SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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ALEXANDER CONDOMINIUM, BY ITS BOARD OF MANAGERS,

Plaintiff,

Index No. 150479/16

- against -

AB FUNDING CORPORATION, CFC SPECIALTY PROGRAM MANAGERS, LLC, BIG APPLE FIRE SPRINKLER CO., INC., NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, ALEXANDER GUREVICH, ELLA GUREVICH, MITCHELL GUREVICH, "John Doe" and "Jane Doe," the true names of said defendants being unknown to plaintiff, the parties intended to be the persons or entities having or claiming an interest in the premises described in this complaint by virtue of being a tenant or occupant in all or part of said premises,

Defendants.

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REED, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff, the board of managers of Alexander Condominium, seeks to foreclose upon a condominium unit which is owned by defendant AB Funding Corporation (AB). Plaintiff moves for the appointment of a temporary receiver of the rents and profits of the unit (motion sequence number 001). AB and defendants Alexander Gurevich, Ella Gurevich, and Mitchell Gurevitch cross-move to dismiss the action pursuant to CPLR 1001 and 1003 or, in the alternative, to join 250 East Borrower, LLC (250 East) as a defendant.

Alexander Gurevich, Ella Gurevich, and Mitchell Gurevitch move to dismiss this action

as against themselves, pursuant to CPLR 3211 (a) (1) and (7) or, alternatively, pursuant to CPLR 3212, and for sanctions against plaintiff, pursuant to 22 NYCRR 130-1.1 (motion sequence number 002).

Plaintiff commenced this action to foreclose a lien for common charges against unit 25PHC and to collect a money judgment for the common charges. Alexander Gurevich owns AB, which owns the unit. Ella Gurevich is the spouse of Alexander Gurevich and Mitchell Gurevich is their son. Nonparty 250 East was the sponsor of the condominium building.

The complaint alleges that AB has not paid the common charges on the unit since October 2011. The complaint alleges that the Gurevich family occupies the unit and that they have been named as defendants due to any right or interest which they may have in the subject premises by virtue of any claim or right of occupancy. It is not alleged that they are tenants under a lease. The complaint seeks a judgment of foreclosure against all defendants and the appointment of a temporary receiver during the pendency of this action. As against AB, the complaint seeks a money judgment of $33,418.18 and interest and attorneys' fees.

The Gurevichs contend that, as they have no interest in the unit, there is no reason for them to be in this action. Each defendant submits an affidavit. Alexander Gurevich, the owner of AB, states that he lives in Connecticut and has his office there. He does not and never has lived in, resided in, used, or occupied the unit. He has never been a tenant of the unit. His only relationship to the unit is that he is a principal of AB. The unit is residential and he has never used it as his office. Alexander Gurevich further states that an individual leased the unit from July 2012 to July 2014. Since then, the unit has been vacant and unused. Currently, there is no lease in effect for the unit. He states that he and his family are significantly prejudiced by being

named as defendants. His business involves finance and real estate transactions. Searches are routinely conducted for judgments, liens, and lawsuits against his name. Being defendants will negatively affect the ability of his business to obtain financing and complete real estate transactions, and his credit rating, and his and his family's banking relationships.

Ella Gurevich states that she lives in Connecticut with her husband and son. She states that she is not a tenant of the unit, and has never resided there, or occupied or used the unit. She has never been a tenant or party to a lease of the unit. Being named as a defendant will negatively impact her credit rating and banking relationships. In his affidavit, Mitchell Gurevitch says the same.

