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

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

AMT CADC Venture

-v-

455 CPW

INDEX NO. 810109/11

MOTION DATE

MOTION SEQ. NO. 06

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion ~~to~~/for a declaratory judgment and to modify the receivership order

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 4-5
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

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

Upon the disposition of plaintiff's motion for summary judgment and defendant Board of Managers of the 455 Central Park West Condominium's cross-motion for summary judgment, which resolves the relief sought by plaintiff's subsequent motion for a declaratory judgment and to modify the prior order appointing a receiver, plaintiff withdraws the later motion.

Dated: 10/21/13

Lucy Billings
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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AMT CADC VENTURE, LLC,

Plaintiff

- against -

455 CPW, L.L.C., DANIEL E. MCLEAN, BOARD OF MANAGERS OF THE 455 CENTRAL PARK WEST CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants,

and

ISTAR FINANCIAL INC. and CORUS BANK, N.A.,

Additional Defendants

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Index No. 810109/2011

DECISION AND ORDER

APPEARANCES:

For Plaintiff
Steven Sinatra Esq.
Greenberg Traurig, LLP
200 Park Avenue, New York, NY 10166

For Defendant Board of Managers of the 455 Central Park West Condominium
Edward M. Cuddy III Esq.
Gallet Dreyer & Berkey, LLP
845 3rd Avenue, New York, NY 10022

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to foreclose on a consolidated mortgage assigned to plaintiff, encumbering three residential units and a commercial garage unit in a condominium building. Defendant

sponsor and owner of the mortgaged condominium units, 455 CPW, L.L.C., defaulted on the mortgage in September 2009. Defendant Board of Managers of the 455 Central Park West Condominium operates the condominium and counterclaims and cross-claims to foreclose a statutory lien for unpaid common charges on those mortgaged units. N.Y. Real Prop. Law (RPL) § 339-z.

Plaintiff moves, and the Board of Managers cross-moves, for summary judgment, C.P.L.R. § 3212(b) and (e), on their respective claims to foreclosure on their liens, which each party maintains is entitled to priority over the other lien under New York's Condominium Act, RPL §§ 339-d - 339-kk. For the reasons explained below, the court grants plaintiff summary judgment and denies defendant Board of Managers summary judgment on this issue.

II. APPLICABLE STANDARDS

The moving parties, to obtain summary judgment, 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); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); 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 the moving party satisfies this standard, the burden shifts to the opponent 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 purposes of the parties' motions, the court construes the evidence in the light most favorable to the opponent. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

III. PRIORITY OF LIENS

On September 14, 2007, Amtrust Bank extended a loan to defendant 455 CPW, which in turn gave a mortgage on five residential units and a commercial garage unit to Amtrust Bank. This mortgage was consolidated with three prior recorded mortgages given by 455 CPW. The consolidated mortgage was recorded November 27, 2007. Plaintiff acquired the mortgage July 21, 2010, after Amtrust Bank ceased operating. The Board of Managers recorded liens for unpaid common charges on three of the five residential units and the garage August 13, 2009. Regarding liens for common charges, RPL § 339-z provides that:

> The board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon, prior to all liens except only . . . (ii) all sums unpaid on a first mortgage of record . . . .

See Bankers Trust Co. v. Board of Mgrs. of Park 900 Condominium, 81 N.Y.2d 1033, 1035 (1993); Cadlerock Joint Venture v. Board of Mgrs. of Parkchester S. Condominium, 289 A.D.2d 1 (1st Dep't 2001).

A. Express Statutory Terms Demonstrating the Meaning of "First Mortgage"

The dispute centers on whether plaintiff's lien based on its assigned consolidated mortgage is entitled to priority over the Board of Managers' lien for unpaid common charges in the condominium. Resolution of this issue turns on whether plaintiff's mortgage is an unpaid first mortgage of record, the term used in RPL § 339-z, but otherwise undefined in the Condominium Act. The Board of Managers contends that plaintiff's mortgage is not a first mortgage because it is a blanket mortgage that was not for the purchase of a unit.

Absent a controlling statutory definition, the court must construe the statutory terms according to their usual and commonly understood meaning. Orens v. Novello, 99 N.Y.2d 180, 185-86 (2002); Rosner v. Metropolitan Prop. & Liab. Ins. Co., 96 N.Y.2d 475, 479 (2001). Dictionary definitions may be used to aid in determining the meaning of a word or phrase. Orens v. Novello, 99 N.Y.2d at 186; Rosner v. Metropolitan Prop. & Liab. Ins. Co., 96 N.Y.2d at 479-80. See Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 284 (2009). The dictionary definitions of first mortgage that plaintiff urges are circular, defining a first mortgage as simply a lien that gives priority to the lender. Consistent with the guidepost of usual and commonly understood meaning, however, the definition of first mortgage of record adopted decades ago is also simple, but more straightforward: the earliest recorded mortgage. Rector, Wardens & Vestrymen of Church of St. Matthew & St. Timothy in

City of N.Y. v. Title Guar. & Trust Co., 246 A.D. 251, 254 (1st Dep't 1936).

As long as the statutory terms are unambiguous, the court must give effect to that plain meaning, as a statute's express terms are the best indicator of legislative intent. New York County Lawyers' Assn. v. Bloomberg, 19 N.Y.3d 712, 721 (2012); Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities, 19 N.Y.3d 106, 120 (2012); DaimlerChrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660 (2006); Perdomo v. Morgenthau, 60 A.D.3d 435, 436 (1st Dep't 2009). See N.Y. Stat. § 94; Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d at 286. The term "first mortgage of record," RPL § 339-z, does not indicate any limitation to mortgages for the purchase of units. See New York County Lawyers' Assn. v. Bloomberg, 19 N.Y.3d at 722. Although the Condominium Act's provisions address blanket mortgages, N.Y. Real Prop. Law §§ 339-r, 339-ee(2), nothing in the Condominium Act prohibits a blanket mortgage from being a first mortgage. Had the legislature intended to limit first mortgages to those mortgages given for the purchase of condominium units or to exclude blanket mortgages from first mortgages of record, then the statutes would have so provided. Greenpoint Bank v. El-Basary, 184 Misc. 2d 888, 890 (Sup. Ct. N.Y. Co. 2000). See Amorosi v. South Colonie Ind. Cent. School Dist., 9 N.Y.3d 367, 373 (2007); Orens v. Novello, 99 N.Y.2d at 189.

While no decision other than Rector, Wardens & Vestrymen of

Church of St. Matthew & St. Timothy in City of N.Y. v. Title Guar. & Trust Co., 246 A.D. at 254, expressly adopts the definition of a first mortgage of record as the earliest recorded mortgage, other decisions are consistent with that definition. As in Board of Mgrs. of Parkchester N. Condominium v. Richardson, 238 A.D.2d 282, 284 (1st Dep't 1997), which found a bank's unpaid mortgage, given by a cooperative apartment owner, to be a first mortgage of record with priority over the cooperative board of managers' lien for unpaid common charges, here the parties do not dispute that the mortgage lien was recorded earlier than the lien for common charges or that the mortgage is "unpaid." RPL § 339-z(ii). In fact the Appellate Division rejected the board of managers' priority even though the board held a prior mortgage given by a prior owner of the cooperative apartment for which a satisfaction had not been filed, because the mortgage had been paid. Board of Mgrs. of Parkchester N. Condominium v. Richardson, 238 A.D.2d at 283-84. Other decisions follow this holding by similarly focussing on the earlier recording and the fact that a mortgage is "unpaid." RPL § 339-z(ii). See Plotch v. US Bank N.A., 39 Misc. 3d 1204 (Sup. Ct. Richmond Co. 2013); Greenpoint Bank v. El-Basary, 184 Misc. 2d at 892; Foxwood Run Condominium v. Goller Place Corp., 166 Misc. 2d 216, 218 (Sup. Ct. Richmond Co. 1995); Dime Sav. Bank of N.Y. v. Levy, 161 Misc. 2d 480, 483 (Sup. Ct. Rockland Co. 1994). Societe Generale v. Charles & Co. Acquisition, 157 Misc. 2d 643, 648 (Sup. Ct. N.Y. Co. 1993), holding to the contrary, unnecessarily relied on the

National Housing Act, 12 U.S.C. § 1715y, which in any event does not define a "first mortgage" to exclude plaintiff's mortgage, as explained below.

