

**Board of Mgrs. of the Alexandria Condominium v
Rackis**

2019 NY Slip Op 30008(U)

January 3, 2019

Supreme Court, New York County

Docket Number: 156850/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 156850/2018

BOARD OF MANAGERS OF THE ALEXANDRIA CONDOMINIUM,
ON BEHALF OF ALL UNIT OWNERS OF THE ALEXANDRIA
CONDOMINIUM, MOTION DATE 12/11/2018

MOTION SEQ. NO. 001

Plaintiff,

- v -

LINDA RACKIS, ROBERT ADELMAN, JOSEPH FUCITO AS
SHERIFF OF THE CITY OF NEW YORK

DECISION AND ORDER

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 21, 22, 23, 24, 25,
26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55
were read on this motion to/for STAY

The petition, brought by order to show cause, for an order staying an upcoming sheriff's sale and stating that petitioner has first priority over the proceeds of that sale is denied.

Background

This proceeding asks the Court to consider how proceeds from an upcoming sale of an apartment owned by respondent Adelman should be distributed. Petitioner operates the condo where Adelman owns the apartment and it commenced a related action to foreclose its lien for unpaid common charges. Petitioner obtained summary judgment in the related case against Adelman (owner) and Rackis (judgment creditor). A referee was appointed to calculate the amount due, but that hearing has not yet been held and so the amount of the lien has not yet been determined or reduced to a judgment.

Respondent Rackis (Adelman's ex-wife) obtained a judgment for over \$100,000 against Adelman in June 2006 although she did not immediately seek to force the sale of Adelman's

apartment to enforce this judgment or her other judgments against Adelman. In 2016, Rackis renewed the judgment and finally issued an execution against the real property to the sheriff in April 2018. A sheriff's sale of the unit was scheduled for August 8, 2018.

Petitioner claims that its condo lien has priority over Rackis' judgment and Rackis is attempting to circumvent petitioner's superior lien. Petitioner seeks a determination that the proceeds of the sheriff's sale should be distributed first to petitioner and that the sheriff's sale should be stayed. Petitioner claims that under Real Property Law § 399-z, Rackis' judgment is junior to its condo lien. Petitioner insists that the Court should reject Rackis' effort to jump priority.

In opposition, respondent asserts that the applicable statute, Real Property Law § 399-z is silent on a property dispute between condo liens and existing judgments. Respondent contends that the common law rule of "first in time, first in right" should apply and it should be allowed to go forward with the sheriff's sale without making petitioner's lien superior.

Discussion

CPLR 5239 allows a special proceeding to "be brought by any interested person against the judgment creditor or other person with whom a priority dispute exists" (Siegel, NY Prac § 521 at 992 [6th ed 2018]).

"Normally, the priority of liens is determined by the chronology of the recording. However, Real Property Law § 399-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 NY3d 477, 482, 34 NYS3d 394 [2016] [citation omitted]).

Based on Real Property Law § 399-z, the Court finds that a condo's lien on a property is superior to a judgment creditor's effort to sell the property at a sheriff's sale. The statute expressly names three liens that are senior to a condo lien: (1) taxes on the unit in favor of "an assessing unit school district, special district, county or other taxing unit," (2) a first mortgage and (3) a subordinate mortgage of record. The exclusionary language in the statute that the condo lien is superior to "all other liens" (except the three listed above) makes clear that a judgment creditor not superior even if it obtains that judgment prior to a condo.

However, petitioner is not entitled to the relief it seeks in this proceeding because its lien has not been reduced to a judgment. "A lien which has not been reduced to a judgment is not definite in amount and is, therefore, inchoate" (*Bd. of Managers of 141 Condo. V Pickett*, 159 Misc2d 1076, 1079, 607 NYS2d 565 [Sup Ct, NY County 1994]). "A state lien is considered choate when it is perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established" (*id.* at 1078 [internal quotations and citations omitted]).

Here, the referee has yet to compute the amount of petitioner's lien and petitioner has not obtained a judgment of foreclosure and sale in the related case. The Court cannot stop the sheriff's sale or hold that petitioner should receive the sale proceeds first where the amount due to petitioner is unknown and the foreclosure case is not final.

A similar scenario exists in other types of foreclosure cases. If a borrower fails to pay both his mortgage and his condo liens, then both the condo and the bank may bring a foreclosure action. And a condo, even though its lien is junior to the bank's mortgage, can sell the property if the bank fails to go forward with its own foreclosure action. The result in such a scenario is that the purchaser at the condo's foreclosure sale buys the property subject to the mortgage (*see*

e.g., *Plotch*, 27 NY3d at 481, 483). Under the instant circumstances, that means that the sale of the property pursuant to a sheriff's sale would not extinguish petitioner's lien, however much it may be. Whoever buys the apartment at the sheriff's sale buys subject to the condo's inchoate lien.

A condo seeking to foreclose its lien for unpaid common charges does not have to wait for a bank to successfully prosecute its own foreclosure case. Similarly, Rackis should not have to wait while petitioner completes its foreclosure case. To be clear, the Court is not suggesting that petitioner failed to timely prosecute the foreclosure case; it is merely a recognition that bringing a foreclosure action does not necessarily suspend the rights of a judgment creditor.

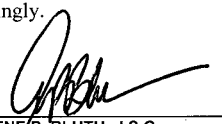
Summary

Although the Court agrees with plaintiff that it has priority over Rackis' judgment, that priority does not apply until its lien is reduced to a judgment. Until then, Rackis is free to try and sell the apartment and any purchaser buys it subject to the condominium's lien.

Accordingly, it is hereby

ADJUDGED that the petition is denied, and this proceeding is dismissed without costs and disbursements, and the Clerk is directed to enter judgment accordingly.

1/3/19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE