

<b>KBS Sheepshead Bay, LLC v Terrapin Design Group LLC</b>
2019 NY Slip Op 31341(U)
April 29, 2019
Supreme Court, New York County
Docket Number: 850121/2016
Judge: Arlene P. Bluth
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**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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KBS SHEAPSHEAD BAY, LLC,		INDEX NO. <u>850121/2016</u>
Plaintiff,		MOTION DATE <u>N/A</u>
- v -		MOTION SEQ. NO. <u>005</u>

TERRAPIN DESIGN GROUP LLC, CITY OF NEW YORK  
DEPARTMENT OF FINANCE, CITY OF NEW YORK  
ENVIRONMENTAL CONTROL BOARD, BOARD OF MANAGERS  
VALHALLA II CONDOMINIUM, BANK OF NEW YORK, AS  
TRUSTEE FOR THE BENEFIT OF CERTIFICATEHOLDERS,  
CWALT, INC., ALTERNATIVE LOAN TRUST 2007-HY4  
MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2007-  
HYF, COLLIN RATH, PAMELA RATH, JOHN DOE #1 - JOHN DOE  
#99

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 288, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 314, 315

were read on this motion to/for

MODIFY ORDER/JUDGMENT

The motion by defendant Board of Managers of the Valhalla II Condominium (the “Condo”) to modify the Court’s order appointing a temporary receiver to direct the receiver to begin paying the Condo for ongoing common charges, to pay the outstanding common charges, and to order the receiver to take appropriate measures to evict the tenants of the unit is denied.

**Background**

In this foreclosure action brought against defendant Terrapin Design Group, LLC (owner of unit 1), the Condo claims that no common charges have been paid for more than three years. The Condo complains that the other unit owners (there are only three units in the building) have been forced to subsidize the payments for services for unit 1 without receiving any compensation. The Condo filed a lien on unit 1 for its unpaid common charges (which allegedly

amounts to over \$85,000). The Condo argues that it should be paid \$14,609 for the time period (May 2018 through November 1, 2018) when the receiver put tenants in the unit.

The Condo argues that the receiver promised to pay the common charges, but it has not done so. The Condo insists it is unfair that rent is being paid on the unit and it has received nothing. The Condo also complains about the current tenants' party habits and alleged violations of the by-laws and the lease by allowing music videos to be filmed in the premises.

In opposition, plaintiff emphasizes that the apartment was in a complete state of disrepair. Plaintiff argues that the Condo allowed the prior tenant (Black) to live in the apartment without collecting any common charges. Plaintiff maintains that the Condo is not owed the common charges arrears because Mr. Rath (the owner of unit 1 through Terrapin Design Group, LLC) pocketed the prepaid rent from Black (for \$90,000) when Rath was on the Condo Board rather than giving it to the receiver. Plaintiff also mentions an agreement made between the Condo and Rath in October 2017 (after a receiver was appointed but without his input) where the remaining units (units 2 and 3) were allowed to do construction. Plaintiff points out that the receiver had to deal with the unhappy tenants in unit 1 who were forced to live next to a construction project. Plaintiff speculates that there would be funds to pay the Condo if the receiver was not forced to give rent abatements due to the construction.

### **Discussion**

Interestingly, the parties don't cite any cases about the Court's power to order a receiver to pay the common charges during the pendency of a foreclosure action. There are few cases on this issue, although the First Department has held that a Court can direct a receiver to apply rental proceeds to pay common charges and that a receiver "had the discretion to direct that rental proceeds first be applied toward payment of the units' common charges in the interest of

preserving the premises during the foreclosure action” (*Ezriel Equities Assoc., L.P. v 157 East 72<sup>nd</sup> St. Assoc.*, 225 AD2d 326, 326, 638 NYS2d 470 [1st Dept 1996]). But *Ezriel* only explores whether it was *permissible* for the receiver to pay the common charges and, certainly, paying the common charges helps preserve the premises. It did not hold that a receiver must pay the common charges.

However, “a receiver can only make payments with respect to the subject property from funds received in his capacity as receiver” (*First New York Bank for Business v 155 E. 34 Realty Co.*, 158 Misc2d 658, 662 601 NYS2d 990 [Sup Ct, NY County 1993] [finding that a receiver should pay common charges during the pendency of a foreclosure action but noting that “a receiver cannot be ordered to pay out more cash than he or she has received”]).

Here, plaintiff and the receiver insist there are insufficient funds to pay the common charges and the Court cannot force the receiver to pay monies that are not available. While the Condo relies on the fact that rent is being paid, plaintiff submits the affidavit of the managing agent who claims that there is \$4,925.49 in the receiver’s account (NYSCEF Doc. No. 295, ¶ 12). The managing agent also claims that there are insufficient funds to pay for additional necessary repairs (*id.*). The Condo offers nothing in reply to dispute the fact that there are insufficient funds to pay for necessary repairs or for the common charges.

It is up to the receiver to make a good faith determination about how to preserve and maintain the apartment (*First New York Bank for Business*, 158 Misc2d at 662) and this Court is unable to find that the receiver’s decisions to make repairs and give rent abatements lacked good faith. If there comes a time when the receiver’s account contains ample funds for both repairs and common charges, then the Court expects that the receiver shall start paying common charges. But the record before this Court shows there is no money to pay the common charges,


so the Court cannot grant the Condo's relief. The Court also observes that the Condo has already filed a lien based on outstanding common charges for \$85,374.28 (NYSCEF Doc. No. 247). It is in line to recover the money it is owed if, and when, the property is sold.

With respect to the nuisance complaints about the tenants, the Court declines to order the receiver to take certain actions. The Condo has many remedies available to it to address perceived breaches of the by-laws or breaches of the Administrative Code. But this is a mortgage foreclosure action, not a plenary action alleging nuisance. The receiver is entrusted to take actions necessary to maintain the property—if the receiver decides that he should tell the tenants to quiet down or avoid having visitors on the property without proper insurance (as the Condo alleges), then the receiver has the discretion to take those steps. But the Court will not micromanage every complaint about noise or excess garbage from the Condo.

Accordingly, it is hereby

ORDERED that the motion by defendant Board of Managers of the Valhalla II Condominium for *inter alia* an order directing the receiver to pay common charges is denied.

4.29.19  
DATE

  
ARLENE P. BLUTH, J.S.C.  
HON. ARLENE P. BLUTH

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT

<input type="checkbox"/>	OTHER
<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: