UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARC J. COHEN — CASE NO. 01-65784

Debtor — Chapter 7

APPEARANCES:

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Hon. Stephen D. Gerling, Chief .S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed on behalf of Genesee Court Householders Association, Inc. ("Association ") by way of an Order to Show Cause, dated June 24, 2002. The Association seeks relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). On July 15, 2002, an affidavit was filed by Marc Cohen ("Debtor") opposing the motion.

The Court heard oral argument on the motion on July 25, 2002, in Utica, New York. Counsel for the Association represented to the Court that an Amended Notice of Unpaid Common Charges ("Amended Notice") had been filed with the office of the Oneida County Clerk, thereby perfecting its lien. The motion was adjourned to August 29, 2002, to allow the

parties to submit memoranda of law on the limited issue of whether the Association, by filing the Amended Notice, was entitled to relief from the automatic stay. The matter was submitted for decision on August 30, 2002.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a),157(b)(1), (b)(2)(G) and (O).

FACTS

The Debtor filed a voluntary petition pursuant to chapter 7 of the Code on September 25, 2001. In his schedules, the Debtor lists an ownership interest in a condominium unit located at 10 Genesee Court, Utica, New York *See* Schedule A, attached to the Debtor's petition. The only creditor listed in his schedules is the Association. *See* Schedule F. He lists an unsecured claim of $1,750 pursuant to a judgment issued by the Utica City Court on February 4, 2000, for damage to a door in 1999.[1] He also lists a judgment issued on September 11, 2000, in the amount of $105, which he identifies as an "assessment for painting." Finally, he lists a claim of $6,400 for "1999-2001 assessments [for] parking fees, water, Niagara Mohawk, attorney's fees, damage."

At the evidentiary hearing held on December 3, 2001, in connection with a motion filed

[1] In his Statement of Financial Affairs, he indicates a judgment date of February 4, 2001.

by the Debtor pursuant to Code § 362(h) motion, the Debtor testified that he had lived in the Condominium Unit for approximately seven years and that approximately three years ago he had noted that certain members of the Board of Directors/Managers ("Board") were not paying what he considered to be their fair share of the parking charges. As a result, he notified the Board that he was withholding the monthly parking assessment from his payment and sent in the balance of the amount due. He testified that in approximately December 2000 the Board refused to accept reduced payments from him and informed him that he was no longer entitled to maintenance services. On September 28, 2001, the Association arranged to have the water turned off in the Debtor's condominium unit.

In its Memorandum-Decision, Findings of Fact, Conclusions of Law and Order, dated May 10, 2002, the Court found that the Association had violated the automatic stay pursuant to Code § 362(h) and awarded damages to the Debtor. *See Genesee Court Householders Association, Inc. V. Cohen (In re Cohen)*, Case No. 01-65784, Adv. Pro. 01-08197 (Bankr. N.D.N.Y. May 10, 2002) ("May 2002 Decision"). The Court also denied a motion by the Association seeking relief from the automatic stay because it had not filed a notice of lien pursuant to § 339-aa of New York Real Property Law ("NYRPL"), thereby perfecting its lien provided for in NYRPL § 339-z. The Court indicated, however, that the Association was not precluded by the automatic stay from filing "a verified notice of lien" to perfect its lien and once it had complied with the requirements of NYRPL §339-aa, it would be entitled to renew its motion seeking relief from the automatic stay. *See* May 2002 Decision at 17.

On June 12, 2002, the Association filed its Notice of Unpaid Common Charges ("Original Notice") in the office of the Oneida County Clerk in the amount of $14,619.87, and renewed its

motion for relief from the stay. The Debtor filed opposition to the Association's motion on the grounds that the Original Notice did not comply with the statutory requirements of NYRPL § 339-z. The Debtor contends that not only was it not verified, but that it also identified monies which the Debtor contended did not represent "common charges" as defined in NYRPL § 339-e. On July 22, 2002, three days prior to the argument of the motion, the Association filed an Amended Notice of Unpaid Common Charges in the amount of $12,037.47("Amended Notice").[2] The Amended Notice is signed by Roy R. Bouse as Treasurer of the Association, stating that "contents of unpaid common charges . . . are true to my knowledge . . ."

DISCUSSION

The issue before the Court is whether the Association was entitled to amend its Original Notice, filed on June 12, 2002, which did not include a verification as required by the statute, in order to perfect its lien. The Debtor takes the position that because the Original Notice lacked verification, it was a nullity. The Debtor contends that there is no statutory authority that allows the Association to file its Amended Notice. In support of his position, the Debtor directs the Court to three cases, *Schenectady Contracting Co. v. Schenectady Railway Co.*, 106 A.D. 336 (N.Y. App. Div. 1905), *Hurd Bros. v. The H.R. Day Construction Co.*, 146 Misc. 103 (N.Y. Sup. Ct. 1932), and *Fries v. Bray,* 279 A.D. 8 (N.Y. App. Div. 1951). All three cases involved

[2] The Amended Notice does not identify the address of the property as required by NYRPL § 339-aa. However, as there is not assertion by the Debtor that the form of the Amended Notice is ineffective in this regard, the Court need not address it further in the context of this Decision.

mechanics' liens.

In *Schenectady Contracting* the notice of lien was merely acknowledged, rather than verified. The court found that the notice of lien was insufficient to create a lien but allowed the plaintiff to seek recovery from the owner of the property and the contractor under a breach of contract theory. *See Schenectady Contracting*, 106 A.D. at 338.

