STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

THE BOARD OF MANAGERS OF GREEN MANSIONS COUNTRY CLUB ESTATES SECTION III–Building 11,

Plaintiff,

v.

MARK A. GRIMALDI and CHRISTINA GRIMALDI,

Defendants.

DECISION AND ORDER

Index No. 58943
RJI No. 56-1-2014-0031

Stanclift, Ludemann, Silvestri & McMorris, P.C., Glens Falls (*Stacy M. Frederick* of counsel), for plaintiff.

Corbally, Gartland and Rappleyea, LLP, Poughkeepsie (*Allan B. Rappleyea* of counsel), for defendants.

ROBERT J. MULLER, J.S.C.

Defendant Mark A. Grimaldi and his wife, defendant Christina Grimaldi, own Unit 11Y in Green Mansions Country Club Estates Section III (hereinafter the Condominium Association) in the Town of Warrensburg, Warren County, which Unit is subject to a certain "Declaration of Condominium" (hereinafter Declaration). This Declaration provides, in pertinent part, that "[a]ll Unit [o]wners shall be obligated to pay [c]ommon [c]harges assessed by [plaintiff.]" In accordance with this provision, each Unit owner is required to pay charges in the amount of $475.00 per month. Defendants defaulted in their payments of common charges beginning on October 1, 2012, as the result of which plaintiff commenced this action on June 13, 2013 seeking a money judgment in the amount of $5,600.00, together with counsel fees. Issue was subsequently joined, with defendants serving an answer consisting only of general denials. Presently before the Court is plaintiff's motion for summary judgment granting the relief

requested in the complaint and defendants' cross motion to amend their answer.[1] The motion and cross motion will be addressed *in seriatim*.

On a motion for summary judgment, the movant must establish, by admissible proof, its entitlement to judgment as a matter of law (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]). Once the movant has met this initial burden, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Here, plaintiff contends that "Article VI Section 4 of the Declaration states in part that 'all unit owners shall be obligated to pay common charges assessed by [plaintiff], as well as be obligated for a proportionate share of the common expenses of the [Condominium] Association, plus late charges, interest and collection costs, including reasonable attorney fees."[2] Thus, according to plaintiff, it is entitled as a matter of law to (1) a judgment in the amount of $3,850.00, which reflects the common charges due and owing as of December 2013, together with late fees;[3] and (2) a judgment in the amount of $4,229.94, which reflects the counsel fees incurred by plaintiff to date in this matter. Insofar as the $3,850.00 figure is concerned, the Court notes that only $950.00 constitutes common charges, with the remaining $2,900.00

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[1] The Court notes that the motion and cross motion were held in abeyance at the request of the parties pending the conclusion of settlement discussions, which discussions ultimately proved unsuccessful.

[2] This quote is taken from paragraph "6" of the affidavit of counsel submitted in support of the motion. As indicated above, there is an internal quotation mark beginning at "all unit owners . . . ." There is, however, no internal quotation mark to denote where the quote ends.

[3] Plaintiff concedes that defendants made payments of $5,700.00 subsequent to the commencement of this action, thus decreasing the amount due and owing.

comprised of late fees. Plaintiff imposes late fees cumulatively, with $50.00 charged for each month that the common charges remain unpaid. Defendants were thus charged $50.00 the first month, $100.00 the second month, $150.00 the third month and so on. Plaintiff apparently adopted this policy because it "had a difficult time in the collection of [common charges]" and needed "a . . . penalty that would serve as a catalyst for timely payments . . . ."

In support of these contentions, plaintiff has submitted only three pages of the Declaration, which pages appear to contain Sections 4 through 11 of Article VI. The Court has reviewed these pages at length and found nothing which authorizes plaintiff to charge late fees. Specifically, contrary to plaintiff's synopsis of Section 4, the Section in fact provides that "[a]ll Unit Owners shall be obligated to pay [c]ommon [c]harges assessed by [p]laintiff pursuant to the provisions of Section 1 of this Article VI at such times as [plaintiff] shall determine." While this section speaks to common charges, there is no reference to late fees. There may be a reference to late fees in Section 1 of Article VI, but this Section of the Declaration was not submitted.

Section 5 then provides that plaintiff "shall take prompt action to collect any [c]ommon [c]harges due from any Unit [o]wner which remain unpaid for more than thirty (30) days after the date set by [plaintiff] for payment thereof." Again, there is no reference to late fees. Finally, Section 7 provides, in pertinent part:

> "In the event any Unit [o]wner shall fail to make prompt payment of his [c]ommon [c]harges, such Unit [o]wner shall be obligated to pay interest at the maximum legal rate on his unpaid [c]ommon [c]harges from the due date thereof, together with all expenses, including attorneys' fees, paid or incurred by [plaintiff] in any proceeding brought to collect his unpaid [c]ommon [c]harges . . . ."

While this Section provides for counsel fees, there is nothing relative to late fees.

Based upon the provisions of Sections 4, 5 and 7 of Article VI of the Declaration, the

Court finds that plaintiff has satisfied its initial burden of establishing its entitlement to judgment as a matter of law for the $950.00 in common charges. The Court further finds, however, that plaintiff has failed to satisfy its initial burden relative to the $2,900.00 in late fees. Plaintiff has provided the Court with no proof whatsoever of its authority to impose late fees, let alone its authority to impose them in such a harsh manner. Finally, the Court finds that plaintiff has failed to satisfy its initial burden of establishing its entitlement to judgment as a matter of law for the $4,229.94 in counsel fees. While plaintiff is entitled to counsel fees as a matter of law for the collection of common charges, here all of the fees requested pertain not only to the collection of common charges, but also to the collection of late fees. A review of the billing statement submitted by counsel for plaintiff amply demonstrates that there is no way to separate out time spent on the collection of common charges from that spent on the collection of late fees. Unless and until it is determined that plaintiff is entitled to the late fees requested, it cannot be said that plaintiff is entitled to the full amount of counsel fees requested.

To the extent that plaintiff has satisfied its initial burden relative to the $950.00 in common charges, the burden now shifts to defendants to establish the existence of triable issues of fact. To that end, defendants first contend that, because plaintiff has failed to provide the Unit owners with an annual report as required under the Condominium Association's bylaws, there exists a triable issue of fact as to whether they owe common charges. More specifically, defendants contend – and plaintiff does not dispute – that Article X of the bylaws requires plaintiff to provide all Unit owners with "[a]n annual report of the receipts and expenditures of the Condominium [Association], certified by an independent certified public accountant, . . . promptly after the end of each fiscal year." Defendants requested such a report in 2008 and 2009

and nothing was provided. The bookkeeper who handled the [Condominium Association's] finances – as well as the finances of several related associations – was then arrested and charged with stealing over $200,000.00 in March 2010 and subsequently pleaded guilty in November 2011. Defendants became concerned that plaintiff's "lack of oversight . . . permitted this theft." According to defendants, in October 2012, after plaintiff had failed to provide any of the annual reports requested, they retained legal counsel and declined to pay any further common charges. The annual reports were subsequently provided in May 2013, following which they paid the $5,225.00 due and owing in common charges from October 2012 to August 2013. Defendants then paid the common charges in a timely manner in September 2013. However, when plaintiff once again failed to provide them with an annual report, defendants withheld payment of their common charges for October and November of 2013, and presumably continue to withhold such payments to date. According to defendants, "aside from withholding dues, [they] have no practical way" of compelling plaintiff to comply with the bylaws.

The Court finds that defendants have failed to raise a triable issue of fact as to whether they owe common charges. Neither the bylaws nor those portions of the Declaration provided contain anything to indicate that Unit owners are entitled to withhold common charges in the event plaintiff fails to provide them with an annual report. Further, if defendants felt that plaintiff had violated the bylaws, the "practical way" to compel compliance was to commence a proceeding (*see e.g. Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]; *Bluff Point Townhouse Owners Assn., Inc. v Kapsokefalos*, 129 AD3d 1267 [2015], *lv denied* 26 NY3d 910 [2015]; *Matter of St. Denis v Queensbury Baybridge Homeowners Assn., Inc.*, 100 AD3d 1326 [2012]) – not to withhold the payment of common charges.

In view of the foregoing, plaintiff's motion for summary judgment is granted to the extent that defendants are liable for the payment of $950.00 in common charges for October and November of 2013, together with the payment of all monthly common charges which remain outstanding to date. Defendants shall make such payment to plaintiff within **thirty (30) days** of the date of service of this Decision and Order with notice of entry thereon. Plaintiff's motion is otherwise denied.

Turning now to the cross motion, "[w]hether leave to amend a [pleading] should be granted rests within the sound discretion of the trial court, although leave should be freely granted if the amendment is not plainly lacking in merit and does not unduly prejudice or surprise the nonmoving party" (*Vermont Mut. Ins. Co. v Mowery Constr., Inc.*, 96 AD3d 1218, 1219 [2012] [citation omitted]; *see Dever v DeVito*, 84 AD3d 1539, 1541 [2011], *lv dismissed* 18 NY3d 864 [2012]; *Architectural Bldrs. v Pollard*, 267 AD2d 704, 705 [1999]). To that end, "[d]elay alone is not sufficient to deny a motion to amend unless accompanied by significant prejudice" (*Architectural Bldrs. v Pollard*, 267 AD2d at 705; *see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Morris v Crawford*, 281 AD2d 805, 806 [2001]).

Here, defendants seek to amend their complaint so as to add four counterclaims. The first counterclaim demands an accounting, alleging as follows:

> "Upon information and belief, in and prior to 2011, a former bookkeeper hired or allowed to be hired by [plaintiff] plead[ed] guilty to stealing funds belonging to the [Condominium A]ssociation. . . . Upon information and belief, [plaintiff] bears responsibility for not having proper checks in place to ensure that this did not occur. In addition, . . . this lawsuit constitutes an improper use of [Condominium Association] funds, as it rests largely upon an alleged late fee policy that has no legitimate basis."

The second counterclaim alleges breach of fiduciary duty, alleging as follows:

> "[Plaintiff] arbitrarily decides how it shall pursue and collect alleged overdue [common charges]. Defendants believe there is at least one case where fees were unpaid and not pursued, and there may be others. However, as defendants have, at times, questioned [plaintiff] and its policies, [they] have been singled out for rougher treatment . . . ."