In opposition, plaintiff states that the Gurevichs were made defendants because they use the unit as a pied a terre and, since Alexander Gurevich is a principal of the unit's owner, the Gurevichs have a right of occupancy. In her affidavit, Kathryn M. Quigley, plaintiff's president, says that Mitchell and Ella Gurevich occupied the unit as recently as July 2015, that "just a few weeks ago" Alexander Gurevich permitted a friend to stay in the unit, and that "just a few days ago" Alexander and Ella Gurevich went there to retrieve mail and clothing. Allegedly, the concierge told Quigley that each member of the family has his or her own keys to the unit and that sometimes they use the keys kept by the concierge. Quigley alleges that defendants have dry cleaning and other items delivered to the unit. A copy of the condominium's records for 2015 attached to Quigley's affidavit shows that three times Ella Gurevich took the keys to the unit and subsequently returned them and that items were dropped off for her and that she dropped off items for another to pick up.

In reply, defendants argue that plaintiff's evidence demonstrates how little interest they

have in the unit. The log shows that Mitchell Gurevich did not visit the unit at all in 2015. In his reply affidavit, Alexander Gurevich states that he let a friend stay in the unit temporarily and that he visits the unit at least once every two months in his capacity as an officer of AB. He comes to inspect and maintain the unit. He also states that he and his family would consent to being bound by a judgment of foreclosure.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court takes the facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged in the complaint fit within any cognizable legal theory (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]; *African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]). The plaintiff may use affidavits to supplement the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). In that case, the appropriate standard of review of a motion to dismiss "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Dollard v WB/Stellar IP Owner, LLC,* 96 AD3d 533, 533 [1st Dept 2012] [internal quotation marks and citation omitted]).

Dismissal is warranted pursuant to CPLR 3211 (a) (1) where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA,* 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]).

To warrant dismissal under CPLR 3212, the proponent of the motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Santiago v Filstein,* 35 AD3d 184, 185-186, [1st Dept 2006]). If the proponent makes this showing, the motion's opponent must present

evidence sufficient to raise a genuine, triable issue of fact (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). In case of any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The issue is whether the Gurevichs have sufficient interest in the property to be properly named as defendants in this foreclosure action. Plaintiff sufficiently alleges that the Gurevichs are occupants or that they have some kind of interest in the unit which makes them proper defendants. The Gurevichs do not show that they do not have some interest in the unit or that there is no issue of fact in that regard. Affidavits are not considered documentary evidence for the purposes of a CPLR 3211 (a) (1) motion (*Fontanetta v John Doe*, 73 AD3d 78, 85-86 [2d Dept 2010]) and, in this case, the affidavits do not serve the purposes of a motion for summary judgment by eliminating questions of fact.

Real Property Law (RPL) § 339-aa provides that a lien for common charges may be foreclosed "in like manner as a mortgage of real property . . . ." The law of mortgage foreclosures is analogous to the law of foreclosing a lien for common charges (*see Board of Mgrs. of Parkchester N. Condominium v Alaska Seaboard Partners Ltd. Partnership*, 37 AD3d 332, 332 [1st Dept 2007]). The function of a foreclosure proceeding is "to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale" (*Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 404 [2d Dept 1983]). Persons holding title to the premises or acquiring any right to or lien on the property subsequent to the mortgage should be made parties in the foreclosure action (*New Falls Corp. v Board of Mgrs. of Parkchester N. Condominium, Inc.*, 10

AD3d 574, 576 [1st Dept 2004]).

There is a distinction between necessary parties and indispensable parties (*see Marine Midland Bank v Freedom Rd. Realty Assoc.*, 203 AD2d 538, 539 [2d Dept 1994]). An action can proceed without a necessary party, but must be dismissed in the absence of an indispensable party (*ibid.*). While tenants and occupants are necessary parties to a foreclosure action, they are not indispensable parties (*Balt v J.S. Funding Corp.*, 230 AD2d 699, 699 [2d Dept 1996]). The absence of a tenant or occupant of the premises in a foreclosure action does not render the judgment of foreclosure and sale defective (*ibid.*; *see also G.C. M. Corp. v 382 Van Duzer Corp.*, 249 AD2d 264, 264 [2d Dept 1998]). The effect of such an absence in a foreclosure action is to leave that party's rights unaffected by the judgment and sale, which means that the foreclosure sale may be considered void as to the excluded party (*Board of Mgrs. of Parkchester*, 37 AD3d at 333; *6820 Ridge Realty v Goldman*, 263 AD2d 22, 26 [2d Dept 1999]; *Polish Natl.*, 98 AD2d at 406). "Thus a tenant or occupant who was not named as a party in the foreclosure action retains his or her possessory rights and a right of redemption" (*MERS, Inc. v Bernard,* 18 Misc 3d 1134[A], 2008 NY Slip Op 50308[U] [Sup Ct, Nassau County 2008]; *see also Matter of SI Bank & Trust v Sheriff of City of N.Y.*, 300 AD2d 667, 667 [2d Dept 2000]; *276 W. 113 Funding, Inc. v 113th St. Realty, LLC,* 2010 WL 128083, 2010 NY Misc LEXIS 1181 [Sup Ct, NY County 2010]). Further steps related to foreclosure must be taken to terminate the interest of the absent party (*MERS, Inc.*, 18 Misc 3d 1134[A], 2008 NY Slip Op 50308[U]).

While the absence of the Gurevichs would not be fatal to a foreclosure, assuming that there will be one, plaintiff might have to take more measures to terminate any rights or interest which the Gurevichs may have in the unit. Although the Gurevichs claim that they would agree

to be bound by a foreclosure judgment, they do not claim that they have no interest in the unit at all or that they would be willing to sign a document to that effect. They point to deficiencies in plaintiff's evidence, but they do not allege that they do not use the unit.

In *Empire Sav. Bank v Towers Co.* (54 AD2d 574, 575 [2d Dept 1976]), a handyman occupied an apartment in the subject premises but paid no rent. Because "[t]he interest of an occupant of the mortgaged premises who is not served remains unaffected by the foreclosure," the court ruled that he was "properly joined as a party in order to cut off his interest as an occupant in possession of an apartment in the premises" (*ibid.*). In *Flushing Savings Bank v CCN Realty Corp.* (82 AD2d 907, 908 [2nd Dept 1981]), the court held that the occupants of a proprietary home had the same status as tenants with leases. In *Gibbs v Kinsey* (170 AD2d 1049, 1049 [4th Dept 1991]), the court held that a party who was not joined in the action could not be evicted without commencing an eviction or holdover action, even if she "has no legitimate interest in the property." *Green Point Sav. Bank v Defour* (162 Misc 2d 476, 478 [Sup Ct, Kings County 1994]) involved a tenant whose lease had expired. The court held that even if he had no legitimate interest in the property, plaintiff could not evict him without commencing an eviction action or a summary holdover proceeding against him. Similarly, in *Mortgage Elec. Registration Sys., Inc. v Anuforo* (15 Misc 3d 1124[A], 2007 NY Slip Op 50834[U] [Sup Ct, Nassau County 2007]), a prior owner of foreclosed premises who transferred title to her sister, but who was not named as a defendant in the mortgage foreclosure proceeding, could not be removed by a writ of assistance issued to the sheriff. As the prior owner was not named as a party, her interest was not affected by the foreclosure.

These cases show that a party need not be an actual tenant to have an interest in property.

The Gurevichs, while not tenants, may be occupants of the unit with some interest or right in the unit. For that reason, their motion to be dismissed from this action is denied.

Pursuant to CPLR 1001 and 1003, AB and the Gurevichs cross-move to dismiss the complaint for failure to join a necessary party or, in the alternative, to add that party, 250 East, the condominium sponsor, as a defendant. Gene Kisselman submits two affidavits in support of the cross motion. In one affidavit, he identifies himself as a principal of AB and in the other as a principal of 250 East. A deed attached to the cross motion shows that 250 East transferred the unit to AB in July 2013 for the sum of $10.

