

**State of N.Y. Mtge. Agency v 936-938 Cliffcrest Hous.  
Dev. Fund Corp.**

2016 NY Slip Op 32575(U)

December 4, 2016

Supreme Court, New York County

Docket Number: 850011/13

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X **Decision and Order**

STATE OF NEW YORK MORTGAGE AGENCY,

Plaintiff,

-against-

Index No. 850011/13

936-938 CLIFFCREST HOUSING DEVELOPMENT  
FUND CORPORATION, THE DEPARTMENT OF  
HOUSING PRESERVATION AND DEVELOPMENT  
OF THE CITY OF NEW YORK, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW  
YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, AND JOHN AND JANE DOES\  
1-10, ABC LLC 1-10, XYZ CORP. 1-10,

Defendants.

-----X

936-938 CLIFFCREST HOUSING DEVELOPMENT  
FUND CORPORATION,

Third-Party Plaintiff

-against-

THE WAVECREST MANAGEMENT TEAM  
LTD., COMMUNITY CAPITAL BANK n/k/a  
CARVER FEDERAL SAVINGS BANK, LEE  
WARSHAVSKY, SHUHAB HOUSING  
DEVELOPMENT FUND CORPORATION,  
JOHN AND JANE DOES 11-20, the identity of  
such persons being unknown to the Third-Party  
Plaintiff, but intended to describe those persons  
who corruptly influenced their employer,  
THE DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT OF  
THE CITY OF NEW YORK to look away from  
their defalcations of the Third-Party Plaintiff's  
funds,

Third-Party Defendants.

-----X

JOAN A. MADDEN, J.

In this foreclosure action, plaintiff moves for an order granting an interim distribution of

funds held by the Receiver of \$12,000 a month. Defendant/third-party plaintiff 936-938 Cliffcrest Housing Development Fund Corporation (“Cliffcrest”) opposes the motion, which is granted for the reasons below.

Cliffcrest is a tenant owned development company and the owner of the property located at 938 St. Nicholas Avenue, New York, New York (“the Building”). Cliffcrest became the owner of the Building through third-party defendant Department of Housing Preservation and Development of the City of New York’s (HPD’s) Third-Party Transfer Program (“TPT”). Pursuant to the TPT, residential properties, on which the City holds tax liens, are transferred, first, to a private not-for-profit entity and, then, to a sponsor which agrees to provide construction or permanent financing, typically in conjunction with partial funding by HPD, in accordance with HPD guidelines.

HPD holds two mortgages on the Building which were originally provided as part of a joint construction loan, originated in 2002, with Fleet National Bank (“Fleet”), to provide construction financing to rehabilitate the Building (hereinafter “the HPD mortgages”).<sup>1</sup> In connection with this financing, on December 19, 2002, HPD and Fleet executed a Construction Loan Participation Agreement (“Participation Agreement”) to fund HPD’s share of the construction.

The rehabilitation of the Building was purportedly completed in September 2006;

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<sup>1</sup>According to HPD, on September 29, 2006, three mortgages originally made and dated December 19, 2002, in the principal amount of \$2,512,103, were consolidated into one mortgage under which Cliffcrest was required to pay interest at a rate of .62% per annum starting on November 1, 2006, in monthly installments through November 1, 2036. Also, on September 29, 2006, two mortgages originally made and dated December 19, 2002 in the principal amount of \$947,500, were consolidated into a second HPD mortgage, which is “a standing loan” with no interest or payments required with the debt to be forgiven barring a default. Cliffcrest paid the interest under the first HPD mortgage until April 2012 but has not made any payments since that time.

however, Cliffcrest alleges in its third-party action that substantial portions of the funds from the loan were not used to rehabilitate the Building. On or about January 27, 2007, title to the Building was transferred to Cliffcrest and the conversion closed. The individual units in the Building were sold to the current unit owners as low-income cooperative apartments at prices below market value. As part of the transfer, Cliffcrest assumed the obligations under all the mortgages on the Building, including the HPD and Fleet mortgages, and the construction loan was converted to a permanent loan.

On September 28, 2006, Cliffcrest executed and delivered to Community Capital Bank n/k/a Carver Federal Savings Bank ("CCB"), a Mortgage Note ("the Note") evidencing a commercial loan made to it in the principal amount of \$1,650,000, plus interest as set forth in the Note. Simultaneously with the execution of the Note, Cliffcrest executed and delivered to CCB a Mortgage, Assignment of Leases and Rents and Security Agreement, which provided partial security for the money due and owing CCB under the Note. That same day, CCB assigned to Peny & Co. (Peny), the original plaintiff in this action, the Note and the Mortgage along with the Leases and Rents (together "the Loan Documents"). There is evidence in the record that Peny paid CCB \$1,650,000 for the assignment of the Loan Documents. The HPD mortgages are subordinate to the Mortgage pursuant to a subordination agreement HPD and CCB entered into on September 29, 2006, under which HPD agreed that the HPD mortgages, shall be subject and subordinate in time and payment and to the liens, terms and covenants in the Loan Documents.

From 2006 until 2012, Cliffcrest made payments to Peny as agreed to under the Note and Mortgage without objection or reservation. However, it is alleged that beginning in March 2012, Cliffcrest ceased making monthly payments of principal and interest due under the Loan Documents, that Cliffcrest failed to make payments for real estate taxes assessed against the Building and failed to provide proof of insurance covering the Building. When Cliffcrest failed

to cure its alleged defaults, Peny commenced this foreclosure action in 2013. Peny also filed an application for the appointment of a temporary receiver. The court granted the application by order dated March 17, 2015, and Daniel R. Milstein, Esq was appointed as the receiver (“Receiver”).<sup>2</sup>

In the third-party action, Cliffcrest alleges, *inter alia*, that certain funds in received in connection with the TPT were not used for the purposes of rehabilitating the Building, and that HPD, the sponsor and related third-party defendants (“the sponsor defendants”) were involved in a scheme to defraud Cliffcrest of the loan proceeds. In its decision and order dated March 30, 2016, the court granted Cliffcrest’s motion to amend its First Amended Answer and Third-party Complaint to the extent of permitting it to assert third-party claims of fraud and conspiracy to defraud against HPD and the sponsor defendants. Significantly, however, the court denied Cliffcrest’s motion to the extent it sought to assert various counterclaims and affirmative defenses against plaintiff. A motion for summary judgment by the plaintiff is currently pending before the court.<sup>3</sup>

In this motion, plaintiff seeks an interim distribution of \$12,000 a month from the Receiver, noting that before the Receiver’s appointment, Cliffcrest had stipulated to pay \$12,000 per month to the Peny. Plaintiff also notes that the Receiver was appointed after Cliffcrest failed to make these agreed upon payments, and that no payments have been made to it since October 2015. It further points out that the Receiver’s report dated October 31, 2015, shows that there is \$92,401.51 in his account representing the net balance of rents collected after property related

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<sup>2</sup>While the application was made *ex parte*, this court required that Peny give notice of the application.

<sup>3</sup>While the court initially granted plaintiff’s motion for summary judgment in connection with the denial of the motion to amend, upon Cliffcrest’s request, the court vacated that part of the order so as to permit Cliffcrest to submit opposition to the summary judgment motion.

expenses. Furthermore, the Receiver's report dated May 23, 2016, submitted while this motion was pending, shows a net balance of \$202,480.76.

In opposition, Cliffcrest argues that the motion is "an improper attempt by Peny who is a party in this action but not a holder of the Mortgage and [State of New York Mortgage Agency], which is not a party to this action but is the holder of the Mortgage, to quietly settle significant issues in the action as to whether Peny had standing to initiate this action, whether the Mortgage ever came due, or whether Peny is entitled to payments at this time." Cliffcrest also argues that it is premature to direct that the distributions be made in light of various factual questions raised in its proposed affirmative defenses and counterclaims as to the validity of the Note and Mortgage.

Cliffcrest's opposition is unavailing. First, insofar as Cliffcrest raises issues of standing, such issues have now been resolved by the court in plaintiff's favor. Specifically, in its decision and order dated March 30, 2016, the court granted Peny's motion to substitute State of New York Mortgage Agency ("SONYMA") as a plaintiff. SONYMA subsequently assigned the Loan Documents and its rights in this action to 936 Coogans Bluff, LLC ("Coogans Bluff"), and when Cliffcrest opposed the substitution, SONYMA made a motion to substitute Coogans Bluff as plaintiff, which the court granted by decision and order dated September 21, 2016.<sup>4</sup>

Notably, in connection with its decision granting the substitution motion, the court rejected the nearly identical argument as to Peny's lack of standing that Cliffcrest raises here, finding that the documentary evidence submitted by Peny established that Peny had standing at the time that it commenced the action, citing Aurora Loan Servs., LLC v Taylor, 25 NY3d 355,

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<sup>4</sup>However, while the court's order granted the relief and amended the caption, the court records do not yet reflect the substitution.

361 (2015) (“[a] plaintiff has standing where it is the holder or assignee of the underlying note at the time the action is commenced”).

Next, Cliffcrest’s argument that the motion is premature is unavailing, particularly in light of Cliffcrest’s previous agreement to pay Penny \$12,000 per month. See Constellation Bank, N.A. v. Binghamton Plaza, Inc., 236 AD2d 698 (3d Dept 1997)(trial court did not abuse its discretion in allowing Receiver to make interest payments to the mortgagee where mortgagor had not objected to the payments). Moreover, while Cliffcrest alleges in its third-party action that substantial amounts of the loan proceeds were not used for the purpose of rehabilitating the Building, as indicated above, in its March 30, 2016 order, the court denied Cliffcrest’s motion to amend to include various affirmative defenses and counterclaims against the plaintiff.

Furthermore, the pending motion for summary judgment does not raise any credible issues as to the validity of the Mortgage and the Note or Cliffcrest’s obligations thereunder See CW Capital Asset Mgt., LLC v. Great Neck Towers, LLC, 99 AD3d 851 (2d Dept 2012)(permitting the receiver to make payments of accrued interest on the mortgage during pendency of foreclosure action where “defendants’ affirmative defenses and counterclaims contained in their answer did not raise any assertions such that the receiver should not have been directed to make mortgage interest payments to [the mortgagee] during the pendency of the foreclosure action”); East New York Savings Bank v. 520 West 50<sup>th</sup> Street, Inc., 160 Misc2d 789 (Sup Ct NY Co. 1994)(holding that the court may order a Receiver to pay funds necessary to pay the mortgage). Finally, the Receiver’s report indicates that it has sufficient funds with which to pay plaintiff.

Accordingly, it is

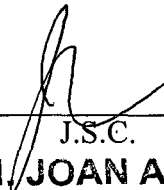
ORDERED that plaintiff’s motion for an order granting an interim distribution of funds

held by the Receiver of \$12,000 a month is granted and it is further

ORDERED that the Receiver is authorized to pay Coogan's Bluff, LLC, which has been substituted as plaintiff herein, \$48,000, representing monthly payments in the amount of \$12,000; and it is further

ORDERED that the Receiver is authorized to pay Coogan's Bluff, LLC \$12,000 per month on the 15<sup>th</sup> day of each month commencing in January 2017, pending further order of the court.

Dated: December 27, 2016

  
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J.S.C.  
**HON. JOAN A. MADDEN**  
J.S.C.