The third counterclaim seeks an Order compelling plaintiff to "provide[] the meeting minutes for elections of Directors and officers, to determine if these people are properly authorized, in accordance with the bylaws," as defendants suspect that they are not. Finally, the fourth counterclaim pertains to a notice of lien filed by plaintiff against defendants' Unit and alleges as follows:

> "In or about December, 2013, many months after this action was [commenced, p]laintiff caused to be filed a notice of lien in the public land records, asserting that [d]efendants were indebted to [it] in the sum of $4,125.00, much of which is claimed to be owed for late fees which are clearly improper. This notice is needlessly vexatious, . . . was done to injure and embarrass [d]efendants and their credit . . . ."

In opposition to the cross motion, plaintiff does not question the merit of the counterclaims, but instead contends that it will suffer significant prejudice if the requested amendment is permitted. Specifically, plaintiff contends that defendants were given several extensions of time in which to serve their answer and therefore had ample opportunity to include any counterclaims that they wished. This notwithstanding, they served an answer with only general denials. Plaintiff thus contends that it was cajoled into making a motion for summary judgment and will be prejudiced if defendants are now permitted to add the counterclaims.

The Court is not persuaded. Although this action was commenced over two years ago, the parties have been engaged in ongoing settlement discussions and there has been no discovery to date. Indeed, the settlement discussions began prior to commencement of the action and likely generated the several extensions granted to defendants for service of an answer, as well as the

sparse answer ultimately served. It must also be noted that all of the allegations contained in the counterclaims have been previously asserted by defendants in correspondence to plaintiff and, as such, certainly did not take plaintiff by surprise.

Under the circumstances, defendants' cross motion is granted in its entirety (*see Hudock v Village of Endicott*, 28 AD3d 923, 924 [2006]; *Morris v Crawford*, 281 AD2d 805, 806 [2001]; *Architectural Bldrs. v Pollard*, 267 AD2d 704, 705 [1999]). Defendants are hereby directed to serve their amended verified answer with counterclaims upon plaintiff within thirty (30) days of the date of service of this Decision and Order with notice of entry thereon, and plaintiff shall then have twenty (20) days from the date of receipt to serve its reply.

Counsel for the parties are further directed to appear for a preliminary conference on **February 22, 2016 at 10:00 A.M.** at the Warren County Courthouse in Lake George, New York.

Therefore, having considered the Affidavit of Stacy M. Frederick, Esq. with exhibits attached thereto, sworn to January 8, 2014, submitted in support of the motion; Affidavit of Michael Farber with exhibits attached thereto, sworn to December 12, 2013, submitted in support of the motion; Memorandum of Law of Stacy M. Frederick, Esq., dated January 2, 2014, submitted in support of the motion; Affirmation of Allan B. Rappleyea, Esq., dated February 20, 2014, submitted in support of the cross motion and in opposition to the motion; Affidavit of Christina Grimaldi with exhibits attached thereto, sworn to February 21, 2014, submitted in support of the cross motion and in opposition to the motion; Affidavit of Stacy M. Frederick, Esq. with exhibits attached thereto, sworn to March 27, 2014, submitted in further support of the motion and in opposition to the cross motion; Affidavit of Michael Farber, sworn to March 27,

2014, submitted in further support of the motion and in opposition to the cross motion; Affidavit of Matthew R. Ludemann, Esq. with exhibits attached thereto, sworn to March 27, 2014, submitted in further support of the motion and in opposition to the cross motion; and Affirmation of Allan B. Rappleyea, Esq., sworn to April 10, 2014, submitted in further support of the cross motion, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted to the extent that defendants are liable for the payment of $950.00 in common charges for October and November of 2013, together with the payment of all monthly common charges which remain outstanding to date; and it is further

ORDERED that defendants shall make such payment to plaintiff within **thirty (30) days** of the date of service of this Decision and Order with notice of entry thereon; and it is further

ORDERED that plaintiff's motion for summary judgment is otherwise denied; and it is further

ORDERED that defendants' cross motion is granted in its entirety; and it is further

ORDERED that defendants shall serve their amended verified answer with counterclaims upon plaintiff within **thirty (30) days** of the date of service of this Decision and Order with notice of entry thereon, and plaintiff shall then have **twenty (20) days** from the date of receipt to serve its reply; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference on **February 22, 2016 at 10:00 A.M.** at the Warren County Courthouse in Lake George, New York; and it is further

ORDERED that any relief not specifically addressed herein has nonetheless been

considered and is expressly denied.

The original of this Decision and Order has been filed by the Court together with the Notice of Motion dated January 8, 2014, the Notice of Cross Motion dated February 21, 2014 and the submissions enumerated above. Counsel for plaintiff is hereby directed to promptly obtain a filed copy of the Decision and Order for service with notice of entry upon defendants in accordance with CPLR 5513.

Dated: January 12, 2016
Lake George, New York

____s/_____
ROBERT J. MULLER, J.S.C.

ENTER: