BRUCE J. BERGMAN

First Mortgage vs. Condominium Common Charge Lien— in Legal and Political Battle*

Here is another article by a recognized expert on real estate law on a tricky priority question. Real estate lawyers— and New York State legislators— will get help from reading his analysis and advice.

Introduction

Which is superior, a first mortgage or a condominium common charge lien? Mortgage lenders urge that the judicial votes are in. Condominiums opine that the issue is unsettled. The decision *should* be simple, but apparently it is not *and*, neither the appeals tribunals nor the legislators have yet been heard from.

In these troubled times of depressed real estate values, one of the few islands of comfort and certitude for mortgage lenders was the assurance that their mortgage lien positions would be senior to all subsequent interests attaching to the secured property, save real estate taxes and certain "super liens." But the symmetry of that formulation has been shaken by some unfortunately ambiguous statutory language designed to protect the condominium common charge lien. This, in turn, has led to continuing contentious litigation and unresolved political maneuvering.

To explain, pursuant to RPL Section 339-z,[1] the condominium board of managers can obtain a lien on a condominium unit for unpaid common charges. Such a lien is effective, however, only from and after the filing of a verified notice of lien in the office of the recording officer in which the declaration is filed.[2] If such a lien is properly filed, the condominium board of managers then has a position of record with relative priorities to other liens and encumbrances.

The controlling statute[3] sets forth a special priority for this lien. It is prior to all other liens *except*:

(a) liens for taxes on the unit in favor of any assessing unit, school district, special district, county or other taxing unit; and

(b) all sums unpaid on a first mortgage of record; or

(c) a subordinate mortgage of record held by the New York job development authority or by the New York state urban development corporation.

Even though there are exceptions to the priority of the condominium common charge lien, the statute[4] also provides that the declaration of an exclusive non-residential condominium may provide that the common charge lien will be superior to any mortgage liens of record.

When a unit is sold or conveyed, unpaid common charges must be paid either out of the sale proceeds or by the grantee.

If a mortgage being foreclosed is a second, or more junior mortgage, not held by one of the entities cited in the statute as an exception, such common charges as have been encompassed by a properly filed common charge lien will be superior to the mortgage.[5] Accordingly, the

[1] "Section 339-z. Lien for common charges; priority; exoneration of grantor and grantee.

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 other liens except only (i) liens for taxes on the unit in favor of any assessing unit, school district, special district, county or other taxing unit, and (ii) all sums unpaid on a first mortgage of record or on a subordinate mortgage of record held by the New York job development authority or held by the New York state urban development corporation. Upon the sale or conveyance of a unit, such unpaid common charges shall be paid out of the sale proceeds or by the grantee. Any grantor or grantee of a unit shall be entitled to a statement from the manager or board of managers, setting forth the amount of the unpaid common charges accrued against the unit, and neither such grantor nor grantee shall be liable for, nor shall the unit conveyed be subject to a lien for, any unpaid common charges against such unit accrued prior to such conveyance in excess of the amount therein set forth. Notwithstanding the above, the declaration of an exclusive non-residential condominium may provide that the lien for common charges will be superior to any mortgage liens of record."

[2] RPL Section 339-aa. To be effective the lien must contain the information required by this section.

[3] RPL Section 339-z.

[4] *Id.*

[5] RPL Section 339-z.

board of managers, as lienor, would not be a necessary party defendant in such foreclosure action. Where a *first* mortgage is in foreclosure, the weight of authority interpreting RPL Section 339-z correctly holds that the first mortgage is superior to the condominium common charge lien.[6] Stated in an alternative perspective, the condominium common charge lien is junior to a first mortgage and therefore subject to extinguishment in a foreclosure action upon a first mortgage.[7] Consequently, when a condominium common charge lien is filed, the board of managers is a necessary party in a foreclosure of a first mortgage.

That there are conflicting decisions on what should otherwise be apparent arises out of that portion of RPL Section 339-z requiring condominium common charge liens to be paid either out of sale proceeds or by the grantee. Were that mandate to apply to a foreclosure sale, it would effectively elevate the lien to superiority even over a first mortgage, a formulation otherwise antagonistic to prior verbiage in the statute. The clear majority of cases hold, affirmatively or tacitly, that the sale contemplated by the statute does not include a mortgage foreclosure sale.[8]

Analysis of Cases

Position of Foreclosing Mortgagee

When the secured premises is a condominium, the board of managers of the condominium would be named as a necessary party defendant in order to extinguish whatever lien the latter *may* have for unpaid common charges. Since *any* junior lien has a claim against surplus[9] the condominium is already afforded special priority as a matter of law without necessity for any separate decree.[10]

To impose a requirement that a purchaser at a first mortgage foreclosure sale pay the common charges would burden the marketability of the property and prejudice the rights of the foreclosing plaintiff by diminishing the value of the property devolving through the foreclosure sale.

Initially, observe that a first mortgage is prior in time, both as to execution and recording, to whatever claim a condominium may have. In any event, common charges have no status vis a vis any other encumbrances until those common charges are reduced to a lien. In this regard, RPL Section 339-aa provides that:

> The lien provided for in the immediately preceding section (RPL Section 339-z) shall be effective from and after the filing in the office of the recording officer in which the declaration is filed a verified notice of lien...(parenthetical matter added)

Although the lien (if any) for condominium common charges is clearly and undeniably subsequent in time—and therefore junior—to a first mortgage, the condominium lien *does* receive special treatment. Special though that treatment is, such lien is still inferior to a *first* mortgage, which is the specific mandate of RPL Section 339-z, thus:

> 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 other liens *except*...all sums unpaid on a first mortgage of record...

Given the cited verbiage of RPL Section 339-z, there would not be even a hint of an issue as to the relationship between a first mortgage and a condominium common charge lien, save that the statute also says:

> Upon the sale or conveyance of a unit, such unpaid common charges shall be paid out of the sale proceeds or by the grantee.

This latter quote could only have had application to a non-judicial sale

▲ *The author of* Bergman on New York Mortgage Foreclosures, *Matthew Bender & Co., Inc. (1990), Mr. Bergman is a partner in the law firm of Certilman Balin Adler & Hyman in East Meadow and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. A graduate of Cornell University and Fordham Law School, he is a member of the American College of Real Estate Lawyers and past chair of the Real Property Law Committee of the Nassau County Bar Association.*

---

[6] *Long Island Sav. Bank v. Gomez.* ___ Misc. 2d ___, 568 N.Y.S. 2d 536 (1991); *Bankers Trust Co. v. Pal*, N.Y.L.J., June 26, 1991, at 23, col. 1 (Sup. Ct. N.Y. Co., Gammerman, J.); *Dime Sav. Bank v. Miles*, N.Y.L.J., May 15, 1991, at 23, Col. 2 (Sup. Ct. Bronx Co., Silver, J.); *Republic Nat'l Bank v. Joubert*, Index No. 6657/90, Bronx Co., Justice Howard R. Silver (not officially reported); *The Bowery Sav. Bank v. Olivia Lee, et al.*, Index No. 1670/90, New York Co., Justice Jacqueline W. Silberman (not officially reported); *Dime Sav. Bank v. Theresa Nigro, et al.*, Index No. 5598/89, New York County, Justice Alfred Tooker (not officially reported, 6/7/91); *Dime Sav. Bank v. Alan Damone, et al.*, Index No. 22513/89, Nassau County, Justice John DiNoto (not officially reported, 6/5/91); *GMAC Mortgage Corp. v. Shahid Butt, et al.*, Index No. 16968/88, New York County (not officially reported, 2/15/91); *Long Island Sav. Bank v. Gene Chun, et al.*, Index No. 9741/90, Queens County, Justice Joseph Rosenzweig (not officially reported), 5/14/91); *The Greater New York Sav. Bank v. James M. Folks, Sr., et al.*, Index No. 8007/91, Suffolk County, Justice Patrick Henry (not officially reported); *contra: East River Sav. Bank v. Saldivia.* N.Y.L.J., Oct. 11, 1989, at 21, col. 4 (Sup. Ct. N.Y. Co., Lebedeff, J.); *Prudential Ins. Co. of America v. Ward*, N.Y.L.J., May 15, 1991, at 22, col. 2 (Sup. Ct. N.Y. Co., Saxe, J.).

