BACM 2006-4 Off. 41-60, LLC v Flushing Landmark Realty L.L.C.
2014 NY Slip Op 32184(U)
July 21, 2014
Sup Ct, Queens County
Docket Number: 701135/2013
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES Justice   IA Part 17

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BACM 2006-4 OFFICE 41-60, LLC,

Plaintiff,

-against-

FLUSHING LANDMARK REALTY L.L.C., MYINT J. KYAW A/K/A JEFFREY WU, IP IOC HENG A/K/A VERONICA WU, WU TOWERS, LLC, W TOWERS II, LLC, VICTORIA TOWERS DEVELOPMENT CORP., BOARD OF MANAGERS OF VICTORIA TOWERS CONDOMINIUM AND "JOHN DOE # 1" though "JOHN DOE # 20," the last twelve names being fictitious and unknown to BACM 2006-4 OFFICE 41-60, LLC, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming interest in or lien upon the premises described in the complaint,

Defendants.

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Index Number 701135/ 2013

Motion Date June 18, 2014

Motion Seq. No. 5

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QUEENS COUNTY

The following papers numbered 1 to 16 read on this motion by the court appointed temporary receiver for an order pursuant to CPLR Articles 15 and 63, and Real Property Law § 329, striking of record (a) the Zoning Lot Description and Ownership Statement recorded against the mortgaged real property designated as Block 5121, Lot 20 on the tax map for the Borough of Queens on June 25, 2010; (b) the Certification Pursuant to Zoning Lot Subdivision D recorded against said mortgaged property on June 25, 2010 and; (c) the Declaration of Zoning Lot Restrictions, recorded against said mortgaged property on June 29, 2010; enjoining defendants and their respective officers, members, shareholders, agents, servants, employees and attorneys and all persons acting in concert and participation with them who receive actual or constructive notice

of this order from constructing or submitting to the New York City Department of Buildings Department an application for a permit to construct any structure upon real property designated as Block 5121, Lots 23 and 45 on the tax map of New York City that utilizes any of the development rights appurtenant to the mortgaged property; awarding the receiver costs and fees, including reasonable attorney's fees incurred in making this motion; and designating the New York City Department of Buildings (DOB) as a nominal defendant herein in lieu of John Doe #1, so that the DOB can be provided with notice of this application and be bound by any injunction issued herein pertaining to defendants' right to apply for construction permits for the mortgaged premises.

	Papers Numbered
Order to Show Cause-Affirmation-Exhibits........	E103
Affidavits of Service...........................	E117
Answering Affirmation...........................	E100
Answering Affirmation...........................	E110
Answering Affirmation-Exhibits..................	E111-E115, E117
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Supplemental Opposing Affirmation-Exhibits......	E126-E130
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Memorandum of Law...............................	E90
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Memorandum of Law...............................	E137
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Upon the foregoing papers, it is order that the motion is determined as follows:

On April 2, 2013, plaintiff BACM 2006-4 Office 41-60 LLC (BACM) commenced the within action to foreclose a consolidated mortgage on commercial property located at 41-60 Main Street, Flushing, New York, given by Flushing Landmark Realty LLC (Flushing Landmark) to General Electric Capital Corporation to secure a consolidated loan in the sum of $30,239,000.00. The subject property is improved by a commercial building with retail and office space, and is presently identified as Block 5121, Lot 20.

This court, in an order dated April 3, 2013 and filed on April 9, 2013, and as amended in an order filed on April 15, 2013, appointed Israel Rubin, Esq. as the temporary receiver of rents of the subject mortgaged property. This court expressly granted the temporary receiver of the rents the power to "to institute and carry on all legal proceedings necessary for the protection of said

Property or to recover possession of the whole, or any part thereof". Mr. Rubin filed an oath and bond, and served a copy of the order appointing him temporary receiver on the parties.

