

**Board of Mgrs. of Cassa NY Condominium v Cassa
Props., LLC**

2015 NY Slip Op 32430(U)

December 24, 2015

Supreme Court, New York County

Docket Number: 158245/15

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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BOARD OF MANAGERS OF CASSA NY CONDOMINIUM,

Plaintiff,

- against -

Index No.: 158245/15
Mot. Date: 10/21/2015
Motion Seq. No.: 001

CASSA PROPERTIES, LLC, CASSA 28, LLC, CASSA 45, LLC, CASSA 46, LLC, ENIGME CAPITAL, C.V., LLC, NY 45, LLC, INTERAUDI BANK, WELLS FARGO BANK, N.A., MERS INC., as nominee for HSBC BANK USA, N.A., U.S. BANK NATIONAL ASSOCIATION, as trustee in trust for the holders of COMM 2013-CCRE6 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, 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, NEW YORK CITY DEPARTMENT OF FINANCE; PARK AVENUE BUILDING AND ROOFING, INTERSTATE DRYWALL CORPORATION, INTERSTATE INDUSTRIAL CORPORATION, MILL-DRUCK SPECIALTY CONTRACTING, INC., PARKVIEW PLUMBING AND HEATING INC., WHITE HILL RESTORATION INC., EAGLE ONE ROOFING CONTRACTORS, INC., PAPP IRON WORKS, INC., PAVARINI MCGOVERN LLC, LIF INDUSTRIES INC., RAD & D'APRILE INC., MARJAM SUPPLY CO. INC., W& W GLASS LLC, ESTATE HARDWOOD FLOORS CORP., KSW MECHANICAL SERVICES INC, TURBOCHYLL COMPANY INC., DIRECT BUILDERS SUPPLY, DELTA TESTING LABS, INC., RG CLASS CREATIONS INC., L & L PAINTING CO. INC., ELITE FLOORS INC., PREMIER FIRE SPRINKLER COMPANY INC., CONCRETE INDUSTRIES ONE CORP., CASSWAY CONTRACTING CORP., and JOHN DOES 1-200, their heirs, devisees and personal representatives and his, their or any of their successors in right, title and interest, the names of the last two defendants being unknown to plaintiff, the persons or parties intended to be any person in possession of or claiming interest in or lien against the property described in the verified complaint, and whose interest may not be protected under applicable emergency rent laws,

Defendants.

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Ellen M. Coin, J:

Plaintiff Board of Managers of Cassa NY Condominium (Condominium Board) brings this action to recover unpaid common charges for the condominium building located at 70 West 45th Street, New York, New York (Condominium), against the defaulting residential unit owners, defendants Cassa Properties, LLC, Cassa 45, LLC, Cassa 46, LLC, Cassa 28, LLC (collectively, the Cassa defendants), Enigme Capital, C.V., LLC and NY 45, LLC. The complaint also names as defendants numerous entities that may hold liens against the Condominium, including defendants Wells Fargo Bank, N.A. (Wells Fargo) and U.S. Bank National Association (U.S. Bank). The complaint asserts two causes of action. The first cause of action seeks to foreclose on liens for unpaid common charges and the appointment of a receiver to collect reasonable rent from the defaulting unit owners during the pendency of the foreclosure action, pursuant to the Condominium's by-laws and Real Property Law § 339-aa. The second cause of action asserts a claim for breach of contract for failure to pay common charges, assessments and other charges.

Defendants Enigme Capital, C.V., LLC and NY 45, LLC filed an answer with affirmative defenses on October 15, 2015. The Cassa defendants also filed an answer on October 15, 2015, asserting affirmative defenses and counterclaims and then filed an amended answer on November 18, 2015. In their amended answer, the Cassa defendants asserted counterclaims for: (1) breach of the Condominium Board's "obligat[ion] to exercise its duties and powers in good faith and with a view to the interests of the Condominium" (Cassa defendants' amended answer, ¶ 70); (2) "a permanent injunction enjoining the Plaintiff, their agents, and employees from further breaches of their duties and obligations to Defendants and Defendants' Representative, the Residential Board" (*id.*, ¶ 75); (3) "an Order and Judgement of this Court directing the

Plaintiff to specifically perform its duties and obligations owed to Defendants and Defendants' Representative, the Residential Board" (*id.*, ¶78); and (4) breach of fiduciary duty. Wells Fargo and U.S. Bank filed their answer with affirmative defenses on November 11, 2015.

The Condominium Board now moves by order to show cause for the "[a]ppointment of a temporary receiver for the benefit of the Condominium empowered and authorized to take all steps necessary to avoid waste and generate income from [the] residential condominium units which are owned by" the Cassa defendants, Enigme Capital, C.V., LLC and NY 45, LLC.

The Cassa defendants, Enigme Capital, C.V., LLC and NY 45, LLC cross-move for an order staying the instant action pending the resolution of *OA Manhattan LLC v The Condominium Board of Managers of Cassa NY Condominium and the Residential Board of Managers of Cassa NY Condominium* (Index No. 151067/2014) (the 2014 Action).

Background

The Instant Action

The Condominium was established by a Declaration of Condominium (Declaration), recorded June 25, 2010. The Condominium is a mixed use building, consisting of 53 residential units and three commercial units, two hotels and a restaurant. Pursuant to the Declaration, the residential and commercial units possess 44.68 and 55.32 percent of the common interest of the Condominium, respectively, and are obligated to share the general common expenses according to the proportion of their common interest.

The Condominium By-Laws of Cassa NY Condominium (Condominium By-Laws) govern the conduct of the affairs of the Condominium, whereas the Residential By-Laws of Cassa NY Condominium (Residential By-Laws) govern the affairs of the residential section,

comprised of the residential units and residential limited common elements (Affidavit of Benjamin Smillie, sworn to August 17, 2015, Ex. 1 [Condominium By-Laws] § 1.2; Ex. 1, Schedule D [Residential By-Laws] §§ 1.1, 1.2). Provisions of the Residential By-Laws are subject to the provisions of the Declaration and Condominium By-Laws (Residential By-Laws § 1.1). “. . . [T]he rights of the Residential Unit Owners shall generally only be enforced by the Residential Board on behalf of the Residential Unit Owners” (*id.*).

Pursuant to the Condominium By-Laws, the Condominium Board is empowered to act with respect to all matters relating to the operation and administration of the Condominium, including the “[d]etermination and imposition of General Common Charges, preparation and adoption of Budgets . . . and determination and imposition of Special Assessments” (Condominium By-Laws § 2.2.2 [b]). After the Condominium Board determines the portion of the general common charges that are the responsibility of the Residential Board, the Residential Board assesses the individual residential unit owners.

Should a residential unit owner fail to pay the common charges, the Residential By-Laws provide as follows:

The Residential Board shall take prompt action to collect any Residential Common Charges which remain unpaid for more than thirty (30) days after the due date for payment thereof Subject to the applicable terms of the Condominium By-Laws, in the event the Residential Board, after notice from the Condominium Board, fails to take such action against a Residential Unit Owner, then the Condominium Board may do so, in its own name or, if necessary, in the name of the Residential Board

(Residential By-Laws § 6.3.1). The Residential Board “shall have a lien for Residential Common Charges unpaid by any Residential Unit Owner” (*id.*, § 6.3.2) and

[[if the Residential Board shall bring an action to foreclose such lien because of unpaid Residential Common Charges, the defaulting Residential Unit Owner *shall be required to pay a reasonable fee for the use and occupancy* of its Unit and the plaintiff in such foreclosure action *shall be entitled to the appointment, without notice, of a receiver to collect the same . . .* (emphasis added)

(Residential By-Laws § 6.3.3).

Article 13 of the Condominium By-Laws, governing events of default, provides as follows:

13.1 Failure to Pay General Common Charges

13.1.1 The Condominium Board shall take prompt action to collect any General Common Charges or Special Assessments which remain unpaid following notice and the expiration of applicable grace periods, including, without limitation, the institution of such actions and the recovery of interest and expenses as are provided in this Article 13.

13.1.2 The Condominium Board shall have a lien (the 'Condominium Board's Lien') for all unpaid General Common Charges, Special Assessments, other sums payable as if part of General Common Charges or amounts otherwise due to the Condominium Board (together with interest thereon as provided in this Article) from a delinquent Unit Owner. The lien of a prior recorded first mortgage on any Unit shall be superior to the Condominium Board's Lien. . . . Without limiting any of the foregoing, the Condominium Board may: (w) bring an action to foreclose the Condominium Board's Lien in accordance with Section 339-aa of the Real Property Law; (x) purchase the interest of the owner of such Unit at a foreclosure sale resulting from any such action; (y) proceed by appropriate judicial proceedings to enforce the specific performance or observance by the defaulting General Common Charge Obligor of the applicable provisions of the Declaration or these By-Laws from which default arose; or (z) exercise any other remedy available at law or in equity

* * *

13.3 Priority of Recourse Against Residential Unit Owners

13.3.1 Notwithstanding anything to the contrary contained in this Article 13 and without limiting the rights of the Residential Board as set forth in the Residential By-Laws, the Residential Board shall in the first instance have the exclusive right of enforcement with respect to, and to exercise any remedy or recourse as against, a Residential Unit Owner as to whom or which any default under the Declaration, the residential By-Laws or the General Rules and Regulations exists. The Residential Board shall, upon demand by the Condominium Board, use commercially reasonable efforts . . . to cause such defaulting Residential Unit Owner to cure such default . . . However, a default shall in no event be deemed to exist with respect to the Residential Board by reason of any action or inaction by, or a default existing with respect to, a Residential Unit Owner (or such Board's action or inaction with respect to the enforcement or cure of same).

13.3.2 In the event the Residential Board fails, within forty-five (45) days after demand is made by the Condominium Board to cause the Residential Unit Owner in question to cure its default ..., then the Condominium Board shall be entitled to exercise its right to cure any such default in accordance with the applicable provisions of the Declaration or these By-Laws.

The residential unit owners named in this action own 47 of the 53 residential units in the Condominium, with Cassa Properties, LLC owning 41 of those units (Cassa Units). COMM 2013-CCRE6 Mortgage Trust (Trust or First Mortgage Holder) holds the first mortgage encumbering the Cassa Units. Wells Fargo is the master servicer and special servicer with respect to the First Mortgage Holder and U.S. Bank is the trustee to the Trust. Wells Fargo and U.S. Bank state that pursuant to the mortgage documents, Cassa Properties has set up a clearing account into which it is obligated to deposit all funds, including rental income, paid with respect to the Cassa Units. Those amounts are swept into a cash management account maintained by Wells Fargo and are disbursed in the order and priority set forth in the loan agreement, paying

the principal and interest on the mortgage, taxes and insurance prior to any general common charges assessed by the Residential Board.

The Cassa defendants and Enigme Capital, C.V., LLC have allegedly failed to pay any of the assessed general common charges since December 1, 2013. NY 45, LLC allegedly last paid its common charges in November 2014. According to the Condominium's managing agent, as of October 16, 2015, the common charge arrears for these defendants totaled \$2,455,761.06. The Condominium Board states that each month defendants fail to pay the common charges, the Condominium loses \$77,817.59 in cash flow and the commercial unit owners must bear a corresponding amount of monthly general common expenses.

By letter dated April 10, 2015, the Condominium Board sent the Residential Board a "Notice of Delinquent Common Charges and Demand to Collect" (Demand) (Smillie Aff., Ex. 3). The Demand stated that it "serve[d] as a formal demand under Article 13.3.1 of the by-laws that the Residential Board take action against delinquent unit owners to cure their defaults in the payment of common charges" and that if the defaults were not cured within 45 days, the Condominium Board would be entitled to pursue its legal remedies, including "the filing of liens for unpaid common charges and foreclosure of such liens" (*id.*). No payments were made in response to the Demand. By letter dated May 19, 2015, Ezak Assa, a member of the Residential Board, wrote that the Residential Board considered the Condominium Board's billing to be incorrect and that "as of the end of April . . . a credit [was] due to the Residential Condominium Board in the amount of \$587,439.64" (*id.*, Ex. 6).

In June and July 2015, the Condominium Board recorded liens for unpaid common charges against the delinquent residential units. On August 8, 2015, the Condominium Board commenced the instant action.

The 2014 Action

On February 5, 2014, OA Manhattan LLC, a residential unit owner, sued both boards for breach of contract, specific performance and an accounting, based on the defendants' alleged failure to provide contracted-for amenities and their alleged imposition of arbitrary and capricious charges. The boards answered, cross-claiming against each other.

By order to show cause dated March 10, 2015, the Residential Board moved for injunctive relief to prevent the Condominium Board from: (1) undertaking any action relating to the unpaid common charges under the Condominium's 2014 budget, including enforcement of the liens filed in connection therewith; or (2) implementing the Condominium's 2015 budget. The Condominium Board cross-moved for injunctive relief, seeking an order directing the Residential Board to: (1) grant the Condominium Board access to floors 28-47; (2) stop transient use of the residential units located on those floors; and (3) remove the lobby's check-in desk and implement more stringent security measures to prevent transient use of the residential units.

The Residential Board argued that the Condominium Board had violated the Condominium By-Laws in adopting the 2014 Budget at a February 20, 2014 meeting, because the meeting was not properly noticed, rendering general charges invalid and unenforceable. It also contended that the liens could not be enforced because under both sets of by-laws, the Residential Board was the "sole lien holder" and possessed "first right of enforcement." The Residential Board also objected to the 2015 budget, arguing that the Condominium Board

(1) ignored the Residential Board with regard to its repeated requests for documents and information to support the 2015 budget expenses, effectively neutralizing the Residential Board's ability to participate in the budget process ; (2) imposed impermissible, arbitrary and unexplained charges on the residential unit holders; and (3) included a special assessment to satisfy the 2013 shortfall, in violation of section 6.1 of the Condominium By-Laws.

By decision and order dated October 16, 2015, the Court denied the motion and cross-motion for injunctive relief (the Decision). With respect to the Residential Board's contentions regarding the invalidity of the 2014 budget, the Court accepted documentary evidence that the 2014 budget was actually adopted at a properly noticed meeting held on March 12, 2015. The Court also deemed the Residential Board to have abandoned its notice argument. The Court went on to hold that pursuant to section 13.3.2 of the Condominium By-Laws, the Condominium Board acted properly in placing liens for common charges against non-paying residential unit owners, since that section of the by-laws plainly permits it to do so on forty-five days' notice to the Residential Board, with said notice sufficiently given.

Analysis

Cross-Motions to Stay Instant Action

The Cassa defendants and defendants NY 45, LLC and Enigme Capital, C.V., LLC separately cross-move for stay of the instant suit pending resolution of the 2014 Action. Defendants argue that whether they owe any amounts to the Condominium Board is hotly disputed in both actions and that if the Residential Board is successful in the 2014 Action, the instant action will be mooted. The Condominium Board counters that the Decision resolved many of the disputed issues and mooted the instant cross-motions.

The Court has the discretion to stay an action pending the resolution of a prior, related action, in order to advance the “goals of judicial economy, orderly procedure and the prevention of inequitable results” (*Belopolsky v Renew Data Corp.*, 41 AD3d 322, 322 [1st Dept 2007]; *see also* CPLR 2201). A stay is proper even where there is not complete identity of parties, if “there [are] overlapping issues and common questions of law and fact, and the determination of the prior action may dispose of or limit issues which are involved in the subsequent action” (*Belopolsky*, 41 AD3d at 322-323 [internal quotation marks and citations omitted]).

