UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

GEORGE W. HARDER Case No. 95-10486

Debtor

GEORGE W. HARDER and MICHAEL J. HARDER ACTION NO. 1

Plaintiffs

-vs- AP 96-91030

DESERT BREEZES MASTER ASSOCIATION, DESERT BREEZES CASAS HOMEOWNERS ASSOCIATION, GIBRALTAR SAVINGS BANK, NATIONAL MORTGAGE COMPANY, STATE STREET BANK & TRUST COMPANY, BOATMEN'S NATIONAL MORTGAGE, INC., CARLOS E. SOSA AND DAVID M. PETERS

Defendants

GEORGE W. HARDER and MICHAEL J. HARDER ACTION NO. 2

Plaintiffs

-vs-

DESERT BREEZES MASTER ASSOCIATION, DESERT BREEZES CASAS HOMEOWNERS ASSOCIATION, NATIONAL MORTGAGE COMPANY, STATE STREET BANK & TRUST, CARLOS E. SOSA, DAVID M. PETERS, WILLIAM R. FENNELL and JUDITH MANDEL

Defendants

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BACKGROUND

The long and convoluted procedural posture of this case need not be recited here. (I am quite certain that I could not recite it if I had to.) It suffices to say that this matter was before the Bankruptcy Court of the Northern District of New York by virtue of a "special" order of reference under 28 U.S.C. § 157(a), *not* the "general" order of reference under that statute.

That special order seemed to contemplate a report to the District Court, but when this writer first encountered this dispute when sitting by designation as a visiting judge in August of 1996, the parties informed me that their proposed stipulation for a simplification of their respective disputes would place the matter squarely before me for decision.

That stipulation was among all parties other than the parties that are banks, but the banks understood that the Court would move ahead with the simplified dispute before further consideration of their demands to be dismissed out of this litigation.

Under the stipulation placed on the record in open Court before me in Albany, all of the various claims among the non-bank parties would be abandoned and merged into a single question -- Was the non-judicial foreclosure sale by which the
Desert Breezes Homeowners Association (the "Association") acquired title to the Palm Desert condominium unit previously owned by Debtor George Harder and his son Michael Harder, regularly and properly conducted under section 1367 and sections 2924 et seq. of the California Civil Code?[1]

Further, it was stipulated that that question would be submitted to this Court for decision on papers only, if possible, and if not possible, then any evidentiary hearing would take place before me at Buffalo, N.Y., my regular duty station.

The Court deems the matter to be the functional equivalent of a Complaint for Declaratory Judgment, submitted on cross-motions for summary judgment.

Numerous documents, affidavits, etc. have been submitted, both at the parties' pleasure and upon my demand for specific information.

The Court recognizes that it has placed some restrictions on what otherwise might

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[1]Section 1367 is the provision of the California Civil Code (relating to "common interest developments") which allows a lien on property resulting from delinquent assessment fees, to be enforced in a "sale by the trustee," i.e., a non-judicial foreclosure sale. Such sale must be conducted in accordance with various notice provisions of California Civil Code § 2924, et seq.

have been opportunities to demand further argument, further discovery, or to demand evidentiary hearing. But the Court believes that this unusual and complex matter should be resolved on the basis of undisputed facts and irrefutable arguments, if appropriate and possible, in the interest of all parties and of judicial economy. What this means is that there are many other issues, arguments and disputed facts presented that this decision will ignore, some of which might conceivably support the outcome, but none of which could command a different outcome, in my view. In other words, I have considered all other arguments and potential arguments and disputes, and have concluded that even if these were presumed resolved against George and Michael Harder, the Harders would nonetheless prevail.

DISCUSSION

A. As to Michael Harder.

As against Michael Harder, the non-judicial foreclosure proceeding was fatally flawed in three separate ways:

1. *Failure to send the statutory notice of method of foreclosure.*[2] This alone would be fatal to a non-judicial foreclosure. (Perhaps not to a judicial foreclosure.) The Association sent

[2] *See* Cal. Civ. Code § 1365(d) (West 1996). This section requires the Association to send all its members "[a] statement describing the association's policies and practices in enforcing lien rights or other legal remedies for default in payment of its assessments against its members . . . ." *Id.*

only a notice of how and when to pay the annual assessment. This defect was further compounded when the Association first began a judicial foreclosure against the Harders, but later dropped that (at the point of a money judgment against George only), and started over with a non-judicial proceeding. Without the clear, prior announcement required by the statute,[3] even a lawyer-owner could be lulled into believing that a judicial foreclosure proceeding that ended only in a money judgment would be followed by another judicial proceeding if divestiture of title was really the object. In any event, non-judicial divestiture of title because of non-payment of a few hundred dollars in association assessment fees is too drastic to approve without compliance with the statutes that afford adequate prior notice of that process to homeowners each time they are assessed, as explained later.

2. *Failure to attempt service on Michael Harder at the Manhattan address.*[4] The Association tried to serve Michael Harder at his Manhattan address in the judicial foreclosure proceeding, but made no such effort in the non-judicial proceeding. The Association's argument that its knowledge of the Manhattan address was relevant only to the prior judicial proceeding and not to the non-judicial foreclosure proceeding is silly, to put it bluntly. The statute requires

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[3] I view the quoted statute as requiring, at least, that each association elect and announce whether it will use a judicial or non-judicial procedure, and the point in time at which it will resort to same.

[4] I am profoundly troubled by an inaccurate oath filed by a California attorney here. He attested that his firm had no record of the Manhattan address. When I demanded that the firm check with prior counsel, a record of the Manhattan address and of an effort by prior counsel suddenly turned up in the present California counsel's files. This matter might be worthy of the attention of disciplinary authorities.

service at the "last known address."[5] It matters not how that address became "known." It was "known" to the Association's agent (its attorney) in connection with the judicial proceeding, and is imputed to the Association. If the Association had no knowledge of a subsequent address, then the Manhattan address was the "last known address" for purposes of the non-judicial proceeding.

The argument that the doorman's statement to a process server at the Manhattan address that Michael Harder did not live there anymore, somehow relieved the Association of the need to serve him there, is also silly. There can be no *raison d'etre* for a provision for service at the "last known address" except to permit the creditor to serve at the place from which the obligor has already departed, so long as the creditor knows of no forwarding address. Reason to believe that the obligor did live there but does not anymore is precisely why you should serve him there. They never did so.[6]

3. *Naming the Association's own attorney to be the foreclosure Trustee.* In a non-judicial foreclosure proceeding in California, the creditor is to "authorize" a foreclosure Trustee.[7] Here, the named Trustee was one of the Association's own lawyers, representing it in collecting the very debt at issue. Even assuming (as the Association argues) that the non-judicial

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[5] *See* Cal. Civ. Code §§ 2924b(b)(1) (notice of default) and 2924f(c)(3) (special notice of sale).

[6] The Association confuses "service" with "assuring receipt of process." The duty is to "serve." The law does not require assuring that process is received.

[7] In order for a § 1367 lien to be enforced by non-judicial foreclosure, the association must file a notice with the county recorder which states among other things, "the name and address of the trustee authorized by the Association to enforce the lien by sale." Cal. Civ. Code § 1367(b).

foreclosure Trustee is not a fiduciary and is only a "disinterested common agent," common *sense* dictates that the attorney for the creditor cannot serve as such. The Association argues that although nothing permits naming its own lawyers, nothing prevents it. The Court can accept that there probably is no harm in that practice in the "thousands" of instances in which it never had to reach the point of a sale because the monies were collected. But common sense and professional ethics would dictate that in the "handful" of cases (out of thousands) that will actually move on to divestiture of title, the process should be begun over again with a truly "disinterested common agent" such as a title company. The creditor's lawyer cannot serve as such. She cannot be both disinterested and represent one side at the same time, particularly if she is going to continue to represent one side thereafter (as was the case here).[8]

B. As to George Harder

The Court must now address the validity of the proceeding as against George Harder. Indeed, it is only by virtue of his claims to the property that subject matter jurisdiction exists here under 28 U.S.C. § 1334.

George Harder was properly served with process in the non-judicial foreclosure proceeding; or, at least, he admits actual knowledge of that proceeding, and must be viewed as

[8]Consider, for example, Ethical Consideration 5-20 of the New York Code of Professional Responsibility, which permits a lawyer to act as an impartial arbitrator or mediator in matters involving clients only if there is disclosure, and thereafter the representation must cease.

having had an opportunity to defend it. Therefore, no defect of the second type referred to above occurred as to him. He had an opportunity to participate (though not to "litigate," since it was a non-judicial process) in that proceeding.

Even so, if I were writing on a clean slate regarding a New York statute to the same effect, I would not hesitate to rule that the foreclosure failed as to George because it failed as to Michael. I would rule that every statute that may operate against a homeowner and in favor of a homeowners' association must be strictly adhered to in a non-judicial foreclosure sale like that at Bar.

But because I have no knowledge of what problems led the California legislature to give a homeowners' association such extreme powers, I must be prepared to accept the possibility that it is homeowners' associations rather than owners of vacation condos, that are thought by the California legislature to be deserving of strict protection.[9]

I will, therefore, confine myself to a more prosaic and more generally-honored analysis of such statutes.

In my view, defects as to Michael Harder are of no consequence, because defects

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[9]The Debtor cites *Miller v. Cote*, 127 Cal. App. 3d 888 (Cal. Ct. App. 1982), and *System Inv. Corp. v. Union Bank*, 21 Cal. App. 3d 137 (Cal. Ct. App. 1971), to the effect that § 2924 of the Civil Code requires "strict compliance." But, again, those did not involve condominium associations, and non-judicial foreclosure based on delinquent assessment fees. The present Court finds it so astounding that such associations in California need not involve a court in stripping an owner of title, that the present Court will not leap to any conclusions about the applicability of "strict compliance" rulings to this context.

one and three infected the process as to George Harder (at least in combination, if not separately) as well, despite his actual knowledge of the pendency of the non-judicial foreclosure proceeding.

The notice provisions found in California Civil Code section 1365(d) do not seem to be mere suggestions or requests, but are requirements; they seem intended to deter as well as to forewarn. If actual knowledge of the non-judicial foreclosure were to suffice, then what is the purpose of such statutes? They obviously tie into provisions like California Civil Code § 8320 that require maintenance of a suitable mailing list. Had these two statutes been properly observed, all owners who read the annual notice would know whether they could expect judicial foreclosure or non-judicial foreclosure in the event of non-payment, and therefore could consider the extent that an impartial judicial officer will or will not supervise the proceeding. And they would know the importance of giving the homeowners' association a current mailing address at all times, if they want to receive actual notice of a perceived failure to pay assessments.

Let us consider the role of such a forewarning. Just as property owners may make business choices as to whether and when to let property taxes go unpaid up to a certain point (this was a common practice when the interest rate on unpaid property taxes was so low that it was considered to be "the cheapest loan in town"), a homeowner who has advance knowledge of the method and process selected by the association to enforce its liens may make business choices (or life choices, in the case of cash-starved owners) accordingly. All of the transaction costs that must be added to the assessment lien because of collection costs become more predictable, and (most importantly) there is a way to gauge the risk-point in the process.

Conversely, but obviously, an association's claim that assessments were unpaid

can be an error. It happens. And the statute assists the owner who has duly paid the assessments, but who is in a fight with the association as to who in fact has erred, in knowing the point at which the disagreement could ripen into a genuine risk of divestiture.

The latter illustration in particular points up the importance of a good and true list of mailing addresses as required by statute. The possibility that an owner who is fully paid-up could lose title without ever knowing it because the association has not announced its methods of lien enforcement and has no means of maintaining an "official" mailing list, elicits Kafka-esque fears. Yet on the record at Bar the Association seems to think its only duty with respect to maintaining a list of the members' addresses is to publish a phone book for the convenience of the community. Section 8320 certainly has a more profound purpose, clearly related to sections such as § 1365. (And § 1365 itself -- the duty to forewarn -- was enacted as part of the same bill that enacted § 1367 -- the authority of associations to use a non-judicial procedure.)

Neither the notice statute, § 1365(d), nor the mailing list statute, § 8320, was observed by the Association, and that infects the process as to George Harder.[10]

Finally, the court holds that naming one its own lawyers as foreclosure Trustee infected the Association's non-judicial proceeding as against George Harder, for the same reasons it infected it as against Michael Harder.

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[10]George Harder claims that he never knew that there was such a thing as a non-judicial foreclosure for non-payment of assessments. Whether he did or didn't is immaterial, because the statute required an election of one remedy or the other by the Association, in advance. It could not make no election at all, and then use both remedies against the Harders.

CONCLUSION

The proceeding failed as against George and Michael Harder. If some type of recordable judgment to that effect is required, they may so move.

Their counsel shall also confer with the banks' counsel to determine the effect of this holding on the banks' Motion to Dismiss and shall confer with the Chapter 13 Trustee regarding the effect of this holding on the Chapter 13 case; and the Chapter 13 Trustee is requested to advise me of the result of those discussions.

SO ORDERED.

Dated: Buffalo, New York
February 7, 1997

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Michael J. Kaplan, U.S.B.J.