

<b>US Bank N.A. v Sacher</b>
2013 NY Slip Op 30967(U)
May 2, 2013
Sup Ct, New York County
Docket Number: 108546/2007
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. ~~XXXXXXXXXX~~  
Barbara Jaffe Justice

PART 12

Index Number : 108546/2007  
US BANK NATIONAL ASSOCIATION  
VS.  
SACHER, ROBERT P.  
SEQUENCE NUMBER : 004  
APPT TEMP/PERMANENT RECEIVER

INDEX NO. 108546/2007  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...  
Answering Affidavits – Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

MAY 06 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/2/13 \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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 12

-----X  
US BANK NATIONAL ASSOCIATION, as Trustee  
on Behalf of the holders of the CSMC Mortgage  
Backed Pass-Through Certificates, Series 2007-1,

Index No. 108546/2007

Subm: 4/17/13  
Motion Seq. Nos.: 004,005

Plaintiff,

**DECISION AND ORDER**

-against-

ROBERT P. SACHER a/k/a Robert Sacher, Susan  
Sacher, Board of Managers of 175 East Second Street  
Condominium, Greenpoint Mortgage Corp., Mortgage  
Electronic Registration Systems Inc., as nominee for  
Wall Street Mortgage Bankers, LTD. d/b/a Power  
Express, New York City Environmental Control Board,  
New York City Transit Adjudication Bureau, North  
Fork Bank,

Defendants.

-----X  
BARBARA JAFFE, J.S.C.:

**FILED**

**For plaintiff:**  
Margaret Burke Tarab, Esq.  
Frenkel, Lambert, Weiss, *et al.*  
20 West Main St.  
Bay Shore, NY 11706  
631-969-3100

MAY 06 2013

NEW YORK  
COUNTY CLERKS OFFICE

**For defendant Board of Managers:**  
Karen Elyse Goldman, Esq.  
Evan Sarzin, PC  
1501 Broadway, 12<sup>th</sup> fl.  
New York, NY 10036  
212-344-6500

By notice of motion dated January 31, 2012, defendant Board of Managers of 175 East Second Street Condominium moves pursuant to CPLR 6401 for an order appointing a temporary receiver for condominium unit 1B at 175 East Second Street, New York, New York. The unit, owned by Robert Sacher and Susan Sacher, who have not appeared in this action, is vacant. And, by notice of motion dated September 18, 2012, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment and other relief.

I. BACKGROUND

The instant action was commenced to foreclose on a mortgage executed by the Sachers, who purchased unit 1B on or about December 19, 2003. On or about October 5, 2006, they borrowed \$455,000, and an additional \$130,000 that same day, from Wall Street Mortgage Bankers Ltd., d/b/a Power Express (Wall Street Mortgage), which recorded mortgages on

November 2, 2006. (Affidavit of David Steinberg, dated Jan. 25, 2012, Exhs. A, B; Decision and Order, dated October 24, 2007).

In March 2007, the Sachers defaulted on both loans. On June 18, 2007, the loan for \$455,000 was transferred to plaintiff, who commenced this foreclosure action on June 20, 2007 as to the first mortgage. (*Id.*, Exhs. C, D). The Sachers also failed to pay condominium common charges and maintenance fees. (*Id.*).

By notice of motion dated August 15, 2007, plaintiff moved for an order granting it summary judgment and related relief, and by decision and order dated October 24, 2007 and decided on the Sachers's default, the justice previously assigned to this part denied the motion, finding that plaintiff had failed to include a copy of the original assignment from Wall Street Mortgage and that plaintiffs did not serve notices of default on the Sachers at the proper address.

On October 12, 2010, Susan Sacher filed for Chapter Seven protection under the United States Bankruptcy Code. On December 1, 2010, the automatic bankruptcy stay was lifted "to the extent necessary to allow [plaintiff] to foreclose the mortgage on the property. . . ." (*Id.*, Exh. G). Defendant Board of Managers (Board) filed a claim for unpaid maintenance and assessments in the bankruptcy court. While acknowledging that the claim was secured, the court declined to make a distribution. (*Id.*, Exh. H).

By notice of motion dated November 16, 2009, plaintiff renewed its motion for summary judgment and by order dated December 13, 2010, the previously assigned justice denied the motion without prejudice to plaintiff to renew upon proof of compliance with the Administrative Order of the Chief Administrative Judge of the Courts dated October 20, 2010 relating to residential mortgage foreclosures.

Robert Sacher's debts were discharged on January 5, 2011, and Susan's on February 11, 2011. (*Id.*, Exh. I). As of October 2010, the lien for the first mortgage was \$591,627.63 and the stated fair market value of the unit was \$503,500. (*Id.*, Exh. F).

## II. CONTENTIONS

Board asserts that given the lack of equity in the unit, its junior lien will go unsatisfied, and that due to the failure of plaintiff to proceed on the foreclosure action, the amount of its lien has grown to \$30,000. (Affirmation of Karen Elyse Goldman, Esq., dated Jan. 24, 2012).

In opposition, plaintiff maintains that as the Board's lien for common charges is unrelated to the foreclosure action, and absent proof that the condominium bylaws permit the appointment of a receiver or any evidence of waste or mismanagement, the appointment of a temporary receiver is inappropriate. It also argues that the collection of rents to be paid to the Board would circumvent the priority of plaintiff's lien and that the only parties owing on the mortgage are the Sachers. Plaintiff also lists objections relating to the function of the receiver and the costs necessarily incurred in the process, including legal fees, and predicts that renting out the unit will ultimately result in expensive and lengthy eviction proceedings, all to plaintiff's prejudice. (Affirmation of Margaret Burke Tarab, Esq., dated Feb. 10, 2012).

In reply, Board observes that the five-year delay during which plaintiff has failed to proceed with the foreclosure action has caused it great loss, and that given the Sachers's bankruptcy, Board is unlikely to recoup any fees from them or from the foreclosure. It thus contends that the equitable relief sought is appropriate in light of the inequitable circumstances caused by plaintiff's delay in proceeding with the foreclosure action. (Reply Affirmation of Karen Elyse Goldman, Esq., dated Feb. 20, 2012).

## III. ANALYSIS

Pursuant to CPLR 6401:

Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed . . . where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.

A condominium board has standing in a foreclosure action to apply for the appointment of a receiver pursuant to CPLR 6401. (*See U.S. Bank N.A. v Culver*, 27 Misc 3d 1233 [Sup Ct, Orange County 2010]; *see also Global Realty Corp. v Charles Kannel Corp.*, 9 Misc 2d 241 [Sup

Ct, NY County 1958] [junior lienor has standing to apply for appointment of receiver]). Whether to appoint a receiver to preserve an asset during litigation is within the court's discretion. (*Hahn v Wylie*, 54 AD2d 622 [1<sup>st</sup> Dept 1976]). A receiver may only be appointed, however, where there is a danger of irreparable loss, supported by a detailed evidence. (*In re Armiente*, 309 AD2d 659, 661 [1<sup>st</sup> Dept 2003]; *Trepper v Goldbetter*, 205 AD2d 363, 364 [1<sup>st</sup> Dept 1994]; *Groh v Halloran*, 86 AD2d 30 [1<sup>st</sup> Dept 1982]).

Here, Board continues to pay the Sachers's share of the common charges that benefit all residents, and will likely continue to pay the charges because plaintiff has repeatedly failed to foreclose on the property. It is also likely that the Board will not recover the common charges, given the Sachers's bankruptcy, the lack of equity in the unit, and the Board's position as junior lienor. (*Bankers Trust Co v Bd. of Managers*, 81 NY2d 1033 [1993] [board's lien for unpaid common charges is junior to first mortgage]).

The appointment of a receiver does not circumvent the priority of plaintiff's lien. While the foreclosure pends, a receiver may rent out an apartment, use the rental income to pay common charges, and remit the balance to the first mortgage holder. (*Ezriel Equities Assoc. LP v 157 East 72<sup>nd</sup> St Assoc.*, 225 AD2d 326 [1<sup>st</sup> Dept 1996], citing *First N.Y. Bank for Bus. v 155 E. 34 Realty Co.*, 158 Misc 2d 658 [Sup Ct, NY County 1993] [receiver may be directed to pay common charges]; *Columbia Fed. Sav. Bank v Poulidikidis*, 203 AD2d 165 [1<sup>st</sup> Dept 1994] [rental income paid to first mortgage holder]).

There is no need to consult the Board's bylaws. Although a Board may seek rent from a unit owner to pay a lien for common charges pursuant to RPL 339-z, if permitted by the bylaws (RPL 339-aa), RPL 339-aa applies only to the unit owner, not to a receiver renting an apartment during the pendency of a foreclosure proceeding. (*Societe Generale v Charles and Co. Acquisition, Inc.*, 157 Misc 2d 643, 650 [Sup Ct, NY County 1993]).

Contrary to plaintiff's assertion, it will suffer no undue prejudice as it will receive rental income while the foreclosure is pending, and the receiver will be directed to rent out the

\* 6]  
apartment for a limited period of time. (*Culver*, 27 Misc3d 1233 [finding no prejudice to first mortgage holder if apartment only rented for a limited time]).

#### IV. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff contends that it has set forth a *prima facie* showing that it is entitled to a judgment of foreclosure. The Sachers submit no opposition. Notwithstanding the December 2010 order granting plaintiff renewal solely upon proof of compliance with the Administrative Order of the Chief Administrative Judge of the Courts, plaintiff does not move to renew, but proceeds *de novo*, offering additional evidence in support of its motion.

In a foreclosure action, a plaintiff's *prima facie* entitlement to summary judgment is demonstrated by submitting admissible evidence showing the existence of the mortgage and a default. (*JP Morgan Chase Bank v Shapiro*, 104 AD3d 411 [1<sup>st</sup> Dept 2013]; *1855 East Tremont Corp. v Collado Holding LLC*, 102 AD3d 567 [1<sup>st</sup> Dept 2013]; *CitiFinancial Co. v McKinney*, 27 AD3d 224 [1<sup>st</sup> Dept 2006]). In a residential foreclosure action, the summons and complaint must be served with a homeowner's notice. (RPAPL 1303; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 165-170 [2d Dept 2010]). In addition, plaintiffs' counsel must submit an affirmation certifying that they have communicated with someone having personal knowledge of the case, and that they have inspected the papers to determine whether they are complete and accurate. (Administrative Order of the Chief Administrative Judge of the Courts, dated Oct. 20, 2010). If a plaintiff prevails on summary judgment, it is appropriate to appoint a referee to determine the amount owed on the mortgage. (*Bd. of Directors of Hunt Club v Hebb*, 72 AD3d 997 [2d Dept 2010]).

Here, plaintiff submits the affidavit of Gary Cloward, the document control officer of Select Portfolio Servicing, attorney in fact for plaintiff. Cloward swears that he has personal knowledge of the case, that plaintiff owns the \$455,000 mortgage, and that the Sachers are in default. (Affirmation of Margaret Burke Tarab, Esq., dated Sept. 18, 2012 [Sept. 2012 Tarab Aff.]). The mortgage documents and assignments to plaintiff are attached, as is proof that the

homeowner's notice was served and the necessary attorney certification. (*Id.*). Plaintiff has therefore established, *prima facie*, that it is entitled to an order granting it summary judgment on the \$455,000 mortgage, and that a referee is needed to calculate the amount owed. However, no evidence is offered as to who owns the \$130,000 mortgage or that it is in default.

The justice previously assigned to this part denied plaintiff's motion for summary judgment on the ground that the homeowner's notice was served at the Sachers's Brooklyn apartment, not on the apartment being foreclosed, as is required under section seven of the mortgage. While section seven requires that any notices listed in the mortgage must be served on the apartment that is the subject of the mortgage, it is silent as to other kinds of notices. (Sept. 2012 Tarab Aff.), Exh. A).

Pursuant to RPAPL 1303, the homeowner's notice must be served with the summons and complaint. Here, the homeowner's notice, along with the summons and complaint, was served at the Sachers's home in Brooklyn, where they then resided. The previously presiding justice held, however, that the homeowner's notice must be served at the premises subject to foreclosure, a holding that is presumably the law of the case. In light of the requirements of RPAPL 1303 and because service at the premises subject to foreclosure almost guarantees that the notice will not be received, whereas service at the Sachers's residence is far more likely to succeed, I must consider how bound I am by the prior justice's order.

The Court of Appeals has characterized and explained the doctrine of the law of the case as "necessarily amorphous, in that it directs a court's discretion, but does not restrict its authority," and acknowledged that it had in the past "used the term to connote a preclusive type doctrine." (*People v Evans*, 94 NY2d 499, 503 [2000]). The First Department, more recently and forthrightly, characterized the law of the case as "discretionary," and held that in the matter before it, the law of the case "did not require the court to deny the motion to dismiss the second amended complaint, even though it had previously denied the motion to dismiss the amended complaint." (*Cobalt Partners, LP v GSC Capital Corp.*, 97 AD3d 35, 39 [1<sup>st</sup> Dept 2012]). Consequently, I do not deem myself bound by the prior justice's holding that the homeowner's

notice must be served at the premises subject to disclosure, and hold that service of the notice at the Sachers's present residence is sufficient.

V. CONCLUSION

Accordingly, it is hereby

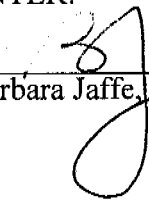
ORDERED, that the Board's motion to appoint a receiver is granted; it is further

ORDERED, that the Board and plaintiff will together, within 60 days, present this Court with an order specifying the limitations on the receiver's authority; it is further

ORDERED, that the plaintiff's motion for summary judgment is granted solely as to foreclosure on the \$455,000 first mortgage, and it is further;

ORDERED, that the plaintiff's motion to appoint a referee to calculate the amount owed to plaintiff is granted.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, ISC

DATED: May 2, 2013  
New York, New York

**FILED**

MAY 06 2013

CLERK'S OFFICE