

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 13 115 01299 10

The Nexus Condominium c/c Cooper Square Realty	("Claimant")
and	
Dana Reeves Carter and Karia Olivier	("Respondent")

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Commercial Arbitration Rules and Mediation Procedures, amended and effective June 1, 2009 (the "Rules"), of the American Arbitration Association (the "Association") and the By-Laws of The Nexus Condominium (the "By-Laws"), governing the affairs and the conduct of The Nexus Condominium (the "Condominium") and the unit owners of the Condominium, and having been duly sworn, having duly considered the submissions of the parties, the evidence, and the proofs presented, and having considered and heard the claims and allegations of the parties and the testimony of the witnesses at the evidentiary hearing that occurred on January 14, 2011 before the Association appointed arbitrator herein, Alfreida B. Kenny, Esq. (the "Arbitrator"), hereby renders the decision, and makes the findings and awards herein set forth.

PROCEDURAL POSTURE AND FACTS

Respondents, Dana Reeves Carter and Karla Olivier (collectively, the "Respondent"), are the unit owners of apartment # 2F (the "Unit"), located at 84 Front Street, Brooklyn, New York (the "Premises"). Respondent acquired title to the Unit by Unit Deed, dated February 28, 2007 (Claimant's Exhibit 6). As of the date of closing of title to the Unit, the common charges for the Unit were fully paid through February 28, 2007 (Claimant's Exhibit 6). By Summons and Notice, dated May 5, 2009, and Verified Complaint, verified on May 5, 2009 (the "Complaint"), Claimant commenced an action in the Supreme Court of the State of New York, County of Kings (the "Court") to foreclose on the outstanding common charges pursuant to a Notice of Lien, acknowledged on August 29, 2008, and recorded on September 19, 2008 in the Office of the City Register of the County of Kings (Respondent's Exhibit 5). The Notice of Lien states that as of August, 2008, Respondent owed the sum of Nine Thousand Six Hundred Fifty Five Dollars and Six Cents (\$9,655.06) for the period February, 2008 through August, 2008.

Claimant alleged in the Complaint that (1) Respondent is the Owner of 1.9882% of the common interest in the Premises,¹ (2) during the period February 1, 2008 through August 1, 2008, Respondent failed or refused to pay the monthly common charges for the Unit, (3) Claimant filed and caused to be recorded a Notice of Lien on September 19, 2008, and that the lien for common charges imposed against the Unit had not been satisfied. Claimant requested the Court to grant a judgment of foreclosure on its lien, grant an order permitting Claimant to sell the Unit pursuant to Real Property Law § 339-aa, grant a judgment of possession and Writ of Assistance for the removal of Respondent and all occupants of the Unit, grant an order directing Respondent to pay Claimant use and occupancy charges to be determined by the Court, and grant an order directing Respondent to pay the legal fees and expenses incurred by Claimant as a result of Respondent's violation of the By-Laws.

The parties engaged in motion practice before Justice Schmidt of the Court. During the pendency of Respondent's motion, the Court granted an Order, dated September 29, 2009 (Respondent's Exhibit 10), directing Respondent to pay to Claimant the common charges as billed by Claimant, effective as of

¹ The Unit Deed, conveying to Respondent the Unit together with the common elements, states that Respondent's interest in the common elements is 2.3180%. Subsequent to the date that Respondent acquired title to the Unit, the Declaration of the Condominium was amended by Amended Declaration, dated July 17, 2007, reducing Respondent's interest in the common elements to 1.9882%.

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AWARD OF ARBITRATOR CONTINUED

October 1, 2009, without prejudice. Respondent apparently did not pay timely the common charges that the Court directed Respondent to pay, and Claimant requested the Court to grant an order of contempt against Respondent and direct Respondent to purge the contempt by paying the common charges as billed by Claimant beginning October 1, 2009.

Claimant and Respondent informed the Arbitrator that the Court dismissed Claimant’s Complaint because the Court held that pursuant to the By-Laws of the Condominium, the parties had agreed to resolve all disputes by arbitration. Neither Claimant nor Respondent delivered to the Arbitrator a copy of the Court’s Order dismissing the Complaint for failure to submit the dispute to arbitration in accordance with Article 9 of the By-Laws.

Claimant filed with the Association its Demand for Arbitration, signed by Claimant on May 17, 2010. In Claimant’s Demand for Arbitration, Claimant demanded the sum of Twenty One Thousand Three Hundred Forty Two Dollars and Sixty Nine Cents (\$21,342.69) for unpaid common charges, interest, and attorneys’ fees as of May 17, 2010. The Arbitrator rejected Respondent’s counterclaim because it was not filed timely in accordance with the Report of Preliminary Hearing and Scheduling Order, dated August 19, 2010.

