

**DLJ Mtge. Capital, Inc. v Molyaev**

2015 NY Slip Op 31425(U)

July 20, 2015

Supreme Court, Kings County

Docket Number: 508610/2014

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

RECEIVED NYSCEF: 07/30/2015  
At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 20<sup>th</sup> day of JULY 2015

**P R E S E N T:**

**HON. LARRY D. MARTIN, J.S.C.**

DLJ MORTGAGE CAPITAL, INC.,

Plaintiff,

-against-

JOSEP MOLYAEV, et al,

Defendants.

INDEX No.:  
508610/2014

The following papers numbered 1 to 2 read on this motion

Papers Numbered

Affirmation and Affidavit

1-2

HON. LARRY D. MARTIN, J.S.C.:

Upon the foregoing papers, plaintiff moves this Court for an order granting it leave to serve defendants, Board of Managers of Boro Park Village — Phase II Condominium (the “Board”) and Boro Park Village — Phase II Condominium (the “Condominium”) (collectively, the “Condo” defendants) by an alternate means of service pursuant to CPLR § 308 (5); and for an extension of time to serve those defendants with process (CPLR 306-b).

Plaintiff maintains that the Condo defendants are necessary parties under RPAPL § 1311 as a lien for common charges dated June 4, 2010 was filed against the unit/unit-owner, Josep Molyaev, the mortgagor in this action. A lien for common charges lasts for six years or until it is fully paid off with interest, whichever comes sooner (*see* RPL 339-aa); therefore, at least the Board<sup>1</sup> is still a necessary

<sup>1</sup>

The Court directs plaintiff’s attention to RPL § 339-aa, stating that a lien for common charges . . . may be foreclosed by suit authorized by and brought in the name of the board of managers, acting on behalf of the unit owners, in like manner as a mortgage of real property, without the necessity, however, of naming as a party defendant any person solely by reason of his owning a common interest with respect to the property.

Thus it is unclear whether it is necessary to name and serve the Condominium, which is presumably comprised of every unit owner, as it is only the Board, acting on behalf of the Condominium itself, that holds the lien.

party at this juncture.

In order to grant a motion for alternate service pursuant to CPLR § 308 (5), plaintiff must show that service by other means is impracticable. The “impracticability” standard does not require plaintiff to demonstrate a due diligence standard under CPLR § 308 (4), nor make an actual showing that service has been attempted under subdivisions (1), (2), and (4) of § 308 (*Contimortgage Corp. v Isler*, 48 AD3d 732, 734 [2d Dept 2008], citing, inter alia, *State St. Bank & Trust Co. v Coakley*, 16 AD3d 403 [2d Dept 2005]). “Once the impracticability standard is satisfied, due process requires that the method [of service] be ‘reasonably calculated, under all the circumstances, to apprise’ the defendant of the action (*Contimortgage*, 48 AD3d at 734, quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]).

Here, plaintiff demonstrated through affidavits from its agents and process servers numerous attempts to locate a Board member to effectuate service, as well as diligent searches for Howard Zelcer, the “Managing Agent” who signed the common charges lien, as well as searches to find an address and/or agent via the New York State Department of State, Division of Corporations and the New York City Housing Preservation and Development (“HPD”). It is worthy to note that RPL § 339-n contains the statutorily-required content of a declaration under the Condominium Act; and subdivision (7) of the statute provides that the board of managers or corporation of the condominium shall designate an agent for service of process with the Secretary of State. The statute does not state an alternative or remedy in the case where, as here, the Board failed to designate an agent with the Secretary of State (*see* exhibit F, ¶¶ 2–4 [plaintiff’s searches yielded no results]). However, based upon the search results conducted with the HPD,<sup>2</sup> the Court will direct service upon the Board in care of Jakab Dreyfuss as Head Officer

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<sup>2</sup> It appears from the attorney’s affirmation that the initial search revealed that an “Emma Wohlberg” was listed as the Head Officer of the Board; such search results had allegedly not been

and upon the Board in care of Howard Zelcer as Managing Agent (*see* exhibit H).

Further, with respect to the Condominium, RPL § 339-dd requires that a “person [be] designated in the declaration to receive service of process” on behalf of “the unit owners in any action relating to the common elements or more than one unit.” Here, plaintiff found the recorded declaration and noted that the Condominium was owned and sponsored by a separate entity, “Boro Park Townhouses Associates”; and plaintiff’s agents continued its investigation with that entity in mind. However, if one read further into the declaration, one would find Article Seventh, entitled “Service of Process” (*see* Reel 2224, page 1480). Therefore, service upon the Condominium itself will be made pursuant to the declaration as ordered below.

The Court also notes that plaintiff failed to mention the other action previously commenced to foreclose on the same loan documents executed by defendant Molyaev.<sup>3</sup> The action, *DLJ Mortgage Capital, Inc. v Molyaev* (Index no. 11159/2011), was commenced in this Court and assigned to the very same justice.<sup>4</sup> In that action, George Stiefel, Esq. filed a notice of appearance on behalf of the Board dated August 9, 2011, and demanded service of all papers in the action. Even if Mr. Stiefel no longer represents the Board, he may at least know of the proper person(s) to serve. Thus, the Court will direct service upon this attorney as well.

Accordingly, plaintiff’s motion is granted to the extent that the Court authorizes alternative

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updated since 2009 (Manniello aff, ¶ 20). When service was attempted at the address listed on April 14, 2015, the current resident stated that Emma Wohlberg and the Board are unknown at that address. Coincidentally, the search was conducted again just over one month later and was presumably updated for the first time in approximately five (5) years to reflect another name and address, with Emma Wohlberg now omitted.

<sup>3</sup> See plaintiff’s complaint at paragraph 12, alleging that no prior action had commenced to recover on the same debt. Such statement is in violation of RPAPL § 1301 (2).

<sup>4</sup> By decision and order dated March 17, 2014, the Court dismissed the action for failing to timely enter default judgment. In the decision, the Court noted a possible defect in the affidavit of service upon the Board even though it had filed a notice of appearance.

service of process (i.e., the summons, complaint, and notice of commencement of action subject to mandatory electronic filing [together, “process”])<sup>5</sup> upon the Condo defendants as follows: it is hereby

**ORDERED** that plaintiff shall serve process upon the Board c/o Jakob Dreyfuss, Head Officer at 1900 51st Street, Unit 4 E in Brooklyn, New York 11204 via certified mail, return receipt requested; and it is further

**ORDERED** that plaintiff shall serve process upon the Board c/o Howard Zelcer, Managing Agent at 4813 13th Avenue in Brooklyn, New York 11219 via certified mail, return receipt requested; and it is further

**ORDERED** that plaintiff shall serve process upon the Board c/o George Stiefel, Esq. at 444 Madison Avenue, Suite 1805, in New York, New York 10022, or his last known address, via by certified mail, return receipt requested; and it is further

**ORDERED** that plaintiff shall serve process upon the Condominium at 1900 51st Street in Brooklyn, New York by affixing process to the main entrance or front door, or lobby, and mailing a copy of the same by first-class mail; and it is further

**ORDERED** that plaintiff shall serve process upon the Condominium at 4813 13th Avenue in Brooklyn, New York 11219 by affixing process to the main entrance or front door, or lobby, and mailing a copy of the same by first-class mail; and it is further

**ORDERED** that plaintiff shall serve process upon the Condominium c/o President of the Board at 1900/1901 Fifty Second Street in Brooklyn, New York, which is the address set forth in its declaration, via certified mail, return receipt requested; and it is further

**ORDERED** that plaintiff is granted an extension of time to serve process upon the Condo

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<sup>5</sup> Plaintiff may serve the Certificate of Merit if it wishes at the same time, or serve it upon all parties at any time prior to moving for an order of reference.

defendants; and it is further

**ORDERED** that plaintiff shall file proof of service as directed above within 120 days from entry of this order in the Kings County Clerk's Office (CPLR 306-b); and it is further

**ORDERED** that nothing in this decision and order shall be construed so as to limit the means of service upon the Board if, upon further investigation, plaintiff is able to personally serve the Board's attorney, or one of its agents, members, or officers pursuant to CPLR § 308 (1), (2), or (4).


The foregoing constitutes the decision and order of the Court.

**For Clerks use only**  
MG \_\_\_\_  
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Motion Seq. # \_\_\_\_

ENTER,

  
JUL 20 2015

HON. LARRY D. MARTIN  
J.S.C.

  
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KINGS COUNTY CLERK