Here, the 2014 Action, like the instant action, involves a dispute over the accuracy of the common charges. The Court has already determined that the Condominium Board followed the necessary procedures in adopting the 2014 budget and that it had the right to impose liens for unpaid common charges. Therefore, a number of the disputed issues have already been “dispose[d] of or limit[ed]” in the 2014 Action (*Belopolsky*, 41 AD3d at 323). Moreover, the Court did not find that there was a likelihood that the Residential Board would prevail in establishing the arbitrariness of increases of common charges in the condominium’s 2014 and 2015 budgets. Any possible change in the Court’s view after full discovery is further diminished in light of of the business judgment doctrine, which insulates the Condominium Board from second-guessing by the Court, absent evidence of self-dealing or some sort of nefarious ulterior motive (*Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537 [1990][business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in exercise of honest judgment in lawful and legitimate furtherance of corporate purposes]; *see also The South Tower Residential Bd. of Mgrs. of Time Warner Ctr. Condominium v The Ann Holdings, LLC*, 127 AD3d 485, 487 [1st Dept] , *lv denied* 25 NY3d 1196 [2015] [prejudice from

favoritism in exercising right of first refusal deemed speculative and not susceptible to elucidation through discovery]). Therefore, permitting the instant action to continue is unlikely to lead to inconsistent or inequitable results. Accordingly, the cross-motions to stay the instant action are denied.

Motion for the Appointment of a Receiver

The Condominium Board contends that its motion for a temporary receivership should be granted, as provided for by the Condominium and Residential By-Laws and Real Property Law. In opposition, the Cassa defendants argue that there is no emergency requiring the appointment of a temporary receiver. Wells Fargo and U.S. Bank contend that pursuant to the Residential By-Laws, only the Residential Board can obtain and foreclose on liens for unpaid common charges against defaulting residential unit owners and that only the Residential Board is entitled to the appointment of a receiver during the pendency of such a foreclosure action. In addition, Wells Fargo and U.S. Bank argue that the Condominium Board is seeking to use the receivership to obtain the ultimate relief it is seeking in this action, the payment of all arrears, and is doing so in violation of the rights of the First Mortgage Holder, which has priority over any claims of the Condominium Board. They also contend that as “Wells Fargo, on behalf of the borrower, has fully and timely paid all assessments made by the Residential Board,” there is no basis for upsetting the agreed-upon payment protocol (Affidavit of Jonathan P. Wolfert, sworn to October 20, 2015, ¶ 27).

Real Property Law § 339-z provides, in relevant part, that “[t]he board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof . . . prior to all other liens except . . . all sums unpaid on a first mortgage of record.” The

Court of Appeals has held that with this language, “the Legislature intended to subordinate liens for unpaid common charges to a first mortgage” (*Bankers Trust Co. v Board of Mgrs. of Park 900 Condominium*, 81 NY2d 1033, 1036 [1993]). However, the holding of *Bankers Trust Company* did not address whether a condominium board is entitled to “payment of common charges from rental proceeds during the pendency of the foreclosure action” (*Ezriel Equities Assoc., L.P. v 157 E. 72nd St. Assocs.*, 225 AD2d 326, 327 [1st Dept], lv dismissed 88 NY2d 1064 [1996]). In considering this question, the Appellate Division, First Department, held that a receiver may “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” (*id.*).

Real Property Law § 339-aa provides, in relevant part, as follows:

In the event that unpaid common charges are due, any member of the board of managers may file a notice of lien Such lien may be foreclosed by suit authorized by and brought in the name of the board of managers, acting on behalf of the unit owners In any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit for any period prior to sale pursuant to judgment of foreclosure and sale, if so provided in the by-laws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same.

The Cassa defendants’ contention, that the Condominium Board has failed to demonstrate that an emergency requires the appointment of a receiver, misapprehends the basis of the instant motion.¹ Here, the Condominium Board is proceeding pursuant to section 13.3.2 of the Condominium By-Laws, section 6.3.3 of the Residential By-Laws and section 339-aa of Real

¹ Notably, in support of this contention, the Cassa defendants cite federal cases applying federal law.

