REAL ESTATE

Condominium Foreclosure for Unpaid Common Charges

By Andrew Lieb

In *Plotch v. Citibank*, decided on May 10, 2016, the Court of Appeals clarified issues of lien priority between a consolidated mortgage and a condominium's common charge lien pursuant to RPL §399-z. Specifically, the court addressed whether the exception to a common charge lien's priority for "all sums unpaid on a first mortgage of record," as set forth in RPL §399-z, applies to a consolidated mortgage recorded prior to the recordation of such common charge lien. The court held that a consolidated mortgage constitutes only one first mortgage of record for purposes of lien priority under the Condominium Act. However, the court limited its holding by emphasizing that the consolidated mortgage was recorded prior to the common charge lien, and therefore the court expounded that "[t]he consolidation agreement […] did not interfere with any rights of the condominium board." In such, it is envisioned that a subsequently recorded consolidation agreement to a common charge lien will not be given first lien priority pursuant to RPL §399-z.

The facts before the court concerned a declaratory judgment action by the purchaser of a condominium unit who sought to have a second mortgage lien on the purchased condominium unit extinguished as a result of the condominium's prior RPL §399-aa foreclosure action. The owner argued that a common charge lien has priority over second mortgages, pursuant to RPL §399-z, and therefore the prior common charge lien foreclosure extinguished the second mortgage irrespective of the fact that the second mortgage was previously consolidated with the first mortgage and the same was recorded prior to the common charge lien. The specific issue before the court was whether "two mortgages that were consolidated into a single mortgage lien years before the condominium board filed its common charges lien qualify as the first mortgage of record." The underlying facts were that Citibank had extended two mortgages in subsequent years approximately seven years prior to any common charge lien being recorded, but upon extending the second mortgage Citibank "entered into a consolidation agreement [] whereby the two mortgages were consolidated 'into a single mortgage lien'."

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Under these facts, the Court of Appeals was faced with setting forth the definition of "first mortgage of record" as set forth in RPL §399-z, which is an exception to RPL §291's normal lien priority rules. Before the court were two competing definitions for "first mortgage of record," to wit: "the mortgage recorded earliest in time" and that a "consolidation agreement qualifies." In defining the "first mortgage of record" as enabling a consolidation agreement to qualify, the court emphasized that the dispositive fact in reaching this definition, in the instant case, was the timing of recording. Specifically, the court underlined the word "*prior*" when setting forth when the consolidation agreement was recorded in reference to the common charge lien. Further, the court cited to the Supreme Court, Rockland County, in *Dime Sav. Bank of N.Y. v Levy*, for the rule that "[a] consolidation agreement, however, 'cannot adversely affect, impair or derogate the priorities of any lien which has *intervened* between the respective dates of execution and delivery of the two consolidated mortgages." Here, the court held that a previously recorded consolidated mortgage did not interfere with the rights of the condominium board.

The court then looked to policy to support its holding. The court explained that a contrary "result might adversely affect the ability of a homeowner to refinance." To justify this explanation the court pointed out that a contrary ruling would result in increased costs to refinance because "banks and condominium owners would simply take additional steps to satisfy the original mortgage, take out a new mortgage, and pay the additional fees required to achieve precisely the same result." In fact, the court explained that the holding comports with the purpose of the Condominium Act, which is to stimulate private enterprise's motivation to build housing units because "it allows condominium unit owners greater flexibility in obtaining a larger mortgage or refinancing." In all, the court's decision boils down to two concepts, to wit: the timing of the consolidation evidenced that it did not interfere with the rights of any other liens (i.e., it was not done in bad faith); and public policy is better served by encouraging consolidations because it results in better access to financing, which spurs the private real estate market.

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FAMILY

Diff'rent Strokes for Diff'rent Folks — Differing Standards for Child Support Requests

By Vesselin Mitev

"Substantial change in circumstances" is a phrase thrown around so often in matrimonial/family law circles as it relates to child support, that it sometimes verily appears it has subsumed the long-standing and applicable case law that appends itself to a petition for child support. Like a code word activating a sleeper agent (the support magistrate, or the judge, or opposing counsel, or opposing counsel's brand new associate, who was just this day sent into Family Court to boldly demand child support based on a "substantial change in circumstances"), the phrase has a superficial veneer of authority but by itself is utterly meaningless.

Most child support orders emanate from agreements entered into between the parties and then signed off in some fashion by the courts. For those amounts (presumably the product of arms-length bargaining, negotiating and planning for the future as between the parties), the standard for modification is the so called "unanticipated and unreasonable change in circumstances," as laid out by the Court of Appeals in 1977 in *Boden v Boden*, 42 NY2d 210, 213 [1977]. Cogently reiterating the logical principle that parties who settle their differences are in the best position to (have known) what's best, the court held that:

"It is to be assumed that the parties anticipated the future needs of the child and adequately provided for them. It is also to be presumed that in the negotiation of the terms of the agreement the parties arrived at what they felt was a fair and equitable division of the financial burden to be assumed in the rearing of the child. Included in these obligations is the financial responsibility of providing the child with adequate and reasonable educational opportunities. Absent a showing of an unanticipated and unreasonable change in circumstances, the support provisions of the agreement should not be disturbed."

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Five years later, in *Brescia v. Fitts*, 6 NY2d 132, 139 [1982] the court clarified that where a child's needs were not being met, the higher *Boden* standard did not necessarily apply, clarifying that the *Boden* standard was meant to "apply only when the dispute is directed solely to readjusting the respective obligations of the parents to support their child" and not when it was alleged that the children's needs were not being met. For example, in a support petition seeking contribution to college costs, the *Boden* standard would apply, since that expense would necessarily impact the parties' respective obligations; and while crucial, a college education is not considered a need of a child.

Taken together, in any event, the two cases explicitly stand for the proposition that where the parties settled their child support obligations via an agreement, the standard for modification is "unanticipated and unreasonable change in circumstances, resulting in a concomitant need" and *not* a boilerplate allegation of a substantial change in circumstances, which is the standard used when an order was arrived at by a court (in other words, the lesser standard applies when the parties left it up to a third party (the court) to resolve their dispute for them.

Post-October 2010, however, the law was again amended to add two other ways to modify a child support order (DRL 236 B (9)(b)and FCA 451), where

(A) three years have passed since the order was entered, last modified or adjusted; or

(B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; with the law explicitly requiring diligent efforts to secure commensurate employment for petitions claiming reduced income.

Conversely, the law also allows the parties to specifically opt out of the two additional modification clauses in a "validly executed agreement or stipulation entered into between the parties," which is a maneuver that should be agreed to on a case-by-case basis, depending on whom one represents.

For these self-evident reasons, when faced with a child support petition, it would behoove one to carefully scrutinize the allegations raised therein and to check them against the applicable governing document. For a pre-October 2010 agreement, and a petition filed thereupon, the higher standard of unanticipated *and* unreasonable change in circumstances should apply; one can ably argue, therefore, that nearly everything should have been anticipated by the parties when they came to their initial agreement.

Moreover, the "concomitant need" of the child is a separate element that must be established (either via the petition, but certainly at a hearing). Failure to establish same should properly result in a dismissal, even if the movant overcomes the initial threshold of demonstrating that something unanticipated and unreasonable occurred.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.