

Liquidation Props., Inc. v Okada

2009 NY Slip Op 32102(U)

September 10, 2009

Supreme Court, New York County

Docket Number: 111429/2007

Judge: Walter B. Tolub

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: **WALTER B. TOLUB**

PART 15

Justice

Liquidation Properties, Inc.

INDEX NO. 111429/07

MOTION DATE _____

- v -

MOTION SEQ. NO. 02

Okada, Naomi

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

SEP 15 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/10/09

W
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
LIQUIDATION PROPERTIES, INC.,

Index No.111429/2007

Plaintiff,

-against-

NAOMI OKADA; BOARD OF MANAGERS OF
INTERNATIONAL PLAZA CONDOMINIUM;
CHRIS ALICIA

Defendants.

-----x
WALTER B. TOLUB, J.:

This is Plaintiff's motion for an order confirming the Referee's Report dated May 13, 2009 and for the issuance of a Judgment of Foreclosure and Sale as set forth in its proposed Judgment (Plaintiff's moving papers).

Defendant Board of Managers of International Plaza Condominium (BMIPC) partially opposes the motion arguing that the Order for Foreclosure and Sale should be amended to provide that if there are surplus funds over the amount awarded to Plaintiff, BMIPC shall be paid its common charges from said surplus.

Facts

Prior to this action being commenced, on or about June 20, 2007, the Board of Managers of International Plaza Condominium (hereinafter "BMIPC") commenced an action in the Supreme Court of the State of New York, New York County entitled *the Board of Managers of International Plaza Condominium v. Naomi Okada, Option One Mortgage Corporation*, Index 108797/07 (hereinafter

Mtn Seq.002
FILED
SEP 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

"BMIPC Action").

In that action BMIPC claimed that Ms. Okada purchased apartment 25A, located at 303 East 43rd Street, New York, NY ("Unit") on June 11, 1986. BMIPC further claimed that Ms. Okada was in default of her common charges as of September, 2006.

In order to purchase the premises, Ms. Okada executed a first mortgage with Citibank, N.A. Additionally, Ms. Okada executed a second mortgage on August 23, 2005 from Option One Mortgage Corporation. Option One Mortgage assigned Ms. Okada's second mortgage to Liquidation Properties, Inc. (Plaintiff herein) on July 16, 2007.

In the BMIPC Action, BMIPC was granted a lien against the Unit on May 7, 2007 for Ms. Okada's failure to pay common charges (Plaintiff's Reply Ex. J). Ms. Okada continues to default in her payments and common charges continue to accrue.

Liquidation Properties (Plaintiff herein) commenced this action (11429/2007) on August 21, 2007. BMIPC filed a cross-claim for the same relief as the BMIPC Action.

By decision dated February 4, 2009, Justice Kornreich held, in pertinent part, that (1) BMIPC's cross-claim for common charges against Ms. Okada was granted; (2) that Liquidated Properties mortgage interest supercedes BMIPC's lien for common charges on the property; (3) that Ruth Gursky be appointed as referee to ascertain and compute the amount due upon the bonds, common

charges and mortgages being foreclosed; and, most importantly for our purposes (4) **that any surplus funds which exist over and above the amount awarded to plaintiff Liquidation Properties Inc. and obtained from the sale of Unit 25A be paid to BMIPC** (*emphasis added*).

The Referee's Report dated May 13, 2009 states, in pertinent part, that as of April 15, 2009, the amount due to Plaintiff on the mortgage is \$802,576.33. The Report does not state the amounts due and owing to BMIPC.

By this motion Plaintiff seeks an order confirming the Referee's Report dated May 13, 2009 and the issuance of a Judgment of Foreclosure and Sale as set forth in its proposed Judgment (Plaintiff's moving papers).

BMIPC partially opposes the motion arguing that the Order for Foreclosure and Sale should be amended to provide that if there are surplus funds over the amount awarded to Plaintiff, BMIPC shall be paid its common charges from said surplus.

Discussion

RPAPL §1351(3) provides that:

If it appears to the satisfaction of the court that there exists no more than one other mortgage on the premises which is then due and which is subordinate only to the plaintiff's mortgage but is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354, upon motion of the holder of such mortgage made without valid objection of any other party, the final

judgment may direct payment if the subordinate mortgage debt from the proceeds in accordance with subdivision 3 of section 1354.

(RPAPL §1351[3]).

Judge Kornreich's February 4, 2009, decision held, in no uncertain terms, that any surplus funds obtained through the sale of the Unit are to be paid to BMIPC.

The "law of the case doctrine" is applicable between courts of coordinate jurisdiction in a continuing litigation (People v. Evans, 94 NY2d 499 [2000]). The doctrine was designed to limit the relitigation of issues which the parties had a full and fair opportunity to litigate (Id.). Courts generally refuse to reopen what has been decided by a judge in the case on the same or higher level of the judiciary and to adhere to the prior decision on a judicially determined issue (Id.). As such, the Order for Foreclosure and Sale shall be amended to provide that if there are surplus funds over the amount awarded to Plaintiff, BMIPC shall be paid its common charges from said surplus.

BMIPC's remaining arguments regarding interest have been considered by the Court and are found to be unavailing.

Accordingly, it is

ORDERED that the Order for Foreclosure and Sale shall be resubmitted and amended to provide that if there are surplus funds over the amount awarded to Plaintiff, BMIPC shall be paid

its common charges from said surplus; and it is further

ORDERED that the Referee Report of May 13, 2009 is confirmed and that the outstanding issue, not determined in the Referee's Report of common charges owed, is referred to a Special Referee, to hear and report with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further;

ORDERED that this motion for an order confirming the Referee's Report dated May 13, 2009 is denied to the extent indicated; and it is further


ORDERED that the proposed Judgment of Foreclosure and Sale is denied with leave to renew so that the proposed judgment is in conformity with the aforementioned changes and additions; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee. as set forth in its proposed Judgment (Plaintiff's moving papers).

Counsel for the parties are directed to contact this Court once the Special Referee has issued a new Report or the parties have agreed on an amount BMIPC is owed. If Counsel fail to contact the Court to proceed on this matter, a control date for an appearance has been scheduled for November 20, 2009 at 11:00am in room 335 at 60 Centre Street.

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

Dated: 9/10/09



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

FILED
SEP 15 2009
COUNTY CLERK'S OFFICE
NEW YORK