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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 600462/2007
WINN, PAUL
VS.
TVEDT, MICHELLE
SEQUENCE NUMBER : 004
DISMISS ACTION

INDEX NO. _____
MOTION DATE 12/7/09
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

FILED
JAN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that Owners Corp.'s motion (Sequence No. 004) in Action 1 (Index No. 600462-2007) to dismiss the Complaint of Paul Winn and all cross claims is denied; and it is further

ORDERED that the branch of Owners Corp.'s motion (Sequence No. 001) in Action 3 (Index No. 114929-2008) for summary judgment against Winn and foreclosing Winn's purported conditional rights and interests with respect to the Units is denied; and it is further

ORDERED that the branch of Owners Corp.'s motion (Sequence No. 001) in Action 3 (Index No. 114929-2008) for default judgment against all defendants except for Esanu Katsky Korins & Siger, LLP, is granted and the damages against said defendants be assessed at the time of the trial of the action or disposition of the action; and it is further

ORDERED that Owners Corp. shall serve a copy of this Order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/14/2010

HON. CAROL EDMEAD J.S.C.

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

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

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PAUL WINN,

Plaintiff,

-against-

MICHELLE TVEDT a/k/a MICHELLE POLIZZI a/k/a MICHELLE THERESA POLIZZI a/k/a MICHELLE ADELE POLIZZI a/k/a MICHELLE CONNELLY, THERESA POLIZZI a/k/a ADELE THERESA POLIZZI a/k/a ADELE POLIZZI a/k/a ADELE MICHAEL POLIZZI a/k/a ADELE MICHAELS, FEDERAL DEPOSIT INSURANCE CORPORATION in its Capacity as Receiver of INDYMAC BANK, FSB., GMC MANAGEMENT COP, LAWRENCE CULLEN, GEORGE MERCIER, IVY MORTGAGE CORP., BANK OF NEW YORK, as Trustee under the Pooling and Servicing Agreement Series 1996-5, PAUL PIOTROWSKI, 12 EAST 87TH STREET OWNERS CORP., ABBEY FUNDING CORP., AND "JOHN DOE" AND "JANE DOE", said names being Fictitious,

Defendants.

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DECISION/ORDER

Index No. 600462-2007
Action 1
Motion No. 004

MICHELLE TVEDT a/k/a MICHELLE CONNOLLY a/k/a MICHELLE POLIZZI a/k/a MICHELLE THERESA POLIZZI a/k/a MICHELLE ADELE POLIZZI and JUDY POLIZZI a/k/a JUDY ABRAHAMSEN a/k/a JUDY ABRAHAMSON,

Plaintiffs,

-against-

GEORGE MERCER, GMC MANAGEMENT CORP., JEWISH ASSOCIATION FOR SERVICES FOR THE AGED, as Guardian for the Personal Needs and Property Management of THERESA POLIZZI a/k/a ADELE THERESA POLIZZI a/k/a ADELE POLIZZI a/k/a ADELE MICHAEL POLIZZI a/k/a ADELE MICHELS, CRAIG WEXLER, PAUL S. NEIGER, PRIVATE CAPITAL CORP., JEROME Z. CLINE, STARR CLINE, PAUL WINN, WEATHERVANE OWNERS CORP, RIVERVIEW TENANTS CORP, 12 EAST 87TH STREET OWNERS CORP, 31577 OWNERS CORP., JOHN DOE 1-10, XYZ CORP 1-10,

Defendants.

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Index No. 108438-2008
Action 2

12 EAST 87TH STREET OWNERS CORP.,

Plaintiff,

-against-

PAUL WINN, MICHELLE CONNELLY a/k/a MICHELLE THERESA POLIZZI a/k/a MICHELLE THERESA POLLIZZI a/k/a MICHELLE CONNOLLY a/k/a MICHELE TVEDT a/k/a MICHELLE POLIZZI a/k/a MICHELLE ADELE POLIZZI, THERESA POLIZZI a/k/a ADELE THERESA POLIZZI a/k/a ADELE POLIZZI a/k/a ADELE MICHAEL POLIZZI a/k/a ADELE MICHELS, JEWISH ASSOCIATION FOR SERVICES FOR THE AGED, As Guardian for the Personal Needs and Property Management of THERESA POLIZZI a/k/a ADELE THERESA POLIZZI a/k/a ADELE POLIZZI a/k/a ADELE MICHAEL POLIZZI a/k/a ADELE MICHELS, INDYMAC BANK, FSB, INDYMAC BANK MORTGAGE HOLDINGS, EQUITIES, INC., INDYMAC MORTGAGE HOLDINGS, INC., GMC MANAGEMENT CORP. a/k/a GEORGE E. MERCIER, GMC MANAGEMENT CORP., PRIVATE CAPITAL CORP., LAWRENCE V. CULLEN, GEORGE MERCIER, IVY MORTGAGE CORP., BANK OF NEW YORK, As Trustee under the Pooling and Servicing Agreement Series 1996-5, PAUL PIOTROWSKI, WINDWARD VENTURES LLC, EASTERN SAVINGS BANK, FSB, EMIGRANT MORTGAGE COMPANY, INC., HSBC MORTGAGE CORPORATION, P&B ASSOCIATES, COPYTONE, INC., ABBEY FUNDING CORP., NORTHFORK BANK, BERNARD WAIN, ILANA HOSCHANDER, ESANU KATSKY KORINS & SIGER, LLP, BP CONSOLIDATED EQUITIES INC., NELLA PASCAL,"JOHN DOE 1" through JOHN DOE 10" and "JANE DOE 1" though "JANE DOE 10", Said Names Being Fictitious, but the parties intended are all those claiming an interest in Units 8C and Penthouse at 12 East 87th Street, New York, New York,

Defendants.

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Index No. 114929-2008
Action 3
Motion No. 001

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

MEMORANDUM DECISION[1]

These two consolidated motions involve three actions, which concern title to two units, a Penthouse and Unit 8C (the "Units"), located at 12 East 87th Street, New York, New York. In Action 1, Paul Winn ("Winn") seeks declaratory judgment that he has valid ownership interests in the Units, and for an order directing 12 East 87th Street Owners Corp. ("Owners Corp.") to issue him stock certificates and proprietary leases for the Units. In Action 2, Michelle Tvedt ("Tvedt") alleges that the previous foreclosures of the Units, which terminated her ownership interests therein, were invalid. In Action 3, Owners Corp. seeks, *inter alia*, a declaration that it is the fee owner of the Units, and to recover the shares of stock and lease to regain possession of the Units.

Factual Background[2]

As to the Penthouse, in 1989, Tvedt's mother, Theresa Polizzi ("Polizzi")[3] was issued the proprietary lease (the "Penthouse lease") and stock certificate representing 574 shares for the Penthouse from Owners Corp., and thereafter assigned her ownership interest therein to Tvedt who was "using the name Michelle Connelly." In 1996, the stock certificate and lease were then assigned to IndyMac to secure a loan. When IndyMac lost the stock certificate and lease, Owners Corp. replaced same in the name of "Michelle Theresa Polizzi" (who is Tvedt).

The stock certificate and lease were then assigned to GMC Management Corp. ("GMC").

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[1] The motion in Action 1 (Index No. 600462-2007) bearing sequence number 004, and the motion in Action 3 (Index No. 114929-2008) bearing sequence number 001, are consolidated for joint disposition herein.

[2] The factual background is taken in large part from the Complaint of Paul Winn.

[3] In Action 1, Winn also seeks rescission of his agreement with Polizzi to sell the Units, and a $50,000 refund from Polizzi for misrepresenting that she would deliver title documents as the last shareholder of record.

When Tvedt thereafter defaulted on the loan payments, in 2002, GMC foreclosed on the Penthouse and GMC successfully bid on the Penthouse. In 2004, GMC reached a redemption agreement with Polizzi, Tvedt, and George Mercier ("Mercier")[4]; however, Tvedt and Polizzi later defaulted on their obligations under the redemption agreement. In 2005, GMC assigned its successful bid to Lawrence Cullen ("Cullen"), and Mercier and GMC's interests were also assigned to Cullen. The successful bid was eventually assigned from Cullen to Winn.

As to Unit 8C, prior to 1995, Polizzi and/or Tvedt acquired the stock certificate representing 575 shares and proprietary lease (the "Unit 8C lease") from Owners Corp. On February 16, 1996, Tvedt assigned her ownership interest in the stock certificate and lease to Ivy Mortgage Corp. to secure a loan. Days later, Polizzi assigned her interest to Tvedt; Owners Corp. entered into a recognition agreement with Polizzi and Abby Funding. After Tvedt defaulted on her loan, Bank of New York, to which the security interest and note ultimately had been assigned, foreclosed on Unit 8C and became the successful bidder. The successful bid was assigned to IndyMac, who later assigned the successful bid to Unit 8C to Winn, as a principal of Windward Ventures.

As such, Winn's now holds the successful bid as to the Penthouse, and as a principal of Windward Ventures, the successful bid for Unit 8C.

Due to the default in maintenance payments, Owners. Corp. served, *inter alia*, a 10-day notice to cure to all "interested parties" as to the Units, dated July 2, 2008, warning that in the event the failure to pay rent is not cured "on or before Friday, July 18, 2008," Owners Corp. shall

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[4]Mercier is an individual who Owners Corp. identifies as a person who claimed and may now be claiming an interest in and to the subject shares and leases.

terminate the tenancy.

On July 17, 2008, Winn moved by order to show cause to stay his time to cure and the Court granted a stay, on the condition that (1) "payment for rent/maintenance allegedly in arrears . . . is tendered" within 15 days, and (2) "rent/maintenance remains current thereafter" (the "July 17th Order"). The Court directed Winn to pay maintenance, "but with the reservation of all [r]ights."[5]

Winn sent a check for the arrears, on July 30, 2008, as required. However, the parties required clarification when Owners Corp. refused to accept Winn's checks, which were tendered "without prejudice" and "with all rights reserved."[6] Thus, the parties appeared for a conference on this issue on August 19, 2008.

At the August 19, 2008 conference, the Court directed Owners Corp. to accept Winn's checks, whether or not they included a reservation of rights. However, because Winn could not establish at the hearing that he sent the August 1, 2008 payment that was then due, the Court lifted the stay. (This transcript was entered on August 28th). The Court stated that:

> the check should have been delivered . . . Somebody should have made sure it got there. He doesn't get the benefit of a stay unless he can show full compliance. . . . If [Winn] can show full compliance, let me know. He can come back in.
>
> * * *
>
> Time was up when I don't have proof that he did it.
> (August 19, 2009 Transcript, pp. 6, 7).

Winn did not seek renewal of the August 19th order lifting the stay.

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[5]July 17, 2008 Transcript, pp. 14, 15.

[6]August 19, 2008 Transcript, p. 3.

The day following the August 19, 2008 conference, Owners Corp. sent a letter to Winn, returning Winn's August 1, 2008 check, which was marked "without prejudice to all rights," on the ground that the check "appeared to be marked as a conditional tender." Owners Corp. then served a notice of termination, dated August 20, 2008, as to each Unit, which stated that Owners Corp.

> hereby elects to terminate (as of August 29, 2008) all tenancies for the Demised Premises (or any other rights you may have in and to the Demised Premises) . . .
>
> * * *
>
> . . . this termination has been issued based upon your failure to comply with the Notice to Cure dated July 2, 2008 . . . and that there continues to be a default in the payment of such rent or maintenance as has accrued on the apartment . . . The total arrearage . . . is in the sum of $20,177.24.
> (the "Termination Notices").

On August 27, 2008, Winn attempted to move by order to show cause to stay the termination and present a copy of the check that was sent. At the hearing on that date, the Court ruled that since the period to cure the alleged default had expired, the Court lacked jurisdiction to issue or reinstate the stay. Thus, the Court declined to sign the order to show cause.

No one appealed this August 27, 2008 ruling.

Yet, on or about September 4, 2008, Winn appealed the order "dated August 19, 2008 terminating the Stay embodied in the Order to Show Cause . . . and entered by the Clerk of the Court on August 28, 2009 contained in the minutes of the proceedings held on August 19, 2008. . ."

On December 4, 2008, the First Department issued an interim stay, and on February 17, 2009, stayed the order "dated August 19, 2008" entered on August 28, 2008, on the condition that

Winn cured all arrears and made all future payments no later than the 10th day of each month.[7]

On November 19, 2009, the First Department affirmed the August 19, 2008 order, stating that the record "establishes that [Winn] failed to comply with the conditions imposed by the court in granting the stay and that he was afforded an opportunity to remedy his noncompliance."

First Motion by Owners' Corp.

Now, in Action 3, Owners Corp. moves for summary judgment against Winn and foreclosing Winn's purported conditional rights and interests with respect to the Units, and a default judgment against all other defendants ("defaulting defendants"), except Esanu Katsky Korins and Siger, LLP ("Esanu LLP"), for failing to appear in this action.

As against Winn, it is argued that Owners Corp. has a first lien on all shares owned by each shareholder. Owners Corp. contends that the Penthouse and Unit 8C leases (collectively, the "lease") impose a continuing obligation upon the shareholder to pay rent, until the time that the lease is terminated, new shares are issued and a new lease issued. The charges which accrue against the shares include maintenance, attorneys' fees, and all expenses.

The stock certificates expressly provide that Owners Corp. "has a first lien on the shares represented by this certificates for all sums due and to become due under said proprietary lease." Following the enforcement of such a lien, the shareholder's shares become void and Owners Corp. can issue new shares to a purchaser. The By-Laws also provide that Owners Corp. can withhold its consent to the transfer of shares where the shareholder is indebted, pending payment of the debt. Thus, the By-Laws provide that the Corporation has a first lien, any transfer of

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[7]According to Transcript dated August 17, 2009, counsel for Winn stated "Following that we were entering into settlement negotiations so we were not able to be totally [compliant] with the stay. So that was lifted." (p. 14)

shares must be Board approved, the debts outstanding against the shares must be paid, and the Board may withhold its consent to approve the transfer absent payment of the debt. Owners Corp. also has the right to foreclose if charges are not paid.

According to Owners Corp., "Michelle Theresa Polizzi" is the last owner of record of the two Units, and title to these two units have not been transferred to any other entity on the Owners Corp.'s books. A review of the relevant documents demonstrate that Winn's claim of a contingent interest in the two Units, if any, are subject to and controlled by the terms of the By-Laws and lease. Winn cannot demonstrate clear title.[8]

The terms of the foreclosure sale of the Units provide that they were sold subject to the By-Laws, rules, regulations, procedures, resolutions and offering plan and any amendments. The purchaser may have obtained certain rights and obligations of Tvedt,[9] but subject to the terms of the By-Laws and lease. As such, there was a continued obligation to pay maintenance. Winn's payments with respect to both Units were frequently late and stopped in March 2008.

Any rights established by Esanu should be preserved; however, they should be recognized to be secondary to those of Owners Corp. Accordingly, any financial interest established by Esanu LLP should be satisfied through the funds generated by the sale of the stock and lease in Units 8C and the Penthouse, but only after the financial interests of Owners Corp. have been accounted for and satisfied.

With service of the Termination Notices, the rights of Tvedt and the purported

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[8] During the pendency of this litigation, Winn has successfully taken steps to clear title.

[9] In its motion papers, Owners Corp. contends that "Michelle Connelly a/k/a Michelle Theresa Polizzi was the owner/borrower and GMC Management was the secured party/lender" in connection with the "foreclosure sale of the Penthouse on May 23, 2003." According to Winn's Complaint, the loan with GMC Management was made after Tvedt obtained her interest in the Penthouse (¶¶16, 17), and Tvedt was the person who defaulted on this loan (¶20).

conditional rights of Winn have ended, foreclosure and sale of the stock and lease are warranted, and plaintiff is entitled to use the proceeds of the sale to satisfy the debt pending against the shares.

Winn's Opposition

Since Winn acquired his interest in the Units in early 2005, he has been paying maintenance consistently from late 2006 until June 2008, when Tvedt instituted her action alleging that the foreclosure was improper. At the time of the August 19, 2008 hearing, in which this Court lifted the Stay, Winn had paid approximately 94% of all maintenance due to Owners Corp.; the remainder of the maintenance due consists of payments Winn sent to Owners Corp., and which Owners Corp. rejected. Neither Tvedt nor Polizzi have remitted one maintenance payment since Winn acquired his ownership interests in early 2005.

If summary judgment is granted, Winn's ownership interest in the Units, which has not been fully adjudicated in two related actions, may be rendered moot. Further, this Court's decision to lift the Stay cannot be considered a final judgment, or an adjudication on the merits, such that Owners Corp. may base the instant motion upon it. Such decision cannot preclude Winn from receiving an ultimate determination of his rights in the Units.

Summary judgment also should be denied because the Termination Notices upon which this foreclosure action is based, are premised upon Winn's alleged failure to pay maintenance, even though Winn made the payment, and Owners Corp., in violation of this Court's July 17th Order, rejected Winn's check for August maintenance as well. Because the Termination Notices were invalid, this action, which flows from it, cannot be decided on summary application. Unsurprisingly, during the August 19, 2008 hearing, this Court quickly disposed of Owners

Corp.'s argument by stating, "The reservation of rights in . . . the check does not in any way mitigate the Court's ruling with respect to what the effect would be on the Board." This Court based its decision to lift the stay on Winn's failure to prove he had remitted a second check for August maintenance, not on any purported reservation of rights. The Court never made the determination that the reservation of rights was improper. In fact, Winn complied with the Court's order by staying current with maintenance, and Owners Corp. improperly rejected Winn's payments, permitting Owners' Corp. a basis, of its own devise, to issue the Termination Notices. Such invalid Termination Notices should be rejected and cannot form the basis of this action or the motion.

Winn also argues that granting defendant's motion for summary judgment will lead to an inequitable result. If the parties had not called for the August 19, 2008 hearing, the Court would have heard arguments on the September 16, 2008 return date, at which point the check for August maintenance would have been in hand. The parties do not dispute that the check was eventually delivered and received by Owners Corp. This Court's decision led directly to the actions to terminate Winn's rights to the Units, including the delivery of the Termination Notices to Winn for the Units and the commencement of this foreclosure action.

Equity favors Winn, because this action stems from one alleged instance of default. Owners Corp. has asserted that although Winn sent the check to the correct address, he included the wrong zip code, which delayed the arrival of the rent check until August 20, 2008, one day after the Court lifted the stay after Winn allegedly could not prove the check was received. Winn stands to lose everything because of an allegedly incorrect zip code and a check allegedly received one date after a hearing. In considering this Court's abhorrence of the forfeiture of

leases, equity requires that this Court deny the instant motion.

If Owners Corp. would have accepted Winn's recent checks, Winn would have been current as of the date of the August 19, 2008 decision on nearly four years of maintenance payments. Winn remains ready, willing and able to make all payments going forward. Thus, equity directs that this Court deny the instant motion.

Moreover, Owners Corp. accepted Winn's payments of arrearages and current maintenance charges in curing previous defaults; they should not now come before the Court, and demand effectively the termination of all of Winn' s rights. Also, while Owners Corp. alleges that the By-laws require that a purchaser in foreclosure satisfy maintenance owed, as the holder of a first lien on the Units, Owners Corp. failed to permit Winn the opportunity to pay maintenance in arrears, instead bleeding him of monthly maintenance while at the same time offering him no prospect of being granted possession of the Units, or even the ability to inspect them. And, while Owners Corp. states that "Polizzi" is the owner of record, Owners Corp.'s own facts show that her ownership interests were foreclosed by her lenders, and if this is unclear, this represents facts in dispute as well.

Reply

Winn failed to demonstrate that he has a valid chain of title. Winn was told of the defects in the chain of title in 2005, and filed suit to clear the chain of title in 2007. Despite the passage of time, Winn failed to meet his burden and clear title, and this failure should not be used to prejudice the interests of Owners Corp. which has acted appropriately at all times. In any case, argues Owners Corp., even if Winn could prove that he had clear title to the Units, this would have no bearing on the foreclosure action. The foreclosure action is based on the termination of

the lease. Since the two issues are unrelated, the ongoing litigation concerning Winn's purported right to title should not delay Owners Corp.'s right to foreclose on the Units.

Further, Winn's claim that Owners Corp. improperly rejected his payment has already been resolved by the Court and under the doctrine of *res judicata*, may not be revisited. Winn does not claim any defect in the Termination Notices. The Court's prior decisions were sound because there was no good faith effort by Winn to pay. Rather, Winn attempted to reserve his rights despite the fact that he had been told he could not do so, and then failed to heed repeated requests for payment. The Court lifted the stay on Winn's time to cure and recognized the terminations. Winn's continued delay is highly prejudicial to the interests of Owners Corp. Owners Corp. has been deprived of operating funds and has been forced to incur legal fees as a result of the litigation tactics used by Winn. Further, the conduct of Owners Corp. in rejecting payment is not subject to review because it acted in good faith and in furtherance of the interests of the corporation.

The equities favor the Board and Winn has come to court with unclean hands. Winn, who spent $1.8 million dollars on foreclosure bids for the two Units without confirming he had clear title, is now trying to force the Board to give him stock and lease with clear title. It would be a violation of the Board's fiduciary duty to do so. Still Winn filed six motions and one appeal in an effort to break Owners Corp. Winn had a history of late and failed maintenance payments. When Winn was served with the Notices to Cure, he commenced a course of legal maneuvers to stall the Board's efforts to obtain payment and force the Board to incur legal expenses.

Winn disregarded Owner Corp.'s legitimate efforts to resolve this matter without continued litigation. For example, after the Appellate Division granted its stay, Owner Corp.

voluntarily extended Winn's time to comply with the order and pay all arrears while negotiations went forward. Winn took advantage of this opportunity, failed to negotiate in good faith. When Owners Corp. realized that Winn was acting in bad faith, it filed its motion for summary judgment in the foreclosure action in June of 2009. This was met with the motions to stay and consolidate, and the application to extend the time to file the appeal. Moreover, Owners Corp. has tried, in good faith, to reach a settlement in accordance with the terms of an understanding reached in open Court on September 2, 2009. However, months have passed with additional legal expense to Owners Corp. and no resolution.

Second Motion by Owners Corp.

Owners Corp. also moves in Action 1, to dismiss Winn's Complaint and all cross claims, on the grounds that the August 19 and 28, 2009 orders of the Court are law of the case and collaterally estop any party from seeking affirmative relief against Owners Corp. Based on the above, and *res judicata* and collateral estoppel, Winn's rights, if at all, have been terminated by the Termination Notices, and Winn's request for a declaration that he had good and valid ownership interest, which would required Owners Corp. to issue new stock certificates to Winn, no longer exists.

Winn's Opposition

Winn argues that he did not have a full and fair opportunity to litigate the question of his rights to the Units. The Court's remarks dealt with the issue of whether to lift the stay of termination only; the Court did not issue a judgment on the ultimate issue of ownership of the Units.

Further, the Court's statements during the August 19th and 27th hearings should not be

considered binding under the "law of the case" doctrine, because they came during a hearing on a provisional remedy, before there was a full and fair opportunity to litigate the issue before the Court. And, since the statements were mere *dicta* and the decision to deny a stay of a termination notice is akin to the refusal of a temporary injunction, such statements cannot constitute the law of the case.

In light of Winn's long history of making payments in this case, and Winn's good faith effort to remit payments in arrears and stay current, if the lease is terminated, his opportunity to prevail on the merits may also be foreclosed.

Moreover, Owners Corp. waived its right to terminate Winn's lease, based on its repeated acceptance of maintenance. Winn also sent his August 2008 check, and Owners Corp. acted in bad faith by not accepting it.

Analysis

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 Perlbinder*, 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]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a 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]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

Pursuant to the terms of the foreclosure sale of the Units, the Units were sold subject to the By-Laws, and it is undisputed that under Article VI, Section 6 of the By-Laws, Owners Corp. has a "first lien upon the shares owned by each shareholder for all indebtedness and obligations owing . . . by such shareholder . . . arising under" the lease. The By-Laws also grant Owners Corp. the right to enforce such a lien. It is also undisputed that pursuant to the lease, Owners Corp. has "the right to terminate the lease should the shareholder be in default for a period of one month and fail to cure the default within ten (10) days after the service of a Notice of Cure" (Section 31(d)), and that upon "termination of the Lease, the shareholder must surrender possession." (Section 21(c)).

Owners Corp. concedes that both its motion on its foreclosure action (Action 3) and its

motion for dismissal of Winn's action (Action 1), are based on the termination of lease by virtue of the Termination Notices served upon Winn. However, Owners Corp., as the movant, failed to establish that the rights of Winn concerning the Units were properly terminated as a matter of law.

Winn appeared in Court on July 17th, one day before the expiration of the 10-day cure period. Thereafter, when Owners Corp. rejected Winn's July 2008 payment, Winn and Owners Corp. appeared in Court on August 19th. When the Court discovered that the August 1st payment had not yet been received by Owners Corp., the Court determined that the copy of the August 1st check, in and of itself, was insufficient to establish that Winn had in fact tendered the check to Owners Corp., and thus, Winn, as the First Department upheld, failed to establish that he complied with this Court's order to pay maintenance as a condition of the stay of the cure period. Therefore, the Court lifted the stay. Whether the Court's August 19th order lifting the stay constitutes a "final determination" or is *dicta,* is moot in light of the First Department's affirmance of the lifting of the stay, and in this regard, the determination to lift the stay is now law of the case. However, when the Court lifted the stay on August 19th, Winn had until August 20th to comply with the 10-day notice to cure or establish to the Court his compliance within the cure period.

As demonstrated by Owners Corp.'s own letter dated August 20th, Owners Corp. possessed Winn's August 1st check on August 20th, within the cure period. Yet, Owners Corp. did not bring to the Court's attention, on August 20th, the fact that Winn's payment was received, and it does not appear that Winn received Owners Corp.'s August 20th letter on that day in order to bring such letter to the Court's attention on August 20th. Notably, Owners Corp., in possession of Winn's August 1st check on August 20th, disingenuously rejected Winn's payment on grounds

which the Court previously expressly directed Owners Corp. to accept the checks (*see supra* at p. 5). It bears repeating that on July 17, 2008, when the Court heard oral argument on Winn's order to show cause to stay the cure period, the Court expressly conditioned the stay of the cure period upon Winn's payment of maintenance with a reservation of all rights. And, when the parties sought clarification on the issue of the reservation of rights, the Court confirmed that Winn's payments could be tendered with a reservation of all rights.

Thus, by rejecting Winn's checks on the ground that they contained a reservation of rights or constituted a "conditional" payment, and issuing the Termination Notices based on Winn's failure to pay the maintenance, the Termination Notices were served in contravention of this Court's order permitting Winn to tender his check with a reservation of rights, and were therefore issued in bad faith and lacked basis (*see e.g., K.S.L.M. Columbus Apartments Inc. v Bonnemere*, 8 Misc 3d 1026, 806 NYS2d 445 [N.Y.City Civ.Ct. 2004] [stating that upon timely cure, the landlord cannot commence a summary proceeding to retake possession of the subject premises, and the tenant is no longer in jeopardy of forfeiting the tenancy]). Since the Termination Notices were served prematurely (*see e.g., Williamsen v Bugay*, 21 Misc 3d 1128, 875 NYS2d 824 [N.Y.City Civ.Ct. 2008] [where February 28, 2008 was the date by which the alleged violations must be cured before the petitioners can seek to terminate the tenancy for non-compliance with the Notice service of any termination notice prior to February 29, 2008 deprived the tenant the full 10 day cure period and was three days premature]; *96 Broadway Realty, LLC v Kyung Sik* Kim, 18 Misc 3d 1119, 856 NYS2d 49 [N.Y.City Civ.Ct. 2008] [where notice of termination was mailed prematurely and fails to set forth specific facts to establish the grounds for the landlord to recover possession, it is therefore inadequate, premature and ineffective]), they are insufficient to serve as

a basis for Owners Corp. instant motions.

The Court notes that although the First Department upheld this Court's determination to lift the stay based on Winn's failure to establish compliance with the Court's order, the issue of whether Winn's alleged rights in the Units were properly terminated pursuant to the Termination Notices was not an issue before the Appellate Division.

Since it cannot be said that Winn's alleged rights have been terminated by the Termination Notices, Owner Corp.'s motions for (1) summary judgment foreclosing Winn's rights to the Units and (2) dismissal of Winn's Complaint and all cross-claims, are unwarranted at this juncture. As to Owners Corp.'s motion for default judgment, this branch of Owners Corp.'s motion is granted, without opposition.

Conclusion

Although the record demonstrates that Owners Corp. has a first lien on all shares pertaining Unit 8C and the Penthouse, the lease imposes a continuing obligation upon the shareholder to pay rent, until the time that the lease is terminated, new shares are issued and a new lease issued, and that the charges which accrue against the shares include maintenance, attorneys' fees, and all expenses, based on the above, it is hereby

ORDERED that Owners Corp.'s motion in Action 1 (Index No. 600462-2007) to dismiss the Complaint of Paul Winn and all cross claims is denied; and it is further

ORDERED that the branch of Owners Corp.'s motion in Action 3 (Index No. 114929-2008) for summary judgment against Winn and foreclosing Winn's purported conditional rights and interests with respect to the Units is denied; and it is further

ORDERED that the branch of Owners Corp.'s motion in Action 3 (Index No.

114929-2008) for default judgment against all defendants except for Esanu Katsky Korins & Siger, LLP, is granted and the damages against said defendants be assessed at the time of the trial of the action or disposition of the action; and it is further

ORDERED that Owners Corp. shall serve a copy of this Order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 14, 2010

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

HON. CAROL EDMEAD