At the hearing, Claimant introduced into evidence copies of bills for common charges for the period July 1, 2007 through September 1, 2010. Claimant introduced into evidence seven (7) bills for common charges for the period July 1, 2007 through February 1, 2008 (Claimant’s Exhibit 1), sixteen (16) bills for common charges for the period March 1, 2008 through June 1, 2009 (Claimant’s Exhibit 2), and fourteen (14) bills for common charges for the period July 1, 2009 through September 1, 2010 (Claimant’s Exhibit 3). Claimant’s Exhibits 1 through 3 show the aggregate sum of Twenty Three Thousand Three Hundred Thirty Two Dollars and Eighty Three Cents (\$23,332.83) due by Respondent to Claimant as of September 1, 2010 for outstanding common charges, late fees, and attorneys’ fees.² Respondent did not offer any evidence to refute Claimant’s proof of the sums due or any evidence to show that a different sum of money was due. Respondent questioned the aggregate sum of the monthly charges but did not state or introduce into evidence any documents to show the sum of money that Respondent claimed to be due. Respondent questioned how Claimant arrived at the sum of the monthly common charges.

Although Respondent questioned how the Condominium arrived at its annual budget, which is the basis for the Condominium determining the annual monthly common charges for the unit owners, Respondent did not offer any testimony or evidence that would call into question the sum of the monthly common charges budgeted by the board of managers of the Condominium or the accuracy of Claimant’s calculations in arriving at the sum of the monthly common charges. According to the testimony of Rene Paula, Esq., resident of the Premises, former member of the board of managers of the Condominium and

² During the period July, 2007 through February, 2008, the Condominium was managed by Taube Management Realty; during the period February, 2008 through May, 2009, the Condominium was managed by Wentworth Property Management; and during the period June, 2009 to January, 2011, the Condominium was managed by Cooper Square Realty, Inc.

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AWARD OF ARBITRATOR CONTINUED

former treasurer of the board of managers of the Condominium, and the testimony of Michelle Schlossberg, the former agent for the Premises, employed by Cooper Square Realty, Inc., the budget for the Condominium has remained the same from March, 2007 through July, 2009. Since March, 2007, the monthly budgeted sum for the expenses of the Condominium has been Forty Five Thousand Eighteen Dollars and Forty Seven Cents (\$45,018.47) per month. The monthly common charges for each unit are calculated by multiplying the percentage of the unit owner's interest in the common elements by the monthly budgeted sum of the expenses. When 1.9882%, Respondent's interest in the common elements, is multiplied by the monthly budgeted amount of the expenses of Forty Five Thousand Eighteen Dollars and Forty Seven Cents (\$45,018.47), the sum of the monthly common charges derived for the Unit is Eight Hundred Ninety Five Dollars and Seven Cents (\$895.07). The monthly common charges payable by Respondent have been Eight Hundred Ninety Five Dollars and Seven Cents (\$895.07) since August, 2007.

When Respondent acquired title to the Unit on February 28, 2007, the monthly common charges were One Thousand Forty-Three Dollars and Fifty Two Cents (\$1,043.52). While the budgeted monthly amount for expenses of Forty Five Thousand Eighteen Dollars and Forty Seven Cents (\$45,018.47) remained the same, Respondent's percentage interest in the common elements was reduced from 2.3180% to 1.9882 % when the Condominium Declaration was amended by Amended Declaration, dated July 17, 2007. The reduction in Respondent's percentage interest in the common charges resulted in a concomitant reduction in Respondent's monthly common charges for the Unit.

Respondent testified that they were not obligated to pay the monthly common charges because they did not receive monthly bills. During her testimony, Ms. Olivier seemed to question how the Condominium arrived at the monthly common charges, inasmuch as, according to her testimony, the board of managers of the Condominium had not sat down for at least 2 and ½ years to determine the amount of the monthly budgeted expenses and concomitant monthly common charges.

Ms. Olivier also testified that she is an attorney and that she represented herself and her spouse, Dana Reeves Carter, also an attorney, at the closing of title on the Unit on February 28, 2007. Ms. Olivier testified that she did not recall the sum of the monthly common charges as of the date of the closing, although she testified that as of the date of the closing, she knew the amount of the monthly common charges. Ms. Olivier also testified that she did not recall ever having received a notice of change in the sum of the monthly common charges due and payable by Respondent.

