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

PRESENT: LUCY BILLINGS J.S.C. Justice — PART 46

COMMUNITY PRESERVATION CORPORATION

- v -

WADSWORTH CONDOS, LLC, et al.

INDEX NO. 114865/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for ~~summary judgment~~, severance, and discontinuance

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2-4
Replying Affidavits	5-6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this motion~~:

The court grants plaintiff's motion for summary judgment, for severance to the extent set forth, and for discontinuance against the Doe defendants without opposition; otherwise denies plaintiff's motion; and grants summary judgment to defendant Sparrow Construction Corp. dismissing defendant Park Owners Group's cross-claim against Sparrow Construction pursuant to the accompanying decision. C.P.L.R. §§ 603, 1001(a), 1002, 3212(b), 3217(b); R.P.A.P.L. § 1311(3).

FILED

MAR 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/9/12

Lucy Billings

J.S.C.

LUCY BILLINGS

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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COMMUNITY PRESERVATION CORPORATION,

Plaintiff

-against-

WADSWORTH CONDOS, LLC, CARNEGIE HOLDINGS, LLC, 43 PARK OWNERS GROUP, LLC, INWOOD EQUITIES GROUP, INC., SPARROW CONSTRUCTION CORP., PERRY FINKELMAN, MARK ENGEL, ELI BOBKER, BEN BOBKER, and JOHN DOE #1 through JOHN DOE #12, the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons, or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants

----------x

Index No. 114865/2009

DECISION AND ORDER

----------x

SPARROW CONSTRUCTION CORP.,

Third Party Plaintiff

-against-

ADG WADSWORTH CONSTRUCTION GROUP, LLC,

Third Party Defendant

----------x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

This action, for foreclosure of 1 Wadsworth Terrace, New York, New York, first requires untangling the parties' complicated relationships and claims. Defendants Wadsworth Condos, LLC, and Carnegie Holdings, LLC, were the sole owners of

the property until July 6, 2005, when they conveyed a 20% interest in the property to defendant 43 Park Owners Group, LLC. These three defendants entered a management agreement to govern the development of condominiums on the property. Wadsworth Condos, Carnegie Holdings, and their guarantors Eli and Ben Bobker (Bobker defendants) interpret the management agreement as imposing responsibility on 43 Park Owners Group's principals, defendants Perry Finkelman and Mark Engel, for managing the project's construction activities, records, and accounts.

Later in 2005 Wadsworth Condos, Carnegie Holdings, and 43 Park Owners Group executed notes and mortgages on the property separately with plaintiff and with defendant Inwood Equities Group, Inc. Inwood Equities Group concedes its mortgage is subordinate to plaintiff's. Eli Bobker, a managing member, and Ben Bobker, an owner of a beneficial share, of Wadsworth Condos, and Finkelman and Engel, managing members of 43 Park Owners Group, each personally guaranteed the notes.

II. THE PARTIES' CLAIMS AND POSITIONS

Along with the Bobker defendants' affirmative defenses to plaintiff's foreclosure action, the Bobker defendants cross-claim against 43 Park Owners Group, Finkelman, and Engel (43 Park Owners defendants). Junior mortgagee Inwood Equities cross-claims for foreclosure against defendants Wadsworth Condos, Carnegie Holdings, Eli Bobker, Ben Bobker, 43 Park Owners Group, Perry Finkelman, and Mark Engel. Defendant Sparrow Construction Corp., holder of a mechanic's lien on the property, impleaded

third party defendant ADG Wadsworth Construction Group, LLC, claiming its breach of a contract that formed the basis for Sparrow Construction's lien. Sparrow Construction also counterclaims and cross-claims for foreclosure of that mechanic's lien against plaintiff, defendants Wadsworth Condos, Carnegie Holdings, and 43 Park Owners Group, LLC, and third party defendant ADG Wadsworth Construction Group. 43 Park Owners Group cross-claims against Sparrow Construction for wilful exaggeration of the lien.

Plaintiff has moved for summary judgment on plaintiff's foreclosure claim, to discontinue its action against the Doe defendants, to sever the cross-claims and third party claims, and to appoint a referee. The Bobker defendants oppose plaintiff's motion for summary judgment as premature because the parties have not yet conducted disclosure. Inwood Equities opposes severance, but does not oppose summary judgment. Sparrow Construction has released its lien and supports severance.