[7] *Long Island Sav. Bank v. Gomez, supra., Bankers Trust Co. v. Pal, supra., Dime Sav. Bank v. Miles, supra., Republic Nat'l Bank v. Joubert, supra., The Bowery Sav. Bank v. Olivia Lee. et al., supra., Dime Sav. Bank v. Theresa Nigro, et al., supra., Dime Sav. Bank v. Alan Damone. et al., supra., GMAC Mortgage Corp. v. Shahid Butt, et al., supra., Long Island Sav. Bank v. Gene Chun. et al., supra., The Greater New York Sav. Bank v. James M. Folks., Sr., et al., supra.*

[8] *Id.*

[9] See *Bergman on New York Mortgage Foreclosures*, Section 35.03[1].

[10] RPL Section 339-z.

by a unit owner. It could not mean that common charges had to be paid by a successful bidder at a foreclosure sale because such a construction would negate the absolutely clear provision that a first mortgage is senior to the condominium common charge lien.

Case Law Interpretations

In *East River Sav. Bank v. Saldivia*[11] the court posited the question to be whether common charges are completely extinguished by foreclosure of a first mortgage. It found the answer to be in the negative.

The difficulty the court discovered was in resolving the perceived patent conflict between the otherwise undeniable priority of a first mortgage and the requirement that common charges be paid either out of sale proceeds or by the grantee. The language of the statute concededly leaves room for consternation in interpretation. Placing reliance upon the condominium's amended declaration in that case— and peculiar to that case— the court fashioned what it denominated a "hybrid form of priority" and ruled that the unpaid common charges had to be paid either out of foreclosure sale surplus or by the purchaser.

If the condominium had reduced its claim to a lien,[12] that it could claim against surplus was already well established. Shifting the burden to pay the common charges to the grantee in the absence of a surplus, however, meant that an interest unquestionably junior to the foreclosed mortgage (the common charge lien) was not extinguished— a conspicuous and insupportable anomaly.

Concurrence with *Saldivia* appears in *Prudential Ins. Co. of America v. Ward*.[13] But that decision did not have the benefit of assessing either *Long Island Sav. Bank v. Gomez*[14] or *Republic Nat'l Bank v. Joubert*[15] and is therefore no more persuasive than *East River Sav. Bank v. Saldivia*.[16]

The confusion exacerbated by *Saldivia* was then addressed in *Republic Nat'l Bank of New York v. Joubert*,[17] where, upon a motion for summary judgment in a mortgage foreclosure case, the condominium board of managers (Parkchester South Condominium) cross-moved to have the common charge lien paid out of the foreclosure sale proceeds. The court granted the cross-motion *only* to the extent that the condominium could be paid out of *surplus*.

The court further ruled, though, that:

> Parkchester argues that RPL Section 339-z would require that if plaintiff purchased the property at the foreclosure sale it would be responsible for the unpaid common charges. However, this would be contrary to RPAPL Section 1353.
>
> This section states that when a first mortgagee forecloses a lien on real property and the property is sold at a foreclosure sale in which there are no surplus monies, all subordinate liens are extinguished. The language Parkchester points to in RPL Section 339-z refers to the general case of the sale of a condominium unit to a grantee and not to a foreclosure sale to a mortgagee.

Thus, the *Joubert* decision tacitly rejected *Saldivia* and instead supported the clear intent of RPL Section 339-z that a first mortgage is indeed superior to any condominium common charge lien.

More expansive and forthcoming in its analysis in rejecting *Saldivia* is the compelling decision in *Long Island Sav. Bank v. Gomez*.[18]

In *Gomez*, the foreclosing lender named the condominium as a defendant, intending to extinguish the lien for common charges so that the ultimate foreclosure sale would not be subject to the lien nor would the purchaser be required to pay the cost.

The condominium, no doubt relying upon *Saldivia*, interposed an answer and when plaintiff moved for summary judgment, it cross-moved for a declaration that the common charges were to be paid out of foreclosure sale proceeds, with any deficiency to be the responsibility of the grantee. In assessing the confusion engendered by the verbiage of Real Property Law Section 339-z, the court focused upon the essential question— whether the sale of a condominium unit was intended by the statute to include a foreclosure sale. The condominium argued that it did. The foreclosing lender urged that it did not. The court agreed with the lender.

In so ruling, the court gleaned the legislative intent from that portion of Real Property Law Section 339-z providing that "Notwithstanding the above, the declaration of an exclusive non-residential condominium may provide that the lien for common charges will be superior to any mortgage liens of record."

In reliance upon the quoted language, the court in *Gomez* stated:

> By thus specifically affording a mechanism for establishing the priority *to any mortgage* of a lien for common charges of any exclusive non-residential condominium, the Legislature, by implication, has denied the lien for common charges of a residential condominium any right of priority to a first mortgage. Permitting the lien for common charges to survive a foreclosure sale would have the effect of creating such a priority and would be in contravention of the legislative intent.

The court went on to emphasize that the specific mention in the statute of non-residential condominiums perforce implied the exclusion of residential condominiums. Thus, the statute did not intend to exempt from extinguishment the condominium's lien for common charges. Such an interpretation, the court opined, did not render Real Property Law Section 339-z meaningless in a mortgage foreclosure action because the condominium's lien still received priority over all other liens attaching to surplus.

---

[11] N.Y.L.J., Oct. 11, 1989, at 21, col. 4 (Sup. Ct. N.Y. Co., Lebedeff, J.).
[12] RPL Section 339-aa.
[13] N.Y.L.J., May 15, 1991, at 22, col. 2 (Sup. Ct. N.Y. Co., Saxe, J.).
[14] ___ Misc. 2d ___, 568 N.Y.S. 2d 536 (1991).
[15] Index No. 6657/90, Bronx Co., Justice Howard R. Silver (not officially reported).
[16] N.Y.L.J., Oct. 11, 1989, at 21, col. 4 (Sup. Ct. N.Y. Co., Lebedeff, J.).
[17] Index No. 6657/90, Bronx Co., Justice Howard R. Silver (not officially reported).
[18] ___ Misc. 2d ___, 568 N.Y.S. 2d 536 (1991).

The wisdom of both *Gomez* and *Joubert* was correctly adopted in *Dime Sav. Bank v. Miles*,[19] adding to the weight of authority holding that a first mortgage *is* superior to any condominium common charge lien.

Still further, in *The Bowery Sav. Bank v. Olivia Lee*,[20] Justice Jacqueline W. Silberman, sitting in New York County, addressed the issue, specifically analyzing *Prudential Ins. Co. of America v. Ward*,[21] *Dime Sav. Bank v. Miles*,[22] *Long Island Sav. Bank v. Gomez*,[23] *Republic Nat'l Bank of New York v. Joubert*[24] and *East Riv. Sav. Bank v. Saldivia*.[25] Justice Silberman concluded that the word sale in RPL Section 339-z does not relate to a foreclosure sale:

> It is clear to this Court that the legislature, by the mere inclusion of the one sentence...in one section of a comprehensive act consisting of more than thirty sections did not intend to change, in the case of condominiums alone, such a basic principal as the extinguishing of inferior liens upon the foreclosure of the superior lien.

Continuing the progression of authority supporting the superiority of a first mortgage over a condominium common charge lien is *Bankers Trust Co. v. Pal*,[26] which is especially persuasive because it weighed and analyzed the prior cases, some of which were at odds with each other.

The bank was foreclosing a first mortgage. Upon the ultimate motion for summary judgment by the lender bank, the condominium board argued that both RPL Section 339-z and public policy mandated survival of the board's lien through the foreclosure. The board relied, as expected, upon the language of the statute calling for the condominium lien to be paid out of sale proceeds or by the grantee. The bank took the position that the condominium lien could not survive the foreclosure, but rather had to be extinguished.

Justice Gammerman in New York County framed the issue as whether the phrase "sale or conveyance of a unit" in the statute included a foreclosure sale. Dispositively, the judge ruled that it did not, stating that:

> Upon my reading of RPL Section 339-z, and taking into account the purposes of a foreclosure sale (*i.e.*, joinder of all subordinate interests in a foreclosure action to extinguish the rights of redemption of all those who have such subordinate interest in the property and to vest complete title in the purchaser at the judicial sale) (*Polish Nat'l Alliance of Brooklyn, U.S.A. v. White Eagle Hall Co., Inc.*, 98 A.D. 2d 400; see also, RPAPL Section 311 and Section 1353), I find that the language of RPL Section 339-z, "the sale or conveyance of a unit," applies to the general sale of a condominium unit to a grantee and not to a first mortgage foreclosure sale. (*Long Island Savings Bank FSB v. Gomez*. NYLJ, April 17, 1991, at 25, col. 2, 1991; *Dime Sav. Bank v. Miles*. NYLJ, May 15, 1991, p. 23, col. 2; but *cf. East River Sav. Bank v. Saldivia*, NYLJ, October 11, 1989, p. 21, col. 4, *Prudential Ins. Co. of America v. Ward*. NYLJ, May 15, 1991, p. 22, col. 2). I agree with the finding made by the court in *Long Island Savings Bank, supra.*, which, *inter alia*, found that the intention of the Legislature was clear from the final sentence of Section 339-z.

Relying on *Long Island Sav. Bank v. Gomez*,[27] the judge in *Bankers Trust*[28] ruled further as follows:

> Accordingly, the Legislature did not intend to exempt the condominium lien for common charges from RPAPL Section 1353 which extinguishes all liens subordinate to the first mortgage upon the foreclosure sale unless there are proceeds remaining to be distributed in accordance with RPAPL Section 1354. In that event, defendant Board's lien will have priority to other liens.

What Next — The Possible Clash of Law and Politics

Although the clear weight of authority confirms that a first mortgage *is* superior to a condominium common charge lien, the issue has not been decided at the Appellate Division level. With the question not dispositively resolved, and because losing is potentially expensive, lenders and condominiums continue to joust whenever this point emerges in a mortgage foreclosure case.

Recognizing the ongoing uncertainty, the two sides have quietly sought allies in the legislature. Lenders want the statute clarified by a few simple words to confirm what they believe the legislature must have always intended in the first place. Condominium interests, primarily from New York City, are supporting legislation to codify superiority for the common charge lien, perhaps up to six months of accruing sums.

There are, to be sure, two sides to the competing desires. Lenders need the certitude previously mentioned. In any given situation, mounting common charges could be the difference between a bank recouping its interest or suffering a loss. If the condominiums prevail, needed mortgages on condominium units may be harder to obtain, or would at least cost more. That is hardly conducive to buttressing either commerce or the real estate market. On the other hand, the viability of some condominiums may indeed be threatened by loss of common charge income when units suffer foreclosure.

The ultimate resolution may in the end be a test attributable more to relative political strength than what the law was originally intended to accomplish. We will all have to wait and see.

---

[19] N.Y.L.J., May 15, 1991, at 23, col. 2 (Sup. Ct. Bronx Co., Silver, J.).

[20] Index No. 1670/90, New York Co., Justice Jacqueline W. Silberman (not officially reported).

[21] N.Y.L.J., May 15, 1991, at 22, col. 2 (Sup. Ct. N.Y. Co., Saxe, J.).

[22] N.Y.L.J., May 15, 1991, at 23, col. 2 (Sup. Ct. Bronx Co., Silver, J.).

[23] 568 N.Y.S. 2d 536 (1991).

[24] Index No. 6657/90, Bronx Co., Justice Howard R. Silver (not officially reported).

[25] N.Y.L.J., Oct. 11, 1989, at 21, col. 4 (Sup. Ct. N.Y. Co., Lebedeff, J.).

[26] N.Y.L.J., June 26, 1991, at 23, col. 1 (Sup. Ct. N.Y. Co., Gammerman, J.).

[27] ____ Misc. 2d ____, 568 N.Y.S. 2d 536.

[28] N.Y.L.J., June 26, 1991, at 23, col. 1 (Sup. Ct. N.Y. Co., Gammerman, J.).