Ms. Olivier testified that she never made a request in writing to the Condominium or its managing agent to provide to her a statement of unpaid common charges. Ms. Olivier testified that she never made a written request of the Condominium or its managing agent to provide her with any information regarding how the board of managers of the Condominium calculated the monthly common charges. Ms. Olivier testified that she never made a request in writing or orally of the Condominium or its managing agent to

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AWARD OF ARBITRATOR CONTINUED

examine the books and records of the Condominium. During cross-examination, Ms. Olivier admitted that Respondent had not paid the monthly common charges for sixteen (16) months.

Dana Reeves Carter testified that all of the payments that Respondent made in payment of common charges during the period August, 2007 through September 1, 2010 have been credited to Respondent.

Respondent argued that Respondent was not required to pay the monthly common charges because Respondent did not receive monthly bills.³ Respondent also argued that because the budget was not properly derived, the sum of the common charges was not correct. Respondent produced no documents showing that Respondent at any time had questioned the calculations of the board of managers of the Condominium to arrive at the monthly common charges. Respondent offered no testimony or evidence to show that the monthly common charges were incorrectly calculated.

Mr. Rene Paula testified that prior to each annual meeting of the unit owners, annual statements were delivered to the unit owners, which included a copy of the budget, balance sheet, agenda for the annual meeting and proxies. The notices for the annual meetings were sent by the managing agent. Mr. Paula testified that the bills for the monthly common charges were delivered by the superintendent of the building by sliding the bills under the doors of each unit owner. Subsequently, the bills were delivered by United States Postal Service.

CLAIM FOR UNPAID COMMON CHARGES

When Respondent acquired title to the Unit on February 28, 2007, Respondent agreed that the By-Laws of the Condominium would govern Respondent's and Claimant's affairs and conduct. Article 6 of the By-Laws (Claimant's Exhibit 4) authorizes the board of managers of the Condominium to prepare and adopt a budget of the Condominium, determine the aggregate amount of common expenses of the Condominium, and pro-rate the aggregate amount of common expenses among the unit owners relative to their respective interests in the common elements. The By-Laws provide that if the board of managers of the Condominium should fail to prepare or adopt a budget in any year to determine the common expenses, such failure shall not be deemed a waiver or modification or a release of any unit owner from that unit owner's obligation to pay the monthly common charges.

Section 6.2(A) of Article 6 of the By-Laws provides that each unit owner is obligated to pay the monthly common charges and any assessments assessed against the Unit. Section 6.2 further provides that the Condominium Board shall have a lien on each unit on behalf of all unit owners for unpaid common charges. Paragraph D of Section 6.2 states:

³ Mr. Rene Paula refuted this argument during his testimony. Mr. Paula testified that when Respondent purchased the Unit, the monthly bills for monthly common charges were delivered by the superintendent of the building under the doors of each of the unit owners. Sometime later, the managing agent began to send the monthly bills for common charges by United States Postal Service.

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AWARD OF ARBITRATOR CONTINUED

No Unit Owner shall be exempted from liability for the payment of Common Charges or Special Charges by waiving the use or enjoyment of any or all of the Common Elements or by abandoning his or her Unit (except with respect to a conveyance of the same to the Condominium Board, without compensation, pursuant to the terms of paragraph (C) hereof). No Unit Owner shall be entitled to a diminution or abatement in the Common charges or Special Assessments payable thereby for any inconvenience or discomfort arising from (i) the failure or interruption of any utility or other services; (ii) the making of repairs or improvements to the Common Elements or any Unit (including, without limitation, such Unit Owner's Unit) pursuant to the terms of Section 5.1, 5.2 or 5.3 hereof, or (iii) any action taken by the Condominium Board or the officers of the Condominium to comply with the Law.

RPL § 339-x provides that there is no defense for failure of a unit owner to pay the monthly common charges. "No unit owner may exempt himself from liability for his common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit." RPL § 339-x.

Section 6.3 of Article 6 of the By-Laws provides that the Condominium Board shall promptly provide a written statement of all unpaid common charges due from any unit owner upon receipt from such unit owner of a written request from the unit owner. The unit owner also shall be permitted to examine the books and records of the Condominium at reasonable times on weekdays upon written request.

Respondent did not make any written request of the Condominium to provide a written statement of all or any unpaid common charges. Respondent did not make any written request of the Condominium Board to inspect the books and records of the Condominium.

