SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1513-16T1

UNION HILL CONDOMINIUM ASSOCIATION,

Plaintiff-Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant-Respondent.

Argued October 30, 2017 – Decided November 15, 2017

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0523-15.

John J. Abromitis argued the cause for appellant (Lavery, Selvaggi, Abromitis & Cohen, PC, attorneys; Mr. Abromitis, on the briefs).

Henry F. Reichner argued the cause for respondent (Reed Smith LLP, attorneys; Mr. Reichner, of counsel and on the briefs).

PER CURIAM

Plaintiff Union Hill Condominium Association ("the Association") appeals the Law Division's November 7, 2016 order

concluding on stipulated facts that defendant Wells Fargo Bank, N.A. ("Wells Fargo") is not a "lender in possession" or a "mortgagee in possession" required to pay the Association maintenance assessments and counsel fees for a vacant condominium unit as to which Wells Fargo has a pending mortgage foreclosure action. We affirm.

The record owner of the unit, Michael Demers, was delinquent on both his mortgage payments due to the lender and his assessments due to the Association. Wells Fargo brought a foreclosure action against Demers in August 2012. Demers died in 2013. The foreclosure case has not yet resulted in a final judgment.[1] In the meantime, Wells Fargo has engaged in certain measures such as changing locks, "winterizing" the premises, landscaping, and the remediation of "stink bugs." Wells Fargo also had repairs performed to a door and a handrail, and ordered certain other repairs that were not completed.

In a detailed written decision by Judge Thomas C. Miller, the trial court rejected the Association's contention that these actions by Wells Fargo were sufficient to make it responsible for ongoing assessments. The Association now appeals these findings,

[1] At oral argument on the appeal, counsel for Wells Fargo advised us that a guardian ad litem for Demers' heirs may soon be, or has already been, appointed.

and also argues the trial court erred in holding that the lien priority statute, see N.J.S.A. 46:8B-21, is the Association's sole remedy against Wells Fargo in these circumstances.

Both parties have helpfully submitted supplemental briefs at this court's request comparing the facts of this case with those in Woodlands Community Association v. Mitchell, 450 N.J. Super. 310 (App. Div. 2017) (holding on the facts presented in that case, involving a lender's assignee's "winterization" of property, that the assignee was not a lender in possession liable for condo fees). Having considered those submissions, and the parties' oral and other written arguments, we affirm the trial court's denial of relief to the Association. We do so substantially for the sound reasons articulated by Judge Miller as well as in accordance with this court's June 6, 2017 precedential opinion in Woodlands, which was issued after this appeal was filed.

As we recognized in Woodlands, a mortgagee or its assignee that brings a foreclosure action against a condominium unit owner is not liable for delinquent common charges unless and until it has engaged in sufficient activities to be considered "in possession" of the premises. Id. at 315; see also Woodview Condo. Ass'n, Inc. v. Shanahan, 391 N.J. Super. 170, 173 (App. Div. 2007). "Whether a mortgagee or its assignee is in [such] possession is determined on a case-by-case basis." Woodlands, supra, 450 N.J.

Super. at 315. For example, if a mortgagee rents the premises to a third party and collects rent, that exercise of ownership rights is sufficient to make the mortgagee a lender in possession. Ibid.; see also Woodview, supra, 391 N.J. Super. at 173-74. By contrast, actions by a mortgagee that merely protect its security in the property, such as changing locks, paying realty taxes, and "winterizing" the property to prevent frozen pipes, is insufficient to make the mortgagee a lender in possession. Woodlands, supra, 450 N.J. Super. at 316-19. For these reasons, we held in Woodlands that the "minimal actions" taken there by the lender's assignee to protect its security interest in the property did not rise to a level requiring it to pay maintenance fees to the condominium association. Id. at 318.

We discern no material difference between the facts in Woodlands and the facts in this case. We do not regard the incidental actions taken by Wells Fargo as sufficient to render it "in possession." Although more extensive repairs or improvements arguably might have tipped the balance in the Association's favor, the modest repairs to a door and a railing essentially comprise measures to keep the premises safe rather than capital investments. Nor do the landscaping and pest control measures that were taken alter the mortgagee's status.

Although we appreciate the Association's reasonable desire to obtain a contribution from this long-vacant unit for common expenses, the facts presented simply do not support a finding that Wells Fargo is "in possession." That said, we urge Wells Fargo to take reasonable and prompt steps to pursue the apparently-uncontested and long-delayed foreclosure action to completion.

Affirmed.