

Wells Fargo Bank Minnesota, N.A. v Ng

2008 NY Slip Op 32852(U)

October 16, 2008

Supreme Court, New York County

Docket Number: 110715/06

Judge: William J. Davis

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DAVIS

PART 33

Justice

Index Number : 110715/2006

WELLS FARGO BANK

INDEX NO.

110715/06

vs

NG, MOLINE

MOTION DATE

Sequence Number : 005

MOTION SEQ. NO.

005

CONFIRM/REJECT REFEREE REPORT

MOTION CAL. NO.

is motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavit

Exhibits 2.0 2008

Answering Affidavits - Exhibits

Replying Affidavits

FILED
OCT 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion TO CONFIRM THE REPORT OF REFEREE, IRWIN KAHN, Esq., TO DIRECT DISBURSEMENT OF THE SURPLUS MONIES IN THIS ACTION PURSUANT TO THE REPORT OF MR. KAHN, ACCORDING TO THE PRIORITY OF CLAIMS THERETO, AND TO REFER THIS MATTER TO A SPECIAL REFEREE TO ASERTAIN AND REPORT THE AMOUNT DUE TO DEFENDANT, BOARD OF MANAGERS OF 200 RIVERSIDE BOULEVARD AT TRUMP PLACE CONDOMINIUM FOR ATTORNEYS' FEES AND COSTS IS DECIDED IN ACCORDANCE WITH THE COURT'S DECISION AND ORDER ISSUED THIS SAME DATE, OCTOBER, 2008.

Dated: OCTOBER 16, 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

-----X

WELLS FARGO BANK MINNESOTA, N.A. AS
TRUSTEE FOR OPTION ONE MORTGAGE
LOAN TRUST 2003-6 ASSET-BACKED
CERTIFICATES, SERIES 2003-6,
Plaintiff,

DECISION AND
ORDER

Index No. 110715/06

-against-

MOLINE NG, MARGARIDA DE BRITO, BOARD
OF MANAGERS OF 200 RIVERSIDE
BOULEVARD AT TRUMP PLACE CONDOMINIUM
COMMISSIONER OF JURORS,
NYC PARKING VIOLATIONS BUREAU,
Defendants.

FILED
OCT 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

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WILLIAM J. DAVIS, J.:

By notice of motion dated September 5, 2008, counsel for defendant, Board of Managers of 200 Riverside Boulevard at Trump Place Condominium ("Board of Managers"), moved for an order 1) confirming the report of Referee Irwin Kahn, Esq.; 2) directing disbursement of the surplus monies in this action for foreclosure and sale of a residential condominium apartment, pursuant to Mr. Kahn's report; and 3) referring this matter to a Special Referee to ascertain and report the amount due to the Board of Managers as and for attorneys fees and disbursements in this action. It should be noted that by order entered May 29, 2008, this Court confirmed the Report of Sale of Referee Ruth Gursky, Esq. and appointed Mr. Kahn to report on the amount due to the Board of Managers and any other person who may have a lien on surplus monies from the subject sale, and to ascertain the priority of those liens.

Mr. Kahn indicates in his August 8, 2008 report that this foreclosure and sale action was commenced by the holder of the first mortgage on the apartment, and that following said sale, surplus monies of \$84,972.91 were paid to the Commissioner of Finance of the City of New York. The Board of Managers then filed its claim for surplus monies, based upon unpaid common charges, on October 23, 2007, and defendant, Margarida De Brito, the former owner of the apartment and the holder of the equity of redemption of the mortgaged premises, filed her claim for surplus monies on January 25, 2008. According to Mr. Kahn, although a lien and judgment search disclosed a judgment against De Brito for the amount of \$250.00 in favor of defendant, the Commissioner of Jurors, and a judgment against defendant Moline Ng, the mortgagor of the apartment, for the amount of \$570.000 plus \$158.52 in interest in favor of defendant, the New York City Parking Violations Bureau, neither these defendants nor any other parties filed a notice of claim for the surplus monies in this matter.

Mr. Kahn determined that pursuant to Real Property Law §339-z, the surplus monies should be paid first to the Board of Managers¹ in the sum of \$11,153.42 in payment of all sums due for unpaid common charges and assessments owed on the subject apartment. Mr. Kahn also determined that with no other individuals or entities making a claim

¹ Although Mr. Kahn indicates in Paragraph 17 of his report that payment should be made to the "Board of Managers of Evans View Condominium," this is clearly an error and it should read Board of Managers of 200 Riverside Boulevard at Trump Place Condominium, which is, in fact, referenced throughout the report.

to any of the surplus monies, the balance, after payment of all sums due to the Board of Managers, including legal fees and disbursements, should be released to Margarida De Brito. Mr. Kahn noted that he did not receive any objections to his report, nor did he get any requests for a formal hearing.


With respect to confirming Referee Kahn's report, "it is well-established that the report of a Referee shall be confirmed whenever the findings contained therein are substantially supported by the record and the Referee has clearly defined the issues and resolved matters of credibility." Kaplan v Einy, 209 AD2d 248, 251 (1st Dept. 1994); see also Melnilzky v Uribe, 33 AD3d 373 (1st Dept. 2006). Since Referee Kahn's function of reporting the amounts due to lienholders of the surplus monies in this action and of ascertaining the priority of such liens had nothing to do with resolving matters of credibility, and there were no hearings or transcripts for this Court to review, we turn to the issue of whether or not Referee Kahn properly exercised his discretion here. See Kaplan v Einy, 209 AD2d at 251.

In the instant matter, Referee Kahn providently exercised his discretion because his findings are substantially supported by both the record and the case law. The record supports Referee Kahn's determination that the Board of Managers established its lien on the surplus monies in this matter. Said lien is a statutory lien for the unpaid common charges, pursuant to Real Property Law §339-z, and it takes priority over all other liens, except liens for taxes on the

unit and liens for all sums unpaid on a first mortgage. See Real Property Law §339-z; Bankers Trust Co. v Board of Managers of the Park 900 Condominium, 81 NY2d 1033, 1035-1036 (1993). Since there were no tax issues noted in the moving papers, and there were no unpaid sums on the first mortgage in this surplus monies proceeding, Referee Kahn correctly determined that the surplus monies should be paid first to the Board of Managers in the sum of \$11,153.42. Referee Kahn also correctly determined that the balance of the surplus monies, after payment of Board of Managers' legal fees and disbursements, should be released to De Brito. Pursuant to Article 5, Section 5.5(c) of the Condominium's by-laws, the Board of Managers is entitled to recover its attorneys' fees and disbursements incurred in any proceeding brought to collect unpaid common charges or assessments.

The Board of Managers is entitled to an order directing payment as set forth in Referee Kahn's report. See RPAPL §1362(1). The Board of Managers is further entitled to an order referring this matter to a Special Referee to determine the amount due to the Board of Managers for attorneys' fees and disbursements. See RPAPL §1361(2).

Accordingly, the Board of Managers' unopposed motion to confirm the report of Referee Irwin Kahn is granted and the report is ratified and confirmed. The disbursement of the surplus monies in this matter is hereby ordered and directed to take place as set forth in Referee Kahn's August 8, 2008 report. It is further ordered that this action


is referred to IRWIN KAHN, Esq. 299 BROADWAY N.Y. N.Y. 10007
 (212) 227-8075

J.S.C.

in order to ascertain and report the amount due to the Board of Managers from the surplus monies for attorneys' fees and disbursements.

This constitutes the decision and order of the court.

DATED: 10/16/08



J.S.C.

FILED
OCT 20 2008
COUNTY CLERK
MEMPHIS