In accordance with Section 6.4 of Article 6 of the By-Laws, the Condominium filed and recorded on September 19, 2008 with the Kings County Register's Office a Notice of Lien, acknowledged on August 29, 2008, for unpaid common charges to be foreclosed upon. The Notice of Lien was for unpaid common charges and late fees for the period February, 2008 through August, 2008 in the sum of Nine Thousand Six Hundred Fifty Five Dollars and Eight Cents (\$9,655.08). The Notice of Lien did not include attorneys' fees.

Under the terms and provisions of the By-Laws, Respondent was obligated to pay the monthly common charges and has no valid defense or excuse for Respondent's failure to pay the monthly common charges. RPL § 339-j provides that unit owners "shall comply with the by-laws and with rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief or both maintainable by the board of managers on behalf of the unit owners or, in a proper case, by an aggrieved unit owner". See, *Board of Managers of the First Avenue Condominium v. David Shandel*, 143 Misc.2d 1084.(Civ. Ct., NY Co., 1989).

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AWARD OF ARBITRATOR CONTINUED

CLAIM FOR REASONABLE ATTORNEYS' FEES AND COSTS INCURRED IN CONNECTION WITH COLLECTING THE UNPAID COMMON CHARGES.

Paragraph (B) of Section 6.4 of Article 6 entitles Claimant to be reimbursed for reasonable attorneys' fees and costs and expenses associated with the board of managers of the Condominium collecting unpaid common charges. Paragraph (B) of Section 6.4 of Article 6 of the By-Laws states:

In the event that any Unit Owner shall fail to make prompt payment of Common Charges, such Unit Owner shall be obligated to pay all costs and expenses paid or incurred by the Condominium Board, the Managing Agent, (if any) in connection with collecting such unpaid Common Charges and/or in foreclosing the aforementioned lien, including, without limitation, reasonable attorneys' fees and disbursements and court costs. In addition, if the Condominium Board shall bring an action to foreclose the aforementioned lien, the defaulting Unit Owner will be required to pay a reasonable rental for the use of his Unit, and the plaintiff in such foreclosure action shall be entitled to the appointment of a receiver to collect the same.

It is without question that the By-Laws require Respondent to pay Claimant's reasonable attorneys' fees incurred in connection with collecting unpaid common charges. The issue is whether the attorneys' fees Claimant incurred in connection with the action commenced by Claimant in the Court are reasonable attorneys' fees. Section 9.1 of Article 9 of the By-Laws provides that "any dispute between the Unit Owners, members of the Condominium Board, or Officers of the Condominium shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association then obtaining". Inasmuch as the By-Laws obligate the parties to arbitrate their dispute, any attorneys' fees, costs and expenses relating to the commencement of the action in the Court, which were incurred prior to the submission of the Demand for Arbitration, dated May 17, 2010, are not reasonable attorneys' fees, costs and expenses payable by Respondent. All fees, costs, and expenses associated with the filing of the Notice of Lien and the arbitration of Claimant's claims are reasonable attorneys' fees, costs, and expenses for which Claimant is entitled to collect from Respondent.

Counsel for Claimant submitted copies of invoices addressed to the managing agent of the Condominium for the period August 18, 2008 through January 14, 2011 (Claimant's Exhibit 7) and a bill for the period January 13 and January 14, 2011, which was submitted after the hearing that occurred on January 14, 2011. There are two bills for January 13 and January 14, 2011, one included in Exhibit 7 for the sum of One Thousand Three Hundred Dollars and Zero Cents (\$1,300.00) and one delivered to the Arbitrator post-hearing upon the consent of the parties for the sum of One Thousand Five Hundred Dollars and Zero Cents (\$1,500.00). The bill included in Exhibit 7 for January 13 and January 14, 2011 will be disregarded because it includes an estimated four (4) hours for the time spent at the hearing and is superseded by the bill delivered to the Arbitrator post-hearing, showing the actual time of five (5) hours spent at the hearing.