Plaintiff thereafter moved for summary judgment on its first cause of action for foreclosure, in which it alleged Flushing Landmark had defaulted on its payment obligations under the loan and a forbearance agreement and had also defaulted under the terms of the mortgage by entering into a cross agreement encumbering the mortgaged property with an easement. Said cross agreement, dated March 10, 2010, was executed by defendant Myint J. Kyaw a/k/a Jeffrey Wu on behalf of Flushing Landmark, Wu Towers LLC and Wu Towers II, LLC. Plaintiff alleged that as the borrower did not seek the consent of the plaintiff or its predecessors in interest to enter into said cross-agreement, said encumbrance constituted a default under the terms of the mortgage. Plaintiff, in its first cause of action for foreclosure alleged that the easements created by the March 10, 2010 cross-agreement constituted a junior interest in the subject real property which it sought to extinguish. This court, in an order dated August 12, 2013, granted plaintiff's unopposed motion for summary judgment on its first cause of action for foreclosure, and granted plaintiff's request for an order of reference. A referee was appointed pursuant to an order dated October 23, 2013. The referee, however, declined the appointment and a successor referee was appointed pursuant to an order dated May 1, 2014.

In the within motion, Mr. Rubin, as temporary receiver, seeks an order striking of record three documents that were recorded with the Queens County Register to effectuate a merger of the zoning lots located at Queens County Block 5121, Lots 20,23 and 45, and injunctive relief. The affidavit of service submitted herein establishes that service was made on the defendants' counsel as directed on April 24, 2014. Mr. Rubin died on May 23, 2014, prior to the within motion being fully submitted. This court in an order dated May 29, 2014 and filed on May 30, 2014, appointed Daniel Milstein, an attorney, as the successor temporary receiver, and granted him all of the powers that were granted to Mr. Rubin as the temporary receiver. The within motion was fully submitted on June 18, 2014, and Mr. Milstein has adopted Mr. Rubin's motion as his own. Therefore, the court deems the within motion to be that of the successor temporary receiver.

Background

On June 12, 1997, Flushing Landmark Realty Corp. purchased the subject real property, along with two adjoining lots, then identified as Block 5121, Lots 23, 44 and 46 from Greenpoint Bank.

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Flushing Landmark Realty Corp. transferred title to the property along with the two adjoining lots to Flushing Landmark on September 10, 1999.

On March 21, 2001 Flushing Landmark Realty LLC, the then owner of all three lots executed a Zoning Lot Description and Ownership Statement that was recorded by the New York City Registrar on March 27, 2001. Said document declared that the three lots would be considered one lot for zoning purposes.

Flushing Landmark, pursuant to a deed dated May 14, 2001, divided Block 5121 Lot 23 in half, creating Lots 23 and 20; conveyed Block 5121 Lot 23, and Lots 44 and 46 (creating Lot 45) to Wu Towers LLC; and retaining ownership of the new Lot 20. The metes and bounds of the lot retained by Flushing Landmark corresponds to the present Lot 20, the mortgaged premises. Said deed refers to attached Schedules A and B, and provides that "the party of the second part [Wu Towers LLC] covenants and agrees that it, the heirs and successors and assigns will not obstruct the said corridor nor interfere with the use of said corridor by the party of the first part, its successors and assigns, nor prevent ingress and egress of persons through said corridors.

Schedule A sets forth the metes and bounds of Tentative Lot 23 and provides as follows with respect to Tentative Lot 23:

> "The party of the first part [Flushing Landmark] does further grant and release to the party of the second part[Wu Towers LLC], the successors and assigns of the party of the second part forever all unused and excess development rights as said terms are interpreted and applied in accordance with section 12-10 of the Zoning Resolution of the City of New York, Effective December 15, 1961, as amended, from Tentative Lot 20, as described in Attached Schedule B."
>
> "The party of the first part does further grant and release unto the party of the second, its successors and assigns of the party of the second part forever full and free right and authority to enter and exit via pedestrian traffic through a 16-foot corridor leading to the main arcade of the building erected, situate and lying on the lot described and set forth in attached Schedule B."
>
> "The party of the first part does further covenant that no building or structure shall be permitted to be erected on Tentative Lot 20 as described in Attached Schedule B that shall exceed the height of fifty (50)

[* 5]

feet average legal grade as measured from Main Street".