In *Hurd Bros.* the court was asked to determine the validity of various mechanics' liens and to provide for distribution of funds which totaled less than the amount of liens which had been filed. One such entity was The Standard Oil Company, whose claim was disallowed because the notice of lien was not verified as required by the statute. *See Hurd Bros.*, 146 Misc. at 111.

In *Fries* the lower court had allowed the subcontractor to amend its notice of mechanic's lien *nunc pro tunc* following its failure to sign the affidavit of verification. The appellate court concluded that "the lienor's failure to sign the verification constituted a defect of substance not subject to amendment" and reversed the lower court. *Fries*, 279 A.D. at 11. The dissent asserted that "such defect may be cured by amendment nunc pro tunc on proper application, where no prejudice ensues to a lienor, mortgagee or purchaser in good faith." *Id.* at 11-12.

At the outset, the Court notes that there is a distinction to be made between a mechanic's lien and a condominium lien. *See Board of Managers of the Mews at North Hills Condominium v. Farajzadeh*, 189 Misc. 2d 38 (N.Y. App. Div. 2001).

> A mechanic's lien is a statutory lien on buildings and other improvements on realty, and on the realty itself, in favor of contractors, materialmen, and other classes of workers, to secure to them priority or preference in the payment of compensation for their work or material (citations omitted). A condominium lien, on the other hand, enforces the contractual obligation of a

> condominium unit owner to pay common charges. Such a contractual obligation has nothing to do with contractors, materialmen and other classes of compensation for work or material.

Id.

In the case of a mechanic's lien, the filing of notice of lien is crucial to the priority scheme among other subcontractors similarly situated, particularly where the trust monies created by statute are insufficient to satisfy all their claims. The state legislature, however, has seen fit in enacting NYRPL § 339-z, applicable to a condominium or common charge lien, to derogate the well-established legal concept of "prior in time, prior in right," except as it applies to a first mortgage recorded prior to a recorded common charge lien and to liens for municipal/school taxes. *See Greenpoint Bank v. El-Basary*, 184 Misc. 2d 888, 891 (N.Y. Sup. Ct. 2000). Allowing the Association to amend its Original Notice to cure the lack of verification will in no way prejudice any mortgagee, lienor or purchaser in good faith under the circumstances herein presented. This is particularly true given the fact that the Association is not requesting that the Amended Notice be made retroactive to June 12, 2002. Accordingly, the Court must conclude that the Amended Notice is sufficient to allow this Court to address the Association's request for relief from the stay to pursue any rights it might have in state court.

The Association has not indicated under what subsection of Code § 362(d) it is seeking relief. Code § 362(d)(2) requires that the debtor not have any equity in the property and that the property not be necessary for the Debtor's effective reorganization. As this is a chapter 7 case, it is clear that the property is not necessary for the Debtor's reorganization.

With respect to the issue of equity, at the prior trial held in this case on April 15, 2002,[3] the Association offered the testimony of a certified appraiser that the Debtor's condominium unit had a market value of $17,000. Without determining the appropriateness of the amounts identified by the Association in its Amended Notice as common charges, which total $12,037.47,[4] it is clear that the Debtor does have equity in the unit. Therefore, there is no basis for relief pursuant to Code § 362(d)(2).

Alternatively, the issue before the Court is whether the Association has established "cause" pursuant to Code § 362(d)(1) for it to be granted relief from the automatic stay. In this case, the Association alleges that the Debtor has failed to pay the common charges assessed against him. At the evidentiary hearing on December 3, 2002, the Debtor acknowledged that sometime in 1999 he had begun withholding a portion of the monthly assessments. In approximately December 2000 the Association refused to accept the reduced payments, which they had a legal right to do. *See Farajzadeh*, 189 Misc.2d at 40 (noting that "the law is clear that a condominium owner cannot withhold payments of common charges due to maintenance failures or other disputed acts of the condominium board (citations omitted)."). The fact that the Debtor has not paid any common charges in approximately three years leads the Court to conclude that relief should be granted to the Association on a finding of lack of adequate protection. *See In re*

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[3] The Association had filed a complaint seeking a denial of the Debtor's discharge pursuant to Code § 727 or a determination of nondischargeability of its debt pursuant to Code § 523(a)(6). At the close of the proof at the trial, the Court dismissed both causes of action, finding that the Association had failed to meet its burden of proof.

[4] Although the Debtor requests that this Court examine whether the various amounts are "common charges" as defined in NYRPL § 339-e, this Court concludes that the issue is more appropriately determined in state court.

Eatman, 182 B.R. 386, 391 (Bankr. S.D.N.Y. 1995). This comports with the intent of the state legislature in "'ensuring the continued viability of the entire condominium project and protecting those who have invested substantial sums of their life savings from unit owners who have failed to pay their common charges.'" May 2002 Decision at 17, quoting *Washington Federal Savings and Loan Association v. Schneider*, 95 Misc. 2d 924, 929 (N.Y. Sup. Ct. 1978) (emphasis added).

Based on the foregoing, it is hereby

ORDERED that the Association was entitled to amend its Original Notice, filed in the office of the Oneida County Clerk, and it is further

ORDERED that the Association's motion seeking relief from the automatic stay pursuant to Code § 362(d)(1) is granted.

Dated at Utica, New York

this day of September 2002

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge