

CFC Specialty Program Mgrs., LLC v AB Funding Corp.
2018 NY Slip Op 30571(U)
March 29, 2018
Supreme Court, New York County
Docket Number: 850177/2016
Judge: Judith N. McMahon
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At IAS Part _____ of the Supreme Court of the
State of New York, held in and for the County
of New York, at the Courthouse thereof, 60
Centre Street, New York, New York on the
29 of March, 20 18

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

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CFC SPECIALTY PROGRAM MANAGERS, LLC,

Plaintiff,

-against-

AB FUNDING CORPORATION, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
BOARD OF MANAGERS OF 250 EAST 49TH STREET
CONDOMINIUM, BOARD OF MANAGERS OF THE
ALEXANDER CONDOMINIUM, BERKLEY
REGIONAL INSURANCE COMPANY, and "JOHN
DOE" and "JANE DOE", said name being fictitious, it
being the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein, and any
parties, corporations or entities, if any, having or claiming
an interest or lien upon the mortgaged premises,

Defendants.

Present:

HON. JUDITH N. McMAHON

DECISION AND ORDER

Index No. 850177/2016

Motion Sequence No. 001

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Plaintiff's, CFC Specialty Program Managers, LLC ("CFC"), motion seeking a default
judgment against certain Defendants and granting Summary Judgment against Defendant, Alexander
Condominium, By Its Board of Managers (the "CONDO BOARD"), is denied. The CONDO
BOARD's cross-motion, seeking to dismiss pursuant to CPLR 3212 is granted.

This is an action whereby CFC seeks to foreclose on its Consolidated Amended and Restated
Project Loan Mortgage (the "PROJECT LOAN") against premises known as 250 East 49th Street, New
York, New York 10017, Condominium Unit 25PHC.

There has been a total of twenty-four mortgages filed against the subject property. These twenty-four mortgages, through various assignments and consolidations, have been consolidated into three mortgages: the Consolidated Amended and Restated Acquisition Loan Mortgage (the "ACQUISITION LOAN"), dated December 29, 2006, and recorded January 17, 2007, the Consolidated Amended and Restated Building Loan Mortgage (the "BUILDING LOAN"), dated February 13, 2008, and recorded March 3, 2008, and the PROJECT LOAN, also dated February 13, 2008, and recorded March 3, 2008.

The ACQUISITION LOAN, the BUILDING LOAN, and the PROJECT LOAN were all assigned to CFC on January 28, 2013.

CFC seeks a default judgment against all Defendants, except for the CONDO BOARD, which is the only Defendant to have filed an answer. CFC seeks Summary Judgment against the CONDO BOARD, and an order appointing a referee to compute the amounts due on the PROJECT LOAN.

The CONDO BOARD cross-moves to dismiss, pursuant to CPLR 3212, on the grounds that the Real Property Law Section 339-z gives the CONDO BOARD's lien for unpaid common charges priority over the PROJECT LOAN.

Real Property Law Section 339-z provides that, "the board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon, prior to all other liens except only (i) liens for taxes on the unit..., (ii) all sums unpaid on a first mortgage of record, and (iii) all sums unpaid on a subordinate mortgage of record held [by various state and city agencies]." *N.Y. Real Prop. Law 339-z*.

The CONDO BOARD's lien for unpaid common charges was filed January 4, 2016, and it covers unpaid common charges going back to 2010. But for the provisions of RPL 339-z, the ACQUISITION LOAN, the BUILDING LOAN, and the PROJECT LOAN would all have priority over the CONDO BOARD's lien because they were recorded first. *See N.Y. Real Prop. Law 291*.

"Real Property Law 339-z provides that a condominium board's lien for unpaid common charges has priority over other liens, except for certain statutory exceptions; those statutory exceptions expressly include a first mortgage of record." *Plotch v. Citibank, N.A.*, 27 N.Y.3d 477, 54 N.E.3d 66, *reargument denied*, 28 N.Y.3d 945, 60 N.E.3d 408 (2016).

CFC argues that for the purposes of RPL Section 339-z, the PROJECT LOAN constitutes a first mortgage of record and takes priority over the CONDO BOARD's lien for unpaid common charges. CFC argues that each of the ACQUISITION LOAN, the BUILDING LOAN, and the PROJECT LOAN, constitute a first mortgage of record, because each is prior in time to the claim of unpaid common charges and each is held by the same entity.

By definition, there can be only one first mortgage of record. To agree with CFC's argument, the Court would have to conclude that either the ACQUISITION LOAN, the BUILDING LOAN, and the PROJECT LOAN were legally consolidated when all three were assigned to CFC on January 28, 2013, or that liens change priority based on the identity of the lien-holder and other liens held by such entity.

CFC's own statement of facts contradicts any assertion that the three mortgages have been consolidated.

The only legal authority presented to the Court supporting an argument that liens change priority based on the identity of the lien-holder is RPL 339-z, which gives priority to the CONDO BOARD's lien over all liens other than the first mortgage of record.

Had CFC actually consolidated the ACQUISITION LOAN, the BUILDING LOAN, and the PROJECT LOAN and recorded such consolidated loan at any time prior to the CONDO BOARD recording its lien for unpaid common charges, the case law supports the argument that all the component liens thus hypothetically consolidated would be considered a single 'first mortgage of record' which would have maintained priority over the CONDO BOARD's lien.

However, by CFC's own admission, this was never done. To attempt to consolidate the loans now would be to no avail. "A consolidation agreement, however, cannot adversely affect, impair or derogate the priorities of any lien which has intervened between the respective dates of execution and delivery of the [three] consolidated mortgages. Rather, for purposes of determining priority when there is an intervening lien, the mortgages retain their separate-lien status. In that scenario, the [hypothetical] consolidation agreement would not be considered the first mortgage of record." *Id.*

The CONDO BOARD's lien must be considered an intervening lien from the moment it was recorded, as RPL 339-z immediately gave it second lien status behind the ACQUISITION LOAN, but ahead of the BUILDING LOAN, and the PROJECT LOAN.

Had CFC consolidated the PROJECT LOAN with the ACQUISITION LOAN prior to the CONDO BOARD recording its lien, or if CFC had foreclosed on the ACQUISITION LOAN rather than the PROJECT LOAN, the relief sought herein would be proper. However, neither is the case.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

Here, as a matter of law, the CONDO BOARD's lien is superior to the PROJECT LOAN by the authority of RPL 339-z.

Accordingly, it is:

ORDERED, Plaintiff's motion is denied in its entirety; and it is further

ORDERED that Defendant Alexander Condominium, By Its Board of Managers' cross-motion seeking to dismiss Plaintiff's Complaint pursuant to CPLR 3212 is granted and the complaint is dismissed; and it is further

ORDERED that Defendant Alexander Condominium, By Its Board of Managers' cross-motion seeking sanctions and attorneys' fees is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March ²⁹, 2018

ENTER,

J.S.C.

Hon. Judith N. McMahon
J.S.C.