Schedule B sets forth the metes and bounds of then Tentative Lot 20, and provides as follows:

> "Party of the first part [Flushing Landmark] further reserves unto itself an easement in a width required by the City of New York and/or any other governmental entity or agency with an authority over such matters for ingress and egress through Tentative Lot 23 as described herein in attached Schedule A to Sanford Avenue and/or Maple Avenue."
>
> "The party of the first part further reserves unto itself a perpetual easement for 92 vehicular parking spots on Tentative Lot 23 as described herein Attached Schedule A for any garages hereinafter constructed on said Tentative Lot 23, and this reservation of an easement shall include full and free right and authority to enter and or exit over and through said Tentative Lot 23 for purposes of gaining access to the parking spots and/or subsequently constructed garage."
>
> "The party of the first part further reserves unto itself a perpetual easement for standing, loading and unloading and otherwise servicing of Tentative Lot 20, described hereinabove, through and upon Tentative Lot 23, as described herein in Attached Schedule A, at interior or exterior areas designated for such purposes by owners of Tentative Lot 23 provided such area are accessible to tentative Lot 20."
>
> "The party of the second part [Wu Towers LLC] covenants and agrees that it and the successors and assigns of the party of the second part forever shall construct and maintain the aforesaid easements and pay all taxes and insurance respecting the aforesaid easements. Any construction or other use on Tentative Lot 23 shall not interfere with the easements granted herein. In the event the party of the second part fails to construct, maintain and/or pay taxes or insurance, the party of the first part may expend such sums as are necessary to cure the failure of the party of the second part and thereafter file an accounting reflecting such expenditures, and the same shall constitute a lien against the real property of the party of the second part

and the successors and assigns of the party of the second part."

The May 14, 2001 deed did not transfer any development rights or create any easements with respect to the newly created Lot 45. On December 31, 2008, Wu Towers LLC transferred its interest in Lot 45 to Wu Towers II, LLC. This property is located at 134-39 Maple Avenue, Flushing, New York and is vacant and unimproved. Wu Towers LLC retained Lot 23, located at 133-38 Sanford Avenue, Flushing, New York, which is improved by a residential condominium with commercial units on the garage level and ground floor.

On July 21, 2006, Flushing Landmark Realty LLC gave plaintiff's predecessor in interest General Electric Capital Corporation a mortgage on Lot 23 (currently identified as Lot 20), in order to secure a loan, which is the subject of the within foreclosure action. Section 3.5 of the subject mortgage provides, in pertinent part, that the borrower would not, without the Mortgagor's consent, "consent to any public restriction (including any zoning ordinance) or private restriction as to the use of the Mortgaged Property". Section 3.9 of the subject mortgage provides, that the borrower would not, without the mortgagor's consent, "directly or indirectly sell, transfer, convey, mortgage, pledge, or assign any interest in the Mortgaged Property or any part thereof . . . or . . . enter into any easement or other agreement granting rights in or restricting the use or development of the Mortgaged Property."

On March 10, 2010, Jeffrey Wu on behalf of Landmark Realty, Wu Towers LLC and Wu Towers II LLC executed a cross easement agreement whereby each property owner granted easements over and across their respective parcels for means of ingress and egress.

On June 25, 2010, Flushing Landmark recorded in the Office of the City Register of the City of New York, a Zoning Lot Description and Ownership Statement (Statement), indicating that Flushing Landmark, Wu Towers, LLC and Wu Towers II, LLC had submitted or would be submitting applications for permits pertaining to the mortgaged property and the two nearby properties owned by Wu Towers LLC and Wu Towers II, LLC (Block 5121 Lots 23 and 45), and a Certification Pursuant to Zoning Lot Subdivision D (Certification), which certified that the only "parties in interest" with respect to all three properties were the fee owners.

On June 29, 2010, Flushing Landmark Realty LLC recorded a Declaration of Zoning Lot Restrictions (Declaration) in which it was asserted that the only parties in interest who have not waived their respective rights to join therein with respect to the three

properties are the fee owners, and stated that the three properties are "to be treated as one zoning lot for the purposes of and in accordance with the provisions of the aforesaid Zoning Resolution. . . ."

Wu Towers II, LLC transferred its interest in Lot 45 to Crown Mansion LLC on May 29, 2013. Crown Mansion LLC has not been substituted as a defendant in the within action. It is undisputed that the property owner seeks to construct a new 15-story mixed use condominium on Lot 45, utilizing development rights obtained from the adjoining property owners.

