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Revisiting the Condominium Charge Lien

One old saw—and song—has it that "everything old is new again." And so it is with the apparently interminable dispute between condominiums and mortgage holders, rising phoenix-like from the ashes no matter how often the issues seem to be concluded. Although these were matters reviewed at length both elsewhere and in these pages in 1992 and 1996,[1] respectively, emphasis upon and clarification of a continuing contentious point has recently emerged which makes a revisitation worthy.

The question before us is, does the consolidation of a first and second mortgage create the variety of first mortgage entitled to priority over a subsequent condominium common charge lien?[2] Previously, one case said no,[3] another ruled yes.[4] A new third case joins the affirmative column and also rejects the condo's latest counter-thrust - an argument that because the mortgage asserting seniority was not a purchase money mortgage it was not protected by the relevant statute.[5] Since appreciating the genesis of the arguments benefits from a knowledge of the background, a preliminary review follows.

The focus of all this is what was surely intended to be an innocent, clear and otherwise mundane statute: RPL §339-z. Its essence is that a condominium common charge lien enjoys a special priority, by virtue of which it is superior to all other liens, save those specifically excepted by the statute, the most important of which is a first mortgage.

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In short, a first mortgage is senior to a subsequently filed condominium common charge lien. Therefore, the condo holding such a lien is a necessary party defendant in the foreclosure of the senior mortgage.

But the otherwise prosaic language of the statute stumbled in providing that "[U]pon the sale or conveyance of a unit ... unpaid common charges shall be paid out of the sale proceeds or by the grantee." If "sale" meant a judicial sale as well as a typical commercial transaction - e.g., a volitional sale by the unit owner - then the stated intent of the statute to maintain the primacy of a first mortgage would be thwarted.

While it is hardly irrational to view the statute as possibly ambiguous, foreclosure practitioners (among others) recognized that a first mortgage was intended to remain superior. And it is perhaps unlikely that there would have been much doubt except for the unfortunate happenstance that the first judge to address the issue decided that the solution was to create a previously unknown hybrid form of priority.[6]

Emboldened by this victory, condo attorneys were prepared to litigate the priority question whenever a condo lien was in jeopardy. That engendered an unusual number of decisions at the Supreme Court level and although most of them upheld the seniority of the first mortgage,[7] the matter remained unresolved until the Court of Appeals rendered the ultimate decision in Bankers Trust Co. v. Board of Managers of the Park 900 Condominium.[8] The dispositive ruling was that RPL §339-z must be interpreted to mean that the statutory lien for common charges does not survive foreclosure of a first mortgage.[9]

Among the permutations which nevertheless outlasted disposition of the first mortgage/condo lien brouhaha involves the effect of a consolidation of two mortgages. Mortgagees would understandably argue that when a first mortgage is consolidated with a second mortgage to form a single lien, a first mortgage emerges which, pursuant to RPL §339-z, is superior to a subsequently filed condominium common charge lien. But as it was with the main priority question, when initially the issue was addressed by a court, the first mortgage lost.[10]

In a case which shocked title company attorneys -- Societe Generale[11] -- a condominium unit was burdened by a first mortgage recorded in 1985. A second mortgage and a consolidation of the first and second mortgage were recorded in 1991. A condominium common charge lien was not recorded until 1992. In the face of an answer interposed by the condominium, the foreclosing lender moved for summary judgment, averring that the consolidation created a single, prior, senior lien. The condominium countered with the theory that regardless of consolidation, the second mortgage remained junior.

Upon what certainly seems misplaced interpretation of prior authoruty,[12] the trial court ruled that the consolidated mortgages did not constitute a single loan and consequently the condo lien retained priority over the second mortgage[13] --albeit a former second mortgage. Although it is true that consolidation cannot elevate a later second mortgage to priority over an earlier intervening lien, such a maxim does not gainsay the effect of a consolidation when no encumbrances intervene.

It can readily be recognized why Societe General was markedly disquieting to the real estate bar. It is pointedly counter to firmly accepted precepts. So the holding did not remain unassaulted for long. As a matter of both law and practical philosophy, *Dime Sav. Bank of New York v. Levy*[14] rejected the reasoning in *Societe General. So now* the score was a problematical one to one.

The tie was broken in February of 2000 in *Greenpoint Bank v. El-Basary.* [15] Again, the facts were similar to earlier cases. Plaintiff bank held a first mortgage (originally $263,000) upon the unit since 1986.

The property was sold and the new owner obtained a second mortgage of $75,000 from the bank on Oct. 7, 1997, at which time the mortgages were consolidated in the amount of $250,000, with the consolidation agreement recorded Apr 23, 1998. (Although before consolidation the condo had filed three liens, each was satisfied.)

Beginning in October, 1997, common charges were not paid and on Oct. 2, 1998 (almost six months after recordation of the mortgage consolidation agreement) the condo board filed a common charge lien. Prior to that though, because the owner also never made a single payment upon the consolidated mortgages, the bank instituted a foreclosure in August, 1998. After judgment of foreclosure and sale issued, the condo moved to vacate its default and to amend the judgment to recognize the board's claimed interest in the condominium unit. In asserting its supremacy, the condo argued that there were actually two separate mortgages on the premises -with only the first senior to the common charge lien - and that in any event because the consolidation was not a purchase money mortgage, the legislature's intent would be defeated by construing the consolidation as giving rise to a single first mortgage.

'Societe' and 'Dime'

In considering both *Societe General* and *Dime v. Levy,* denying the board's motion and ruling that the consolidated mortgage was a first mortgage entitled to priority over a later-arising condominium common charge lien, the court presented an extensive analysis:

• In the foreclosure action, neither the referee's computation nor the judgment made any distinction between the two loans. Rather the interest was calculated on the consolidated amount.

• The consolidation agreement specifically provided that the bank had only one lien on the property, thus confirming the parties' intention to combine the two obligatins into one first mortgage.

• RLP§339-z does not provide that the common charge lien is subordinate solely to a purchase money mortgage. Instead, the lien is inferior to "all sums unpaid on a first mortgage of record." It is therefore apparent that had the legislature intended subordination to apply exclusively to purchase money mortgages, it would have so stated. But the statute recites only a "first mortgage of record," leading to construction of the phrase to mean any first mortgage of record, whether for purchase of the unit or not.[16]

• Although unquestioned that a consolidation agreement cannot adversely affect the priority of any lien arising between the date of the original mortgage and the consolidation,[17] the condo board had no lien when the original first mortgage was recorded and the consolidation never interfered with any prior rights held by the condo board.

• *Societe Generale* is wrong in holding that even with no intervening lien there cannot be an effective consolidation against a condo board's subsequently filed lien.

• A statute enacted in derogation of the common law (such as RPL §339 z) must be strictly construed[18] and the construction must be as narrow as permitted by the words and the underlying purpose of the statute. Without the condo lien priority afforded by RPL §339-z in derogation of the common law principle of "first In time, first in right," the condo board would not be entitled to any priority over previously recorded liens. So, the condo board's lien cannot prime an earlier lien unless the statute clearly intended such a reversal, which it does not.

• RPL §339-z does not bar a condominium unit owner from refinancing by satisfying an existing mortgage and obtaining a new first mortgage in a larger amount. In that scenario there is no question but that the new first mortgage would be senior to a later condo common charge lien.[19] As a practical matter, issuance of a second mortgage then consolidated with an existing first mortgage is the same thing.

The expansive examination of the mortgage consolidation issue vis a vis the common charge lien in the *Greenpoint Bank* case creates a roadmap for future contemplations. But if the jousting continues exclusively at the Supreme Court level, there could always be room for uncertainly in a realm where dubiousness seems exquisitely out of place. This is an issue for the appellate division.

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(1) "First Mortgage vs. Condominium Common Charge Lien - In Legal and Political Battle, 64, New *York State Bar Journal 34* (January, 1992); "Common Charge Lien Condo Attacks First Mortgage, A Creature That Wouldn't Die," New York Law Journal, Jul. 24, 1996, at 5 Col. 2.

(2) See RPL §339-z.

(3) Societe Generale v. Charles & Company *Acquisition, 157* Misc.2d 643, 597 N.Y.S.2d 1004 (1993).

(4) Dime Sav. *Bank of* New *York v.* Levy, 161 Misc.2d 480,615 N.Y.S.2d 218 (1994).

(5) Greenpoint *Bank v. El-Basary,* -Misc.2d-, 711 N.Y.S.2d 275 (Sup. Ct., MY Co. 2000).

(6) East River Sav. *Bank v. Saldivia, NYLJ,* Oct. 11, 1989, at 29, col. 4 (Sup. Ct., N.Y. Co-Lebecliff, J).

(7) For a more complete review of all the cases, see 3 Bergman on New York Mortgage Foreclosures, §36.02[1], [21 and [3] Matthew Bender & Co., Inc. (rev. 2000); "First Mortgage vs. Condominium Common Charge Lien - In Legal and Political Battle," 64 New York State Bar Journal 34; (Jan. 1992).

(8) 81 N.Y.2d 1033,600 N.Y.S.2d 191, 616 N.E.2d 848 (1993). Note that the decision in the First Department which the Court of Appeals affirmed was especially thoughtful and expansive, offering a more comprehensive review of tile subject, as reported at 181 A.D.2d 274, 584 N.YS.2d 576 (Ist Dept. 1992).

(9) Other cases similarly on point, sometimes with slightly different perspective include: Victoria Woods Homeowners Association v. Gonyo, 192 A.D.2d 1107, 596 N.Y.S.2d 259 (4th Dept. 1993); Melsten v. Board of Managers 178-184 E. Second *St., NYLJ,* May 2,1994, at 28, col. 2 (Sp. Ct., N.Y. Co. Crane, J.); Dime Sav. *Bank of New* York v. Pesce, 217 A.D.2d 299,636 N.Y.S.2d 747 (1st Dept. 1995); GE Capital Mort. Services v. Misevcis, 204 A.D.2d 963, 612 N.Y.S.2d 275 (3d Dept. 19.94); Dime Sav. *Bank of New* York v. Kakar, 203 A.D.2d 50, 610 N.YS. 2d 33 (1 st Dept. 1994); Marine *Midland Bank* v. Valeria Associates, *NYLJ, Feb.* 5, 1994, at 28, col. 2 (Sup. Ct., West. Co., J.B. Leikowitz, J.).

(10) Societe Generale v. Charles & Company Acquisition, 157 Misc.2d 643, 597 N.YS.2d 1004 (1993).

(11) Id.

(12) Societe Generale v. Charles & Company Acquisition, 157 Misc.2d 643, 597 N.Y.S.2d 1004 (1993), citing Skaneateles Sav. *Bank v.* Herold, 50 A.D.2d 85,376 N.Y.S.2d 286 (4th Dept. 1975), aff'd 40 N.Y.2d 999, 391 N.Y.S.2d 107, 359 N.E.2d 701; Dominion Fin. Corp. v. 275 Washington Street Corp., 64 Misc. 2d 1044, 316 N.Y.S.2d 803 (1970).

(13) Societe Generale v. Charles & Company Acquisition, supra at note 10.

(14) 161 Misc.2d 480, 6 15 N.YS.2d 218 (1994). The court's evaluation was thoughtful and persuasive. Because, however, much of it is duplicated (and expanded upon) In the newer case discussed, reference to the original is more economical than recitation here.

(15) _Misc.2d-, 711 N.Y.S.2d 275 (Sup. Ct., N.Y. Co., 2000).

(16) Greenpoint *Bank v.* El-Basary, _Misc.2d_, 711 N.Y.S.2d 275 (Spu. Ct., N.Y.Co. 2000), citing Board of Managers of the *Parkchester North Condominium* v. Richardson, 238 A.D.2d 282, 656 N.Y.S.2d 269.

(17) Greenpoint *Bank v.* El-Basary, _Misc.2d_ 711 N.Y.S.2d 275 (Sup. Ct., N.Y.Co. 2000), citing *FDIC v.* Five Star Management, Inc., 258 A.D.2d 15, 692 N.Y.S.2d 69; Dime Sav. *Bank of New* York *F.S.B.* v. Levy, 161 Misc.2d 480,615 N.Y.S.2d 218.

(18) Oden v. Chemung County Indus. Dev. Agency, 87 N.Y.2d 81, 637 N.Y.S.2d 670,661 N.E.2d 142.

(19) Greenpoint *Bank v.* El-Basary, __Misc.2d_, 711 N.Y.S.2d 275 (Sup. Ct., N.Y. Co. 2000), citing Board of Managers of the *Parkchester* North Condominium v. *Richardson, 238* A.D.2d 282, 656 N.Y.S.2d 269.