

Select Portfolio Servicing, Inc. v Krupin

2009 NY Slip Op 33063(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 113286-2006

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT.

PART 35

Justice

Index Number : 113286/2006

SELECT PORTFOLIO SERVICING, INC.,

vs.

KRUPIN, LILLIAN

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO.

113286-06

MOTION DATE

10/13/09

MOTION SEQ. NO.

#001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

FILED

DEC 30 2009

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of plaintiff's motion for summary judgment dismissing the Answer of the defendant Seward Park Housing Corporation ("Seward Park"), is granted; and it is further

ORDERED that the branch of plaintiff's motion for permission to treat Seward Park's Answer as a limited Notice of Appearance so as to entitle Seward Park to receive, without prior notice, a copy of the Notice of Sale, Notice of Discontinuance, and Notice of Surplus Money Proceedings, if any, is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order appointing a Referee to determine whether the premises may be sold in parcels, is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order directing that all non-appearing and non-answering defendants be deemed in default, and said default be fixed and determined by the referee is granted; and it is further

ORDERED that the branch of plaintiff's motion for an order appointing a Referee to determine the amount due plaintiff is granted and a Referee or Special Referee shall hear and report with recommendations on the amounts due and owing to plaintiff, including fixing and determining the amount of the default of the non-appearing and non-answering defendants,

Page 1 of 2

Dated: _____

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):

except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Referee, or Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED the movant shall move pursuant to CPLR 4403 within 30 days of receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the branch of plaintiff's motion to amend the caption is granted without prejudice, and upon receipt of a copy of this order, the Clerk shall amend the caption by substituting "Michael Gertel," "Stephanie Krupin," and "Tiffany Gerstler," as party defendants in place of "John Doe" and substituting the name of the plaintiff to "Select Portfolio Servicing, Inc. as Servicer for DLJ Mortgage Capital, Inc.;" and it is further

ORDERED that the branch of plaintiff's motion for an order severing Seward Park's cross-claims and counterclaims against Lillian Krupin for declaratory relief and damages for breach of By-Laws and Proprietary Lease, and forgery of Seward Park's President's signature, is granted, and said counterclaims are hereby severed; and it is further

ORDERED that the branch of Seward Park's cross-motion for summary judgment dismissing the Complaint is denied; and it is further

ORDERED that the branch of Seward Park's cross-motion for an order declaring that Seward Park has a lawful and valid first lien for any and all monies and arrears, including attorneys' fees, owed by Lillian Krupin with respect to the subject Apartment, and for summary judgment dismissing the counterclaims of defamation and intentional infliction of emotional distress asserted by Michael Gertel and Stephanie Krupin-Gertel, is granted, and said counterclaims are hereby severed and dismissed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.
This constitutes the decision and order of the Court.

FILED

DEC 30 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated 12/23/09

ENTER:  J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
SELECT PORTFOLIO SERVICING, INC.,

Plaintiff,

Index No. 113286-2006

-vs-

LILLIAN KRUPIN AND SEWARD PARK HOUSING CORPORATION, EMIGRANT SAVINGS BANK, JOHN DOE (said name being fictitious, it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

In this foreclosure action, plaintiff Select Portfolio Servicing, Inc. ("plaintiff") moves for summary judgment dismissing the Answer of the defendant Seward Park Housing Corporation ("Seward Park"), and for permission to treat said Answer as a limited Notice of Appearance so as to entitle Seward Park to receive, without prior notice, a copy of the Notice of Sale, Notice of Discontinuance, and Notice of Surplus Money Proceedings, if any, that this Court appoint a Referee to determine the amount due and to ascertain whether the premises may be sold in parcels, and that the caption be amended by substituting "Michael Gertel," "Stephanie Krupin," and "Tiffany Gerstler," as party defendants in place of "John Doe" all without prejudice, that the name of the plaintiff be amended to "Select Portfolio Servicing, Inc. as Servicer for DLJ Mortgage Capital, Inc.," and that all non-appearing and non-answering defendants be deemed in default, and said default be fixed and determined.

In response, Seward Park cross moves for, *inter alia*, summary judgment dismissing the

* 4]
Complaint, and declaring that Seward Park had a lawful and valid first lien for any and all monies and arrears, including attorneys' fees, owed by Krupin with respect to the Apartment.

Motion

Plaintiff contends that it seeks to foreclose on a \$564,000 loan upon which Stephanie Krupin ("Krupin") has defaulted due to her failure to make the monthly payments as required. Plaintiff submitted the Cooperative Loan Note (the "Note") Krupin signed, the Stock Certificates for 39 shares of the capital stock of Seward Park (the "shares"), and the Proprietary Lease between Seward Park and Krupin for the premises known as 415 Grand Street, E806, New York, New York (the "Apartment").

Plaintiff argues that the general denials in Seward Park's Answer are either immaterial or spurious and fail to raise an issue of fact regarding the allegations in the Complaint. Further, the affirmative defenses that (1) the complaint fails to state a cause of action, (2) the agreement violates the Statute of Frauds, (3) the complaint is barred by the Statute of Limitations, (4) the complaint is barred by waiver and/or estoppel, (5) plaintiff has unclean hands, (6) the Note is against public policy, and (7) the culpable conduct of plaintiff proximately caused plaintiff's damages, are spurious, lack merit, or fail as a matter of law.

Plaintiff further argues that Seward Park's cross-claims and counterclaims against the Mortgagor for declaratory relief and damages for breach of By-Laws and Proprietary Lease, and forgery of Seward Park's President's signature, should be severed from this action. Such allegations pertain to a separate dispute between Seward Park and Krupin. The plaintiff bank should not have to await the outcome of a trial on Seward Park's unrelated claims

As to the remaining parties, Michael Gertel and Stephanie Krupin (Gertel) (the

“Gertels”), and Tiffany Gerstler, service of the pleadings were made upon such individuals on September 25, 2006, and their respective counsel interposed untimely Answers on their behalf in January 2007. Thus, plaintiff rejected their Answers.

Seward Park's Cross-Motion

Seward Park argues that no valid security in, or lien on, the Apartment was ever created pursuant to a mortgage loan. Seward Park contends that the By-Laws and Lease provide that no transfer or assignment of the lease and shares of stock may be made absent approval of Seward Park's Board of Directors (the “Board”), which approval may be withheld “for any reason or no reason.” Seward Park contends that it never approved encumbering or collateralizing Krupin's Apartment with a lien. Upon request, plaintiff's counsel provided Seward Park with a “Recognition Agreement,” which is a tripartite document used in cooperative loan transactions, signed by the cooperative, lender and shareholder. The Recognition Agreement provides that if the shareholder is in arrears in maintenance payments, the cooperative will notify the lender of its opportunity to cure any default and protect its collateral. The Recognition Agreement also provides that the cooperative corporation has approved the pledge and assignment by the shareholder to the lender of the shareholder's stock and lease. According to the affidavit of the then President of Seward Park, Stanley Friedland, his signature on the Recognition Agreement was forged. Seward Park's records indicate that Krupin and her husband were “original” owners at Seward Park dating back to 1959; however, such records contain no reference to, or indication that, there was ever an application for Krupin to take out a loan against, and be secured by, the Apartment. According to Mr. Friedland and Seward Park's former managing agent told Krupin's son-in-law that only Krupin herself, as shareholder, and not her family members, could apply for

a loan. Plaintiff may have rights against Krupin and others, but has no lien upon or rights against the Apartment. Thus, plaintiff cannot foreclose any loan against the Apartment.

Even, if a valid mortgage lien encumbered the Apartment, plaintiff has not demonstrated an assignment of the original alleged shareholder loan, *i.e.*, that plaintiff is the current “owner” of the loan. The Loan Security Agreement and Note identify Fairmont Funding, Ltd., a nonparty, as the “Lender.” Although plaintiff now claims to be a “servicer” for “DLJ,” another nonparty, no showing has been made that DLJ has any cognizable ownership interest, *via* assignment or otherwise, in the underlying mortgage paper.

Further, plaintiff’s motion for summary judgment is defective as a matter of law, and should be dismissed because plaintiff moved under an inapplicable statutory framework, *i.e.*, RPAPL §1321. Since New York treats cooperative property as personal property, plaintiff’s rights, if any, arise out of Article 9 of the UCC and not RPAPL. Further, the dismissal of its affirmative defenses is premature at this pre-discovery phase of the litigation.

Further, the Court should declare that Seward Park has a valid first lien on the Apartment. The By-Laws and Lease provide that Seward Park has a first lien on the shares for all sums due and owing to Seward Park. And, Article X of the By-Laws extends Seward Park’s lien “for all other indebtedness” to attorneys’ fees owed in connection with enforcing Seward Park’s rights upon a shareholder’s default. Seward Park contends that plaintiff acknowledged in an email that the “coop has the superior lien” and when the property was sold, all “maintenance arrears and attorneys’ fees ahead of the mortgage at issue” “will be paid in full.” In response to Seward Park’s request that plaintiff pay maintenance arrears and legal fees owed, in March 2007, plaintiff paid \$19,158.92 to Seward Park, representing these items owed. In the meantime, in a

separate landlord-tenant proceeding brought by Seward Park, Seward Park and Krupin entered into a Stipulation whereby the matter was marked off the calendar, and Krupin's daughter, who has Krupin's power of attorney, agreed to sell the Apartment. Although the Apartment is listed for sale, current maintenance arrears exceed \$20,000 and Seward Park has commenced another landlord-tenant proceeding to recover such arrears.

Seward Park also seeks summary judgment dismissing the Gertels' counterclaims of defamation and intentional infliction of emotional distress against it, as lacking in basis. The counterclaim for defamation appears to be based on Seward Park's allegation of forgery in the third-party complaint, and for such basis alone, should be dismissed under the absolute privilege rule. And, the only category of libel *per se* applicable to defamation is "commission of a serious crime." However, forgery on a recognition agreement is a misdemeanor, not a "serious offense." To the extent the third-party counterclaim for defamation is predicated on other statements of publications, the Gertels have failed to set forth the "particular words complained of" as required under CPLR 3016(a). The Gertels have not alleged when the alleged defamatory statements were made, where they were published, what was their context, who received statements, or the person who articulated the defamatory statements. Furthermore, to the extent the intentional infliction of emotional distress claim is based on Seward Park's allegations, the absolute privilege bars such claim. Finally, the alleged misconduct by Seward Park in locking the Gertels out of the Apartment and prevented them from selling it, was in furtherance of its corporate interests and legal rights, and thus, was not "outrageous" or "extreme" or beyond the bounds of decency.

Plaintiff's Opposition

In opposition, plaintiff argues that its submissions establish entitlement to summary judgment. Krupin does not deny delivery of the Note and Mortgage, or the default in payment. The original note was delivered to plaintiff and the UCC-1 on file was assigned to DLJ Mortgage Capital, Inc., and a UCC-3 was recorded on August 4, 2009. Plaintiff affirms that the Note and Mortgage were transferred to DLJ Mortgage Capital Inc. prior to commencement of this action. The UCC-3 establishes plaintiff's ownership and holding of the Note and Loan Security Agreement, and there is no evidence to refute these claims. The caption was intended to reflect plaintiff "as servicer for DLJ Mortgage Capital, Inc."

Seward Park accepted the \$19,158.92 payment without protest as to the validity of plaintiff's lien, and no notice was sent that said sum was being accepted pending determination of this Court as to the validity of the liens or as to the plaintiff's right to foreclose.

The fact that there is a possibility that the mortgage lien was not duly acknowledged by Seward Park raises an issue of fact. Given the large number of apartments (1,700) and residents (5,000), it is incredulous that Mr. Friedland asks this Court to believe that he recalls this specific conversation with Krupin's son-in-law. Given the complex hierarchy and numerous parties involved with the management of the Board, it is unclear how Mr. Friedland can affirm that no attempt or effort was made by Krupin or her family members for the subject mortgage application. Similarly, Mr. Friedland may not recall every recognition agreement he signed during his tenure as President of the Board.

In any event, Seward Park failed to allege or establish that there was any wrongdoing or "unclean hands" on the part of plaintiff in this transaction.

Further, Seward Park failed to establish entitlement to summary judgment on its declaratory judgment claim. Plaintiff, in its acceptance of the mortgage lien upon the cooperative unit from Krupin, has already affirmed that any outstanding charges payable to Seward Park for maintenance arrears would be paid at sale or advanced by plaintiff.

By negotiating and accepting the payment of \$19,158.92, Seward Park's claims must now be barred under the doctrine of equitable estoppel. Plaintiff remitted payment of past due arrears based on the position that plaintiff was a valid lien holder upon the Apartment, and was advancing these fees to protect its security investment. By claiming that plaintiff lacks standing to foreclose, and does not have a valid lien, Seward Park contradicts its prior actions, and causes plaintiff to suffer irreparable harm for relying on the original position of Seward Park. Seward Park failed to establish that its lien is in jeopardy or that plaintiff has endangered its lien, and therefore, is not entitled to declaratory judgment.

If the Court decides that plaintiff is not entitled to maintain its mortgage lien upon the Apartment, the plaintiff can demonstrate its rights to an equitable lien. As a result of the closing on the Apartment, the subject mortgage loan replaced the "Emigrant Mortgage" lien, and under the doctrine of equitable subrogation, the mortgagee is subrogated to the position of the senior lienholder, since funds of the mortgagee are used to discharge a prior lien.

Seward Park's Reply

The inadmissible hearsay of plaintiff's Document Control Officer fails to establish an enforceable mortgage. There is no document evidencing a "transfer" or "assignment" from Fairmont to plaintiff or DLJ. Plaintiff also failed to address its failure to bring this action under the proper statutory framework.

Seward Park also adds that the Gertels have not opposed the branch of the cross-motion seeking dismissal of their counterclaims and have not appeared in this action in nearly three years.

Finally, the Court should vacate so much of its Order, dated September 8, 2009, directing the Clerk to enter judgment striking and the Answer and affirmative defenses of Krupin. Although Seward Park consented to having plaintiff's summary judgment motion against Krupin proceed pending full submission of the instant motion (as set forth in the Court's Order), Seward Park did not consent to having a judgment entered which may permit plaintiff to proceed with a foreclosure of the Apartment. The Court should adjudicate Seward Park's and Krupin's respective rights.

Discussion

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its

attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). The party opposing the motion must demonstrate by admissible evidence the existence of a material factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

As to plaintiff's motion for summary dismissal of Seward Park's Answer, defendant failed to assert any facts in support of any of the following affirmatives defenses: that the agreement violates the Statute of Frauds, the complaint is barred by the Statute of Limitations, the complaint is barred by waiver and/or estoppel,¹ plaintiff has unclean hands, the Note is against public policy, and the actions of others not within the control of Seward and the culpable

¹ Although plaintiff argues that Seward Park's claims are barred under the doctrine of equitable estoppel based on Seward Park's acceptance of the \$19,158.92 payment, Seward Park does not advance any arguments in support of its waiver/estoppel defense.

conduct of plaintiff proximately caused plaintiff's damages. Seward Park also failed to explain how additional discovery would yield evidence that would support any of these affirmative defenses. Therefore, the second through eighth affirmative defenses are dismissed.

As to the first affirmative defense that the complaint fails to state a cause of action, to state a claim seeking the foreclosure of a cooperative apartment, plaintiff must allege that the existence of the mortgage and mortgage note, ownership of the mortgage and the defendant's default in payment [*Witelson v Jamaica Estates Holding Corp. I*, 40 AD3d 284, 835 NYS2d 179 [1st Dept 2007]; *Bercy Investors, Inc. v Sun*, 239 AD2d 161, 657 NYS2d 47 [1st Dept 1997] ["Plaintiff established a prima facie case in both foreclosure actions by proof of the notes, mortgages, previous assignments and consolidation agreements, and of defendant's default, and thereby required defendant to come forward with evidence showing the existence of a triable issue of fact with respect to any of its affirmative defenses"]. With respect to demonstrating ownership of the mortgage, it is noted that assignments are made by either written instrument or by the assignor physically delivering the mortgage and note to the assignee (*Deutsche Bank Nat. Trust Co. v Bailey*, 22 Misc 3d 1119, 880 N.Y.S.2d 872 [Sup Ct King County 2009]).

The complaint sufficiently asserts the existence of the Note, defendant's failure to comply with the payment terms of the Note, and its ownership of the Note. Upon review of the Complaint and the exhibits attached to the Complaint, such exhibits do not indicate that plaintiff is in fact the owner of the Note; nor does the Complaint set forth that the Note was assigned to plaintiff. Specifically, the Complaint alleges that Krupin "executed and delivered to plaintiff a certain note entitled, 'Cooperative Loan Note,' a copy of which is hereto annexed and marked as Exhibit 'A'" and that a "Financing Statement (Standard form UCC-1) for said Cooperative Loan

Note . . . was duly filed . . . [a] copy of which is hereto marked as Exhibit 'B.'" Yet, both Exhibits A and B reflect that "Fairmont Funding Ltd." is the lender and party to this loan transaction. However, in reply, plaintiff submitted the UCC-3 reporting that the Note was assigned from Fairmont Funding Ltd. to DLJ Mortgage Capital, Inc., effective January 1, 2006. Further, the affidavit of plaintiff's "Document Control Officer" Troy Noble, who is also the "attorney in fact" for DLJ Mortgage Capital, Inc. states that plaintiff "is the holder of the Note by virtue of endorsements or allonges, if applicable, that are in proper form, duly executed. . . ." Therefore, such UCC-3 and affidavit sufficiently establish that the Note was assigned to plaintiff and that plaintiff is the holder of the Note. That plaintiff did not submit a written assignment to plaintiff is insufficient to overcome plaintiff's claim that it is the holder of the Note.

However, the *complaint* alleges, and it is undisputed, that the security pledged in this foreclosure action was "Certificate No. 2069 for shares" constituting ownership of a cooperative apartment No. E806, and the proprietary lease, which "represents chattel real, i.e., personalty, not realty," and is thus governed by the procedure for enforcement of a security interest (*Fundex Capital Corp. v Reichard*, 172 AD2d 420, 568 NYS2d 794 [1st Dept 1991] citing UCC Art. 9), rather than the procedure for summary recovery of real property (RPAPL Art. 7).

Therefore, while plaintiff does not state a claim for foreclosure, plaintiff does state a claim to enforce its security interest (*see Bank of New York v Carr*, 161 Misc 2d 332, 613 N.Y.S.2d 572 [Sup Ct Queens County 1994]). Thus, the affirmative defense that the complaint fails to state a cause of action is dismissed.

However, plaintiff failed to establish entitlement to treat Seward Park's Answer as a limited Notice of Appearance so as to entitle Seward Park to receive, *without prior notice*, a copy

of the Notice of Sale, Notice of Discontinuance, and Notice of Surplus Money Proceedings, and as such, this branch of plaintiff's motion is denied.

Further, plaintiff is not entitled to a Court-appointed Referee to determine whether the premises may be sold in parcels, and this branch of plaintiff's motion is denied and deemed an application for a Referee to hear and report (*see Bank of New York v Carr* [In an action to foreclose a security interest consisting of a proprietary lease and shares of stock representing the ownership of a cooperative apartment, holding that the branch of plaintiff's motion for the appointment of a Referee to ascertain and compute the amount due on the promissory note (RPAPL 1321) shall be deemed an application for a Referee to hear and report]).

As there is no opposition to the remainder of plaintiff's motion, the caption shall be amended by substituting "Michael Gertel," "Stephanie Krupin," and "Tiffany Gerstler," as party defendants in place of "John Doe" all without prejudice, the name of the plaintiff shall be amended to "Select Portfolio Servicing, Inc. as Servicer for DLJ Mortgage Capital, Inc.," and that defendants Michael Gertel, Stephanie Krupin, and Tiffany Gerstler shall be deemed in default, with said default to be fixed and determined also by the Referee. Further, plaintiff's request that Seward Park's cross-claims and counterclaims against the Mortgagor for declaratory relief and damages for breach of By-Laws and Proprietary Lease, and forgery of Seward Park's President's signature, be severed from this action, is granted, also without opposition.

As to Seward Park's cross-motion for a declaration that Seward Park has a valid first lien on the Apartment, it is uncontested that the By-Laws and Lease provide that Seward Park has a first lien on the shares for all sums due and owing to Seward Park. Further, Article X of the By-Laws extends Seward Park's lien "for all other indebtedness" to attorneys' fees owed in

connection with enforcing Seward Park's rights upon a shareholder's default. In *Bank of New York v Carr*, plaintiff sought to foreclose a security interest consisting of a proprietary lease and shares of stock representing the ownership of a cooperative apartment. Plaintiff then moved for summary judgment dismissing the answer and counterclaim of defendant Union Gardens Cooperative Section I Inc. (the "cooperative corporation") and for the appointment of a Referee to compute the amount due on the underlying promissory note. The Recognition Agreement (identical to the one involved in this action, though allegedly forged), contained the following:

"Notwithstanding any apparent authority granted to us under agreements with the Lessee, WE [plaintiff] SHALL HAVE NO RIGHT OR POWER TO TRANSFER THE APARTMENT UPON FORECLOSURE OR OTHERWISE EITHER TO US OR ANYONE ELSE WITHOUT YOUR [Seward Park's] APPROVAL AS REQUIRED BY THE LEASE provided, however, that nothing contained herein shall limit any rights we may have to dispossess the Lessee pursuant to law or realize upon our security in accordance herewith."

Emphasis in the original.

It was uncontested that debtors, defendants Linda and Kenneth Carr, defaulted in their secured obligations to plaintiff, and plaintiff conceded the priority of the lien of the cooperative corporation for charges due pursuant to the occupancy agreement entered into with the debtors. The sole issue raised was whether plaintiff, as a second creditor, was subject to the purchase option provisions of the cooperative corporation's bylaws and occupancy agreements which permitted the transfer of shares only upon a waiver by the cooperative corporation of its option to purchase the shares at book value. Citing to the language of the Recognition Agreement, the Court held that plaintiff's security interest was subject to the option rights of the cooperative corporation.

The Recognition Agreement is signed in the form of a contract between the cooperative

and the lender, which usually provides a mechanism for the lender's notification of any default by the shareholder in the payment of maintenance so that the lender can protect its security interest by paying the shareholder's default or taking other legal action (*Klingsberg v River Terrace Apts.*, 7 Misc 3d 1029, 801 NYS2d 235 [Sup Ct Bronx County 2005]).

While the signature of Seward Park's President on the Recognition Agreement herein was allegedly forged, the By-Laws and Proprietary Lease provide, and the record indicates, that plaintiff acknowledged Seward Park's first lien position. Therefore, Seward Park's cross-motion for a declaration that Seward Park has a valid first lien on the Apartment is granted (*see Bank of New York v Carr*).

However, in light of this Court's finding that plaintiff states a cause of action to enforce its security interest, the branch of Seward Park's cross-motion to dismiss the Complaint is denied

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion for summary judgment dismissing the Answer of the defendant Seward Park Housing Corporation ("Seward Park"), is granted; and it is further

ORDERED that the branch of plaintiff's motion for permission to treat Seward Park's Answer as a limited Notice of Appearance so as to entitle Seward Park to receive, without prior notice, a copy of the Notice of Sale, Notice of Discontinuance, and Notice of Surplus Money Proceedings, if any, is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order appointing a Referee to determine whether the premises may be sold in parcels, is denied; and it is further

ORDERED that the branch of plaintiff's motion for an order directing that all non-appearing and non-answering defendants be deemed in default, and said default be fixed and determined by the referee is granted; and it is further

ORDERED that the branch of plaintiff's motion for an order appointing a Referee to determine the amount due plaintiff is granted and a Referee or Special Referee shall hear and report with recommendations on the amounts due and owing to plaintiff, including fixing and determining the amount of the default of the non-appearing and non-answering defendants, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Referee, or Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED the movant shall move pursuant to CPLR 4403 within 30 days of receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the branch of plaintiff's motion to amend the caption is granted without prejudice, and upon receipt of a copy of this order, the Clerk shall amend the caption by substituting "Michael Gertel," "Stephanie Krupin," and "Tiffany Gerstler," as party defendants in place of "John Doe" and substituting the name of the plaintiff to "Select Portfolio Servicing, Inc. as Servicer for DLJ Mortgage Capital, Inc.;" and it is further

ORDERED that the branch of plaintiff's motion for an order severing Seward Park's cross-claims and counterclaims against Lillian Krupin for declaratory relief and damages for

breach of By-Laws and Proprietary Lease, and forgery of Seward Park's President's signature, is granted, and said counterclaims are hereby severed; and it is further

ORDERED that the branch of Seward Park's cross-motion for summary judgment dismissing the Complaint is denied; and it is further

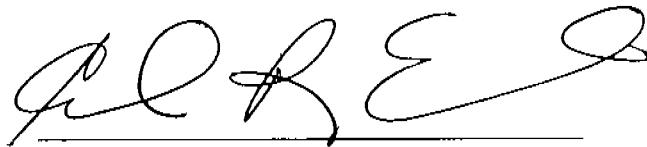
ORDERED that the branch of Seward Park's cross-motion for an order declaring that Seward Park has a lawful and valid first lien for any and all monies and arrears, including attorneys' fees, owed by Lillian Krupin with respect to the subject Apartment, and for summary judgment dismissing the counterclaims of defamation and intentional infliction of emotional distress asserted by Michael Gertel and Stephanie Krupin-Gertel, is granted, and said counterclaims are hereby severed and dismissed; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: December 23, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDM

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