SKW 6 E. 74th St. Lender LLC v Adina 74 Realty Corp.
2022 NY Slip Op 32821(U)
August 17, 2022
Supreme Court, New York County
Docket Number: Index No. 850019/2021
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

----------X

SKW 6 EAST 74TH STREET LENDER LLC,

Plaintiff,

- v -

ADINA 74 REALTY CORPORATION, EZRA CHAMMAH, ITAFIN, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, U.S. SMALL BUSINESS ADMINISTRATION, JOHN DOE

Defendant.

----------X

INDEX NO. 850019/2021

MOTION DATE

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion to/for APPOINT - FIDUCIARY.

Upon the foregoing documents, Adina 74 Realty Corporation (the **Borrower**), Ezra Chammah, and Itafin, Inc.'s (the **Guarantors**) motion to dismiss (Mtn. Seq. No. 001) must be granted solely to the extent of (i) dismissing the cause of action for foreclosure as against the Guarantors, (ii) dismissing the cause of action for the appointment of a receiver to the extent it is asserted as a separate cause of action (*Pool v West 111th St. Rehab Assoc.*, 121 AD3d 571, 572 [1st Dept 2014]) and (iii) dismissing the cause of action for a constructive trust because the Amended Complaint (the **AC;** NYSCEF Doc. No. 5) does not allege a confidential or fiduciary relationship between the Lender and the Borrower or the Guarantors (*Evans v Rosen*, 111 AD3d 459, 459 [1st Dept 2013]).

SKW 6 East 74th Street Lender LLC (the **Lender**) has standing to bring this action because the Note (hereinafter defined) was properly assigned to the Lender by the Original Lender (hereinafter defined). Contrary to the Moving Defendants' (hereinafter defined) argument, *Reich v 559 St. Johns Pl, LLC*, 204 AD3d 850 (2d Dept 2022) does not stand for the proposition that a collateral assignment of a promissory note necessarily divests a lender of standing. That case stands for the unremarkable proposition that when standing is challenged, (i) standing must be demonstrated with proper documentation, and (ii) to enforce a promissory note, one must be in possession of the promissory note and physically possess it. In this case, the Lender meets its *Reich* burden. To wit, the Restated Note is uploaded to the docket with the Allonge attached to it. In the affirmation of Bret Garver (counsel for the Lender), Mr. Garver indicates that the Lender has the Restate Note and Allonge and has had them since the commercial paper was first required (NYSCEF Doc. No. 45, ¶ 5). The Lender also adduces an affidavit from Jay Shah, First Vice President at Metropolitan Commercial Bank (**Metropolitan**), *i.e.*, the entity to whom the Collateral Assignment was made, which indicates that it is the Lender and not Metropolitan who has the right to enforce the obligations under the Note (NYSCEF Doc. No. 46, ¶ 5).

The Lender's motion for the appointment of a receiver (Mtn. Seq. No. 002) must also be granted.

The Relevant Facts and Circumstances

Reference is made herein to (i) a certain Restated Note (NYSCEF Doc. No. 7), dated March 20, 2013 between the Borrower and Bethpage Federal Credit Union (the **Original Lender**) pursuant to which the Original Lender loaned $5,200,000 to Borrower and the Borrower agreed to repay

to the Original Lender $5,200,000 by April 1, 2023 and a certain Allonge (the **Allonge;** the Allonge, together with Restated Note; hereinafter, collectively, the **Note;** NYSCEF Doc. No. 7), dated December 29, 2020, pursuant to which the Original Lender assigned and endorsed their interest in the Restated Note to the Lender. The Allonge is attached to the Restated Note and uploaded as NYSCEF Doc. No. 7.

Reference is also made to (ii) a first mortgage, consolidation, modification, extension, and security agreement (the **Mortgage;** NYSCEF Doc. No. 34) dated as of March 20, 2013, by the Borrower as mortgagor and the Original Lender as mortgagee whereby the Borrower assigned all of its right title and interest in the Mortgaged Property to the Original Lender, (iii) two guaranties (the **Guaranties;** NYSCEF Doc. No. 10) dated March 20, 2013 by the Guarantors to the Original Lender whereby the Guarantors guaranteed the Borrower's performance under the Note, (iv) an assignment of mortgage (the **Mortgage Assignment;** NYSCEF Doc. No. 35) dated December 29, 2020, between the Original Lender as assignor and the Lender as Assignee whereby the Original Lender assigned the Mortgage, together with all bonds, notes, or obligation therein described, to the Lender, and (v) a collateral assignment of mortgage (the **Collateral Assignment;** NYSCEF Doc. No. 36) dated December 29, 2020, between the Lender and Metropolitan whereby the Lender assigned the Mortgage to Metropolitan as collateral security for the a certain loan (the **Loan**) from Metropolitan to the Lender.

On March 30, 2013, the Borrower executed the Restated Note in consideration of a loan made to the Borrower by the Original Lender. The Restated Note required the Borrower to make monthly payments of principal and interest (NYSCEF Doc. No. 7, ¶ 1). Payments were to be

made until the loan matured on April 1, 2023. The Borrower's obligations were guaranteed by the Guarantors (NYSCEF Doc. No. 10). The Mortgage was executed to secure payments due under the Note. The Mortgage also required the Borrower to pay all taxes of the mortgaged property (NYSCEF Doc. No. 34, § 1.04). If there was an Event of Default, including the Borrower's failure to make timely payments, the Borrower agreed to consent to the appointment of a receiver (*id.*, § 2.04). The Lender alleges that the Borrower has failed to make payments starting in July 2020 and continuing.

On December 29, 2020, the Original Lender assigned the Mortgage and the Restated Note to the Lender (NYSCEF Doc. Nos. 35, 44) and executed an appropriate Allonge endorsing its interest in the Restated Note to the Lender. The assignment of the Mortgage included the assignment of any bonds, notes, or obligations described in the Mortgage and money due under the Mortgage (NYSCEF Doc. No. 35). The Note (*i.e.*, the Restated Note together with the Allonge) was delivered to the Lender on or about December 29, 2020 and have been in Lender's possession from that time (NYSCEF Doc. No. 45, ¶ 4-5). In order to pay the Original Lender for the Mortgage and the Note, the Lender took out the Loan from Metropolitan (NYSCEF Doc. No. 47). As collateral security for the Loan, the Lender collaterally assigned its right, title and interest in the Mortgage to Metropolitan (NYSCEF Doc. No. 36). Pursuant to the express terms of the Collateral Assignment, the Lender retained the right to collect payments from the Borrower and retained the right to enforce the Note and the Mortgage (NYSCEF Doc. No. 46, ¶¶ 6, 14).

The Lender sued by summons and complaint dated February 16, 2021. The Lender filed the AC on February 16, 2021, alleging causes of action for (i) foreclosure against all defendants (first cause of action), (ii) the appointment of a receiver (second cause of action), and (iii) a constructive trust (third cause of action). The Borrower and Guarantors (hereinafter, collectively, the **Moving Defendants**) move to dismiss (Mtn. Seq. No. 001). The Lender moves for the appointment of a receiver (Mtn. Seq. No. 002), arguing that the appointment of a receiver is appropriate based on the terms of the Mortgage, the mismanagement and waste of the property by the Borrower, and the Borrower's failure to pay taxes.

Discussion

The motion to dismiss must be granted solely to the extent of dismissing the causes of action for appointment of a receiver and a constructive trust (Mtn. Seq. No. 001)

On a motion to dismiss, the Court must afford the pleading a liberal construction and accept the facts as alleged as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

As an initial matter, the Moving Defendants' argument that the Lender lacks standing fails. As discussed above, the Moving Defendants' reliance on *Reich v 559 St. Johns Pl, LLC*, 204 AD3d 850 (2d Dept 2022) is misplaced. In that case, the defendant asserted that the plaintiff lacked standing. In opposition, the plaintiff adduced only an affidavit of his lawyer signing as attorney in fact without annexing a copy of the executed power of attorney. The court (Partnow, J.) held that the plaintiff had not made his prima facie showing that had standing and denied the plaintiff's motion for summary judgment. On the defendant's cross-motion seeking dismissal,

the court granted the motion because the court held that the plaintiff failed to raise an issue of fact as to whether he had standing given that he collaterally assigned his interest in the promissory note and physically delivered the promissory note to the lender. The Appellate Division affirmed. As discussed above, in this case, the Lender meets its *Reich* burden to demonstrate standing. The Lender did not deliver the Note to Metropolitan and the express terms of the Collateral Assignment indicate that it is the Lender and not Metropolitan that has the right to enforce the obligations under the Note. To clear up all doubt, Metropolitan itself has submitted an affidavit indicating that it is the Lender and not Metropolitan that has the right to enforce the obligations under the Note. Lastly, the Moving Defendants' argument that the Lender lacks standing because the Allonge was not affixed to the Note prior to the commencement of this action also fails (cf. *Aurora Loan Services, LLC v Taylor*, 225 NY3d 355, 361 [2015]; *US Bank, N.A. v Askew*, 138 AD3d 402, 402 [1st Dept 2016]). On the record before the Court, the Note and the Allonge appear to be one document (NYSCEF Doc. No. 7). There is simply no basis for the argument that the Allonge was not affixed to the Note when it was delivered to the Lender. The Lender thus has standing to bring this foreclosure action. For completeness, however, the Lender shall upload an affidavit to NYSCEF within two weeks indicating that the Allonge is affixed to the Note and has been since the commencement of this action.

The second cause of action for the appointment of a receiver must be dismissed, as it cannot be asserted as a standalone cause of action (*Pool v West 111th St. Rehab Assoc.*, 121 AD3d 571, 572 [1st Dept 2014]).

The third cause of action for a constructive trust must also be dismissed, because the Lender has failed to establish a confidential or fiduciary relationship between the Lender and the Borrower sufficient to give rise to a constructive trust (*Evans v Rosen*, 111 AD3d 459, 459 [1st Dept 2013]).

The motion to appoint a receiver must be granted (Mtn. Seq. No. 002)

Pursuant to NY Real Prop § 254(10), a covenant that the holder of a mortgage is entitled to the appointment of a receiver in any action to foreclose it must be construed as meaning that the mortgagee, or the mortgagee's heirs, successors or assigns is entitled to the appointment of a receiver. Where the mortgage agreement provides for the appointment of a receiver, a plaintiff is entitled to such appointment without notice and without regard to the adequacy of any security of the debt (*CSFB 2004-C3 Bronx Apts LLC v Sinckler, Inc.*, 96 AD3d 680, 680-681 [1st Dept 2012]).

It cannot be disputed that the Mortgage contains an explicit covenant that the holder of the Mortgage is entitled to the appointment of a receiver (NYSCEF Doc. No. 34, § 2.04). The Moving Defendants rely on the arguments set forth in the motion to dismiss to argue that the Lender lacks standing to move for the appointment of a receiver. For the reasons set forth above, those arguments fail. The argument that the Lender has failed to establish a default also fails. In the Affidavit of Matthew Contreras, a managing director at Lender (NYSCEF Doc. No. 74), he sets forth that the Borrower has failed to make payments under the Note for July 2020 and every month thereafter. The Moving Defendants, while disputing that the Lender has failed to demonstrate that a default occurred, do not allege that a default did not occur. The Lender has

made a sufficient showing that a default has occurred. For completeness, this showing is not dependent on the reports of unpaid taxes for the period after this lawsuit was commenced. The Lender has sufficiently demonstrated its entitlement to the appointment of a receiver.

The Court has considered the Moving Defendants remaining arguments and finds them unavailing.

It is hereby ORDERED that the motion to dismiss (Mtn. Seq. No. 001) is granted solely to the extent of dismissing the first cause of action as against the Guarantors and dismissing the second and third causes of action; and it is further

ORDERED that the motion for the appointment of a receiver (Mtn. Seq. No. 002) is granted; and it is further

ORDERED that the parties shall meet and confer with an eye to agreeing on a receiver who shall be appointed in this matter; and it is further

ORDERED that if the parties are unable to agree, each party shall submit to the Court (sfc-part53@nycourts.gov) by August 24, 2022, a list of three names of potential receivers and the Court will choose the receiver from those lists.

20220818114020ABORROKEC2C667657A7AD7A83AE59CAB6C50880

8/17/2022
DATE

ANDREW BORROK, JSC

CHECK ONE:

	CASE DISPOSED			X	NON-FINAL DISPOSITION		
	GRANTED		DENIED	X	GRANTED IN PART		OTHER

850019/2021 vs.
Motion No. 001 002