

**Board of Directors of Three Vil. Green
Homeowners Assn., Inc. v Pipia**

2009 NY Slip Op 30982(U)

March 16, 2009

Supreme Court, Suffolk County

Docket Number: 08-15337

Judge: Donald R. Blydenburgh

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SUPREME COURT - STATE OF NEW YORK
IAS PART - SUFFOLK COUNTY

PRESENT:

Hon DONALD R. BLYDENBURGH
Justice of the Supreme Court

APPLICATION FOR AN
ORDER OF REFERENCE
#001 - MotD

-----X
BOARD OF DIRECTORS OF THREE VILLAGE :
GREEN HOMEOWNERS ASSOCIATION, INC., :
:
Plaintiff, :
- against - :
:
BARTOLOMEA PIPIA, CHARLES PIPIA, :
AMERICAN GENERAL HOME EQUITY, INC., :
BALLY FITNESS 92 PROFESSIONAL :
RECOVERY SYSTEM, as Assignee of JACK :
LaLANE FITNESS CENTERS, INC. and "JOHN :
DOE" and "JANE DOE," being fictitious names :
and intended to be tenants or persons in possession, :
and/or any other person who by bond, note, :
extension agreement or otherwise may be liable for :
deficiency judgment, if such deficiency judgment is :
desired and/or any party in possession of any part of :
the liened premises whose interest plaintiff desires :
to bar, :
Defendants. :
-----X

COHEN & WARREN, P.C.
Attorney for Plaintiff
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Smithtown, New York 11787

Upon the following papers numbered 1 to 17 read on this application for an order of reference; Application and supporting papers ; Answering Affidavits and supporting papers 17, Notice of Appearance & Waiver; Replying Affidavits and supporting papers ; Other ; it is,

ORDERED that this ex-parte application by plaintiff Board of Directors of Three Village Green Homeowners Association, Inc., for an Order of Reference to compute the amount due on the lien filed against the premises herein and for a default judgment to foreclose a lien for default of unpaid assessments which arose under Article VI of the Declaration filed February 26, 2001 by plaintiff Association, and by virtue of the defendant Bartolomea and Charles Pipia's ownership in fee of the premises located at 47 Sunflower Ridge Road, South Setauket, NY. Pursuant to By-Laws and Declaration of plaintiff Association filed February 26, 2001 in Liber 12104 at Page 26, and the lien filed August 16, 2007 in the Suffolk County Clerk's Office, the application is denied.

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On April 17, 2008 the action to foreclose the lien filed August 16, 2007 was commenced by Summons and Complaint bearing Index #08-15337 and the date on the face. A Notice of Pendency was filed the same date, all in the Office of the Clerk of Suffolk County, where the premises are situate. Since the filing of the Notice of Pendency, Summons and Complaint there has been no amendment to add new parties or claims against the liened premises. All the defendants are of full age, sound mind, and none are absentees or in military service. The defendants have been served including the John and Jane Does and American General Home Equity Inc., in accord with affidavits of service pursuant to CPLR 308[1], 308[2], 311, 311-a and BCL 306 on April 28, and May 6, 2008 respectively.

ORDERED that any renewed application by the plaintiff shall be accompanied by copies of this order and all supporting proof submitted on the instant application.

This is an action to foreclose a lien, which effects two mortgages, but is not itself a mortgage in the principal amount of \$2,805.00, alleged to be in default. The lien was filed against the defendants Bartolemea Pipia and Charles Pipia, the alleged members and owners in fee of 47 Sunflower Ridge Road, South Setauket, NY. The home is allegedly a residential unit situate within the residential community developed with various common facilities, operated and managed by Three Village Green Home Owners Association, organized under the Not for Profit Corporation Law, pursuant to Declaration and By Laws which were duly filed in the Office of the Clerk of Suffolk County February 26, 2001. The plaintiff also names as party defendants, John and Jane Doe, fictitious names, intended to designate any tenants, occupants, and others liable or interested in the premises. The defendant American General Home Equity, Inc., is a credit line mortgagee pursuant to mortgage dated May 23, 2006, recorded June 6, 2006 in Liber 21312, Page 728 which is subordinate to plaintiff's lien. The Bally Fitness 92 Professional Recovery System is the Assignee of Jack La Lane Fitness Centers, Inc., who may be a possible judgment or lien creditor against the defendant Charles Pipia and subordinate to plaintiff. There is also a first mortgage held by Guaranteed Home Mortgage Co., Inc., executed by defendant mortgagors Bartolomea and Charles Pipia January 12, 2006, recorded March 9, 2006, Liber 21251, Page 565, in the sum of \$378,750.00. This first mortgage was assigned to Option One Mortgage Corp., January 13, 2006, recorded January 11, 2007 in Liber 21450, Page 180. Neither the first mortgagee or the Option One assignee have been named parties to this action.

It is not alleged in the pleading or the affidavits submitted in support of this motion any particulars regarding the title in fee, whether the interest in issue is held under the New York Condominium Act, Article 9-B Real Property Law, or in another form as a single family residence. The dates and nature of assessments and the date of default except for lapse of thirty days prior to commencement of action have not been alleged. The plaintiff merely contends without facts that defendants failed to comply with the terms and conditions of the Declaration and By-laws by failing to pay the principal and interest of the amount of assessments on the house, building, appurtenances and common areas, lot, premises and parcel of land upon which the same may stand pursuant to Article VI of the Declaration, have since made no payment and are in default. Consequently, plaintiff elected to file a Notice of Lien dated July 10, 2007, filed August 16, 2007 in the Office of the Clerk of Suffolk County where the Declaration and By-Laws were filed February 26, 2001. There is no evidence that a Notice of Default and Cure were served,

This action to foreclose on the lien verified by Manisha Reck, the President of plaintiff Association and filed April 17, 2008, Index number 08-15337. The date of filing and index number appear on the Summons and Complaint to foreclose the premises as described in the Notice of Pendency filed April 17, 2008, to collect the lien for unpaid assessments in the principal sum of \$2,805.62 together with additional assessments accrued from date the lien was filed, interest, expenses, costs of this action and attorney's fees

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of no less than \$1,750.00 . The Notice to “Help for Homeowners in Foreclosure” pursuant to RPAPL 1303 is attached to the pleadings on a separate yellow page without express reference to required type and font in the pleadings, verification or the Attorney’s Affirmation of Regularity. Service on Bartolomea Pipia with Notice pursuant to RPAPL 1303 expressed was made April 28, 2008 personally at the premises in accord with CPLR 308[1]; on Charles Pipia, with Notice expressed pursuant to CPLR 308[2], mailed April 30, 2008, filed May 5, 2008; on John Doe and Jane Doe without Notice expressed April 28, 2008, mailed April 30, 2008, filed May 5, 2008; on American General Home Equity, Inc., May 6, 2008, by service on an authorized agent of the Secretary of State of the State of New York pursuant to BCL §306, filed May 16, 2008. There is no affidavit of service submitted on the defendant Bally Fitness. However, Bally as assignee of Jack La Lane Fitness Centers, Inc., appeared by attorney Charles Jacobsen, Esq., service of the Notice of Appearance and Waiver dated May 8, 2008. All defendants are alleged of full age, sound mind, and no reference to military service is made. An additional copy of the summons was served on all the named defendants by first class mail on May 22, 2008, affidavit pursuant to CPLR 3215[g][3] sworn to July 7, 2008.

In this case, plaintiff is authorized by law to foreclose on a lien under the Condominium Act, RPL 339-aa; RPAPL 1321, filed August 16, 2007, for unpaid charges on properties subject to the Declaration and By-Laws filed by the plaintiff February 26, 2001 provided such are proper (*Board of Managers of Executive Plaza Condominium v Jones*, 251 AD2d 89, 674 NYS2d 304 [1998] *lv dismissed* 92 NY2d 1002, 684 NYS2d 188 [1998]; RPL 339-z). The plaintiff developed the community with construction of 83 homes intending to improve the common areas for the benefit of the individually owned homes. By acceptance of a deed the owner/member covenanted to pay the Association assessments . If unpaid, the costs with interest shall be charged on the land and a continuing lien is imposed on the property owned by the member including a personal obligation of the owner when the assessment fell due. The assessments were used exclusively to promote recreation, health, safety and welfare of the resident properties related to use and enjoyment of the common areas, including taxes, insurance, repair, replacement, additions, labor equipment, materials, services, management and supervision. The Board was charged to fix at least annually the budget and amount for payment by the members. The payments were due monthly. Nonpayment became a continuing lien subject to late charge, interest, lien and action by the Board for money judgment or to foreclose. (Declaration Article I - VI; By-Laws Article I, II, III, IV, V, VI, VIII[5], X, XI).

The condominium common charge lien and enforcement law provides in RPL 339-z, 339-aa that enforcement is not available in District Court as a mechanic’s lien. The lien is effective after filing in the office where the declaration is filed . The notice of lien must be verified, and continues until paid or until 6 years from filing which ever is first. The lien is not tolled by the commencement of a foreclosure action and is not governed by Lien Law §17. Contents of the Notice require the name, address, liber, page of declaration record, name of record owner, unit designated, amount and purpose for the sum due and the date due. If 60 days have lapsed, after charges are unpaid, and no notice was filed, any member of the Board is authorized to file the notice. If the sums remain unpaid, an action for foreclosure or a money judgment may proceed to recover the assessments fixed by the Board.

The plaintiff herein seeks the appointment of a referee to ascertain and compute the amount due and to determine whether the mortgaged premises can be sold in one parcel. Although this action is to foreclose a lien and is not to foreclose a mortgage, there are both a primary first and subordinate mortgage involved. As such, the requirements of Chapter 472 of the Laws of 2008 effective August 5, 2008 must be observed, (RPAPL 1302, 1303, 1304, 1320). Plaintiff failed to request an amendment of the caption to delete the fictitious defendants John Doe and Jane Doe to accurately reflect whether the defendants require

deletion and another party substituted or to amend the affidavits to add service with RPAPL 1303 Notice expressed. Except for Bally's limited appearance, the defendants have not appeared or answered and appear in default. The affidavit of regularity by plaintiff's attorney, Caryn L. Meyer, dated June 19, 2008 does not allege the dates or nature of the assessment, date, duration, amount of default including interest, late charges, penalties, or the current unpaid balance. There is no explanation for the defects in the Notice of Lien. The absence of verification on the Notice of Lien and the difference in the identification of Presidents on the lien signed by Joseph Rainone, notarized July 10, 2007, and that which appears on the Complaint verified by Manisha Reck April 12, 2008 is not pleaded. The failure of plaintiff to identify the exact unit except by address, 47 Sunflower Ridge Road, South Setauket, NY, or explain the purpose, nature, charges and cost of assessments, the absence of reliance on specific law, omission of dates of performance, default, service of notice of lien, absence of proof of notice of default, opportunity to cure, election to foreclose rather than seek money judgment, to name or notice the first mortgagee, cumulatively defective.

As a result of the following deficiencies, the Court is required to deny the plaintiff's application for an Order of Reference and to dismiss the proceeding, without prejudice:

1. The summons and the index number assigned reflect that the date of filing with the clerk of the court is April 17, 2008 in accord with CPLR 305[a]. The summons and complaint filed by plaintiff does not expressly name a first mortgagee or assignee of the mortgage filed and recorded in the Office of the Clerk of Suffolk County. Conflicting and omitted dates, time, names, warrant denial without prejudice to renew and substitute (*see, First Trust Natl. Assn. v Meisels*, 234 AD2d 414, 651 NYS2d 121 [1996]; *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721 [1989]).

2. The Notice of Lien is defective, not verified, though signed and notarized by other than the present Association President. (Board of Directors Of Hunt Club at Coram Homeowners Association, Inc. V. Carole Ann Hebb, Misc3d , 868 NYS2d 856 [2008]; RPL 339-aa). There are no details of assessments, unit affected or service of notice of the lien on the defendants. Proof of service of the "Help for Homeowners in Foreclosure," if appropriate should not merely state color of the notice, but should clearly indicate in the affidavit that the notices required are in compliance with the type, font, and on colored paper other than the color of the summons and complaint.

3. There is only an Affirmation of Regularity and no Affirmation of Merit by plaintiff's representative, (*see, FGB Realty Advisors, Inc. v Parisi*, 265 AD2d 297, 696 NYS2d 207 [1999]; *Merritt v Bartholick*, 36 NY 44 [1867]).

4. Although this provision of law may not be applicable, the plaintiff has not submitted proof in evidentiary form to advise the court whether or why the lien in foreclosure, the first and subordinate mortgage, should not warrant explanation and be required to identify the existing loan obligations as either a "subprime home loan" as defined in RPAPL §1304[5][e], a 'high-cost home loan' as defined in Banking Law §6-1, or a non-traditional home loan as defined in RPAPL §1304[5][e]. Since this is foreclosure, the lien must address on proof, including an affidavit from someone with personal knowledge whether the defendants are known to be residents of the subject property in foreclosure or proof of each defendants' residence address and contact information, sufficient for the Court to properly notice the defendants, pursuant to 2008 NY Laws, Ch. 472, Section 3-a, that if they are residents of such property, they may request a settlement conference (*see, CPLR 3408*). In the event that the lien falls within the new statute, the complaint must contain an affirmative allegations that the plaintiff has complied with all of the provisions of Banking Law §§595-a and 6-1(*see, RPAPL §1302[1]*).

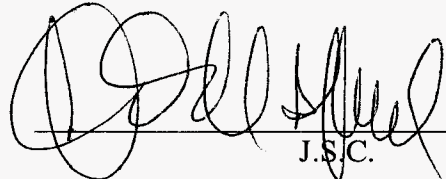
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5. Since Option One Mortgage Corp., who is the first mortgage assignee, appears to have a priority lien on the premises, the mortgagee has a real and substantial interest in the outcome of this action and joinder appears necessary to afford complete relief. Therefore, it is directed that plaintiff amend to add the mortgagee as a necessary party (*Bankers Trust Co. V Board of Mgrs. of Park 900 Condominium*, 81 NY 2d 1033, 600 NYS2d 191 [1993]; *Cadlerock Joint Venture, L.P. v. Board of Mgrs. Of the Parkchester South Condominium, Inc.*, 289 AD2d 1, 733 NYS2d 413 [2001]; RPL §339-z; *Agostino v. Soufer* , 284 AD2d 147, 726 NYS2d 635 [2001]; CPLR 1001).

6. Finally, the plaintiff is reminded that proper proof of compliance with CPLR 3215[g][3], regarding the mailing of additional notice is required and needed upon application for judgment of foreclosure and sale against the defaulting defendant debtor/mortgagors.

Accordingly, the plaintiff's application for an order of reference is denied, pursuant to Laws, Chapter 472, enacted August 5, 2008, and RPL §§339-aa, 339-z, without prejudice to renewal upon proper papers; including but not limited to a copy of all the papers submitted with this application, a copy of this order, and the evidentiary proof specified.

Dated: 3-16-09



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION