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Court Finds Powerful Remedy Against Defaulting Condo Owners



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It has long been the frustration of condominium boards that unlike their cooperative board brethren, condominium boards have very limited options in dealing with a recalcitrant unit owner who fails to pay common charges. Unlike co-ops where the owners are “tenants” who can be evicted for non-payment of rent in a summary proceeding, condominium unit owners have a fee interest in their unit and, generally, condominium boards are relegated to either a plenary action to recover unpaid common charges or the prosecution of an action to foreclose a condominium lien for unpaid common charges filed pursuant to Real Property Law (RPL) 339-z. A foreclosure action can be a lengthy and expensive process, during which time the unit owner

many times remains in possession “rent free.”

‘Heywood v. Wozencraft’

In a major decision issued just weeks ago by the Appellate Division, First Department, the court has provided a powerful remedy to address the case of a defaulting unit owner who refuses to pay common charges. In *Heywood Condominium*

‘Wozencraft’ demonstrates that condominium boards have a powerful weapon when facing a unit owner’s failure to pay common charges.

v. Wozencraft, ___ A.D.3d ___, 2017 N.Y. Slip. Op. (1st Dept. Jan. 12, 2017), the Appellate Division, in a unanimous opinion signed by Justice Peter Tom, affirmed the Supreme Court’s order ejecting the condominium unit owner from the apartment. In considering what the court described as “a rare occurrence—the eviction of a

condominium unit owner from his apartment for failure to pay condominium common charges and rent,” the court held that “pursuant to the Condominium Act and relevant condominium bylaws, and under the circumstances presented here, eviction was proper and not unconstitutional.”

In *Wozencraft*, the defendant Steven Wozencraft was the owner of a condominium unit in the building located at 263 Ninth Avenue in Manhattan. In April 2007, less than a year after he purchased the unit, he ceased paying his common charges, claiming that he was being deprived of certain nonessential services. On Feb. 21, 2013, the condominium board recorded a lien (under RPL 339-z) in the New York City Register’s Office for unpaid common charges of \$211,178, of which \$69,470 constituted late fees and \$63,408 was legal fees.

In March 2013, the board commenced an action to foreclose the lien and simultaneously moved

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for the appointment of a temporary receiver pursuant to RPL 339-aa. By order entered Jan. 28, 2015, Supreme Court (Donna M. Mills, J.) granted the board's motion for the appointment of a receiver. The order, among other things, appointed Allison M. Furman as temporary receiver and directed Wozencraft, who continued to occupy the unit, to pay the receiver "the reasonable fair market rent of \$6,500' per month for his use and occupancy." The order further granted the receiver the authority "to institute any necessary legal proceedings for the protection of the unit, including instituting proceedings to remove any tenant, including defendant."

Wozencraft failed to pay for his use and occupancy of the unit as required by the January 2015 order. Thus, the receiver moved pursuant to Real Property Actions and Proceedings Law (RPAPL) Section 221 for a writ of assistance ejecting the him from the unit. Supreme Court granted the motion and Wozencraft appealed.

Eviction Upheld

First, the Appellate Division found that it was entirely proper for the Supreme Court to have directed the unit owner to pay "rent" for the unit which he owned. The court observed that RPL 339-aa provides that in a

lien foreclosure action, "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" (emphasis in original). The court also rejected the unit owner's claim that it was procedurally improper for the receiver to move for a writ of assistance because the receiver was not attempting to enforce "a properly rendered order or judgment 'affecting the title to, or the possession, enjoyment or use of, real property.'"

The court found that the receiver's reliance on RPAPL 221 was a "technical defect" that should be "disregarded." Among other things, the court found that Wozencraft was not prejudiced by this defect and that the order appointing the receiver had expressly authorized the receiver to take certain actions, including ejectment of Wozencraft from the property.

The Appellate Division also rejected Wozencraft's contention that his ejectment from the unit was unconstitutional. In so holding, the court found that he "was properly required to pay rent on the unit" at the "reasonable fair market rent" of \$6,500 per month for his use and occupancy," regardless of the fact that he was the owner of the unit. The court observed that "both Real Property Law § 339-aa and Section 5.9 of

the bylaws provide that in a lien foreclosure action, 'the unit owner shall be required to pay a reasonable rental for the use of said unit owner's unit.'" The court found that "ejectment under these circumstances" does not deprive the unit owner of his "real property ownership/occupancy rights without due process of law."

Conclusion

Wozencraft demonstrates that condominium boards have a powerful weapon when facing a unit owner's failure to pay common charges. When a unit owner defaults in the payment of common charges, a condominium board can file a lien, commence a lien foreclosure action, and have a receiver appointed to collect a "reasonable rental" from the unit owner. If the unit owner fails to pay, the receiver then has the power to evict the unit owner, allowing the receiver to lease the unit to a paying tenant while the lien foreclosure action is pending. These steps will put significant pressure on defaulting unit owners, who must either continue to pay while the foreclosure action is pending or face eviction.