Property Law. None requires the presence of an emergency. Therefore, this argument is without merit.

Nor is there any merit to the argument that the Condominium Board seeks, through the appointment of a temporary receiver, to be made whole, while avoiding litigation over the propriety of the common charges. As made clear during oral argument of the instant motion, the Condominium Board seeks only reasonable rent for use and occupancy of the units during the pendency of this action, and not the satisfaction of arrears. In addition, while the First Mortgage Holder has priority when it comes to the proceeds from the foreclosure sale (*Bankers Trust Co.*, 81 NY2d at 1036), Wells Fargo and U.S. Bank do not point to any authority that requires this Court to give precedence to their payment arrangements with Cassa Properties, LLC over Cassa Properties, LLC's obligation to pay the Condominium's common charges. Therefore, the mere existence of a first mortgage does not prevent the appointment of a receiver to collect reasonable rent, to "be applied toward payment of the units' common charges . . . during the foreclosure action" (*Ezriel Equities Assoc.*, 225 AD2d at 327).

The contention that the Condominium Board lacks authority to proceed directly against the residential unit owners is contradicted by the plain language of the Residential By-Laws and the Condominium By-Laws, which provide that: "in the event the Residential Board, after notice from the Condominium Board, fails to take such action against a Residential Unit Owner, then the Condominium Board may do so" (Residential By-Laws § 6.3.1); and "[t]he Condominium Board shall have a lien (the 'Condominium Board's Lien') for all unpaid General Common Charges, Special Assessments, other sums payable as if part of General Common Charges . . . *from a delinquent Unit Owner*" (Condominium By-Laws § 13.1.2 [emphasis added]). The

Condominium By-Laws also provide that the Condominium Board may “bring an action to foreclose the Condominium Board's Lien in accordance with section 339-aa of the Real Property Law” (*id.*). The Condominium Board, having established that the Residential Board failed to act upon the Demand (Smillie Aff., ¶¶ 18-22, Ex. 3), was therefore authorized to place liens on the defaulting residential units and to bring the instant foreclosure action.

Further, the Condominium Board is entitled to the appointment of a temporary receiver to collect reasonable rent. The Residential By-Laws require the Residential Board to “take prompt action to collect any Residential Common Charges . . . unpaid for more than thirty (30) days . . . including, without limitation, the institution of such actions and recovery of interest and expenses *as provided in this Article 6*” (Residential By-Laws § 6.3.1 [emphasis added]). The Residential By-Laws also provide that “if the Residential Board shall bring an action to foreclose such lien because of unpaid Residential Common Charges, the defaulting Residential Unit Owner shall be required to pay a reasonable fee for the use and occupancy of its Unit and the plaintiff in such foreclosure action shall be entitled to the appointment, without notice, of a receiver to collect the same” (Residential By-Laws § 6.3.3). As the Residential By-Laws authorize the Condominium Board to “take such action” to collect unpaid Residential Common Charges “as provided in this Article 6” in the event that the Residential Board fails to do so, the Condominium Board is permitted to seek appointment of a receiver under Section 6.3.3 of the Residential By-Laws. Any other interpretation of the governing documents would vitiate the broad authority granted to the Condominium Board under Section 6.3.1 of the Residential By-Laws.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Board of Managers of Cassa NY Condominium (motion sequence number 001) for the appointment of a temporary receiver is granted; and it is further


ORDERED that the cross-motions of defendants Cassa Properties, LLC, Cassa 45, LLC, Cassa 46, LLC, Cassa 28, LLC, Enigme Capital, C.V., LLC and NY 45, LLC to stay the instant action are denied; and it is further

ORDERED that the movant shall settle order appointing receiver on notice.

This constitutes the Decision and Order of the Court.

Dated: December 24, 2015

ENTER:



Ellen M. Coin, A.J.S.C.