The term "first mortgage of record" in New York's Condominium Act, RPL § 339-z, as legislation in derogation of the common law, must be construed strictly. Pekelnaya v. Allyn, 25 A.D.3d 111, 118 (1st Dep't 2005). Board of Mgrs. of Parkchester N. Condominium v. Richardson, 238 A.D.2d at 284, amplifies the application of this principle to that very term when the court gives priority to the "unpaid . . . first mortgage of record," RPL § 339-z(ii), over the unsatisfied prior mortgage of record.

B. The Court Need Not Analyze the Legislative Policies Behind the Condominium Act.

The legislature's expression most indicative of its intent, its unambiguous statutory terms, leaves no reason to resort to statutory construction. Amorosi v. South Colonie Ind. Cent. School Dist., 9 N.Y.3d at 373. See People v. Ballman, 15 N.Y.3d 68, 72 (2010); Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d at 286. Although the Board of Managers maintains that RPL § 339-z is ambiguous, necessitating an analysis involving statutory construction, any such ambiguity arises only from the Board of Managers' interpretations. Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d at 286; 73 Warren St., LLC v. State of N.Y. Div. of Hous. & Community Renewal, 96 A.D.3d 524, 528 (1st Dep't 2012).

Even were the court to consider the policies and purposes behind the Condominium Act as the Board of Managers contends, a

limitation of first mortgages to only purchase money mortgages still would not be warranted. The Board contends that the policy behind RPL § 339-z and its companion statutes is to support apartment ownership by giving priority to banks' mortgages as an incentive for banks to extend mortgages to prospective condominium unit purchasers, see Dime Sav. Bank of N.Y. v. Pesce, 93 N.Y.2d 939, 941 (1999), and to discourage condominium sponsors from stockpiling units instead of selling them. Affording priority to an unpaid mortgage recorded before an unpaid lien for common charges, whether the mortgage is for the purchase of a unit or not, provides an incentive to banks to extend mortgages for the purchase of units. The Board of Managers does not explain, on the other hand, nor does the court conceive of how limiting first mortgages to purchase money mortgages would discourage sponsors from retaining units.

C. Reliance on Federal Statutes Is Unnecessary.

For similar reasons, the court need not rely on the National Housing Act, which defines first mortgages as:

> such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State, in which the real estate is located, together with the credit instruments, if any, secured thereby.

12 U.S.C. § 1707(a). If RPL § 339-z's legislative terms were ambiguous, then principles of statutory construction would dictate reading RPL § 339-z together with 12 U.S.C. § 1707(a), relating to the same subject, unless clear legislative intent dictated otherwise. Albany Law School v. New York State Off. of

Mental Retardation & Dev. Disabilities, 19 N.Y.3d at 121; 73 Warren St., LLC v. State of N.Y. Div. of Hous. & Community Renewal, 96 A.D.3d at 530. Even if RPL § 339-z's legislative terms and intent necessitated reading the state statute together with related federal statutes to construe the state statute, however, such a reading does not alter RPL § 339-z's construction.

First of all, nothing suggests that plaintiff's blanket mortgage, given to secure loans for construction of the condominium building, does not fit the definition of a lien "given to secure advances on," rather than the unpaid purchase price of, the condominium real estate: 12 U.S.C. § 1707(a)'s alternate definition of a first mortgage. Societe Generale v. Charles & Co. Acquisition, 157 Misc. 2d at 648, focussed on the term first mortgage defined as a lien "given to secure the unpaid purchase price of . . . real estate," where the term is used in 12 U.S.C. § 1715y, to the exclusion of the alternative.

Yet the Board of Managers also points to 12 U.S.C. § 1715y(c)'s provisions regarding the insurability of condominium unit mortgages, distinguished from blanket mortgages, and contends that RPL § 339-r is to ensure compliance with that federal statute. RPL § 339-r requires payment or release of "every mortgage and other lien," which include blanket mortgages, when condominium units first are conveyed. 12 U.S.C. § 1715y(c) merely authorizes the United States Secretary of Housing and Urban Development to insure mortgages for projects, including

blanket mortgages, and grants the Secretary discretion to release mortgages. Thus, even taking 12 U.S.C. § 1715y into consideration in interpreting either RPL § 339-r or § 339-z, the federal statute only provides for methods for insuring condominium mortgages, 12 U.S.C. § 1715y(a), and imposes requirements for insuring both unit and blanket mortgages, 12 U.S.C. § 1715y(c) and (d), demonstrating that the state statutes and federal statutes do not pertain to the same subject or use the same terms. Nor do the statutes otherwise demonstrate that the state statutes were adopted to follow or conform to the federal statutes, other than as required by the Supremacy Clause. U.S. Const. art. VI, cl. 2. See Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities, 19 N.Y.3d at 121. The similar goals of New York's Condominium Act and the National Housing Act are an insufficient basis to treat them in pari materia. 73 Warren St., LLC v. State of N.Y. Div. of Hous. & Community Renewal, 96 A.D.3d at 530.

D. The Condominium's By-Laws Do Not Invalidate the Status of Plaintiff's Mortgage Lien as a First Mortgage.

The Board of Managers also claims that the condominium's By-Laws § 8.1(a), entitling unit owners to give a first mortgage, invalidates the first mortgage status of the mortgage 455 CPW gave to plaintiff, because 455 CPW was a sponsor, not a unit owner. Aff. of Edward Cuddy III in Supp. of Cross Mot. Ex. X, at 48. This provision simply allows a unit owner to give a first mortgage, but does not preclude the sponsor from giving a first mortgage as well. The unit owners to which § 8.1(a) refers,

moreover, do not necessarily exclude the sponsor. The By-Laws do not expressly define a "unit owner," but § 1.5(a) provides that individuals, groups of individuals, and various business entities, including a limited liability company like the sponsor 455 CPW, may own units, Cuddy Aff. in Supp. Ex. X, at 1; § 3.1(c) contemplates a sponsor's unit ownership, Cuddy Aff. in Supp. Ex. X, at 18; and § 3.7(a) allows a sponsor to vote as a unit owner. Cuddy Aff. in Supp. Ex. X, at 20.

The Condominium Act's definitions are consistent with the By-Laws. The Act defines a "Unit owner" as a "person or persons owning a unit in fee simple absolute," RPL § 339-e(16), and a "Person" as a "natural person, corporation, partnership, association, trustee or other legal entity." RPL § 339-e(10). See Guryev v. Tomchinsky, 20 N.Y.3d 194, 199 (2012).

To construe the By-Laws as excluding the sponsor from the definition of a unit owner actually would leave the Board of Managers completely bereft of the remedy they seek, as By-Laws § 5.1(a)(i) obligates only unit owners to pay common charges. Consequently, under the Board's construction of the By-Laws, the Board would not be entitled to collect common charges from the sponsor at all and thus would not "have a lien . . . for the unpaid common charges" on the sponsor's units in the first instance. RPL § 339-z. For all these reasons, 455 CPW is a unit owner that may give a first mortgage under the By-Laws.

E. Foreclosure of Plaintiff's Mortgage Lien Extinguishes the Board of Managers' Lien.

The Board of Managers alternatively contends that, even if plaintiff holds a first mortgage, only the initial mortgage, not any mortgages consolidated with it, are entitled to priority over the lien for common charges. Consolidation of mortgages will not impair the priority rights of parties uninvolved in the consolidation. Federal Deposit Ins. Corp. v. Five Star Mgt., 258 A.D.2d 15, 22 (1st Dep't 1999); Benson v. Deutsche Bank Natl. Trust, Inc., 109 A.D.3d 495, 498 (2d Dep't 2013). Had only the initial mortgage been recorded before the Board of Managers recorded its lien, and then plaintiff's predecessor or plaintiff, after acquiring the mortgage, consolidated other mortgages with it, the applicable rule would support the Board's contention.

