| **BACM 2005-6 Carle Place Off., LLC v HLP Old Country TIC LLC** |
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| 2012 NY Slip Op 33710(U) |
| August 7, 2012 |
| Sup Ct, Nassau County |
| Docket Number: 600710-12 |
| Judge: Timothy S. Driscoll |
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BACM 2005-6 CARLE PLACE OFFICE, LLC,

Plaintiff,

-against-

HLP OLD COUNTRY TIC LLC, CLK/HP ONE OLD COUNTRY ROAD LLC, THE PEOPLE OF THE STATE OF NEW YORK, THE COUNTY OF NASSAU, NEW YORK, THE TOWN OF NORTH HEMPSTEAD, NEW YORK, JOHN DOES NOS. 1-100, JOHN DOE CORPORATION NOS. 1-100 and JOHN DOE COMPANY NOS. 1-1--,

Defendants.

The names of the "John Doe" Defendants Being Fictitious and Unknown to Plaintiff, the Persons and Firms Intended Being Those Who may be in Possession of, or May have Possessory, Lien or Other Interests in, the Premises Herein Described.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 600710-12
Motion Seq. No: 2
Submission Date: 6/15/12

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Affidavit in Support and Exhibits.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Supplemental Affidavit in Further Support and Exhibits.....x
Memorandum of Law in Further Support.....x

This matter is before the Court for decision on the motion filed by Plaintiff BACM 2005-6 Carle Place Office, LLC ("Plaintiff") on April 24, 2012 and submitted on June 15, 2012.[1] For the reasons set forth below, the Court grants the motion and directs Plaintiff to submit an order on ten (10) days notice.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order appointing a receiver for the Mortgaged Premises.

Defendants HLP Old Country TIC LLC and CLK/HP One Old Country Road LLC oppose Plaintiff's motion.

B. The Parties' History

In support of Plaintiff's motion, Richard Le, an Asset Manager at LNR Partners, LLC, the non-member manager of Plaintiff, affirms that this is an action to foreclose a Mortgage, Assignment of Leases and Rents, and Security Agreement and Spreader, Consolidation, Modification and Restatement Agreement dated as of June 3, 2005 ("Consolidated Mortgage") now held by Plaintiff on improved real property identified as Section 09, Block 670, Lot 0056 on the Tax Map of Nassau County, known as and located at 1 Old Country Road, Carle Place, New York, and appurtenances thereto, as set forth in full in the Consolidated Mortgage ("Mortgaged Premises").

The Verified Complaint (Ex. E to Le Aff. in Supp.) alleges as follows:

Plaintiff is the lawful holder of the Consolidated Mortgage. Defendants HLP Old Country TIC LLC and CLK/HP One Old Country Road LLC , referred to collectively as the "Borrower," are the owners of record of the Mortgaged Premises. Defendants People of the State of New York ("State"), County of Nassau, New York ("County") and Town of North Hempstead, New York ("Town"), *inter alia*, assess and collect taxes on real property situated in the State, County and Town. The "John Doe" Defendants constitute persons and/or corporations or firms that may be in possession of, or have other interests in, the Mortgaged Premises.

On or about June 2, 2005, Treeline 1 OCR LLC ("Treeline") and Bank of America, N.A. ("BOA") (together with its successors and assigns, "Lender") entered into a loan agreement

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[1] This action was initially filed in the Supreme Court of New York County and was subsequently transferred to the Supreme Court of Nassau County.

dated June 2, 2005 ("Loan Agreement") (Ex. A to Compl.) pursuant to which BOA made a loan to Treeline in the principal amount of $53,280,000, evidenced by the Consolidated, Amended and Restated Promissory Note ("Consolidated Note") (*id.* at Ex. B) and secured by the Consolidated Mortgage (*id.* at Ex. C). The Consolidated Mortgage was recorded in the Nassau County Clerk's Office ("Clerk's Office) and the mortgage recording tax was paid.

On or about June 2, 2005, Treeline, for the purpose of evidencing the payment to Lender of the sum of $53,280,000 plus interest, executed and delivered to Lender the Consolidated Note pursuant to which Treeline was bound and promised to pay to Lender same sum, plus interest at the rate provided in the Consolidated Note. As collateral security for the payment of said indebtedness, on or about June 3, 2005, Treeline executed, acknowledged and delivered the Consolidated Mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for BOA, pursuant to which Treeline mortgaged to BOA the Mortgaged Premises.

On or about May 8, 2008, Treeline transferred the Mortgaged Premises to Borrower by a deed (Ex. D to Compl.) that was recorded in the Clerk's Office. In connection with this transfer, and as provided in a Loan Assumption and Substitution Agreement dated May 8, 2008 ("Assumption Agreement") (*id.* at Ex. E), Borrower assumed the Debt as defined in the Loan Agreement and all other obligations of Treeline as set forth in the related Loan Documents, including the Consolidated Note and Consolidated Mortgage. The Assumption Agreement was recorded in the Clerk's Office.

On or about April 4, 2011, by assignment recorded in the Clerk's Office on May 3, 2011 (Ex. F to Compl.), MERS assigned the Consolidated Mortgage to Plaintiff. The Consolidated Note, Consolidated Mortgage and Loan Agreement set forth Plaintiff's remedies upon Borrower's failure to pay any portion of the sums due to Lender, which include but are not limited to Lender's right to 1) declare to be immediately due and payable the entire unpaid principal sum, interest and all other sums due under the Consolidated Note and Consolidated Mortgage; and 2) apply for the appointment of a receiver for the Mortgaged Premises, without notice and without regard for the adequacy of the security.

Borrower defaulted under the Consolidated Note and Consolidated Mortgage by failing to make the monthly debt service payments in accordance with the Consolidated Note and other Loan Documents, and thereafter failing to make any additional monthly payments due. By letter

dated November 16, 2010 ("Notice of Default") (Ex. G to Compl.), Lender notified Borrower of its failure to make required payments under the Consolidated Note and Consolidated Mortgage, and declared to be immediately due and payable the entire unpaid principal sum due under the Consolidated Note and Consolidated Mortgage, together with accrued and unpaid interest, late charges, costs and expenses including attorney's fees and all other indebtedness due under the Loan Documents. There is now due and payable to Plaintiff, under the Consolidated Note and Consolidated Mortgage, the principal sum of $53,280,000, together with all accrued and unpaid contract and default interest thereon, real estate tax escrows, late charges, costs and expenses including attorney's fees, and all other indebtedness due under the Consolidated Note and Consolidated Mortgage. Plaintiff seeks relief including a judgment of foreclosure and appointment of a receiver of the Mortgaged Premises during the pendency of this action.

In support of Plaintiff's motion, Le affirms the truth of the allegations in the Complaint regarding the Consolidated Note and Mortgage and other Loan Documents, and Borrower's default thereunder. Le affirms, specifically, that Borrower failed to make the monthly debt service installment payment due on or about October 1, 2010, and failed to make any additional monthly payments due after the initial default.

Le cites relevant provisions of Section 8.1 of the Consolidated Mortgage, titled "Remedies Upon Default," which provide as follows:

> Upon the occurrence and during the continuance of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender:
>
> (b) institute proceedings, judicial or otherwise, for the complete foreclosure of this Security Instrument under any applicable provision of law, in which case the Property or any interest therein may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;
>
> (g) apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, Borrower Principal or any other Person liable for the payment of the Debt;

Le affirms that the Mortgaged Premises consists of one office building and ancillary property. Based on the rent roll provided by Borrower, the annual gross revenue from the Mortgaged Premises is approximately $7,500,000. Le submits that, unless Plaintiff obtains the immediate appointment of a receiver, all of the rents, issues and profits of the Mortgaged Premises will continue to be diverted from the payment of the amounts due to Plaintiff. [2]

In opposition, David Glaser ("Glaser") affirms that he is an authorized signatory of Borrower and has knowledge of the financial and operational needs of the Premises. Glaser affirms that the tenants at the Mortgaged Premises "expect a premier rental experience" (Glaser Aff. in Opp. at ¶ 3) and expresses his belief that the appointment of a receiver would adversely affect Borrower's ability to attract new tenants, potentially alienate existing tenants and ultimately reduce the value of the Mortgaged Premises. Moreover, in light of the expense attendant to the appointment of a receiver, Borrower would have fewer resources to devote to the maintenance and operation of the Mortgaged Premises, further impairing its value.

Glaser also submits that the Court should decline to appoint a receiver in light of the fact that Plaintiff already has control over the rents generated from the Premises by reason of a lockbox agreement ("Lockbox Agreement") set forth in the original Loan Agreement that gives Plaintiff control over the rent generated from the Premises and the payment of operating expenses regarding the Premises. Glaser provides copies of the Lockbox Agreement (Article 10 to the Loan Agreement) and subsequent Three Party Agreement Relating to Lockbox Services (Exs. 1 and 2 to Glaser Aff. in Opp.).

Glaser affirms that, pursuant to the Lockbox Agreement and at Plaintiff's direction, the tenants of the Premises have been remitting all rental payments directly to the Clearing Bank, as defined in the Lockbox Agreement, which transfers the collected rents to an account owned and controlled by Plaintiff. In addition, at Plaintiff's direction, Defendants submit to Plaintiff all third party vendor invoices relating to operating expenses at the Premises for Plaintiff's approval or disapproval. If Plaintiff approves an invoice for payment, Plaintiff remits to the Borrower the precise amount of funds necessary for payment of the approved invoice and Plaintiff can track

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[2] Le affirms that on December 1, 2011, Plaintiff filed an *ex parte* application for the appointment of a receiver for the Mortgaged Premises and by Order dated December 12, 2011, the Court denied the application and granted Plaintiff leave to re-file the application with notice to the Borrower. That application was made in New York County, prior to the transfer of this action to Nassau County.

all payments to ensure that all approved invoices are paid. Thus, Glaser submits, Borrower does not have access to, or control over, the rents generated from the Premises, and no excess rents are paid or turned over to Borrower at any time. Glaser contends that this Lockbox Agreement obviates the need for the receiver requested by Plaintiff.

In reply, Le submits that "[t]he risks of receivership contemplated by the Borrower in its opposition papers are the same risks entailed in allowing the financially-strapped Borrower and its related companies to continue managing the Mortgaged Premises" (Le Supp. Aff. at ¶ 2). Le affirms that Borrower's financial problems, and its connection to the Mortgaged Premises, are well known. Le provides articles from four (4) publications, dated in May, July and August of 2011, that discuss the foreclosure action at the Premises and the Borrower's connection to the Premises (*id.* at Ex. A). In addition, Borrower has allowed the parking structure at the Premises to fall into disrepair, prompting February 13, 2012 and March 13, 2012 letters from tenant 1-800-Flowers.com to Defendants advising Defendants of the potential physical injury to the tenant's employees from concrete falling from the structure (*id.* at Exs. B and C). In light of the foregoing, Le contends, enforcement of Lender's contractual right to the appointment of a receiver cannot impair the public's perception of the Mortgaged Premises and may, in fact, improve that perception.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its entitlement to an Order appointing a Receiver in light of the applicable provision in the Consolidated Mortgage. Plaintiff has cited, and provided the Court with a copy of, a 2011 decision by Justice Shirley W. Kornreich of New York County Supreme Court titled *JPM CC 2006-LDP9 Motor Parkway, LLC et al. v. CLK HP 330-350 Motor Parkway, LLC et al.*, Index Number 651014-11 ("*Motor Parkway*") (Ex. 1 to Mattioli Aff. in Supp.) in which Justice Kornreich granted a motion for appointment of a receiver in a commercial foreclosure action. Plaintiff provides a copy of the mortgage agreement at issue in the *Motor Parkway* matter (*id.* at Ex. 2) which contains language regarding the appointment of a receiver that is similar to the language in the Consolidation Agreement. In granting the motion in *Motor Parkway*, Justice Kornreich held as follows:

> Upon the foregoing papers, it is ordered that this motion is granted for the appointment of a receiver for the mortgaged premises pursuant to the governing loan documents. Real Property Law [§] 254(10) specifically condones such appointment. Given the fact that the sophisticated business entities involved in this transaction agreed to the loan documents and, specifically, to the appointment of a receiver without notice and without regard to adequacy of any security of the debt, and given the fact that no circumstances exist to undermine this agreed-to term, the court will not invoke its discretion and override the contract. *See GECMC 2007C1 Ditmars Lodging, LLC v. Mohola*, LLC, 84 A.D.3d 1311, 1312 (2d Dept. 2011); *Maspeth Fed. Sav. & Loan Assn. v. McGown*, 77 A.D.3d 890 (2d Dept. 2010). Submit order.

Plaintiff notes that at least one of the principals of the Borrower in the matter *sub judice*, Craig Koenigsberg ("Koenigsberg"), is also a principal of the defendant-borrower in *Motor Parkway* and argues that he should be held to the same standards articulated by Justice Kornreich regarding the business sophistication and accountability of the borrower who agrees to a receivership provision. Plaintiff provides copies of the agreements relevant to the *Motor Parkway* action (Exs. 4 and 5 to Mattioli Aff. in Supp.) which identify Koenigsberg as a principal of the borrower entities in *Motor Parkway* and the matter now before the Court.

Borrower opposes Plaintiff's motion, submitting that Plaintiff has failed to make the evidentiary showing necessary to warrant the appointment of a receiver. Borrower submits that the appointment of a receiver is inappropriate and unnecessary in light of the Lockbox Agreement which ensures that Borrower does not have access to, or control over, the rental payments and that Plaintiff controls those payments. Borrower also argues that the appointment of a receiver would adversely affect Defendants' ability to attract new tenants to the Premises, and might prompt existing tenants to leave the Mortgaged Premises, ultimately impairing Defendants' ability to refinance or sell the Mortgaged Premises to satisfy the obligations to Plaintiff.

RULING OF THE COURT

New York Real Property Law Section 254(10) provides as follows:

> Mortgagee entitled to appointment of receiver. A covenant "that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver," must be construed as meaning that the mortgagee, his heirs, successors or assigns, in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness.

Where a mortgage agreement contains a provision that specifically authorizes the appointment of a receiver upon application by the mortgagee in any action to foreclose the mortgage, the plaintiff, as mortgagee, is entitled to the appointment of a receiver without notice and without regard to the adequacy of the security. *Maspeth Federal Savings and Loan Association v. McGown*, 77 A.D.3d 889 (2d Dept. 2010), citing Real Property Law § 254(10); *Naar v. Litwak & Co.*, 260 A.D.2d 613, 614 (2d Dept. 1999); *Febbraro v. Febbraro*, 70 A.D.2d 584, 585 (2d Dept. 1979).

An action to foreclose a mortgage is an action in equity and a court of equity, in its discretion and under appropriate circumstances, may deny an application for appointment of a receiver pursuant to a provision in the mortgage agreement specifically authorizing such an appointment. *ADHY Advisors LLC v. 530 West 152nd Street LLC*, 82 A.D.3d 619 (1st Dept. 2011), quoting *Jamaica Sav. Bank v. M.S. Inv. Co.*, 274 N.Y. 215, 219 (1937) and citing, *inter alia*, *Maspeth*, 77 A.D.3d at 889-890 and *Clinton Capital Corp. v. One Tiffany Place Developers*, 112 A.D.2d 911, 912 (2d Dept. 1985). In *Naar v. Stein*, 260 A.D.2d 613 (2d Dept. 1999), the Second Department held that it was an improvident exercise of discretion for the trial court to vacate the prior orders of appointment of a receiver upon the record before it which reflected that 1) defendants-respondents clearly defaulted under the terms of the mortgage agreements and were admittedly in arrears on taxes and water and sewer charges; and 2) the mortgage agreements at issue each contained a covenant mandating the appointment of a receiver upon default. *Id.* at 614.

The Court grants Plaintiff's application. Plaintiff has demonstrated its entitlement to the requested relief, pursuant to the applicable provision in the Mortgage and the Court, in its discretion, determines that the requested relief is appropriate. Borrower is in default of its

financial obligations to Plaintiff, and the articles and correspondence provided by Le demonstrate that the problems at the Mortgaged Premises are well-known, and potentially serious to the safety of the tenants. The Court has also considered Justice Kornreich's decision in the *Motor Parkway* case, and her conclusion that a receivership was appropriate in that matter which involved a principal who is also involved in the matter *sub judice*. The Court is mindful of the protection provided by the Lockbox Agreement but nonetheless concludes that, under these circumstances, Plaintiff has demonstrated its right to the requested relief.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Submit order on ten (10) days notice.

Counsel for the parties are reminded of their required appearance before the Court for a Preliminary Conference on September 7, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

August 7, 2012

HON. TIMOTHY S. DRISCOLL

J.S.C.