At oral argument, Sparrow Construction asked the court to search the record to grant summary judgment dismissing 43 Park Owners Group's cross-claim against Sparrow Construction for wilful exaggeration of a lien. 43 Park Owners Group opposes dismissal of its cross-claim, but does not oppose plaintiff's motion. Although no party originally submitted 43 Park Owner Group's amended answer to cross-claims containing its own cross-claim against Sparrow Construction, the appearing parties have stipulated that the court may consider 43 Park Owners Group's

recent submission of that pleading as if submitted with plaintiff's motion.

After submission of plaintiff's motion, the Bobker defendants moved to reopen the record for summary judgment, to include new documentary evidence they had uncovered through disclosure in a separate but related action against the 43 Park Owners defendants. The court grants this second motion, includes the new evidence in the record for summary judgment, and considers that evidence for that purpose. Tierney v. Girardi, 86 A.D.3d 447, 448 (1st Dep't 2011); Ashton v. D.O.C.S. Continuum Med. Group, 68 A.D.3d 613 (1st Dep't 2009).

III. SUMMARY JUDGMENT

A. Standards

To obtain summary judgment, plaintiff must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If plaintiff satisfies this standard, the burden shifts to defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for plaintiff's motion, the court must construe the evidence in the

light most favorable to defendants and accept their version of the facts as true. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). In deciding a summary judgment motion on any issues, the court may search the record and grant summary judgment on those issues to any party entitled to judgment even if that party has not moved for that relief. C.P.L.R. § 3212(b); Maheshwari v. City of New York, 2 N.Y.3d 288, 293 n.2 (2004); Merritt Hill Vineyards v. Windy Hgts. Vineyard, 61 N.Y.2d 106, 111 (1984); JPMorgan Chase Bank, N.A. v. Rocar Realty Northeast, Inc., 80 A.D.3d 429, 430 (1st Dep't 2011). As discussed below, however, summary judgment to any party may be premature when disclosure has not been conducted and evidence raising questions of fact may be in the exclusive control of the party seeking summary judgment. C.P.L.R. § 3212(f). E.g., Abramson v. Eden Farm, Inc., 70 A.D.3d 514 (1st Dep't 2010).

B. The Evidence Supporting Plaintiff's Claims and Defendants' Defenses

Plaintiff establishes a prima facie claim for foreclosure by presenting evidence, authenticated on personal knowledge, Aff. of Helen Rudolph (Feb. 5, 2010), of plaintiff's mortgage, defendant mortgagors' underlying promissory notes, and the mortgagors' default of each. Red Tulip, LLC v. Neiva, 44 A.D.3d 204, 209 (1st Dep't 2007); Witelson v. Jamaica Estates Holding Corp. I, 40 A.D.3d 284 (1st Dep't 2007); Citidress II v. 207 Second Ave. Realty Corp., 21 A.D.3d 774, 776 (1st Dep't 2005). Plaintiff's prima facie claim also disposes of the Bobker defendants' first affirmative defense of failure to state a claim. Red Tulip, LLC

v. Neiva, 44 A.D.3d at 209; Citidress II v. 207 Second Ave. Realty Corp., 21 A.D.3d at 776; Cochran Inv., Co., Inc. v. Jackson, 38 A.D.3d 704, 705 (2d Dep't 2007).

The Bobker defendants' second and third affirmative defenses claim plaintiff's action and omissions diminished the Bobker defendants' ownership interest, barring plaintiff from recovering based on its unclean hands. Alden State Bank v. Sunrise Bldrs., Inc., 48 A.D.3d 1162, 1165 (4th Dep't 2008); Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank, 135 A.D.2d 102, 107 (3d Dep't 1998). See Connecticut Natl. Bank v. Peach Lake Plaza, 204 A.D.2d 909, 911 (3d Dep't 1994). Plaintiff's alleged conduct directly relates to the mortgage plaintiff seeks to foreclose, to the reason for the initial loan, and to the Bobker defendants' claimed reasons for their inability to repay the loans. Blueberry Invs. Co. v. Ilana Realty, 184 A.D.2d 906, 907 (3d Dep't 1992). Although a guaranty expressly waiving all defenses other than actual payment would bar the defense of unclean hands against a foreclosure, plaintiff does not claim such a blanket waiver of defenses in this case. See Red Tulip, LLC v. Neiva, 44 A.D.3d at 207. A showing that plaintiff wrongfully caused defendants' default, moreover, may survive even a waiver of defenses. Id. at 211; Canterbury Realty & Equip. Corp., 135 A.D.2d at 106.

Nonetheless, the Bobker defendants present no evidence that plaintiff colluded with the 43 Park Owners defendants or otherwise wrongfully caused the mortgagors' default. The emails

with which the court has permitted the Bobker defendants to supplement the record show only that defendants Finkelman and Engel communicated with plaintiff regarding the financing of the project. The Bobker defendants themselves claim that Finkelman and Engel undertook managerial responsibilities for the project. The affidavit of Eli Bobker, part of the Bobker defendants' original opposition to plaintiff's motion for summary judgment, similarly attests only that Finkelman and Engel worked with plaintiff fulfilling the very managerial responsibilities that the Bobker defendants ascribe to Finkelman and Engel. Aff. of Eli Bobker ¶¶ 4, 6 (Mar. 11, 2010). The Bobker defendants present no evidence that they were harmed by any of plaintiff's actions or by defendants Finkelman and Engel communicating with plaintiff. Even if plaintiff, Finkelman, and Engel discussed or made unauthorized changes to the development plan, the Bobker defendants do not show that such changes caused the default.

Similarly, no evidence supports the Bobker defendants' fourth affirmative defense of equitable estoppel, which requires defendants to show they relied on plaintiff's promise or actions to defendants' detriment. Shondel J. v. Mark D., 7 N.Y.3d 320, 326 (2006); Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., Ltd., 7 N.Y.3d 96, 106-107 (2006); Provident Loan Socy. of NY v. 190 E. 72nd St. Corp., 78 A.D.3d 501, 503 (1st Dep't 2010); Siger v. Rich, 308 A.D.2d 235, 242 (1st Dep't 2003). Eli Bobker does attest that he and Ben Bobker relied on an engineering report, prepared by an engineer whom plaintiff

retained, that turned out to be inaccurate. Bobker Aff. ¶ 8. Eli Bobker does not attest, however, and no other evidence indicates, that the inaccurate report caused or was linked in any way to the default. The Bobker defendants' related fifth affirmative defense of waiver fails because plaintiff's mortgage and its underlying notes expressly preclude waiver of the terms of the mortgage or notes.

C. The Bobker Defendants Have Not Shown an Entitlement to Further Disclosure.

The Bobker defendants may not forestall summary judgment to conduct further disclosure, because they have made no showing that further disclosure would lead to evidence under plaintiff's exclusive control regarding its relationship or collusion with the 43 Park Owners defendants or otherwise supporting the Bobker defendants' defenses. Ehrenhalt v. Kinder, 85 A.D.3d 553 (1st Dep't 2011); Duane Morris LLP v. Astor Holdings Inc., 61 A.D.3d 418 (1st Dep't 2009); Voluto Ventures, LLC v. Jenkens & Gilchrist Parker Chapin LLP, 44 A.D.3d 557 (1st Dep't 2007); Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v. Lauter Dev. Group, 77 A.D.3d 1219, 1222 (3d Dep't 2010). This conclusion is all the more warranted after the Bobker defendants already obtained disclosure, in a related action, of evidence they insisted was relevant to a relationship or collusion between plaintiff and the 43 Park Owners defendants; were allowed to supplement this summary judgment record with that disclosure; and still failed to mount a defense.

[* 10]

D. 43 Park Owners Group's Claim for Wilful Exaggeration of a Lien

Because New York Lien Law § 39-a imposes a penalty, the statute must be strictly construed. Wellbilt Equipment Corp. v. Fireman, 275 A.D.2d 162, 169 (1st Dep't 2000); Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v.Lauter Dev. Group, 77 A.D.3d at 1223; Guzman v. Estate of Fluker, 226 A.D.2d 676, 678 (2d Dep't 1996). The court may not award damages for wilful exaggeration of a lien unless it has been discharged or vacated for that reason. N.Y. Lien Law §§ 39, 39-a; Wellbilt Equipment Corp. v. Fireman, 275 A.D.2d at 167; Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v.Lauter Dev. Group, 77 A.D.3d at 1223; Guzman v. Estate of Fluker, 226 A.D.2d at 678. Damages are unauthorized both when the parties have stipulated to release the lien, Wellbilt Equipment Corp. v. Fireman, 275 A.D.2d at 167, and when the court has vacated the lien before determining the wilful exaggeration claim. Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v. Lauter Dev. Group, 77 A.D.3d at 1223; Guzman v. Estate of Fluker, 226 A.D.2d at 678. If the lienor avoids a wilful exaggeration claim through an involuntary vacatur of the lien for a reason other than wilful exaggeration, then Sparrow Construction's voluntary release of its lien may not be accorded any less effect.

Upon a search of the record, Sparrow Construction's voluntary release of the lien provides grounds to grant summary judgment to Sparrow Construction dismissing 43 Park Owners

Group's cross-claim against Sparrow Construction for wilful exaggeration of a lien. C.P.L.R. § 3212(b); N.Y. Lien Law §§ 39, 39-a; Wellbilt Equipment Corp. v. Fireman, 275 A.D.2d at 169; Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v. Lauter Dev. Group, 77 A.D.3d at 1223; Guzman v. Estate of Fluker, 226 A.D.2d at 678. Because Sparrow Construction voluntarily released the lien, it was not discharged based on wilful exaggeration, rendering further disclosure regarding wilful exaggeration purposeless.

III. SEVERANCE

A. Sparrow Construction

Because Sparrow Construction has released its lien, this defendant is no longer a necessary party to this action. C.P.L.R. § 1001(a); R.P.A.P.L. § 1311(3). Sparrow Construction no longer retains a lien on the property, nor does Sparrow Construction's claim for breach of contract against third party defendant ADG Wadsworth Construction arise out of the same transaction, occurrence, or series of transactions or occurrences as plaintiff's claim for foreclosure of its mortgage or for payment of its note. C.P.L.R. § 1002; R.P.A.P.L. § 1311(3). After this decision, Sparrow Construction's third party action against ADG Wadsworth Construction no longer even shares parties in common with the remaining main action. Requiring the third party claim to be tried with the remaining claims in this action would inconvenience and prejudice all parties by requiring them to litigate claims that bear no relation to their own claims.

C.P.L.R. § 603. The court therefore dismisses Sparrow Construction as a defendant in this action and severs the third party action. Id.

B. Inwood Equities

As a junior mortgagee, defendant Inwood Equities is a necessary party to plaintiff's action for foreclosure. C.P.L.R. § 1001(a); R.P.A.P.L. § 1311(3). Although Inwood Equities' cross-claim for foreclosure involves a different promissory note and mortgage, its cross-claim necessarily involves the same parties as plaintiff's action, R.P.A.P.L. § 1311(3), and involves common issues such as the valuation and sale of the mortgaged premises. It therefore serves the convenience of all remaining parties and prejudices no one to keep Inwood Equities' claims with the remaining claims and deny any severance. C.P.L.R. § 603.

C. The Bobker Defendants' Cross-Claims Against the 43 Park Owners Defendants

The Bobker defendants' cross-claims against the 43 Park Owners defendants do not involve any parties that are not also parties to plaintiff's action. Moreover, the Bobker defendants' cross-claims involve many of the same underlying facts as plaintiff's action for foreclosure. Keeping plaintiff's action and the Bobker defendants' cross-claims together in one action therefore serves all remaining parties' convenience and does not prejudice any party. C.P.L.R. § 603.

IV. CONCLUSION

For the foregoing reasons, after granting the motion by defendants Wadsworth Condos, LLC, Carnegie Holdings, LLC, Eli Bobker, and Ben Bobker to supplement the record, the court grants plaintiff's motion for summary judgment. C.P.L.R. § 3212(b). The court also grants plaintiff's motion for severance to the extent of severing the third party action against Sparrow Construction Corp., C.P.L.R. §§ 603, 1001(a), 1002; R.P.A.P.L. § 1311(3), and for discontinuance of plaintiff's action against the Doe defendants, without opposition. C.P.L.R. § 3217(b). The court otherwise denies plaintiff's motion. Finally, the court grants summary judgment to defendant Sparrow Construction dismissing the cross-claim by 43 Park Owners Group, LLC, against Sparrow Construction. C.P.L.R. § 3212(b). This decision constitutes the court's order. The court will provide copies to the parties' attorneys.

DATED: March 9, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.