Board of Mgrs. of the Ansonia Condominium v Logan
2010 NY Slip Op 31674(U)
June 25, 2010
Supreme Court, New York County
Docket Number: 116761/2007
Judge: Paul G. Feinman

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

PRESENT: FEINMAN Justice

PART 12

THE BOARD OF MGRS. OF THE ANSONIA CONDOMINIUM

-v-

VICKI LOGAN, ETAL.

INDEX NO. 116761/07

MOTION DATE

MOTION SEQ. NO. 01

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

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED
JUN 29 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/25/2010

BHK
J.S.C.

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: CIVIL TERM: PART 12

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THE BOARD OF MANAGERS OF THE ANSONIA CONDOMINIUM ON BEHALF OF THE UNIT OWNERS,

Plaintiff,

against

VICKI LOGAN, WELLS FARGO BANK, N.A., NEW YORK CITY DEPARTMENT OF FINANCE, BRIAN TWIBELL, RACHAEL BILARDI, "JOHN DOE" AND "JANE DOE" (Said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of the premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises),

Defendants.

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Index Number 116761/2007
Mot. Seq. No. 001

DECISION AND ORDER

For the Plaintiff:
Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.
By: Jeffrey C. Chancas, Esq.
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For Defendant Wells Fargo:
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Papers considered in review of this motion to appoint and cross motion to dismiss :

Papers	Numbered
Order to Show Cause, Affidavit, Exhibits	1
Affidavits of Service	2-7
Notice of Cross Motion, Affirmation, Exhibits	8

PAUL G. FEINMAN, J.:

The motion brought by order to show cause, and the cross motion are consolidated for purposes of decision.

Plaintiff seeks the appointment of a temporary receiver to collect rent for the subject condominium unit which is the object of a foreclosure proceeding, pursuant to RPL § 339-aa, and

CPLR 6401. Defendant Wells Fargo does not "necessarily oppose" the motion, but cross-moves for dismissal of the complaint as against it on the ground that it is not a proper or necessary party (Cross Mot. Wrona Aff. ¶ 3). None of the other defendants has appeared on the motion, and neither they nor plaintiff has opposed the cross motion. Although the relief requested by plaintiff may be meritorious, it fails to establish that service was properly made upon defendant Logan, and therefore its motion must be denied without prejudice. The cross motion is granted without opposition.

Plaintiff is the elected governing body of The Ansonia Condominium, a condominium existing pursuant to Article 9-B of the New York Real Property Law (OSC Ex. C. Ver. Compl. ¶ 1). Defendant Logan is the record owner of Unit 17-19 in the Condominium, having acquired title to the premises by deed dated August 2, 2005, and recorded in the Office of the Register of the City of New York on March 2, 2006 (Ver. Compl. ¶¶ 2, 4). According to the complaint, Logan has failed to pay common charges owed on this unit and four others in the building which she owns with another individual (OSC, Krasnow Aff. in Supp. ¶¶ 10, 11). As to Unit 17-19, plaintiff recorded a Notice of Lien for Unpaid Common Charges on August 17, 2007, pursuant to the Condominium By-Laws and to RPL §§ 339-z and 339-aa (Ver. Compl. ¶¶ 8-9).

Plaintiff commenced this action in 2007 seeking to foreclose on the lien. Named as defendants are Wells Fargo, N.A., to whom Logan executed and delivered a note and mortgage in the amount of $415,000 with interest, the City of New York and certain of its various agencies, and two rental tenants in possession.[1] Plaintiff concedes it has a subordinate interest to that of

[1] Upon plaintiff's information and belief, as of December 2009, there are no rental tenants currently in any of the units, including Unit 17-19 (OSC, Krasnow Aff. in Supp. ¶ 18).

Wells Fargo, the first mortgagee, and to the City of New York (OSC, Krasnow Aff. in Supp. ¶ 14).[2]

Because the other parties' foreclosure actions have "dragged on," plaintiff moves by order to show cause seeking appointment of a receiver either to rent out the subject unit at the current market rate, or to collect a reasonable, market rate rent from Logan, so that plaintiff, charged with operating the building based on the monies acquired from the condominium units' common charges and assessments, can incorporate these monies into its operating expenses (OSC, Krasnow Aff. ¶¶ 15, 19-20). According to plaintiff's vice president, Jesse Krasnow, as of the end of December 2009, Logan had failed to pay common charges and assessments for that unit in the amount of $31,071.24, with the current monthly common charges being $647.43, and with a monthly assessment through April 2010 of $34.64 (OSC, Krasnow Aff. ¶¶ 35-26). Krasnow estimates that the unit, a studio apartment, could command approximately $2,000.00 a month in rent, the collection of which would allow plaintiff to improve its operational budget (OSC, Krasnow Aff. ¶¶ 37, 38). Because of the lengthy period of time in which plaintiff has received no common charges or additional charges for Unit 17-19, the Condominium suffers a "huge financial burden," and the apartment is in danger of "being lost, materially injured or destroyed by reason of Logan's defaults" (OSC Krasnow Aff. ¶¶ 39, 40). Plaintiff attempted to recover rental income from the tenants in possession, as allowed under Real Property Law 339-kk, but according to Krasnow, there are no tenants currently living the unit (OSC Krasnow Aff. ¶¶ 17-18,

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[2]Separately, Wells Fargo commenced a foreclosure proceeding against Logan which is currently in this court's inventory, entitled *Wells Fargo, N.A. v Vicki Logan, Board of Managers of Ansonia Condominium, et al.*, bearing index number 114825/2007.

34). Accordingly, plaintiff moves for the appointment of a receiver to collect rent from Logan and to pay it over to plaintiff for the period prior to the sale (RPL § 339-aa), or to appoint a receiver of the rents and profits with the power, among the usual powers, to rent out the subject unit and to pay plaintiff a reasonable rent for the unit for any period prior to the sale.

New York Real Property Law § 339-z provides that a board of managers on behalf of condominium unit owners may have a lien on each unit for unpaid common charges, together with interest, and that this lien is generally subordinate only to the first mortgage and certain City liens, as set forth in the statute. Real Property Law § 339-aa provides that the lien may be foreclosed by suit, and in any such foreclosure the unit owner will be required to pay a reasonable rental for the unit for the period prior to the sale pursuant to the judgment of foreclosure and sale, and the plaintiff in the foreclosure is entitled to the appointment of a receiver to collect the rent. The statute also provides that a board of managers may bring a suit to recover a money judgment for unpaid common charges without foreclosing or waiving the lien securing the same, and that foreclosure is maintainable notwithstanding the pendency of a suit to recover a money judgment.

Article 64 of the CPLR provides for appointment of temporary receivers "where there is danger that the property will be . . . .materially injured or destroyed" (CPLR 6401 [a]). The court may authorize the receiver to, among other actions, "collect . . debts or claims, upon such conditions and for such purposes the court shall direct." A temporary receivership expires after final judgment unless otherwise directed by the court (CPLR 6401 [c]).

Here, there is no dispute the Wells Fargo owns an interest superior to that of plaintiff's, due to the mortgage's status as a purchase money mortgage recorded and filed on March 2, 2006. The Court of Appeals has held that RPL § 339-z specifically establishes "[t]he first mortgage

foreclosure sale, except to the extent that there are proceeds in excess of the first mortgage, [will] extinguish all prior liens," including a board's statutory lien (*Bankers Trust Co. v Board of Mgrs. of the Park 900 Condomiium*, 81 NY2d 1033, 1036 [1993]). The Court of Appeals has not addressed the issue posed by plaintiff of whether common charges owed to a condominium board by a unit in foreclosure may be paid over to the board, or whether these monies are properly considered part of the funds belonging to the first priority lien holder, here Wells Fargo.

The First Department has held, in a foreclosure action where a receiver had been appointed to collect rental payments during the pendency of a foreclosure action, that it was proper for the receiver, an officer of the court, to direct, based on the existence of the common charges lien, that rental proceeds first be applied toward payment of the units' common charges in the interest of preserving the premises during the foreclosure action (*Ezriel Equities Assocs., L.P. v 157 East 72nd St. Assocs.*, 225 AD2d 326, 327 [1st Dept.], *lv dismissed* 88 NY2d 1064 [1996]). The *Ezriel* Court distinguished its holding from *Bankers Trust Co.*, which concerned a post-foreclosure sale situation.

Plaintiff argues that in order to maintain the unit premises, and the operation of the condominium as a whole, a receiver should be appointed either to collect reasonable monthly rentals from Logan, the unit owner, or to rent out the unit and collect reasonable rental income which can go toward the payment of the past due debt owed to the Condominium. It points to the By-Laws at issue (OSC, Ex. A, § 6.4 [B]), which provide that where the Condominium Board brings an action to foreclose on a common charges lien, the defaulting unit owner shall be required to pay a "reasonable rental" for the use of the unit, and the Board of Managers is entitled to the appointment of a receiver to collect these rents. It also relies on *Fairbanks Capital Corp. v*

Nagel, 289 AD2d 99 (1st Dept. 2001), which upheld granting the unopposed motion by the condominium board for the appointment of a temporary receiver to collect common charges from the tenant for the subject unit, based on the occupant's longstanding failure to pay common charges for the unit.

There appears to be little reported case law on the subject. In *Resolution Trust Corp. v J.I. Sopher & Co.*, 927 F. Supp. 753, 755-756 (SDNY 1996), *aff'd* 108 F. 3d 329 (2d Circ. 1997), the federal court relied on *Ezriel Equities*, *supra*, when resolving the motion by the defendant condominium board of managers which sought an order requiring the court-appointed receiver to pay the monthly condominium common charges that had accrued on the subject vacant units during the period of receivership and until the foreclosure sale, a motion opposed by the plaintiff lender which argued that the its interest was superior to that of the lien of the condominium board. *Resolution Trust Corp.* held that based on *Ezriel*, Real Property Law § 339-z is not a statutory bar to payment of common charges during the pendency of foreclosure proceedings. *Resolution Trust Corp.* also relied on the reasoning in *First New York Bank for Business v 155 E. 34 Realty Co.*, 158 Misc. 2d 658 (Sup. Ct. NY County 1993), in finding that a mortgagee, the lender, should not be entitled to benefit from the receiver unless all expenses in connection with the operation of the business are paid in full to the premises owner. In *First New York Bank,* the receiver, appointed in a foreclosure action at the bank's request under RPAPL § 1325 (2) to pay taxes, assessments, water charges, and other premises charges of a delinquent garage condominium unit, was also directed to pay the common charges to the condominium board,

finding that they were part of the expenses of maintaining the premises.[3] The condominium board successfully argued that paying the monthly common charges as rent would be consistent with the receiver's obligation to preserve the premises under RPAPL § 1325 (2), while the bank unsuccessfully argued that the common charges constituted a lien which was junior to its first mortgage and should not be paid by the receiver.[4]

Here, as noted above, Wells Fargo "does not necessarily oppose" plaintiff's motion. However, it cannot be granted on procedural grounds.

At the time of signing the order to show cause, the court adopted the proposed service provisions drafted by movant in its proposed order to show cause. These directed that plaintiff serve the papers by January 14, 2010, on defendant Logan by hand delivery to Unit 17-19, by overnight delivery to the attorney for Wells Fargo, and by hand delivery to the office of the Corporation Counsel for the City of New York. Wells Fargo and the City of New York were served according to the directive in the order to show cause. Specifically, the order to show cause directed that Logan be served with the papers "*by hand delivery to . . . Unit 17-19*" (emphasis added). The affidavits indicate that on January 14, 2010, after the individual rang the door bells of Unit 17-19 and Unit 8-41 each three times and received no response, the server

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[3]RPAPL § 1325 addresses appointment of a receiver in a foreclosure action. Subsection (2) concerns the ability of the court to direct the receiver of rent to apply rental payments to the payment of accrued interest on the mortgage, where the plaintiff has established entitlement to such, as described in the statute.

[4]*First New York Bank* relied in part on the unpublished opinion *Board of Mgrs. v Chelsea Realty Assocs.*, NYLJ Aug. 5, 1995, at 22, col.5 (Sup Ct., NY County), which directed the receiver to pay monthly common charges for the liened premises because they were necessary to operate the premises and could be considered to be an expenditure incurred for the preservation and maintenance of the premises during the pendency of the receivership. (*First New York Bank*, 158 Misc. 2d at 661).

affixed, conspicuously, copies of the order to show cause to appoint a receiver and the RJI on both doors.[5] Thus, Logan was served in effect by substituted service, commonly referred to as "nail and mail" (CPLR 380 [4]). Apparently plaintiff interpreted "hand delivery" to allow for use of substituted service because it did not specify "*in-hand* delivery." Nonetheless, when a party is directed to be served by hand delivery, it must be understood that this is to mean by "personal delivery," or in-hand delivery pursuant to CPLR 308 (1). Notably, plaintiff properly served the City "by hand delivery" by delivering in-hand a copy to the proper office and receiving a stamped receipt. Plaintiff's failure to adhere to the directives of the court order concerning service must result in a denial of the motion, in particular as it cannot be determined why Logan has made no appearance in this motion, when she has appeared and vigorously defended the other foreclosure action prosecuted by Wells Fargo .

Even were the court to overlook the lack of adherence to the court's directive on service, it cannot be found that Logan was properly served in any fashion. The CPLR provides that substituted service, "nail and mail" service, can be made in lieu of personal delivery where, with due diligence, it has been found that in-hand service cannot be effectuated. When using "nail and mail" service, the papers are to be affixed to the door and a copy then mailed to the person's last known residence or to her actual place of business (CPLR 308 [4]). Here, the documents were affixed to the door of two of Logan's apartments, but the affidavits do not indicate that the individual who attempted to hand deliver the documents tried delivery on more than one

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[5]Plaintiff submits two additional affidavits of service stating that on January 13, 2010, Logan was served by affixing to the doors of Unit 17-19 and 8-41, copies of an "order to show cause *with temporary restraining order and supporting papers*," and the RJI.

occasion, so as to establish due diligence (*see, e.g., Janko Pol Service, Inc. v Berelson*, 145 AD2d 897 [3d Dept. 1988] [single effort at personal service can never constitute due diligence so as to allow use of "nail and mail" substituted service]). According to the affidavits, he simply knocked on the doors of two of the five apartments Logan apparently owns in the Ansonia, and then affixed the papers to the doors when there was no answer. Even if it could be understood that the other set of affidavits concerning service on the previous day were mistaken in identifying the nature of the documents delivered and that there were two sets of the same documents served by affixing, there is no indication that the attempts at delivery were made at different times of the day, to establish due diligence in trying to find Logan at home (*cf., Hochhauser v Bungeroth*, 179 AD2d 431 [1st Dept. 1992] [three attempts to service during various hours sufficient established due diligence and allowed use of substituted service]). Additionally, there was no follow-up service by mail to Logan at Unit 17-19, as required by CPLR 308 (4). Accordingly, it cannot be found that Logan was provided sufficient notice of plaintiff's motion. For this reason, the motion is denied without prejudice for failure to make proper service.

Wells Fargo cross-moves seeking dismissal of the complaint as against it and that its name be excised from the caption on the ground that it is not a proper or necessary party. It argues that its ownership of a purchase money mortgage, received from Logan on August 2, 2005, is superior to plaintiff's lien for outstanding common charges, and that a party owning an interest senior or paramount to that of the mortgage being foreclosed upon is neither a necessary or proper party. It also argues that its inclusion in this litigation "tends to cloud the record" and will likely create issues at the time foreclosure is completed as to the continued existence of the

"senior mortgage" (Cross-Mot. Wrona Aff. ¶ 16).

RPAPL § 1311 sets forth necessary defendants in a mortgage foreclosure proceeding as being those "whose interest is claimed to be subject and subordinate to the plaintiff's lien." As set forth in *Scharaga v Schwartzberg*, 149 AD2d 578 (2d Dept. 1989), relied on by Wells Fargo, entities owning an interest in mortgaged premises paramount to the mortgagee, i.e., plaintiff's common charges lien, are neither necessary nor proper parties to the latter's foreclosure, since they did not acquire their rights under the mortgagor. Thus, it is apparent that as plaintiff's lien is subordinate to Wells Fargo's mortgage, there is no need for the latter to be involved in this litigation. Plaintiff does not oppose the motion. Accordingly, it is granted without opposition.

It is

ORDERED that the motion is denied for improper service and without prejudice to renewal, and it is further

ORDERED that the cross motion of defendant Wells Fargo Bank, N.A., to dismiss the complaint as against it, is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant only; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for movant Wells Fargo shall serve a copy of this order with

notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the court.

Dated: June 25, 2010 6:05 pm
New York, New York

J.S.C.