The within motion

Mr. Milstein as successor temporary receiver asserts that the June 25, 2010 Certification was materially false and misleading insofar as "parties in interest" are defined by the Zoning Resolution to expressly include, in addition to fee owners, "the holders of any enforceable recorded interest superior to that of the fee owner which could result in such holder obtaining possession of all or substantially all of such tract of land", and therefore plaintiff in this action is a party in interest as defined by the Zoning Resolution. It is also asserted that the Declaration repeats the false statement regarding the " 'parties in interest", as the plaintiff's predecessor in interest which held the mortgage at the time the Declaration was recorded, neither joined in, nor waived its right to join in, the Declaration as a necessary and indispensable "party in interest" under the Zoning Resolution.

Mr. Milstein argues that the effect of the Declaration, if not stricken, withdrawn or otherwise declared ineffective, is to convey to Wu Towers LLC and Wu Towers II LLC the right to utilize development rights (air rights) now owned by Flushing Landmark Realty LLC, and appurtenant to the mortgaged property, and to correspondently restrict the use and development of the mortgaged property. It is asserted that the Declaration was recorded in derogation of the mortgage and in violation of the Zoning Resolution, and that the defendants are seeking to strip the mortgaged property of valuable development rights that were pledged as security pursuant to the mortgage and which the temporary receiver has been directed by this court to preserve and protect pending this action. The successor temporary receiver thus seeks an order canceling the Certificate, the Statement and the Declaration, enjoining the defendants from utilizing development rights appurtenant to and that are part of the mortgaged property, and enjoining the DOB from accepting or considering any

applications for permits for development or construction projects that utilize the borrower's development rights.

Mr. Milstein further asserts that a preliminary injunction is necessary here to preserve the status quo, as defendants applied for construction permits with respect to the development of Lot 45 utilizing the development rights purportedly obtained from the mortgaged property pursuant to the Declaration. The movant asserts that as this court's granted the lender's motion for summary judgment on its foreclosure claim, he has established the likelihood of success on the merits in this action, and that the Declaration must be stricken so that the development rights are returned to the mortgaged property prior to a foreclosure sale. It is further asserted that the Declaration was recorded in derogation of the mortgage and in violation of the Zoning Resolution; that the declaration and other documents were recorded improperly and should be stricken from the record.

In support of the request for an injunction, Mr. Milstein asserts that the defendants submitted an application to the DOB for a permit to construct a new 15-story mixed use building on Lot 45, utilizing the combined development rights of the recently unified zoning lots on February 3, 2014, and that said application was disapproved by the DOB on February 28, 2014.

Plaintiff's counsel has submitted an affirmation in which he states plaintiff fully supports the within motion. Counsel asserts that defendant Jeffery Wu is a principal of Crown Mansion LLC, and that given the status of the foreclosure action and Mr. Wu's recent efforts to develop Lot 45, there is a substantial risk that Crown Mansion LLC will utilize development rights improperly obtained from the mortgaged property to develop Lot 45 prior to the entry of a judgment of foreclosure and sale formally extinguishing those rights.

The DOB, by its counsel, consents to being added as a nominal defendant herein for the limited purpose of being provided notice of this application and being bound by any injunction issued herein pertaining to defendants' rights to apply for construction permits affecting the mortgaged property. The DOB takes no position with respect to the dispute set forth in the moving papers regarding the merging of the zoning lots.

On May 20, 2014, Crown Mansion LLC's counsel filed a notice of appearance, stating that "Crown Mansion LLC named herein John Doe # 2" was appearing in this action. Counsel for Crown Mansion LLC acknowledges that this entity is not a defendant herein. Counsel however asserts that Crown Mansion LLC has an interest in the

outcome of the within motion and has submitted affirmations in opposition to the within motion. As Crown Mansion LLC has not sought leave to be substituted as a defendant in this action, the papers submitted on its behalf in opposition to the within motion shall not be considered.

Defendants Flushing Landmark, Myint J. Kyaw a/k/a Jeffery Wu, Ip Ioc Heng a/k/a Victoria Wu, Wu Towers, LLC, Wu Towers II, LLC, Victoria Towers Development Corp., and Board of Managers of Victoria Towers Condominium (collectively the Wu defendants) join in the arguments asserted by counsel to Crown Mansion LLC. As counsel for these defendants did not set forth said arguments in his opposing papers, they are not properly before the court, and will not be considered.

The Wu defendants further assert that the receiver's motion serves no legitimate purpose and imposes unnecessary and additional costs in this matter. It is asserted that the mortgaged property is not at risk for loss, and that instant application only interferes with the refinancing receiver and the development of a project that has material benefits to the entire relevant community. It is asserted that the receiver's conduct under the circumstances is oppressive and unconscionable and that the receiver's services are unnecessary. The Wu defendants assert that they have secured a term sheet in a sum that exceeds the principal amount due, and that it has been fully disclosed that said defendants are in the process of refinancing their indebtedness to the plaintiff. Defendants claim that plaintiff has unclean hands in that it is attempting to impose harsh and unreasonable payment terms on these defendants and that plaintiff has failed to honor negotiated terms of agreements or has failed to negotiate in good faith.

Defendants further assert that the receiver is improperly seeking to secure for the plaintiff property and development rights that were sold and properly transferred on May 21, 2001, prior to the existence of the subject mortgage. The Wu defendants state that the mortgaged property was converted to condominium status creating Victoria Tower Condominium pursuant to a Declaration of Condominium, establishing a plan for condominium ownership under Article 9-B of the Real Property Law, dated September 3, 2010, and recorded on October 8, 2010 in the Register's office.

With respect to the request for a preliminary injunction, defendants do not deny that they submitted a building permit application in February 2014. Rather, it is asserted that applications for permits to construct any structure on Lots 23 and 45 and the contemplated utilization of development rights

appurtenant to the mortgaged property can be protracted, and thus no threat of imminent and irreparable injury exists. It is further asserted that the receiver cannot demonstrate irreparable injury, as money damages would suffice as a remedy. Defendants assert that if the receiver is successful in preventing Lots 20, 23 and 45 from being treated as one lot for zoning purposes, Flushing Landmark could be required to demolish the building that currently stands on Lot 20, theoretically jeopardizing the home ownership of 99 potential or current contract vendees.

Plaintiff, in a further affirmation, asserts that the answering defendants improperly disclosed the context of certain confidential settlement negotiations, which should be disregarded by the court; that the defendants attempt to find alternative financing is not a reason to delay this action or to oppose the receiver's motion; that defendants' claim that the payment terms are harsh and unreasonable, is without merit; that unclean hands is not a defense to a mortgage foreclosure action; and that plaintiff is under no obligation to settle this action.

Mr. Milstein, in reply, asserts that the 2010 Certification failed to comply with the provisions of the Zoning Resolution, and therefore did not effectuate a merger of the zoning lots; that the mortgagor's claim that refinancing is imminent is not a basis to stay any aspect of this action, including the within motion; that the 2001 deed did not effectuate a zoning lot merger; that development rights are created by statute and must be transferred in accordance with the statutory requirements; that the deeds relied upon by the Wu defendants did not convey the mortgaged property's development rights to lot 45, now owned by Crown Management; and that the 2001 property description does not apply to the current configurations.

Discussion

At the outset, the fact that the Wu defendants are seeking refinancing does not warrant the denial of the within motion. Plaintiff has obtained an order granting summary judgment on the action for mortgage foreclosure and a referee has been appointed. Plaintiff is not required to settle the within action, and the claim of unclean hands is not a defense to the mortgage foreclosure action, or to the within motion by the receiver.

New York City Zoning Resolution Section 12-10 restricts the buildable floor space of a structure and expresses this limitation in floor area ratios. Through a zoning lot merger and a transfer of airspace from one zoning lot to another, the floor area ratios of multiple zoning lots may be combined to overcome this

restriction (*Newport Assoc. v Solow*, 30 NY2d 263, 265 [1972]). The Zoning Resolution provides three basic mechanisms for the transfer of development rights in New York City: by zoning lot merger, by certification or special permit, or through the Inclusionary Housing Program. A "zoning lot merger" is created when two or more existing zoning lots are joined together. Once the lots are merged, the development rights from all merging lots are combined, and may be used anywhere within the zoning lot, subject to "split-lot" provisions where the merged lot is comprised of lots located within different zoning districts.

Zoning Resolution Section 12-10(d) specifically defines "zoning lot", in relevant part, as "(d) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which at the time of filing for a building permit (or if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated as one zoning lot for the purpose of this Resolution. Such declaration shall be made in one written Declaration of Restrictions covering all of such tract of land or in separate written Declarations of Restrictions covering parts of such tract of land and which in the aggregate cover the entire tract of land comprising the zoning lot . . . Each Declaration shall be executed by each party in interest . . . excepting any such party as shall have waived its right to execute such Declaration . . . Each Declaration and waiver of right to execute a Declaration shall be recorded in the Conveyance Section of the Office of the City Register . . . against each lot of record constituting a portion of land covered by such Declaration."

In order to achieve zoning lot merger, the Declaration must be executed by each "party in interest" who has not waived the right to execute a Declaration, and such Declarations "shall be recorded" with the City Register (*see* Warren's Weed New York Real Property § 6.09). Zoning Resolution 12-10 defines "party in interest" as including: "(W) the fee owner or owners thereof, (X) the holder of any enforceable recorded interest in all or part thereof which would be superior to the Declaration and which could result in such holder obtaining possession of any portion of such tract of land, (Y) the holder of any enforceable recorded interest in all or part thereof which would be adversely affected by the Declaration, and (Z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract covered by the Declaration."

Here, the Certification and Statement were recorded with the City Register on June 25, 2010 and the Zoning Declaration was recorded with the City Register on June 29, 2010. In each instance, the fee owners of Block 5121, Lots 20, 23 and 45, defendants Landmark Realty, Wu Towers LLC and Wu Towers II, LLC respectively, stated that they were the only parties in interest with respect to said real property. However, in each instance, the mortgagee, plaintiff's predecessor in interest, was also a party in interest as defined by the Zoning Resolution. Defendants do not claim that they obtained a written waiver from the mortgagee. Therefore, as the mortgagee did not execute the Declaration and did not execute a waiver, said the Declaration, as well as the Certification and Statement were factually inaccurate and the Declaration failed to comply with the provisions of Zoning Resolution 12-10. Said documents, thus, were insufficient to achieve a zoning lot merger.

Real property air rights may be transferred by a grant of the entire property, i.e., both the airspace and surface portions to the grantee, with the grantor reserving for itself an easement to use the surface areas. However, the transfer of development rights does not confer a right to occupy air space (*see* Warren's Weed New York Real Property, § 6.06; *see also Wing Ming Props. [U.S.A.] v Mott Operating Corp.*, 79 NY2d 1021 [1992]). To the extent that Flushing Landmark transferred development rights to Wu Towers LLC, with respect to Lot 23, pursuant to the May 14, 2001 deed, no such rights were transferred with respect to 45. Moreover, the May 14, 2001 deed did not transfer development rights so as to create a single zoning lot. Adjoining property owners cannot create a single zoning lot by deed. Rather, the transference of development rights in order to create a single zoning lot may only be accomplished pursuant to the provisions of Zoning Resolution 12-10.

In view of the foregoing, that branch of the receiver's motion which seeks to strike the Certification and Statement recorded on June 25, 2010 with the City Register and to strike the Declaration recorded with the City Register on June 29, 2010, in order to effectuate a merger of the zoning lots located at Queens County Block 5121, Lots 20, 23 and 45, is granted.

Turning now to the movant's request for injunctive relief, "[t]o be entitled to a preliminary injunction, the movant 'must demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position' " (*EdCia Corp. v McCormack*, 44 AD3d 991, 993 [2d Dept 2007], *quoting Apa Sec., Inc. v Apa*, 37 AD3d 502, 503 [2d Dept 2007]; *see Nobu Next Door, LLC v Fine Arts*

Hous., Inc., 4 NY3d 839 [2005]; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942 [2d Dept 2009]).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts (*see Cooper v Board of White Sands Condominium*, 89 AD3d 669 [2d Dept 2011]; *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587 [2d Dept 2005]; *Abinanti v Pascale*, 41 AD3d 395, 396 [2d Dept 2007]; *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 AD3d 334, 335 [2d Dept 2004]).

The movant must also show that the irreparable harm is "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]). Moreover, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v McCormack*, 44 AD3d at 994; *see, e.g., Mabry v Neighborhood Defender Serv., Inc.*, 88 AD3d 505, 506 [1st Dept 2011]; *Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]; White Bay Enters., Ltd. v Newsday, Inc., 258 AD2d 520 [2d Dept 1999]; *Schrager v Klein*, 267 AD2d 296 [2d Dept 1999]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Glorious Temple Church of God in Christ v Dean Holding Corp.*, 35 AD3d 806, 807 [2d Dept 2006]).

Here, the likelihood of success on the merits is undisputed, as plaintiff has been granted summary judgment on its claim for foreclosure and a referee has been appointed. However, Mr. Milstein has not established that the alleged irreparable harm is imminent, or that the mortgagor has or is about to commit waste or otherwise damage the mortgaged premises. It is noted that the last application filed by the Wu defendants with the DOB was denied in February 2014 and that no other applications are alleged to be pending before the DOB. Furthermore, as this court has directed that the Statement, Certification and Declaration record with the City Register be stricken, defendants may not, in the future, seek a building permit based upon a single zoning lot, absent consent or waiver by the mortgagee. The movant has also failed to demonstrate that the Wu defendants have or are about to commence construction without a permit. Therefore, that branch of the motion which seeks a preliminary injunction, is denied.

Fees and costs

Pursuant to CPLR 8004, a receiver is entitled to a commission of no more than five percent of the sums received and disbursed by the receiver. A commission is payable based on the value of the

assets which came into the hands of the receiver (*WF Shirley, LLC v William Floyd Plaza Assocs.*, 270 AD2d 255 [2d Dept 2000]; *Eastrich Multiple Invest. Fund, LP v Citiwide Dev. Assocs.*, 218 AD2d 43, 44 [1st Dept 1996]). However, a " 'receiver is not entitled to the statutory maximum as of right; the court has discretion to award a lower percentage' " (*First N.Y. Bank for Bus. v 418 W 49th St. Realty Corp.*, 252 AD2d 460, 460 [1st Dept 1998], *quoting Key Bank v Anton*, 241 AD2d 482, 483 [2d Dept 1997]). A receiver must justify his or her account (*Independent Props. Co. v Mast Prop. Investors, Inc.*, 148 AD2d 849, 849-850 [3d Dept 1989]). Here, the temporary successor receiver has not submitted an account to the court in connection with this motion. However, in the interest of judicial economy, the temporary successor receiver may submit, on notice to all parties, an affidavit which shall include an account of the sums received and disbursed. Therefore, the request for a receiver's commission is held in abeyance pending submission of said affidavit.

With respect to attorney's fees, "it is the rule that a Receiver who is a lawyer is expected to perform customary legal duties connected with his tenure" (*Martini v Martini*, 284 AD2d 510 [2d Dept 2001]; *quoting Strober v Warren Prop. Co.*, 84 AD2d 834, 836 [2d Dept 1981]). However, where even routine matters and proceedings become complicated or are contested, retention of counsel or an award of counsel fees is warranted. Here, Mr. Milstein has not submitted an affidavit setting forth his customary legal fee, the amount of time spent on the motion performing legal services, and "customary fee charged for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented" (*Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 AD3d 1008, 1010 [2d Dept 2010]). Therefore, that branch of the motion which seeks an award of legal fees and costs, is held in abeyance pending submission of said affidavit on notice to all parties.

Conclusion

That branch of the successor temporary receiver's motion which seeks to strike the Certification Pursuant to Zoning Lot Subdivision D and Zoning Lot Description and Ownership Statement recorded on June 25, 2010 with the City Register and to strike the Declaration of Zoning Lot Restrictions recorded with the City Register on June 29, 2010, in order to effectuate a merger of the zoning lots located at Queens County Block 5121, Lots 20, 23 and 45, is granted. That branch of the motion which seeks injunctive relief, is denied.

That branch of the motion which seeks an award of a receiver's fee, attorney's fees and costs, is held in abeyance.

The successor temporary receiver is directed to serve a copy of this order on the Office of the City Register, together with notice of entry.

Dated: July 21, 2014

J.S.C.