NY Secured Funding LLC v Hello Albemarle LLC
2022 NY Slip Op 33205(U)
September 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 513790/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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NY SECURED FUNDING LLC,

Plaintiff, Decision and order

- against - Index No. 513790/21

Hello Albemarle LLC, Eli Karp, CML Taping & Painting Corp., Multivista NYC LLC, New York City Environmental Control Board, Rentom Group Corp., 1 Seal USA LLC, New York State Department of Taxation and Finance, New York City Department of Finance, Julian Samuel, Angela Angarica, Franchesca Medina, Derron Richardson, Ashleigh Richards, Damien DeCuir, Cristina Delgado, Marlon McEachin, Quelmi Johnson, Akpomedayin Obukowho, Lavona Wilchard, Marika Reid, Alexis McCant, Victoria McCant, Kirra McElhenney, Anthony Ford, Kendell Applewhite, Adetola Lawal, Hammed Azeez, Sabir Mandil, Nasra Nimaga, Erika C. Pierre, Anthony Lewis, Devonne Gourdine, Randy Dixon, Patricia Dixon, Ashley Dixon, Santiago Ramirez, Kareem Bishop, Victor Gayton, Kayla Roberson, Arie Lesperance, Madisin Bradley, Arlene Bryant, Jake Shriver, Martha Haastrup, Amanda S. Penco De Jesus, Gilson T. De Jesus, Jeremy Smith, Ferlanda Juste, Arvin Pascual, Steffanie Barrios, Khalijah Brooks, Allyson Aaron, Ashley M. Buonocore, Clayton W. Susnar, Shameeka A. Marc, Imani N. Dickens, Mickey Alexander, RJ Living LLC, Anthony Ryan Leslie, Sheila M. Nghe, Monique Beckford, Craig Reis Brookes, Michael Lowell, Derron J. Richardson, Denis Flaviu, And Joe Douge And "JOHN DOE" #1 Through "JOHN DOE" #20, the last twenty (20) names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Amended Verified Complaint,

Defendants, September 19, 2022
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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking the appointment of a receiver pursuant to RPL §254(10). The defendants oppose the motion. Papers were submitted by the parties and arguments held.

After reviewing all the arguments this court now makes the following determination.

On April 19, 2021 a loan made by plaintiff's predecessor in interest in the amount of $15,000,000 became due. The defendants have not repaid any of the funds and on April 23, 2021 the plaintiff issued a notice of default. Pursuant to 12.03(c) of the loan agreement, upon a default "at Lender's request, Borrower shall cause a notice substantially in the form of Exhibit F attached hereto (a "Tenant Notice Letter"), to be delivered to each Tenant under an existing Lease, notifying such Tenant to send directly to the Bank promptly when due all payments, whether in the form of checks, cash, drafts, money orders or any other type of payment whatsoever of rent or any other item payable to Borrower as landlord or otherwise or payable to Property Manager on behalf of Borrower. Copies of such Tenant Notice Letters, together with evidence of mailing, shall be delivered by Borrower to Lender or its designee simultaneously therewith. If Borrower shall enter into any Future Lease after an Event of Default, Borrower shall immediately cause a Tenant Notice Letter to be delivered to the Tenant thereunder and shall deliver a copy of such Tenant Notice Letter, together with evidence of mailing, to Lender or its designee within ten (10) days after the effective date of such Future Lease" (see, ¶ 12.03(c) of the Loan Agreement [NYSCEF Doc. #124]). The

plaintiff alleges the defendants have frustrated the execution of such letters by expressly advising the tenants to continue to pay the defendants, causing confusion and uncertainty among the tenants. The plaintiff now moves seeking the appointment of a receiver to enable the tenants to comply with the above noted provision of the lease and to allow the defendants to collect rents unencumbered.

Conclusions of Law

It is well settled that pursuant to RPL §254(10) where a mortgage specifically authorizes the appointment of a receiver upon any action to foreclose the mortgage then a receiver may be appointed without regard to the adequacy of the security (Essex v. Newman, 220 AD2d 639, 632 NYS2d 636 [2d Dept., 1995]). The purpose of appointing a receiver is to preserve the property for the owner's and mortgagee's benefit.

Article 10.02(xii) of the Loan Agreement entitled 'Remedies' states that upon any event of default the lender has the right to "apply for without notice, the appointment of a receiver of the Rents, and Lender shall be entitled to the appointment of such receiver as a matter of right, without regard to the value of the Property as security for the Debt, or the solvency or insolvency of any person then liable for the payment of the Debt" (see, Loan Agreement, ¶ 10.02(xii)). It is true that even where a loan

agreement authorizes the appointment of a receiver such appointment rests in the discretion of the court (Ridgewood Savings Bank v. New Line Realty VI Corp., 24 Misc3d 1227 (A), 897 NYS2d 672 [Supreme Court Bronx County 2009]) and a court in equity can vacate the appointment in appropriate circumstances (see, Naar v. I.J. Litwak & Co., Inc., 260 AD2d 613, 688 NYS2d 698 [2d Dept., 1999]). The 'appropriate circumstances' noted is difficult to quantify. In Home Title Insurance Company v. Isaac Scherman Holding Corp., 240 AD 851, 267 NYS 84 [2d Dept., 1933] one of the earliest cases finding the "possible exercise of discretion" denying a receiver or curtailing the receiver's rights, the court held such discretion could be exercised "in the case of hardship or the like" (id). Essentially, the court should exercise its discretion and deny a receiver where the receiver would serve no useful purpose (Federal Home Loan Mortgage Corp., v. Jerwin Realty Associates, 1992 WL 390264 [E.D.N.Y. 1992]). For example, where the default was inadvertent the court denied the appointment of a receiver (Fairmont Associates v. Fairmont Estates, 99 AD2d 895, 472 NYS2d 208 [3rd Dept., 1984]).

Thus, other than the appropriate and unusual circumstances noted there is no analysis the court must engage in before appointing a receiver pursuant to RPL §254(10). There is no requirement, as argued by the defendants, that the mortgagee must

demonstrate a risk of irreparable loss (see, Memorandum in Opposition, pages 5 and 6) or present competent evidence the asset is being compromised or mismanaged or that harm will befall the property absent a receiver (see, Memorandum in Opposition, pages 6 and 7). Clearly, there is a difference when a receiver is appointed pursuant to RPL §254(10) where absent appropriate circumstances the request should be granted and a receiver appointed pursuant to CPLR §6401 which demands "clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (Board of Managers of Nob Hill Condominium Section II v. Board of Managers of Nob Hill Condominium Section I, 100 AD3d 673, 954 NYS2d 145 [2d Dept., 2012]). The defendant's attempt to require the court to engage in such scrutiny even where the loan agreement allows for a receiver upon a default fails to appreciate the unique allowances afforded by RPL §254(10) which requires no such scrutiny.

Further, in any event, a review of the facts of this case clearly establish the defendants have failed to present any special circumstances why a receiver should not be appointed. Pursuant to RPL §254(10) a receiver may be appointed for "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" (id). Where there are substantial questions of fact or whether there are questions whether a default even occurred or there are questions regarding the validity of the note then a receiver is not warranted despite language pursuant to RPL §254(10) (Phoenix Grantor Trust v. Exclusive Hospitality LLC, 172 AD3d 926, 98 NYS3d 752 [2d Dept., 2018]). There are no questions that defaults exist. Consequently the motion seeking the appointment of a receiver is granted. The plaintiff should present a proposed order to the court on notice to the defendants delineating the specific powers and duties of the receiver.

So ordered.

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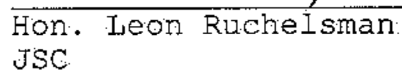

DATED: September 19, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC