

**Board of Mgrs. of St. James Tower Condominium v
Kutler**

2012 NY Slip Op 31042(U)

April 16, 2012

Sup Ct, NY County

Docket Number: 106826/11

Judge: Saliann Scarpulla

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

PRESENT: Scarpulla
Justice

PART 19

Bel. of Mgrs. St. James

INDEX NO. 106826/11

MOTION DATE _____

MOTION SEQ. NO. 82

MOTION CAL. NO. _____

- v -

Kutler, Dorothea

The following papers, numbered 1 to _____ were read on this motion to/for Enjoinctio Relief

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is determined in accordance with the accompanying decision/order.

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/16/12

Saliann Scarpulla
SALIANN SCARPUILLA, S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
BOARD OF MANAGERS OF ST. JAMES TOWER
CONDOMINIUM,

Plaintiff,

- against-

Index No.: 106836/11
Submission Date: 1/18/12

DOROTHEA KUTLER, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
AND "JOHN DOE #1" THROUGH "JOHN DOE #2,"

DECISION AND ORDER

Defendants.

----- X
For Plaintiff:
Robinson Brog Leinwand Greene
Genovese & Gluck
875 Third Avenue, 9th Floor
New York, NY 10022

For Defendant Dorothea Kutler, pro se:
Dorothea Kutler
415 East 54th Street, Unit 2E
New York, NY 10022-5116

FILED

APR 19 2012

Receiver Roy A. McKenzie
641 Lexington Avenue, 27th Floor
New York, NY 10022

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to foreclose on a lien for nonpayment of common charges, defendant Dorothea Kutler ("Kutler") seeks a temporary restraining order and preliminary injunction.

Plaintiff Board of Managers of St. James' Tower Condominium Association ("Board") commenced this action in or about June 2011 to foreclose on a lien for nonpayment of common charges by Kutler, the fee owner of unit 2-E in its condominium building. According to the allegations of the complaint, on January 25, 2011, the Board

recorded a notice of lien in the sum of \$5,381.17 for the common charges then unpaid and due from Kutler. The Board maintained that the lien was a continuing lien and included all amounts due and owing to the condominium, which at the time of the filing of the complaint, was \$12,402.92.

According to the Board, a copy of the notice of lien was sent to Kutler by certified and regular mail on February 3, 2011, advising Kutler that the lien had been filed and unless payment of the lien was made within one week, the condominium would enforce its rights against Kutler, including commencement of an action to foreclose on the lien. Further, by letter notice dated February 25, 2011, a ninety day notice was sent to Kutler and by letter notice dated April 27, 2011, a thirty day notice was sent to Kutler. The lien was not satisfied, cancelled or discharged. The Board sought to foreclose on the lien in the amount of \$12,402.92.

The Board then submitted an application for a receiver. In an order filed August 17, 2011, this Court appointed a receiver on default.

On August 19, 2011, Kutler wrote a letter to the Board indicating that she had paid all maintenance charges owed from October 2010 through June 2011. The Board responded by letter dated August 26, 2011 advising Kutler that as of July 25, 2011, she owed the Board \$21,369.15 for common charges, late fees, operating costs, assessments and legal fees, less \$10,442.97 received on account for a total due of \$10,926.18. Kutler replied by letter, objecting to the amounts owed.

By order to show cause, Kutler now seeks to restrain and enjoin the Board and the receiver from continuing the foreclosure process, and instead, give her an opportunity to present evidence in her defense at a hearing and participate in a settlement conference as required by CPLR 3408.¹ She also seeks to enjoin the debt collectors from interfering with her property rights to her residence.

Kutler alleges that she was never served with the original summons and complaint and first received the supplemental summons and amended complaint by mail on August 16, 2011. A day later, she received this Court's order appointing a receiver. She also claims that she was never served with the ninety day notice. She maintains that the notice was dated February 25, 2011, which was the time when her residence had been infested with mold, and she was forced to evacuate and place all of her contents into storage. She further argues, *inter alia*, that she made all required payments and that the Court lacked authority to appoint a receiver.²

The Board submits, *inter alia*, the affidavit of its treasurer Donald Epstein ("Epstein"), who avers that on November 3, 2011, he and one of the Board's managers met with Kutler to discuss her common charges account. At that time, Epstein informed her of her outstanding account and Kutler refused to pay. Epstein also provides that he

¹ Kutler also requests time to hire counsel, however, the Court notes that at Kutler's first appearance on this order to show cause, the Court stayed the proceedings for three weeks, during which time Kutler did not obtain counsel.

² In January 2012, Kutler also submitted an answer to the Board's complaint to the court, in which she alleges various defenses and counterclaims.

recently reviewed Kutler's account history and that in addition to the amount due as of October 2011, Kutler has not paid the November 2011, December 2011 or January 2012 common charges. Her account has also accrued legal fees, late fees, interest and special assessments for a total owed of \$46,381.16 as of January 10, 2012.³

The Board also submits the affidavit of Timothy Fine ("Fine"), the executive vice president of the Board's managing agent Charles H. Greenthal Management Corp. He explains that the management company is primarily responsible for billing each unit owner on a monthly basis and maintains a record of the amounts owed and paid. Fine reviewed the records relating to Kutler and maintains that she owes \$46,381.16.

Discussion

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *McGuinn v. City of New York*, 219 A.D.2d 489 (1st Dept. 1995). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the

³ The Court also notes that Kutler paid \$6,981 on January 16, 2012.

equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *Amarant ex rel. Mercury Beach-Maid v. Antonio*, 197 A.D.2d 432 (1st Dept. 1993).

Here, Kutler does not meet her burden of establishing a clear right to a preliminary injunction. Her first argument, that she should have been able to participate in a settlement conference pursuant to CPLR §3408 is without merit because CPLR §3408 refers to settlement conferences in cases dealing with foreclosures of sub-prime, high cost, and non-traditional home loans, none of which are at issue here. *See generally Emigrant Mtge. Co. v. Corcione*, 28 Misc. 3d 161 (Sup. Ct. Suffolk Co., 2010).

Further, Kutler's claim that the Court lacked the authority to appoint a receiver is without merit. A receiver is a fiduciary of all the parties interested in the receivership and an officer of the court who acts at its direction and on its behalf. *See Coronet Capital Co. v. Spodek*, 279 A.D.2d 600 (2nd Dept. 2001); *Schwartzberg v. Whalen*, 96 A.D.2d 974 (3rd Dept. 1983). At the time the application to appoint a receiver was presented to the court, the court considered all of the evidence submitted before it and properly determined that a receiver should be appointed in this case. Kutler submits no evidence supporting her argument that a receiver should not have been appointed.

Finally, Kutler's allegation that she made all required payments is belied by the affidavits and documentary evidence submitted by the Board establishing the amounts still owed by her and Epstein's affidavit in which he explains that when he met with her in November 2011, she still refused to pay any amounts owed. In contrast, Kutler submits no material evidence to support her claim that she made all required payments and that the Board should be enjoined from continuing the foreclosure process.

In accordance with the foregoing, it is hereby

ORDERED that defendant Dorothea Kutler's order to show cause seeking a temporary restraining order and preliminary injunction is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 16, 2012


J.S.C.
SALIANN SCARPULLA

FILED

APR 19 2012

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