

**Matter of Jae Kyu Kim v 40 W. 22nd St. Tenants
Coop. Corp.**

2009 NY Slip Op 31798(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 601995/09

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

Jae Kyu A. Kim

INDEX NO. 601995/09

40 W. 22nd Street
Tenants Cooperative Corp.

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION
IS DECIDED**

FILED

AUG 11 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/11/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15.

-----x

In the Matter of
JAE KYU KIM,

Petitioner,

Index No. 601995/09
Mtn Seq. 001

-against-

40 WEST 22nd STREET TENANTS COOPERATIVE CORP,

Respondent.

For a Judgment Vacating and Setting Aside
a Certain Notice of Lien Foreclosure Sale
and permanently Staying Said Sale

-----x

WALTER B. TOLUB, J.:

This is Petitioner's motion to vacate the Notice of Lien Foreclosure Sale and permanently enjoin the sale of Petitioner's stock in Respondent Corporation.

Facts

Respondent is a cooperative apartment corporation located at 40 West 22nd Street, New York, NY (Premises). Respondent is the owner of fourteen residential units and the only commercial space.

The commercial space is a storefront on the ground floor of the Premises (Subject Unit). Petitioner and his wife Jun Eui Kim occupy the Subject Unit pursuant to a Shareholder Proprietary Lease with the Respondent (Agreement)¹.

FILED

AUG 11 2009

NEW YORK
COUNTY CLERK'S OFFICE

¹Neither party attaches the complete Agreement. Petitioner attaches its Certificate of Shares (Petitioner's Ex. 1) and Respondent attaches what appears to be an unsigned copy of the last page of the Agreement (Respondent's Ex. E).

The Agreement provides that the Petitioner and his wife (Shareholders) are required to make monthly maintenance payments which are to be used by Respondent to pay the expenses of owning and operating the building.

Article VI, Section 6 of Respondent's By-Laws states that:

Corporation's Lien. The Corporation shall at all times have a lien upon the shares of each shareholder to secure the payment by such shareholder of all rent to become payable by such shareholder under his proprietary lease and for all other indebtedness from such shareholder to the Corporation and to secure the performance by the shareholder of all the covenants and conditions of said proprietary lease to be performed by the shareholder.

* * *

The Corporation shall have the right to issue to any purchaser of such shares upon the enforcement by the Corporation of such lien, or to the nominee of such purchaser, a certificate if the shares so purchased substantially of the tenor of the certificate issued to such defaulting shareholder, and thereupon the certificate for such shares issued to such defaulting shareholder shall become void and such defaulting shareholder shall become void and such defaulting shareholder shall surrender the same to the Corporation on demand.

(Respondent Ex. A).

According to the Respondent's managing agent, Kyrous Realty Group, the Petitioner and his wife are in arrears of their maintenance payments in excess of \$150,000 (Respondent's Ex. B). Respondent commenced an action in the Housing Court to terminate Petitioner and his wife's lease and right to occupancy. Additionally, Respondent sought to assert its lien rights, as

provided for in its By-Laws.

Petitioner does not deny that he is in arrears of monthly maintenance payments owed to Respondent. Rather Petitioner argues that the Notice of Lien was defective because it was not properly signed or itemized by Respondent pursuant to New York Lien Law §201.

Discussion

Petitioner argues that Respondent did not comply with the requirements of Lien Law §201. However, Section 201 is inapplicable since a holder of a lien against shares of stock may foreclose the lien pursuant to UCC Article 9 (Matter of State Tax Commission v. Schor, 43 NY2d 151 [1977]; Fundex Capital Corp v. Reichard, 172 AD2d 420 [1st Dept 1991]; Brief v. 120 owners Corp., 157 AD2d 515 [1st Dept 1990]). Petitioner has failed to show that there was any procedural irregularity under UCC Article 9.

Even if Section 201 of the Lien Law governed, Petitioner's arguments would still fail. Section 201 of the Lien Law provides that before a sale is held, the lienor shall serve a notice upon the owner (Lien Law §201). The notice shall contain, *inter alia*, a statement of the nature of the debt or the agreement under which the lien arose, with an itemized statement of the claim and the time when due" (Lien Law §201 [1]).

Here, Petitioner argues, *inter alia*, that the set amount

listed in the lien Notice was insufficient to constitute an itemized statement under the Lien Law. However, the Notice of Lien states that \$133,380.11 is due in maintenance, late fees and assessments and that \$5,229.32 is owed in attorneys' fees. Petitioner was aware of his monthly payments, received monthly statements, which it never contested, and understood the consequences of untimely payments. As such, the notice was sufficient to put Petitioner on notice of the amounts owed.

The court has considered Petitioner's remaining arguments and finds them unavailing as sufficient notice was provided to the Petitioner and his wife. However, Petitioner, now understanding of the applicable law, may have the opportunity to demonstrate why it is not in arrears and have the lien vacated upon the posting of a bond for \$160,000.

Accordingly, it is

ORDERED that Petitioner's motion seeking to vacate Notice of Lien Foreclosure Sale is granted to the extent that and on the condition of Petitioner's posting of a \$160,000 bond; and it is further

ORDERED that within 5 days from the date of service of a copy of this order with notice of entry, the Defendant will file


with the Clerk of this Court and upon the attorneys for the Plaintiff a written notice of the bond; and it is further

In the event that the bond is not posted, the motion is denied and the Petition dismissed.

Counsel for the parties are directed to appear for a conference on September 11, 2009 at 11:00 AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/11/09



HON. WALTER B. TOLUB, J.S.C.

FILED
AUG 11 2009
NEW YORK
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