Defendants claim that plaintiff is demanding the payment of common charges from the time when 250 East owned the unit, before AB came to own the unit. Defendants argue that if plaintiff is awarded the common charges sought in this action, AB will become liable for common charges which accrued during the time period that the sponsor owned the unit. Defendants allege that the case cannot be properly adjudicated unless 250 East is made a defendant. If AB is adjudged liable for money owed by 250 East, AB may not be able to recover those funds from 250 East. AB states that maintaining a third party action against 250 East will be difficult because 250 East will raise certain defenses. What these defenses might be is not stated by AB, just as 250 East does not explain why it is not moving to intervene, although it wants to be joined as a defendant.

Kisselman states that 250 East paid plaintiff all the common charges due and that plaintiff refused to credit it for the payments. He argues that this action is the most efficient and cost effective way to determine whether 250 East and AB owe common charges and the amount. Plaintiff opposes the motion on the ground that 250 East no longer has any interest in the unit.

Also, plaintiff states that 250 East's claims are best adjudicated in an action already commenced against it by plaintiff.

A necessary party is a party who must be in the action for complete relief to be accorded between the parties or who will be inequitably impacted by a judgment (CPLR 1001). "Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice . . ." (CPLR 1003). The decision to add or not to add a party is discretionary (*see Oleh v Anlovi Corp.*, 106 AD3d 445, 445 [1st Dept 2013]).

The presence of 250 East is not needed for complete relief between plaintiff and AB. AB does not demonstrate that it cannot show what it owes or does not owe in common charges unless 250 East is a defendant. 250 East does not demonstrate that a decision for or against AB will negatively impact it by binding its interests or rights (*see Eclair Advisor Ltd. v Jindo Am., Inc.*, 39 AD3d 240, 245 [1st Dept 2007]). 250 East is not a party who should be joined. Moreover, 250 East itself states that there are two other actions, apart from this one, pending in this court which require a determination as to the monies paid by 250 East (Albert Ades aff, ¶ 15). The others are *Alexander Condominium, By its Board of Managers v East 49th Street Development II, LLC, 250 East Borrower, LLC, et al.*, Index No. 153813/2016 (250 East is a defendant) and *Alexander Condominium, By its Board of Managers v 250 AB Funding, LLC, et al.*, Index No. 150378/2016.

The cross motion is denied.

Plaintiff moves for the appointment of a temporary receiver under Real Property Law (RPL) § 339-aa, CPLR 6401, and the condominium bylaws. Plaintiff wants AB to pay a fair market value amount of rent or to vacate the unit so that it can be rented by a temporary receiver

who will pay the common charges from the rental proceeds. In her affidavit, Quigley states that the fair market value for the unit is $3,650 a month, based upon comparable leases in the building.

Pursuant to RPL § 339-aa, a condominium board which has served a notice of lien for unpaid common charges may commence an action to foreclose the lien and its right to do so is not impaired by maintaining an action to recover money damages for same.

> "In any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit for any period prior to sale pursuant to judgment of foreclosure and sale, if so provided in the by-laws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same. The board of managers, acting on behalf of the unit owners, shall have power, unless prohibited by the by-laws, to bid in the unit at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same"

(RPL § 339-aa).

The bylaws provide that the unit owner shall pay reasonable rental and otherwise contain the same language as the statute (bylaws at 21).

CPLR 6401 (a) provides that a receiver may be appointed where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.

The decision to appoint a receiver is within the court's discretion (*see United Chelsea Natl. Bank v Rumican 190 Corp.*, 228 AD2d 279, 279 [1st Dept 1996]). The appointment of a receiver is a drastic remedy which could potentially, and unnecessarily, increase the cost of litigation (*see S.Z.B. Corp. v Ruth,* 14 AD2d 678, 678 [1st Dept 1961]). Since the appointment generally results in the taking and withholding of property from a party without adjudication on the merits, courts exercise extreme caution in appointing receivers (*ibid.*; *Jacobowitz v Jacobowitz,* 5 Misc 3d 1012[A], 2004 NY Slip Op 51338[U] [Sup Ct, Kings County 2004],

citing *Hahn v Garay,* 54 AD2d 629, 629-30 [1st Dept 1976]). Therefore, the provisional remedy of receivership is allowed only in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting the party's interests (*Matter of Kristensen v Charleston Sq.*, 273 AD2d 312, 312 [2d Dept 2000]), and where there is the danger of irreparable loss (*Matter of Armienti & Brooks,* 309 AD2d 659, 661 [1st Dept 2003]).

Appointment of a receiver may be denied where the property is sufficient security for the debt and the property is not in danger (*Board of Mgrs. of the 200 Chambers St. Condominium v Braverman*, 2016 WL 5919857, *4, 2016 NY Misc LEXIS 3665, *4 [Sup Ct, NY County 2016], citing *Eastbank v Malneut Realty Corp.,* 180 AD2d 442, 442-443 [1st Dept 1992]). While there is no automatic entitlement to a receiver, an appointment shall not be denied unless the circumstances require denial as a matter of equity (*F.D.I.C. v Vernon Real Estate Investments, Ltd.,* 798 F Supp 1009, 1012 [SD NY 1992]).

Relief under CPLR 6401 is not proper as plaintiff does not show that the property is in any danger of deterioration or that the condominium's financial stability is affected (*see US Bank N.A. v Sacher,* 2013 WL 1930262, 2013 NY Misc LEXIS 1894 [Sup Ct, NY County 2013] [in an action to foreclose a mortgage on a condominium unit, the court appointed a receiver because the board was not likely to recover common charges, given the owners' bankruptcy, the lack of equity in the unit, and the board's position as junior lienor]). The unit is sufficient security for plaintiff's lien.

Defendants oppose the appointment of a temporary receiver, pointing out that plaintiff alleges that AB owes common charges accrued since October 2011. AB raises an issue of fact as to whether the common charges were proportionately attributed to it. In addition, AB allegedly

offered to pay the common charges as they accrued, and plaintiff rejected the offer. Plaintiff states that it rejected the offer because "it will not permit AB Funding to dictate how its payments will be credited" (Quigley reply aff, ¶ 7, May 5, 2016).

Defendants argue that plaintiff seeks the appointment of a receiver to be awarded the ultimate relief sought in this case while avoiding litigation over the disputed common charges. The court agrees with this statement to the extent of deciding that plaintiff may collect reasonable rent for use and occupancy of the units during the pendency of this action, but not for the satisfaction of arrears. AB owns the unit and is not paying common charges on it. Under the statute and the bylaws, plaintiff is entitled to the rents from the unit. They do not entitle plaintiff to appoint a receiver to rent the property to a third person and collect rent from him or her. The court will grant the motion to appoint a receiver to collect a reasonable rental amount and to pay the common charges out of that as they come due. The motion is denied to the extent that the receiver may not use the rent to pay arrears on common charges and the receiver has no authority to rent the unit.

In conclusion, it is hereby

ORDERED (motion sequence number 001) that plaintiff's motion for the appointment of a temporary receiver is granted and plaintiff within 60 days of the date of this order shall present defendants and this court with an order specifying the limitations on the receiver's authority; and it is further

ORDERED (motion sequence number 002) that the motion by defendants Alexander Gurevich, Ella Gurevich, and Mitchell Gurevitch to dismiss this action as against themselves and for sanctions against plaintiff is denied; and it is further

ORDERED that the cross motion by defendants AB Funding Corporation, Alexander Gurevich, Ella Gurevich, and Mitchell Gurevitch to dismiss the action pursuant to CPLR 1001 and 1003 or, in the alternative, to join 250 East Borrower, LLC as a defendant is denied.

Dated: January 9, 2017

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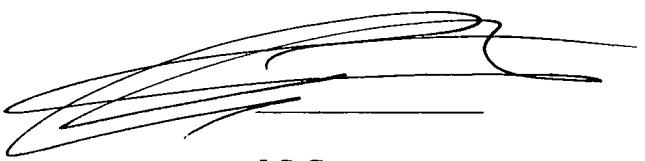

J.S.C.

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