NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

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31 EAST 28TH STREET NOTE BUYER LLC,

Plaintiff,

-against-

Index No.: 850193/2017
DECISION/ORDER
Motion Seq. No. 003

JTRE PARK 28 LLC, JACK TERZI, HAGAI LANIADO, THE BOARD OF MANAGERS OF THE PARKWOOD CONDOMINIUM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, "JOHN DOE #1" TO "JOHN DOE No. XXX," inclusive, the last thirty names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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JTRE PARK 28 LLC,

Counterclaimant/
Third-Party Plaintiff,

-against-

31 EAST 28th STREET NOTE BUYER LLC,

Counterclaim Defendant,

AND

MICHAEL SHAH,

Third-Party Defendant.

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Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing the motion by defendants JTRE Park 28 LLC (JTRE Park), Jack Terzi, and Hagai Laniado (collectively, the JTRE defendants) for an order vacating this court's September 28, 2017, order appointing a receiver (receivership order).

Papers	NYSCEF Documents **Numbered**
Moving Defendants' Notice of Motion, Affirmations, and Brief in Support	45, 46, 47, 48, 49
Plaintiff's Affirmation and Brief in Opposition	58, 59
Moving Defendants' Brief in Reply	60

Jaspan Schlesinger LLP, New York (Kevin J. Etzel, Esq., of counsel), for plaintiff.
Oved & Oved LLP, New York (Andrew J. Urgenson, Esq., of counsel), for moving defendants.

Gerald Lebovits, J.

In this action, plaintiff 31 East 28th Street Note Buyer LLC seeks to foreclose on the first and second mortgage agreements and security agreements encumbering a commercial condominium unit in the building located at 31-33 East 28th Street (mortgaged property). Each mortgage is executed by JTRE Park in favor of nonparty Signature Bank. Each mortgage secures a promissory note executed by JTRE Park in favor of Signature Bank.

The first mortgage and first note bear the principal amount of $2.8 million, and were executed on August 6, 2014. On that date, JTRE Park also executed a cash collateral agreement that requires, in relevant part, JTRE Park to maintain a cash collateral escrow account in the amount of $100,000 and to replenish that amount, should the account fall below $25,000.

The second mortgage and second note bear the principal amount of $1.2 million, and were executed on March 3, 2015. On that date, JTRE Park also executed an amended and restated cash collateral agreement, similarly requiring, in relevant part, JTRE Park to maintain a cash collateral escrow account in the amount of $100,000 and to replenish that amount, should the account fall below $25,000.

Jack Terzi and Hagai Laniado (both, guarantors) each executed a personal guarantee of the first note and second note.

By letter dated May 2, 2017 (default letter), Signature Bank declared JTRE Park in default under the terms of the first and second notes and mortgages, on the ground that the amount in the cash collateral account had fallen to less than $350, well below the contractually required $100,000 balance (*see* first & second mortgages § 2.01 [b]), and demanded that JTRE Park cure by replenishing the funds in that account to $100,000 by May 10, 2017.

By letter dated May 30, 2017 (acceleration letter), Signature Bank declared JTRE Park in default on the first and second notes and mortgages on the ground that it had failed to replenish the cash collateral account, accelerated the outstanding balance due under those agreements, and demanded payment of interest at the default rate, together with fees and charges.

The JTRE defendants allege that Signature Bank did not mail either the default or debt acceleration letters until June 2017, and that the debt acceleration and delay in advising JTRE Park occurred at the direction of plaintiff and its principal, third-party defendant Michael Shah (Shah). The JTRE defendants also contend that Signature Bank froze JTRE Park's accounts with the intention of preventing JTRE Park from curing the default.

By an allonge and assignment agreement each dated July 19, 2017, Signature Bank assigned both the first and second notes and mortgages to plaintiff.

On August 22, 2017, plaintiff commenced the instant action to foreclose both the first and second mortgages on the mortgaged property. The JTRE defendants allege that this action was commenced in furtherance of Shah's fraudulent scheme to buy the mortgaged property at a foreclosure sale for less than fair market value.

On September 8, 2017, plaintiff filed, pursuant to Real Property Law (RPL) § 254 (10) and Real Property Actions and Proceedings Law (RPAPL) § 1325, two ex parte applications for appointment of a receiver, one, in this action and, the other, in a related action (*see 27 W. 72nd St. Note Buyer LLC v JTRE W72nd St. LLC*, Sup Ct, NY County, Hagler, J., index No. 850183/2017 [related action]). The JTRE defendants contend that the two actions are related because they are both commenced by companies owned by Shah to foreclose on mortgages sold to them by Signature Bank on properties owned by JTRE Park.

In the related action, by order dated October 3, 2017, the Honorable Shlomo Hagler declined to sign the proposed receivership order, finding that the defendants were not in default (*see 27 W. 72nd St. Note Buyer LLC v JTRE W72nd St. LLC*, Sup Ct, NY County, Oct. 3, 2017, Hagler, J., index No. 850183/2017).

By order dated September 28, 2017, this court granted plaintiff's ex parte application and issued the receivership order that the JTRE defendants now seek to vacate. On January 9, 2018, the court appointed receiver, Bradley Gurion Marks, Esq., filed the oath of receiver and receiver's bond notice.

By so-ordered stipulation dated January 18, 2018, this court granted the JTRE defendants' request for permission to move to vacate the receivership order, to permit the JTRE defendants to address the merits of plaintiff's receivership application, and stayed the receivership order in its entirety, pending a decision on the instant motion to vacate.

Meanwhile, the JTRE defendants served and filed an answer with affirmative defenses on March 7, 2018, in which they deny all allegations of breach of contract and default. The JTRE defendants also served and filed counterclaims and commenced a third-party action against Shah for breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contract, on allegations that plaintiff and Shah intentionally procured Signature Bank's breach of the first and second notes and mortgages to purchase the mortgaged property at less than fair-market value.

The JTRE defendants now seek an order vacating the receivership order on a variety of grounds, including that plaintiff cannot prove irreparable harm, should a receiver not be appointed, on the record now before the court.

In opposition, plaintiff contends that plaintiff's application is supported by statutory and case law and the express terms of the first and second mortgages; and that, while not required to, plaintiff has established the need for the appointment of a receiver.

The parties dispute whether plaintiff must demonstrate the existence of irreparable harm, should a receiver not be appointed, and whether the appointment of a receiver is warranted in the circumstances presented here. The "drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties" and "[t]here must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a property case has been clearly established" (*Matter of Armienti & Brooks*, 309 AD2d 659, 661 [1st Dept 2003], citing CPLR 6401 [a] [internal quotation marks and citation omitted]; *Matter of Harrison Realty Corp.*, 295 AD2d 220, 220 [1st Dept 2002]). Even where

> "the mortgage agreement . . . contains a provision which specifically authorizes the appointment of a receiver upon application by the mortgagee in any action to foreclose (*see* Real Property Law § 254 [10]), it is well settled that an action to foreclose a mortgage is an action in equity. Thus, a court of equity, in its discretion and under appropriate circumstances, may deny such an application"

(*ADHY Advisors LLC v 530 W. 152nd St. LLC*, 82 AD3d 619, 619 [1st Dept 2011] [internal quotation marks and citations omitted]).

The party seeking to appoint a receiver bears the burden of making "a clear evidentiary showing of the necessity of the conservation of the property and the protection of the interests of that party" (*Modern Collection Assoc. v Capital Group*, 140 AD2d 594, 594 [1st Dept 1988]; *see Eastbank v Malneut Realty Corp.*, 180 AD2d 442, 442-443 [1st Dept 1992]).

The first and second mortgages both provide, in relevant part, that, upon an event of default, the mortgagee "**may** . . . take such action as it deems advisable to protect and enforce its rights against the Mortgagor and in and to the Mortgaged Property including the following actions . . . **apply for the appointment of a . . . receiver** . . . of the Mortgaged Property, without notice and without regard for the adequacy of the security for the Debt" (first & second mortgages § 2.2 [a] [viii] [emphasis added]). Thus, the first and second mortgages expressly authorize plaintiff to apply for the appointment of a receiver ex parte and without regard for the adequacy of the debt security. However, contrary to plaintiff's contention, nothing in those mortgages permits the appointment of a receiver without a showing of irreparable harm.

Plaintiff has failed to demonstrate that irreparable harm will befall the property, in the absence of a receiver or upon vacatur of the receivership order, or that plaintiff is in any danger of losing the value of its security. Plaintiff merely asserts in a conclusory manner that a receiver is necessary in order to protect the mortgage lien and plaintiff's interest in the mortgaged property, and that it is willing to advance any necessary costs and expenses incurred by the receiver in procuring a viable tenant for the mortgaged property (*see* Michael Shah Feb. 9,

2018 aff, ¶ 21).

Moreover, plaintiff does not dispute the JTRE defendants' allegations that they are properly maintaining the mortgaged property, have completed a $500,000 renovation, and are diligently engaged in marketing the mortgaged property for lease.

Contrary to plaintiff's contention, RPL § 254 (10) does not accord plaintiff an automatic right to the appointment of a receiver, without a demonstration that a receiver is necessary to protect against irreparable harm.

RPL § 254 (10) provides, in relevant part, that:

> "[i]n mortgages of real property . . . the following or similar clauses and covenants must be construed as follows: . . . 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"

(RPL § 254 [10] [emphasis added]).

Therefore, that section expressly applies where the underlying mortgage agreement accords the plaintiff an automatic and absolute right to the appointment of a receiver. Here, the first and second mortgages merely accord plaintiff the right to request such appointment (*see* first & second mortgages § 2.2 [a] [viii]).

And even where mortgages by their terms purport to give an absolute right to the appointment of a receiver, the propriety of such an appointment rests in the sound discretion of the court of equity (*see ADHY Advisors LLC v 530 W. 152nd St. LLC*, 82 AD3d at 619).

Contrary to plaintiff's contention, RPAPL § 1325 (1) does not accord a plaintiff an automatic right to a receiver. That section provides, in relevant part, that "[w]here the action is for the foreclosure of a mortgage providing that a receiver may be appointed without notice, notice of a motion for such appointment shall not be required" (RPAPL § 1325). Thus, that section merely provides that a receiver may be appointed ex parte, and does not give a mortgagee an automatic and absolute right to a receiver, without evidence that a receiver is necessary to protect against irreparable harm.

For the foregoing reasons, the receivership order is vacated.

Accordingly, it is

ORDERED that the motion by defendants JTRE Park 28 LLC, Jack Terzi, and Hagai Laniado to vacate the receivership order dated September 28, 2017, is granted, and the receivership order is vacated; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 345, 60 Centre Street, on October 3, 2018, at 11:00 a.m.

Dated: May 31, 2018

J.S.C.

HON. GERALD LEBOVITS J.S.C.