBD-CV22-6042182-S

OFFICE OF THE CLERK

SUPERIOR COURT

DEER HILL ARMS CONDOMINIUM ASSOCIATION, INC.

2024 MAY 22 P 12:44

J. D. OF DANBURY

V.

JUDICIAL DISTRICT
STATE OF CONNECTICUT

AT DANBURY

TREE TOP I, LLC, ET AL.

MAY 22, 2024

MEMORANDUM OF DECISION

PROCEDURAL HISTORY

The plaintiff, Deer Hill Arms Condominium Association, Inc., is a common interest community located in Danbury, Connecticut. The defendant, Tree Top I, LLC, is the record owner of 136 Deer Hill Avenue, Unit 18, Danbury, Connecticut (“Unit”) which is part of the Association. On February 15, 2022, the plaintiff filed an action seeking a judgment of strict foreclosure against the unit for delinquent common charges. The defendant has filed an answer and three special defenses. Docket Entry No. 109. Those three defenses are that 1) the defendant has paid the common charges or special assessments claimed due, 2) it does not owe the plaintiff a sum equal to two months of common expense assessments based on a periodic budget last adopted by the plaintiff and therefore, by virtue of General Statutes § 47-258 (m)(1)(A), it is not permitted to commence this action against it, and 3) there is substantial equity in the property and therefore it is not entitled to the remedy of strict foreclosure.¹

The matter was tried to the court on February 28, 2024 and April 2, 2024 at which time the parties presented testimony and exhibits in support of their claims and defenses.

¹ The defendant Bank of America, N.A., which has a judgment lien in the amount of \$2,417.12 against the property, has not appeared and has been defaulted for failure to do so. Therefore, further reference to the “defendant” in this case shall be specifically to Tree Top I, LLC.

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FACTS

The parties have stipulated that the plaintiff was and is a common interest community as set forth in the Declaration of Unit Ownership recorded January 30, 1975, in volume 564 at page 517 of the Danbury land records, as it has been or may be amended. Further, that the defendant acquired title to the property by quit-claim deed dated March 30, 2017 and recorded April 19, 2017 in volume 2389, page 1096 of the Danbury land records subject to all terms and conditions of the Declaration as amended.

General Statutes § 47-244 (2) provides for the assessment of common expenses by the plaintiff against all units in the condominium in proportion to their respective percentages of interest in the common areas of the condominium. Article XIX of the Amended and Restated Declaration of Deer Hill Arms Condominium Association sets forth the provisions related to the apportionment, assessment, and collection of common charges. Plaintiff's exhibit 1, § 19.1. The Declaration provides for a lien in favor of the plaintiff for all assessments levied and for all fines, fees, late charges, attorney's fees or interest charges assessed against any unit owner from the time of the assessment for any delinquent payments. Plaintiff's exhibit 1; § 19.3 (a) and (g); see also, § 19.2 (a) and (e). An action to foreclose the lien may be commenced by the Association when (1) the defendant at the time the action is commenced, owes a sum equal to at least two months of common expense assessments based on the periodic budget last adopted by the Association; (2) the plaintiff has made a demand for payment in a record; and (3) the Association's Executive Board has either voted to commence a foreclosure action specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit. Plaintiff's exhibit 1; § 19.3 (l).

As to the debt claimed due, the plaintiff presented the testimony of Cathy Stueck director of collections for REI Property and Asset Management (REI) which is the company that manages the

condominium complex. She noted that the defendant had been billed by the plaintiff through REI consistent with the plaintiff's collection policy which was admitted into evidence. Plaintiff's exhibit 2. In bringing the foreclosure action against the unit, REI followed the standard policy of the Association for doing so. Id. Notice of the collection policy was provided by REI to all unit owners in the Association.

Michael Raso, sole member of the defendant, testified that as of July 31, 2020, long prior to the commencement of the action, the defendant had a zero balance with the plaintiff. Plaintiff's exhibit 3. Because of limitations in his mobility due to his physical condition, he was unable to mail the defendant's payments on a monthly basis to Phoenix, Arizona as required by the plaintiff. Instead, he had come to an agreement with the prior management company that a check could be submitted covering six months' worth of payments. For example, prior to August 1, 2020, Raso had issued a check for \$2,462.80 that was dated February 3, 2020 and sent certified mail on February 12, 2020 which was referenced as covering the period January through June 2020. Defendant's exhibit A. On or about July 31, 2020, Raso issued another check in the amount of \$2,215.56 which was referenced as being for the next six-month period July 2020 through December 2020 which he acknowledged was "short" by \$246.72. Plaintiff's exhibit 3. However, at the time that payment was issued, the defendant had a prior balance of \$6,506.28 to which the payment was applied leaving a balance due of \$4,290.72. With payment of additional funds obtained by Raso through an auto accident settlement, and a waiver of late fees and an adjustment by the plaintiff, the defendant brought the account current effective as of July 31, 2020.