Here, however, when the mortgages were consolidated and then recorded as a consolidated mortgage, the recording conferred priority rights on plaintiff's predecessor and assignor in that single consolidated mortgage. Since the consolidation and recording of that mortgage acquired by plaintiff predated its acquisition or other involvement, as well as the recording of the Board of Managers' lien for common charges, plaintiff's lien based on that single mortgage retains the same priority as when that mortgage was recorded. Plotch v. US Bank N.A., 39 Misc. 3d 1204; Greenpoint Bank v. El-Basary, 184 Misc. 2d at 891. Therefore summary judgment of foreclosure on plaintiff's superior mortgage lien extinguishes the Board of Managers' lien for common charges, except insofar as surplus proceeds remain. R.P.A.P.L. §

1353(3); Bankers Trust Co. v. Board of Mgrs. of Park 900 Condominium, 81 N.Y.2d at 1036; Fleet Mtge. Corp. v. Nieves, 272 A.D.2d 435 (2d Dep't 2000); GE Capital Mtge. Servs. v. Misevcis, 204 A.D.2d 963, 964 (3d Dep't 1994).

F. The Effect of Plaintiff's Payment of Taxes

Finally, the Board of Managers contends that, because the payment of taxes on the mortgaged units was 455 CPW's obligation, plaintiff's payment of these taxes was voluntary and therefore, consistent with the principles laid down in Laventall v. Pomerantz, 263 N.Y. 110, 115-16 (1933), is not to be added to the mortgage debt that is superior to the Board of Managers' lien. While this authority holds that taxes will be paid according to any stipulation or other manifested intent of the parties, absent such consent no relief is to be awarded at the expense of the prior mortgagee. See Wesselman v. Engel Co., 309 N.Y. 27, 31 (1955); Vlacancich v. Kenny, 271 N.Y. 164, 170 (1936). Between 455 CPW as the mortgaged units' owner and its mortgagee, the owner was obligated to pay the taxes, just as the owner was obligated to pay the mortgage debt. Wesselman v. Engel Co., 309 N.Y. at 31; Vlacancich v. Kenny, 271 N.Y. at 170; Laventall v. Pomerantz, 263 N.Y. at 114; Korea Commercial Bank of N.Y. v. Ianos, 236 A.D.2d 249, 250 (1st Dep't 1997). Plaintiff did not agree to become obligated to pay the taxes, either between it and the owner or between it and the Board of Managers, just as plaintiff did not agree to carry the mortgage debt. Plaintiff only voluntarily paid the taxes to protect its and the Board's

interest in the property against penalties that would be a lien with priority over both their interests. Laventall v. Pomerantz, 263 N.Y. at 114. See King v. Pelkofski, 20 N.Y.2d 326, 333-34 (1967); Vlacancich v. Kenny, 271 N.Y. at 170.

On this basis, plaintiff would be entitled to recover the tax payments from the owner through equitable subrogation, but the mortgage also entitles plaintiff to add the payments to the mortgage debt. Aff. of Regularity of Steven Sinatra Ex. 1C § 23(b)(iv). See King v. Pelkofski, 20 N.Y.2d at 333-34; Laventall v. Pomerantz, 263 N.Y. at 114. The Board of Managers' lien then is subordinate to plaintiff's mortgage because it is a first mortgage of record, not because plaintiff is entitled to recover the mortgage debt from the Board through equitable subrogation.

IV. CONCLUSION

As set forth above, the court grants plaintiff's motion for summary judgment on the priority of its lien and consequently denies defendant Board of Managers of the 455 Central Park West Condominium's cross-motion for summary judgment on this issue. The order entered November 16, 2012, appointing a referee upon the parties' stipulation, resolved the remainder of plaintiff's motion and defendant Board of Managers' cross-motion. Upon a decision of the summary judgment motions on priority, plaintiff agreed to withdraw its subsequent separate motion for a declaratory judgment and for amendment of the receivership order entered November 16, 2011. This decision constitutes the court's order disposing of plaintiff's motion for summary judgment,

defendant Board of Managers' cross-motion for summary judgment, and plaintiff's separate motion for a declaratory judgment and for amendment of the receivership order.

DATED: October 18, 2013

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.