

<b>Acqua Capital, LLC v Board of Mgrs. of Spook Rock Indus. Park Condominium I</b>
2014 NY Slip Op 31259(U)
March 11, 2014
Supreme Court, Rockland County
Docket Number: 031547/2012
Judge: Thomas E. Walsh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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ACQUA CAPITAL, LLC,

Plaintiff(s),

-against-

**DECISION & ORDER**  
Index No. 031547/2012  
Mot. #8

BOARD OF MANAGERS OF SPOOK ROCK  
INDUSTRIAL PARK CONDOMINIUM I and M20  
REALTY, LLC,

Defendant(s).

-----X  
**Hon. Thomas E. Walsh, II, A.J.S.C.**

The following papers numbered 1-8 read on this motion by plaintiff for an Order: (1) pursuant to CPLR §3212, striking the answer, affirmative defenses and counterclaims of the defendant, Board of Managers of Spook Rock Industrial Park Condominium I (hereinafter the "Board") and granting it summary judgment against Spook Rock for the relief alleged in plaintiff's second amended complaint on the grounds that there are no issues of fact requiring a trial; and (2) on the ground [pursuant to CPLR §3211(a)(7)] that the counterclaim fails to state a cause of action; together with such other and further relief as to the Court may seem just and proper:

- Notice of Motion/Exhibits in Support (A-J)-1-2
- Memorandum of Law in Support-3
- Affirmation in Opposition (Nugent)/Affidavit (Parker)/Exhibits (A-G)-4-6
- Affirmation in Reply (Becker)/Exhibits (L, M &N)-7-8

The plaintiff herein was the purchaser, at a foreclosure sale, of a commercial condominium unit at a complex known as Spook Rock Industrial Park Condominium I (hereafter the "Unit), and managed by the defendant Board of Managers (hereafter the "Board"). The purchase occurred on or about March 6, 2012. The defendant, M20 Realty, LLC, purchased the unit from the plaintiff in an arm's length transaction on November 21, 2012. The Board, claiming an unsatisfied lien for unpaid common charges, insisted on being paid said common charges from the proceeds of said sale, with the end result being that certain monies are being held in escrow by a title company pending a determination by this court as to whether the unpaid common charges are still a lien on the property, or whether they were extinguished by the original

foreclosure action.<sup>1 2</sup> Defendant M20 has not put in any papers on this motion.

While there is a somewhat lengthy procedural history here, what is relevant is the Second Amended Complain filed by the plaintiff, which seeks a determination that the Board no longer has any interest in the unit. The Board's answer contains general denials, ten "boiler plate" affirmative defenses, and a counter claim seeking judgment for all unpaid common charges, interest, costs, and attorneys fees.

The basic facts are not in dispute. The unit was formerly owned by an entity known as RC Real Estate, Inc, and was encumbered by a mortgage held by Keybank. When the owner went into default, Keybank started a foreclosure action on February 23, 2010 by filing a summons, complaint and notice of pendency in the Rockland County Clerk's office. The foreclosure action, bearing Index No. 1907/2010, was assigned to this court. At the time of the commencement of the action, the Board had no filed lien against the unit for any unpaid common charges.<sup>3</sup> Thus, the Board was not a party to the foreclosure action. In fact, the Board did not file a lien until August 5, 2010, long after the commencement of the action.

This court executed a Judgment of Foreclosure and Sale on October 1, 2010. On December 7, 2011, the Board entered a money judgment against the defaulting owner, again after the foreclosure sale took place, which judgment encompassed the period from June 1, 2006 to March 11, 2011. Simply put, the plaintiff claims that it cannot be held responsible for any unpaid common charges that accrued prior to their taking title since they were extinguished in the foreclosure action. The filing of the notice of pendency was constructive notice to the Board, and, having filed their lien after the notice of pendency was filed, they are barred from collecting those charges. Further, the plaintiff argues, under the Declaration which established the condominium, the Board is likewise barred, since Keybank, the original lender, is an "institutional lender", and any purchaser in a foreclosure action commenced by such a lender is not liable for any common charges. Thus, under both the law and the Declaration itself, there is no mechanism under which the Board can recover.

The Board's lien for any unpaid common charges is a creature of statute. Real Property Law §339-aa clearly and succinctly states "The lien...shall be effective from and after the filing..., a verified notice of lien..." (Emphasis supplied). Moreover, since the Board's lien was filed after the commencement of the action, they were not a necessary party to the foreclosure action under RPAPL §1311, since for them to be considered a lien holder their lien would have had to be of record at the time of the commencement of the action, and here it clearly was not. Furthermore, the Judgment of Foreclosure executed by this court would clearly extinguish their claim.

The plaintiff has submitted a memorandum of law in support of it's position. It analyzes each of the affirmative defenses raised by the Board, and why said defense is not a bar to the

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<sup>1</sup> It is unclear from a reading of the papers whether or not the Board ever sought to recover the common charges when the referee conveyed the property, or whether they ever objected when the referee's report was confirmed.

<sup>2</sup> The plaintiff concedes that it owes common charges from March 6, 2012 to November 21, 2012, the time it owned the unit. They aver that they tried to pay said common charges when they conveyed the unit, but the Board would not accept merely the amount due for that short period of time, but rather insisted that their entire lien be paid.

<sup>3</sup> Unexplained is why the Board had not previously filed any lien against the unit, since it would appear that common charges were unpaid for a substantial period prior to the commencement of the foreclosure action.

relief sought herein. It cites to those cases which clearly establish that pursuant to CPLR §6501, a party whose conveyance is recorded after the filing of a notice of pendency is bound by all proceedings taken in the action after such filing to the same extent as if he or she were a party [See, for example, *Novastar Mortgage, Inc v. Mendoza*, 26 A.D. 3d 479 (2<sup>nd</sup> Dept., 2006)].

Furthermore, plaintiff's memorandum addressees the issue that, under it's own declaration, the Board cannot recover these common charges, since Keybank is a National Banking Association, and thus would qualify as an "institutional mortgage" as that term is defined in the condominium's own declaration. Thus, any purchaser in a foreclosure commenced by such lender would not be obligated to pay any said charges.

The Board, of course, opposes the application. It makes much of the fact that the Terms of the foreclosure sale provide that the unit would be sold subject to prior liens of record, and that the plaintiff(purchaser) was responsible for all taxes, assessments, etc, and any other encumbrances, which are, at the time of sale, liens on the premises sold. They further point out that the Referee's deed was subject to any and all easements, restrictions, etc of record affecting the premises. And while they do not dispute that their lien was filed after the commencement of the action, they aver that since it was filed before the Judgment of Foreclosure and Sale, their lien someone survives, thus negating the effect of both the Real Property Law and CPLR sections cited above.<sup>4</sup>

The Board argues that, notwithstanding the fact that their lien was not filed, they were still a necessary party in the foreclosure since they foreclosing bank knew they had an "interest" in the property. However, the case cited by defendant concerned a situation where the condominium allegedly owned the unit, not an interest merely created by unpaid common charges. Besides, a Board has no ownership interest in the condominium itself, nor in the common elements. It merely manages the common elements. Thus, it is disingenuous to suggest that the foreclosing bank should have named them in the foreclosure. Furthermore, the defendant has not cited any authority for it's positions, advanced, save one which is inapplicable to the facts at bar.

In summary, defendant is trying to use the flush language of the Terms of Sale to revive a debt that had already been extinguished by the Judgment of Foreclosure and Sale. Likewise, their interpretation of the language in their own declaration which defined "Institutional Mortgage" is contrary to law and demonstrates a lack of understanding of what a consolidated mortgage is. If the Board had intended a different result, they could have and should have used a different definition in their declaration. The case cited by the plaintiff in it's reply affirmation [*Greenpoint Bank v. El-Basary*, 184 Misc.2d 888 (Su. Ct., New York Co., 2000)], is squarely on point with the facts herein, and clearly demonstrates that regardless on when the mortgages were taken out, there was only one "first" mortgage on the property at the time of foreclosure.

It is well established that the proponent of a summary judgment motion bears the burden of proving *prima facie* entitlement to judgment in its favor as a matter of law and without the need for a trial [*Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986)]. Once this burden is met, the party opposing summary judgment must establish, through admissible evidence, the existence of

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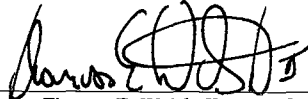
<sup>4</sup>To accept this position would mean that any judgment creditor or supposed lien holder who filed a judgment or lien after the notice of pendency would have their lien survive, thus in effect rendering the foreclosure process almost meaningless, since no purchaser at a foreclosure could ever be secure that prior encumbrances had been extinguished.

[\* 4]

material issues of fact to preclude summary judgment [*Zuckerman v. City of New York*, 49 NY2d 557 (1980)]. “To defeat summary judgment the opponent must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions of fact or of law, are insufficient.” [*Mallard Construction Corp. V. County Federal Savings and Loan Assn.*, 32 NY2d 285 (1973)]. Additionally, the papers on the motion should be scrutinized carefully in a light most favorable to the party opposing relief [*Judice v. DeAngelo*, 272 AD2d 583 (2d Dept. 2000)].

The court finds that the plaintiff has met its burden. The defendant has failed to submit sufficient evidence to rebut plaintiff's entitlement to summary judgment, and thus the application of the plaintiff is granted in its entirety. The Board has no entitlement to any common charges from the plaintiff prior to the time the plaintiff purchased the property at the foreclosure sale. The Board defendant has no claim nor entitlement to any of the funds being held in escrow, except to the extent plaintiff wishes to use same to pay common charges from March 6, 2012 until November 21, 2012, which the plaintiff acknowledges was its responsibility, which they sought to fulfill by requesting a “payoff” amount for that period from the Board's counsel, which counsel refused to provide. Thus, the Board shall not be permitted to collect any late fees, costs, or attorneys fees, except they may collect 9 months of late charges at \$75.00 per month.

Dated: New City, New York  
March 11, 2014



Thomas E. Walsh II, A.J.S.C.

To:  
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