The next payment issued by the defendant was on January 30, 2021 when it issued a check in the amount of \$2,462.28, which was referenced as payment for the period January through June 2021. Defendant's exhibit B. That check was drawn on the checking account of Raso's friend,

Edmund Ligowski, to whom Raso had given the cash to fund the check. However, because the check did not reflect the account number for the billing, it was returned by the plaintiff. Thereafter, the defendant sent through his friend a new check dated March 13, 2021 with the account number and referencing the period January through June 2021. Defendant's exhibit C. While the reference on the check stated it was for the period January through June 2020, Raso noted this was an error as it actually was intended to cover the 2021 period. Defendant's exhibit A. Later, again through Raso's friend, a check dated July 13, 2021, #4309, was issued by certified mail on that date in the amount of \$2,462.28 that was intended for the period July through December 2021. Defendant's exhibit D.

Of the checks referenced, only the first check in the amount of \$2,215.56 issued on or about July 31, 2020, and the last one, issued on July 13, 2021, were posted and credited to the defendant's account. Plaintiff's exhibit 3. The other payment issued for the period January through June 2021, which was erroneously referenced as being for January through June 2020, is not reflected as having been received or credited to the account. This was the payment that was initially issued through Raso's friend, returned by the plaintiff, and then reissued again. Defendant's exhibits B, C. Because it was returned by the plaintiff, it is clear that the plaintiff had received the initial check. Raso credibly testified that the new check to replace the returned check was sent by the defendant as instructed.

The last payment made by the defendant prior to filing the complaint dated January 20, 2022 was on August 26, 2021 in the amount of \$2,462.28. Plaintiff's exhibit 3. The defendant owed \$435.38 per month for the months in 2021 and \$448.17 for January 2022 which included common charges, assessments, loan assessments and late fees. Id. As of the time of the imposition of the late fee for the payment due in January 2022, crediting the defendant for all payments made on account, the plaintiff owed \$5,362.35 which included all prior delinquent charges and fees. Id.

While acknowledging there are some legitimate late charges assessed for the 2021 and 2022 years, as well as the shortfall in the first payment, the defendant contends that at the time of the commencement of the action, there were less than two months' worth of common charges due.² A review of the billing history of the account reveals that although the defendant had issued payments which were referenced to cover specific periods of time, the payments that were received by plaintiff were applied to outstanding balances that had accrued prior to the periods referenced on the checks. After achieving a zero balance on July 31, 2020, it was not until approximately a year later on August 26, 2021 that the plaintiff actually received another payment from the defendant. This was the July 31, 2021 check #4309 in the amount of \$2,462.28 which was credited to the account leaving a balance of due of \$3,172.66 as of August 2021. The court notes that since the filing of the complaint, the defendant has made additional payments which leaves a balance of \$2,532.48 as of December 1, 2023. No additional payments were received by the plaintiff up through the date of trial.

As to the value of the property, the plaintiff presented the testimony of an appraiser, Ralph Biondi, who credibly testified that the fair market value of the unit as of May 12, 2022 was \$175,000 and that its value as of the date of the hearing had increased to \$220,000.

Other facts will be recited as necessary.

ANALYSIS

The court finds the testimony of both the plaintiff's and the defendant's representatives to be credible. The plaintiff and its appraiser presented credible testimony as to the debt and valuation of

² Defendant's exhibit G is a summary of the payments made and charges the defendant believes are outstanding. The amounts due are detailed as follows: \$246.72 shortfall for the July to December 2020 period; \$25 late charge for January 2021 payment; \$25 late charge for the January 2022 payment; the monthly common charge for January 2022 of \$272.89 along with that month's loan assessment of \$84.28 and \$66 regular assessment. Therefore, the total the defendant acknowledges due includes one month of common charges and assessments due for January 2022 (\$423.17) plus shortage and late fees (\$296.72) which come to a total of \$719.89. Two months' worth of common charges and assessments as of January 25, 2022, the date of service of the complaint, would total \$846.34. See docket entry #100.30.

the property. It has also established by a preponderance of the evidence that at the time of the institution of the action, demand had been made upon the defendant for payment through its monthly billing statements and the claim enforced consistent with the Association's collection policy, notice of which had been previously provided to the defendant. The court can also reasonably infer from the credible testimony of Cathy Stueck that the common charges and assessments were made consistent with the budget adopted by the plaintiff. The calculation of the monthly charges and assessments are not done in a vacuum. The sophistication of the Caliber billing system employed by REI as was testified to by Cathy Stueck, and the statements issued through it, are necessarily based on information from the plaintiff as to what amounts are needed to fund its operations. The monthly common charges are assessed against all units in accordance with their percentage interest in the Association. Plaintiff's exhibit 1; § 19.1. The court can reasonably infer that those charges could not be set or assessed without an overall budget being in place.

The only question that remains is whether at the time of the institution of the action, the defendant was more than two months delinquent in its payment obligations for common expenses, assessments, late fees and such. Both parties have presented testimony to support their positions. From the facts recited above, two issues arise with the defendant's contention with respect to the issuance and crediting of its payments. First, although correctly stating that the balance on the account was zero as of July 31, 2020, the defendant fails to note that at the time it made the payment of \$2,215.50 for the period it referenced as July 2020 to December 2020, there was an outstanding balance due of \$6,506.28. Plaintiff's exhibit 3. That payment was applied to the outstanding balance and therefore, the charges due for the months of July to December 2020 continued to accrue until the next payment was received. That is, the payment issued for July to December 2020 did not end up covering that period as it was applied to amounts that had accrued prior to July 2020.

The second issue is whether the payment issued for the period January 2021 through June 2021 was ever received and credited by the plaintiff. This is the period involving the check that was issued but then returned because there was no account number referenced on it. Defendant's exhibits B, C. The evidence is clear the plaintiff received the first check as it was returned to the defendant by the plaintiff. There is credible evidence that the defendant issued a replacement check. However, there is no record of the check being received and credited to the defendant's account. If the check was not received, then the defendant clearly would be delinquent for well more than two months' worth of common charges for that period alone. If it was received but not credited due to inadvertence or error by the plaintiff, the defendant would be entitled to a credit in its favor toward the balance due. However, even if this credit were to be applied, the defendant would still be delinquent by more than two months at the time of the commencement of the action. Unfortunately, there was no evidence presented to the court that the replacement payment of March 13, 2021 in the amount of \$2,462.28 was ever sent by certified mail or other means that would verify the receipt of the payment by the plaintiff. While a copy of the check was provided, there was nothing on it to establish that the check had been accepted and endorsed by the plaintiff. I.e., there was no copy of a cancelled check or other documentary evidence that would have established acceptance of the funds.

The testimony and evidence provided by the plaintiff establishes that as of the commencement of this action there remained a balance due of \$5,362.35. Plaintiff's exhibit 3. Even if the court were to accept the argument that the March 13, 2021 payment of \$2,462.28 was in fact received by the plaintiff and should have been applied to the debt due, that would still leave a balance due in excess of two months' worth of common fees and expenses.

The court finds that the defendant made a good faith effort to make payment of the amounts due. In fact, the transaction history provided by the plaintiff shows that following the commencement of the action the defendant has continued to make payments that cover multiple months' worth of charges and expenses. Plaintiff's exhibit 3. However, that same transaction history reveals that as of the last entry on December 1, 2023, the defendant owed \$2,532.48. *Id.* Cathy Stueck credibly testified that as of the date of trial, no further payments had been received from the defendant after December 1, 2023. While a debt due the plaintiff does exist, the facts do not lead to any conclusion that the defendant purposely or willingly failed to make the payments.

In its prayer for relief, the plaintiff seeks a judgment of foreclosure of the common charge lien pursuant to General Statutes § 47-258 and more specifically a strict foreclosure in addition to attorney's fees and other remedies. The complaint alleges that there are no interests prior in right to the plaintiff's lien. Only the interest of Bank of America, N.A. by virtue of a 2017 judgment lien in the amount of \$2,417.12 is subsequent in right. In a foreclosure proceeding, the trial court must exercise its discretion and equitable powers with fairness not only to the foreclosing mortgagee, but also to subsequent encumbrancers and the owner." (Internal quotation marks omitted.) *Caliber Home Loans, Inc. v. Zeller*, 205 Conn. App. 642, 659, cert. denied, 338 Conn. 914 (2021) (trial court abused discretion by ordering strict foreclosure when property's value exceeded plaintiff's debt by \$90,888.49). Under normal circumstances, the fact that there is substantial equity in this property, approximately \$215,000, a sale of the property would easily be justified.

"[B]ecause a mortgage foreclosure action is an equitable proceeding, the trial court may consider all relevant circumstances to ensure that complete justice is done The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court" (Internal quotation marks omitted.) *TD Bank, N.A. v. M.J.*

Holdings, LLC, 143 Conn. App. 322, 326, 71 A.3d 541 (2013). While that case references the foreclosure of a mortgage, its reasoning is applicable to the foreclosure of a lien for delinquent condominium common charges and assessments. “[A] trial court in foreclosure proceedings has discretion, on equitable considerations and principles, to withhold foreclosure or to reduce the amount of the stated indebtedness.” *Hamm v. Taylor*, 180 Conn. 491, 497, 429 A.2d 946 (1980). While the court may withhold foreclosure based on equitable considerations, most cases withholding foreclosure or reducing the debt owed have been based on the conduct of the plaintiff. See *MTGLQ Investors, L.P. v. Egziabher*, 134 Conn. App. 621, 624, 39 A.3d 796 (2012) (court reduced judgment due to delay caused by plaintiff).

As to the defendant’s first two special defenses, it has failed to establish by a preponderance of the evidence that it has paid all the amounts due or that it does not owe the plaintiff a sum equal to two months of common expense assessments based on the periodic budget last adopted by the plaintiff. The testimony and account statement put into evidence by the plaintiff makes clear that the defendant’s claim that it has paid the outstanding monthly common charges and assessments is not the case. See plaintiff’s exhibit 3. There has been no credible testimony otherwise. Second, the defendant’s defense that it does not owe more than two months of common expense assessments and therefore the plaintiff cannot legally bring the foreclosure action fails for the same reason.

In its last special defense, the defendant claims that there is substantial equity in the property and therefore the plaintiff is not entitled to the remedy of strict foreclosure. This is not a special defense but rather simply a plea that the court exercise its equitable powers in rendering its judgment. To this end, the court finds that it would be inequitable to render a judgment of strict foreclosure. While the court finds a substantial disparity between the amount of the debt and the value of the property, and that the defendant made good faith attempts to make payment of the

amounts due, withholding the remedy of strict foreclosure (or foreclosure by sale) based on equitable considerations is typically limited to cases involving the untoward behavior of the plaintiff. The court does not find the plaintiff to have engaged in the type of behavior that would compel the court's exercise of its equitable powers. Accordingly, the third special defense is of no avail to the defendant.

CONCLUSION

The court finds the plaintiff has established its claim by a preponderance of the evidence. All necessary defaults have been entered. The proper party has sued and been sued. There is a debt due the plaintiff in the amount of \$2,532.48. The fair market value of the property is \$220,000 all allocable to the improvements. Given that the equity in the property far exceeds the lien amount of the common charges and assessments, a judgment of foreclosure by sale may enter in favor of the plaintiff. General Statutes § 49-24.

The sale date is November 16, 2024 at 12:00 noon on the premises. A deposit of \$22,000 by bank or certified check is required to bid. The deposit is waived for the plaintiff. The plaintiff may email or fax in its bid.

Committee appointed: Thomas Wylie Beecher, 148 Deer Hill Avenue, Danbury, CT 06810, ordered in accordance with the Statewide Standing Orders (JD-CV-79) and Uniform Procedures for Foreclosure by Sale Matters (JD-CV-81).

Independent Appraiser: Kurt Stoffel, Kurt Stoffel Appraisals; Office #203-746-3501; cell #203-733-4226, 3 Mountain Laurel Drive, New Fairfield, CT 06812

Return of Appraisal by: November 6, 2024.


No fees or expenses prior to: October 1, 2024.

No sign need be posted.

Publication in the Danbury News Times on: November 8, 2024, and November 15, 2024.

Ad shall also be posted on the Judicial Branch website.

Pursuant to Practice Book § 11-21, the plaintiff shall file with the court within thirty days, a motion for attorney's fees. The motion shall be supported by an affidavit of plaintiff's counsel itemizing the time spent and work done on the matter as well as the hourly rate charged. The affidavit shall also set forth the amounts incurred for any title search and the appraisal of the property. Any objection to the motion shall be submitted within ten days of the filing of the motion with the court. If an objection is filed, a hearing will be scheduled on the motion and objection. Should no objection be filed, the motion will be taken on the papers.



Shaban, J.

Decision entered in accordance with the
Briefing on 5/22/24. Attorney of record notified.
H. VAHABIAN DC, C
H. VAHABIAN
5/22/24