

District Court, Adams County, State of Colorado Adams County Justice Center 1100 Judicial Center Drive Brighton, Colorado 80601 (303) 659-1161	EFILED Document – District Court CO Adams County District Court 17th JD 2009CV1585 Filing Date: Sep 30 2009 1:37PM MDT Transaction ID: 27337871
<hr/> N.E.W.S. (NORTH EAST WEST SOUTH), LLC Plaintiff, v. ESTATE CONSTRUCTION, LLC & CAROL SNYDER in her capacity as the PUBLIC TRUSTEE OF ADAMS COUNTY, STATE OF COLORADO Defendants.	<hr/> ▲ COURT USE ONLY ▲ <hr/> Case No.09 –CV-1585 Division: A
ORDER	

Plaintiff N.E.W.S. filed a Motion for Temporary Restraining Order (TRO), Preliminary Hearing, and Speedy Declaration Hearing on August 31, 2009. The parties stipulated to a TRO on September 1, 2009 until a Preliminary Injunction hearing could be held. A Preliminary Injunction hearing was held on September 22, 2009. The Court heard the testimony, received exhibits and heard arguments of counsel and being fully advised FINDS AND ORDERS AS FOLLOWS:

Background

For purposes of this Preliminary Injunction, an abbreviated statement of the background facts will suffice. N.E.W.S. LLC (NEWS) was the successful bidder on a Deed of Trust encumbering property located in Henderson, Colorado (the Property). Before the sale, Dunes Master Owners Association (HOA) recorded a Notice of Lien claiming a lien on the Property for past due HOA assessments in the amount of \$383.49 (HOA Lien). After NEWS bid on the Property at the

Public Trustee's sale, the HOA assigned its rights in the HOA Lien to Defendant Estate Construction, LLC (Estate) on August 13, 2009.

On August 28, 2009, NEWS tendered payment to Estate of all outstanding obligations to satisfy the HOA Lien. However, Estate allegedly refused to accept payment (\$1049.97). Estate declined to sign a release of its lien and still has possession of the check.

Parties' Arguments

NEWS

NEWS argues that Estate's sole purpose in purchasing the lien was to redeem the property. The Court should issue a Preliminary Injunction enjoining the Adams County Public Trustee from granting a public trustee's deed or certificate of redemption for the Property to either party until a trial on the merits can be held.

Estate

Estate claims that it has rights to the Property by virtue of being the holder of the Assignment of the HOA's assessment lien.

Issue

Is NEWS entitled to a Preliminary Injunction?

Findings of Fact

For purposes of the Preliminary Injunction hearing, the parties agreed that the facts set forth above correctly set forth the essential factual history of this real estate transaction.

Analysis

A preliminary injunction is designed to preserve the status quo or protect a party's rights pending the final determination of a cause. *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004). A complaint seeking injunctive relief "must state with some particularity the basic facts justifying the relief sought." *Board County Com'rs of Pitkin County v. Pfeifer*, 546 P.2d 946, 950 (Colo. 1976).

For a plaintiff to prevail on its claim for a preliminary injunction, it must demonstrate: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) lack of a plain, speedy, and adequate remedy at law; (4) no disservice to the public interest; (5) a balance of equities in favor of the injunction; and (6) preservation by the injunction of the status quo pending a trial on the merits. *Gitlitz v. Bellock*, 171 P.3d 1247, 1278 (Colo. App. 2007). All six factors must be established to issue a preliminary injunction. *Rathke v. MacFarlane*, 648 P.2d 648, 654 (Colo. 1982).

Is There a Substantial Likelihood of Success on the Merits?

A final determination of the merits of this case awaits a future trial. However, before a Court may issue a Preliminary Injunction, plaintiff must demonstrate a reasonable probability of ultimately succeeding on the merits of the case. *See Home Shopping Club, Inc. v. Roberts Broadcasting Co. of Denver*, 961 P.2d 558 (Colo. 1998). The issue squarely presented to the Court is whether Estate, as the assignee of the HOA's assessment lien, may refuse to accept NEWS' (holder of the Certificate of Purchase) tender of the full payment of the debt secured by the HOA's assessment lien. Based upon the legal authority supplied to date, this issue is answered in the negative.