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FINDINGS

1. Respondent, the Owner of the Unit, failed to pay monthly common charges, which Respondent is obligated to pay pursuant to the By-Laws and RPL §§ 339-j and 339-x.
2. Respondent failed to pay the outstanding common charges during the period March, 2007 through July, 2009, and Respondent failed to satisfy the Notice of Lien.
3. For the period March, 2007 through July, 2007, Respondent failed to pay the monthly common charges of One Thousand Forty Three Dollars and Fifty Two Cents (\$1,043.52) in the aggregate sum of Five Thousand Two Hundred Seventeen Dollars and Sixty Cents (\$5,217.60). For the period August, 2007 through July, 2009, Respondent failed to pay monthly common charges of Eight Hundred Ninety Five dollars and Seven Cents (\$895.07) in the aggregate sum of Twenty One Thousand Four Hundred Eighty One Dollars and Sixty Eight Cents (\$21,481.68). The total sum of the unpaid common charges for the period March, 2007 through July, 2009 is Twenty Nine Thousand Six Hundred Ninety Nine Dollars and Twenty Eight Cents (\$29,699.28). After crediting Respondent's payment of Seven Thousand Five Hundred Dollars and Zero Cents (\$7,500.00) that Respondent made in July, 2008, the sum due and payable by Respondent to Claimant as of July, 2009 is Nineteen Thousand One Hundred Ninety Nine Dollars and Twenty Eight Cents (\$19,199.28).
4. Pursuant to the By-Laws, Respondent is obligated to pay to Claimant late fees incurred in the sum of Fifty Dollars and Zero Cents (\$50.00) for each occurrence of a late payment. For twenty-nine (29) months, Respondent did not make payment of the monthly common charges timely. Respondent is to pay Claimant late fees in the sum of One Thousand Four Hundred Fifty Dollars and Zero Cents (\$1,450.00).
5. Pursuant to the By-Laws, Respondent is responsible for payment of reasonable legal fees incurred by Claimant in connection with collecting the arrears of common charges payable to Claimant.
6. Attorneys' fees, costs and expenses associated with commencing and prosecuting the action in the Court are not reasonable attorneys' fees, inasmuch as Article 9 of the By-Laws obligates the parties to submit to arbitration any dispute between the unit owner and the board of managers. Accordingly, Respondent is not responsible for payment of the sum of Twelve Thousand Three Hundred Four Dollars and Zero Cents (\$12,304.00), representing legal fees and expenses incurred by the Condominium associated with commencing and prosecuting the action in the Court.
7. Respondent is responsible for payment of reasonable legal fees in the sum of Four Hundred Dollars and Zero Cents (\$400.00) incurred in connection with filing the Notice of Lien.
8. Respondent is responsible for payment of reasonable legal fees in the sum of Five Hundred Dollars and Zero Cents (\$500.00) incurred in connection with appearing in the bank foreclosure action.
9. Respondent is responsible for payment of reasonable legal fees of the Condominium in the sum of Two Thousand Seven Hundred Dollars and Zero Cents (\$2,700.00), and disbursements in the

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AWARD OF ARBITRATOR CONTINUED

sum of Twenty Dollars and Fifteen Cents (\$20.15) incurred in connection with commencing and prosecuting the arbitration.

10. Respondent is responsible for payment of the cost incurred in connection with the filing of the Notice of Lien in the sum of One Hundred Dollars and Zero Cents (\$100.00).
11. Respondent is responsible for payment of other costs associated with the preparation of, and filing of, the Notice of Lien in the sum of Six Hundred Dollars and Zero Cents (\$600.00).
12. Respondent is entitled to a judgment of foreclosure and sale of the Unit.

AWARD

Claimant is awarded the following:

1. Claimant is entitled to a judgment of foreclosure and sale of the Unit, to enforce such judgment of foreclosure and sale, and is awarded the right to obtain from the Court a grant of an order of such relief.
2. The sum of Nineteen Thousand One Hundred Ninety-Nine Dollars and Twenty Eight Cents (\$19,199.28), representing the unpaid common charges due as of July, 2009.
3. The sum of One Thousand Four Hundred Fifty Dollars and Zero Cents (\$1,450.00), representing late fees due as of July, 2009.
4. Reasonable legal fees and costs in the aggregate sum of Four Thousand Three Hundred Twenty Dollars and Fifteen Cents (\$4,320.15).
5. The compensation of the Arbitrator shall be borne by Respondent.

The administrative fees of the American Arbitration Association totaling \$4,600.00 and the compensation of the arbitrator totaling \$6,045.00 shall be borne entirely by Respondent. Therefore, Respondent shall reimburse Claimant the sum of \$10,645.00, representing that portion of said fees in excess of the apportioned costs previously incurred by Claimant.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

Marc 24, 2011
Date

Alfreida B. Kenny
Alfreida B. Kenny

I, Alfreida B. Kenny, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

Marc 24, 2011
Date

Alfreida B. Kenny
Alfreida B. Kenny