

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D25389  
C/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 23, 2009

STEVEN W. FISHER, J.P.  
DANIEL D. ANGIOLILLO  
RANDALL T. ENG  
PLUMMER E. LOTT, JJ.

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2009-01072

DECISION & ORDER

NYCTL 1999-1 Trust, et al., plaintiffs, v NY Pride Holdings, Inc., respondent, Union Street Management Group, Ltd., appellant, et al., defendants.

(Index No. 9990/03)

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Westerman Ball Ederer Miller & Sharfstein, LLP, Mineola, N.Y. (Jeffrey A. Miller of counsel), for appellant.

Herzfeld & Rubin, P.C., New York, N.Y. (Herbert Rubin, Miriam Skolnik, Neil R. Finkston, and Arlene E. Lewis of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Union Street Management Group, Ltd., appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (Schulman, J.), entered December 19, 2008, as denied that branch of its motion which was to direct the receiver of the subject property to release to it 85.3% of the surplus funds from the sale of the subject property and granted that branch of the cross motion of the defendant NY Pride Holdings, Inc., which was to direct the receiver to release to it 50% of the surplus funds from the sale of the property.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The surplus funds of a foreclosure sale stand in the place of the land for all purposes of distribution among persons having vested interests or liens upon the land (*see Chase Manhattan Mtge. Corp. v Hall*, 18 AD3d 413; *Shankman v Horoshko*, 291 AD2d 441, 442). RPAPL 1361(2) provides that the court shall ascertain the amount due to any claimants and the priority of any liens

December 15, 2009

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for purposes of the distribution of surplus moneys.

A property formerly co-owned, in equal shares, by the defendant Union Street Management Group, Ltd. (hereinafter Union Street), and the defendant NY Pride Holdings, Inc. (hereinafter NY Pride), was sold in a foreclosure sale, and a court-appointed referee filed a report indicating that the amount of surplus funds from the foreclosure sale, after accounting for the various liens, fees, and encumbrances, was \$1,714,042. Union Street moved, inter alia, to direct the receiver to release to it 85.3% of the surplus funds, rather than 50%, which would correspond to its ownership interest in the subject property. Union Street relied on an agreement between it and NY Pride, or the corporations' owners, which included a provision whereby the parties would be reimbursed, from the surplus funds, for their respective expenses related to said property. However, an agreement, either by parol or in writing, to pay a debt out of a designated fund does not operate to create an equitable lien upon the fund, or operate as an equitable assignment of it (*see Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520; *Datlof v Turetsky*, 111 AD2d 364, 365). Therefore, the Supreme Court correctly determined that Union Street did not have a lien on the subject property for more than 50% of the surplus funds.

In light of our determination, we need not reach the parties' remaining contentions.

FISHER, J.P., ANGIOLILLO, ENG and LOTT, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court