§ 38-38-301. Holder of certificate of purchase paying charges--redemption

The holder of a certificate of purchase may pay at any time after the sale and during the redemption period described in section 38-38-302 the fees and costs that the holder may pay pursuant to section 38-38-107 and may include any such amounts as part of the amount to be paid upon redemption.

§ 38-38-107. Fees and costs--definitions

(1) All fees and costs of every kind and nature incurred under the provisions of articles 37 to 39 of this title shall be fees and costs of the sale chargeable as additional amounts owing under the deed of trust or other lien being foreclosed. The amounts shall be deducted from the proceeds of any sale, or, if there are not cash proceeds from a sale adequate to pay such amounts, to the extent of the inadequacy, the amounts shall be paid by the

holder of the evidence of debt. The officer may decline to issue the confirmation deed pursuant to section 38-38-501 until all sums due to the officer have been paid.

(3) Fees and costs include but are not limited to the following amounts that have been paid or incurred:

- (a) Costs and expenses allowable under the evidence of debt, deed of trust, or other lien being foreclosed;
- (b) As used in this subsection (3), "holder" means the holder of the certificate of purchase, the holder of the certificate of redemption, or the holder of the evidence of debt.

NEWS, as the holder of the Certificate of Purchase, is deemed to be the holder of the evidence of debt and may therefore pay "costs and expenses allowable under the evidence of debt, deed of trust, or other lien being foreclosed." NEWS may pay any costs and expenses the lender or beneficiary of the deed of trust could have satisfied.

The Deed of Trust in question includes a Planned Unit Development Rider. Pursuant to §F Remedies thereof, "If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument." Therefore, NEWS as the holder of the Certificate of Purchase, (as could the original lender) may satisfy any amount allowed under the Deed of Trust, which includes the unpaid HOA assessments which was the basis for the HOA lien.

Is Estate obligated to accept the tender and release its lien? The Colorado Court of Appeals has answered that question in the affirmative. "We conclude that a lender cannot place conditions on its release of a deed of trust other than the satisfaction of the indebtedness secured by that deed of trust. This conclusion is consistent with the apparent purpose of the statute, which is to permit the owners of real property to obtain the release of liens by the payment of the full amount secured by the lien and thereby permit the owner to sell, pledge, or otherwise deal with the property free of the lien. If a lien holder were permitted further to condition the release of the lien, it could use that ability to coerce settlement of other disputes or accounts a result which the statute clearly intended to prevent." *Crown Bank*

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DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7305 S. Potomac St. Centennial, CO 80112	CO Arapahoe County District Court 18th JD Filing Date: Apr 2 2009 8:48AM MDT Filing ID: 24481873 Review Clerk: N/A
NEIGHBORHOOD PARTNERS, LLC, a Colorado limited liability company; Plaintiffs, v. KALLIMA PROPERTIES LLC, a Colorado limited liability company and ANA MARIA PETERS- RUDDICK in her capacity as the PUBLIC TRUSTEE OF THE COUNTY OF ARAPAHOE, STATE OF COLORADO Defendants.	^ Court Use Only ^ Case Number: 09CV603 Division: 404
ORDER RE MOTION FOR PRELIMINARY INJUNCTION	

THIS MATTER having come before the Court for hearing on the Plaintiff's Motion for preliminary injunctive relief, the Court having heard testimony, reviewed the evidence, heard argument of counsel and being fully apprised of the issues, enters Findings and Orders as set forth below.

I. FACTUAL FINDINGS

The facts, which for the most part are uncontested, are as follows:

1. Plaintiff Neighborhood Partners, LLC was the successful bidder at the Public Trustee's sale of the subject real property, located at 21763 E. Heritage Parkway, Aurora, Colorado 80016 ("Property") and holds the Public Trustee's Certificate of Purchase.

2. The Property is subject to a HOA lien filed by Heritage Eagle Bend Master Association, Inc. ("Association Lien"). A significant portion of the Association Lien (\$2,309.11) is in excess of the HOA super lien (\$942.00), and is therefore a junior lien to that which was foreclosed in the Public Trustee's sale.
3. Defendant Kallima Properties, LLC is the assignee of the Association Lien, having purchased the Association Lien for \$10,500, which is well in excess of the lien amount, for the purpose of redeeming the Property as a junior lien holder.
4. The Defendant Public Trustee of the County of Arapahoe, State of Colorado has disclaimed any interest in the Property, and is a party to this litigation for the purpose of receiving any order the Court may issue concerning the disposition of the Property.
5. Prior to end of the owner's redemption period the Court entered a Temporary Restraining Order prohibiting the Public Trustee from issuing a Deed to the Property. The TRO remains in effect until modified by the Court.
6. Kallima Properties properly and timely filed its notice of intent to redeem, and stands ready, willing and able to complete the redemption should the Court lift the restraining order.
7. Payment of the full amount of the HOA lien was tendered to both the HOA and Kallima. There is a disputed issue of fact as to whether the tender was made by Neighborhood Partners on its own behalf, on behalf of the Gerald Shiling (one of the owners of the Property who is personally obligated to pay the HOA lien) or both. From the evidence presented, the Court finds that Plaintiff is likely to prevail on this issue, which is that the tender was made on behalf of Gerald Shiling. The Court notes that he is one of the three individuals who will lose title to Property in this foreclosure, all of whom are jointly severally and personally obligated to pay the full amount of the lien.

8. Kallima refused to accept the tender in order to be able to exercise the redemption rights associated with the Association Lien.

The redemption period has now expired and no one else is seeking to redeem the Property. Therefore the issue before the Court is whether to lift the restraining Order and allow the Public trustee to issue a Deed to Kallima Properties, or continue the restraining Order until after a full hearing on the merits. The resolution of this matter turns on whether Kallima, as the assignee of the Association Lien is obligated to accept the tender of the full amount of the Lien, or whether it can reject the tender in order to use the junior lien to redeem the Property.

II. LEGAL: ANALYSIS

The Court applies the *Rathke v. McFarlane*, 648 P.2d 648 (Colo. 1982) standards as follows:

1. Irreparable injury and no adequate remedy at law.

Because the Property appears to be unique, transfer of title to either party would irreparably injure the other if a pre-judgment transfer of title turned out to be in error, as it would be difficult if not impossible to put the parties back into the position they were before the transfer, as both parties fully intend to improve the Property and sell it.

2. Weight of the equities, status quo and public interest.

Neither party is using the property as their home, and both seek commercial benefit by acquiring the property and reselling it. Equity does not favor either party. Maintaining title to the Property in the hands of the Public Trustee will preserve the status quo. The public's interest is a minor factor in this matter.

3. Substantial likelihood of success on the merits.

The resolution of this motion turns on whether Plaintiff has established a substantial likelihood that it will prevail on the merits.

If a junior lien is satisfied prior to redemption, there is no longer a redemption right associated with that obligation. In *National Real Estate Investment v. WYSE Financial Services, Inc.*, 66 P.3d 111 (Colo. App. 2003) the Court held that “[a] debtor or debtor’s agent has the legal right to pay the judgment and thereby prevent a redemption by the assignee of a judgment. See *Plute v. Schick*, 101 Colo. 159, 71 P.2d 802 (1937); *Craft v. Storey*, 942 P.2d 1211 (Colo.App.1996); *Osborn Hardware Co. v. Colorado Corp.*, 32 Colo. App. 254, 510 P.2d 461 (1973). As stated above, the Court finds that Plaintiff has a substantial likelihood that it will be able to prove at trial that sufficient funds were tendered on behalf of Mr. Shilling to both the Association and Kallima Properties to satisfy the Association Lien in full. Plaintiff contends that because the HOA dues obligation, which is the basis for the Association Lien, is a personal obligation of Mr. Shiling, he has the right to pay it at any time in order avoid personal liability. The funds to satisfy the Association Lien were tendered during the owner’s redemption period, therefore a Certificate of Redemption had not issued and the *National Real Estate Investment* Court’s analysis in that regard is not applicable. The Court need not address the issue of whether the right would be affected by a redemption.

The Court notes that the above cited cases do not address the right of the holder of a Certificate of Purchase to pay certain obligations pursuant to C.R.S. §38-38-107 and 301. Therefore, the Court turns to Plaintiff alternative argument which would be applicable if it were determined that the funds were not tendered by Mr. Shirling’s agent. Plaintiff contends that as the holder of the Certificate of Purchase it had the same rights as the holder of the Deed of Trust had to pay the Association Lien in full, thereby extinguishing Kallima’s redemption rights. Plaintiff relies on C.R.S §38-38.107 and 301, the applicable portions of which are as follows:

(C.R.S. §38-38-301)

The holder of a certificate of purchase may pay at any time after the sale and during the redemption period described in section 38-38-302 the fees and costs that the holder may pay pursuant to section 38-38-107 and may include any such amounts as part of the amount to be paid upon redemption.

(C.R.S. §38-38-107)

1) All fees and costs of every kind and nature incurred under the

provisions of articles 37 to 39 of this title shall be fees and costs of the sale chargeable as additional amounts owing under the deed of trust or other lien being foreclosed. The amounts shall be deducted from the proceeds of any sale, or, if there are not cash proceeds from a sale adequate to pay such amounts, to the extent of the inadequacy, the amounts shall be paid by the holder of the evidence of debt. The officer may decline to issue the confirmation deed pursuant to section 38-38-501 until all sums due to the officer have been paid.

(3) Fees and costs include but are not limited to the following amounts that have been paid or incurred:

(a) Costs and expenses allowable under the evidence of debt, deed of trust, or other lien being foreclosed; and

(b) Reasonable attorney fees and the costs incurred by the holder or the attorney for the holder in enforcing the evidence of debt, the deed of trust, or other lien being foreclosed or in defending, protecting, and insuring the holder's interest in the foreclosed property or any improvements on the property, including but not limited to:

(IV) Sums due on any prior lien or encumbrance on the property, including the portion of an assessment by a homeowners' association that constitutes a lien prior to the lien being foreclosed; except that any principal that would not have been due in the absence of acceleration shall not be included in the sum due unless paid after the expiration of the time to cure the indebtedness pursuant to this article:

Plaintiff acknowledges that C.R.S §38-38-107 (3)(b)(IV) only applies to the super lien portion of the Association Lien, which because it has senior lien rights would not be applicable here. It is the junior lien rights that are at issue, and they are not addressed by §107 (3)(b)(IV).

Plaintiff directs the Court to C.R.S. §38-38-107(3)(a). Reading §107 and §301 together provides that during the redemption period Plaintiff, as the holder of the Certificate of Purchase may pay any fees and costs which the "holder" may pay pursuant to §107(3)(a) which include costs and expenses that may be paid under

the Deed of Trust that is being foreclosed. The Court therefore looks to the terms and conditions of the Deed of Trust.

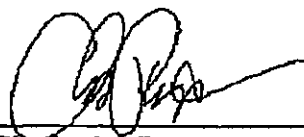
Paragraph F of the Planned Unit Development Rider which is part of the Deed of Trust states in pertinent part; “[i]f the Borrower does not pay PUD dues and assessments when due, then Lender may pay them.” From a review of the PUD Rider it appears that such incorporates HOA Declaration Obligations.

The Court finds that there is a substantial likelihood that Plaintiff will prevail on the merits. Therefore, the Court’s order enjoining the Arapahoe County Public Trustee from issuing a Public Trustee’s Deed for 21763 E. Heritage Parkway, Aurora, Colorado 80016 to anyone shall continue until further order of this Court. Neither party has requested or addressed the issue of a Bond in this matter. The Court sets Bond at \$1,000.00 which shall be posted by the Plaintiff with the Clerk of the Court within five days.

As the Court stated at the end of the hearing, this matter will be set for trial on an expedited docket. Plaintiff shall set the case for trial, on notice, with the trial to be held within the next 60 days.

ORDERED THIS 2nd DAY OF APRIL 2009.

BY THE COURT

A handwritten signature in black ink, appearing to read 'C. Pratt', written over a horizontal line.

Charles M. Pratt
District Court Judge