

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

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**U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR VELOCITY COMMERCIAL CAPITAL  
LOAN TRUST 2017-2,**

**DECISION AND ORDER**

Index No. **803230/2021E**

Plaintiff(s),

Hon. **FIDEL E. GOMEZ**  
Justice

- against -

**687 KING LLC; FRANCIS C. MCGUIRE,  
INDIVIDUALLY; JOHN DOE (SAID NAME  
BEING FICTITIOUS TO REPRESENT UNKNOWN  
TENANTS/OCCUPANTS OF THE SUBJECT  
PROPERTY AND ANY OTHER PARTY OR  
ENTITY OF ANY KIND, IF ANY, HAVING OR  
CLAIMING AN INTEREST OR LIEN UPON THE  
MORTGAGED PROPERTY),**

Defendant(s).

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The following papers numbered 1 to 2, Read on this motion noticed on 10/29/21, and duly submitted as no. 1 on the Motion Calendar of 5/26/22.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference	2	
Memorandum of Law		

Plaintiff's motion seeking, *inter alia*, an order granting it a default judgment against defendants 687 KING LLC, FRANCIS C. MCGUIRE, and ANDREW MCGUIRE is granted on default and without opposition.

Pursuant to CPLR § 3215(f) "[o]n any application for judgment by default, the applicant shall file proof of service of the

summons and the complaint . . . and proof of the facts constituting the claim" (*Pampalone v Giant Building Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005] [Default judgment granted once plaintiff submitted proof that defendant was served with the summons and complaint and an affidavit of the facts constituting the claim.]; *Andrade v Ranginwala*, 297 AD2d 691, 691-692 [2d Dept 2002]). Once the requisite showing has been made and the requisite proof proffered, a motion for a default judgment must be granted unless the defendant can establish a meritorious defense to the claims made, a reasonable excuse for the delay in interposing an answer, and that the delay in interposing an answer has in no way prejudiced the plaintiff in the prosecution of the case (*Buywise Holding, LLC v Harris*, 31 AD3d 681, 683 [2d Dept 2006]; *Giovanelli v Rivera*, 23 AD3d 616, 616 [2d Dept 2005]).

Here, plaintiff establishes that the foregoing defendants were served with the summons and complaint, that they have failed to interpose answers, and that the claims in the complaint, seeking a judgment foreclosing on the relevant mortgage and the sale of the property it encumbers, have merit. Notably, the complaint is verified by Rick Favela, Director of Special Assets for plaintiff.

Plaintiff's application seeking to have a receiver appointed is granted.

RPL § 254 and § 254(10), read together, state that

[i]n mortgages of real property, and in bonds and notes secured thereby or in assignments of mortgages and bonds and mortgages and notes, or in agreements to extend or to modify the terms of mortgages and bonds and mortgages and notes, the following or similar clauses and covenants must be construed 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.

Thus, where a mortgage contains language providing for the appointment of a receiver in an action to foreclose on a mortgage, upon application, the court must appoint a receiver and can do so without notice (*Maspeth Fed. Sav. and Loan Ass'n v McGown*, 77 AD3d 890, 891 [2d Dept 2010] ["The mortgage agreement at issue contains a provision which specifically authorizes the appointment of a receiver upon application by the mortgagee in any action to foreclose the mortgage. Consequently, the plaintiff, as mortgagee, was entitled to the appointment of a receiver without notice and without regard to the adequacy of the security."]; *Naar v I.J. Litwak & Co., Inc.*, 260 AD2d 613, 615 [2d Dept 1999]; *Clinton Capital Corp. v One Tiffany Place Developers, Inc.*, 112 AD2d 911, 912 [2d Dept 1985]). Under the foregoing circumstances, the mortgagee has no obligation to establish the necessity of a receiver (*Febbraro v Febbraro*, 70 AD2d 584, 585 [2d Dept 1979]).

A receiver is charged with "preserv[ing] and operat[ing] the property, within the confines of the order of appointment and any subsequent authorization granted to him by the court" (*Jacynicz v 73 Seaman Assoc.*, 270 AD2d 83, 85 [1st Dept 2000] [internal quotation marks omitted].), and his/her powers are limited to those enumerated in the appointing order (*Daro Indus., Inc. v RAS Enterprises, Inc.*, 44 NY2d 969, 970 [1978]). As to the ambit of a receiver's general powers, CPLR § 6401(b) states that

[t]he court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.

Here, section 4.2(f) of the mortgage states that upon default under the terms thereunder, plaintiff may "[t]ake such other actions or proceedings as the Lender deems necessary or advisable to protect its interest in the Property and ensure payment and performance of the Obligations, including, without limitation, appointment of a receiver without prior notice." Accordingly, since plaintiff initiated the instant foreclosure action, per the language in the mortgage, plaintiff is entitled to the appointment of a receiver pursuant to RPL § 254.

However, such relief cannot be granted until plaintiff submits a separate order for such relief, which provides the Court with the ability designate a receiver pursuant to Part 36 of the Rules of

the Chief Judge. Part 36, governs the appointment of individuals to perform services in cases before the Courts in New York State. Significantly, 22 NYCRR 36.0 states that the rules "are intended to ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case." The rules promulgated by Part 36 apply to receivers (22 NYCRR 36.1[a][8]), attorneys retained to perform services for a receiver (22 NYCRR 36.1[a][10][i]), as well as property managers (22 NYCRR 36.1[a][10][v]). As such, all appointments of people governed by Part 36 must generally be individuals who are members of the relevant list (22 NYCRR 36.2[b][b][1] ["All appointments pursuant to this Part shall be made by the appointing judge from the appropriate list of applicants established by the Chief Administrator of the Courts pursuant to section 36.3 of this Part."]). Pursuant to 22 NYCRR 36.4(b)(4), (4) "[c]ompensation to appointees shall not exceed the fair value of services rendered." order shall provide. It is hereby

**ORDERED** that plaintiff's motion is granted in accordance with the Order Granting Default Judgment and an Order of Reference in Commercial Foreclosure annexed hereto. It is further

**ORDERED** that plaintiff serve a copy of this Order and the Order Granting Default Judgment and an Order of Reference in Commercial Foreclosure with Notice of Entry upon defendants and the referee within 30 days hereof.

This constitutes this Court's decision and Order.

Dated: 10/17/2022

Hon

  
FIDEL E. GOMEZ, AJSC

1. CHECK ONE

CASE DISPOSED                      X NON-FINAL  
DISPOSITION

2. MOTION/CROSS-MOTION  
IS

X GRANTED  
 DENIED  
 GRANTED IN PART  
 GRANTED IN PART

3. CHECK IF  
APPROPRIATE.

SETTLE ORDER  
 SUBMIT ORDER  
 DO NOT POST  
 FIDUCIARY APPOINTMENT  
 REFEREE APPOINTMENT  
 NEXT APPEARANCE DATE

At an IAS Part 32 of the Supreme Court of the State of New York held in the County of BRONX at the Courthouse located thereof on the 17th day of October, 2022

PRESENT: HON: FIDEL E. GOMEZ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR VELOCITY COMMERCIAL  
CAPITAL LOAN TRUST 2017-2,

Plaintiff,

-vs-

687 KING LLC; FRANCIS C. MCGUIRE,  
INDIVIDUALLY; JOHN DOE (SAID NAME  
BEING FICTITIOUS TO REPRESENT UNKNOWN  
TENANTS/OCCUPANTS OF THE SUBJECT  
PROPERTY AND ANY OTHER PARTY OR  
ENTITY OF ANY KIND, IF ANY, HAVING OR  
CLAIMING AN INTEREST OR LIEN UPON THE  
MORTGAGED PROPERTY),

Defendants.

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Index No.: 803230/2021E

**ORDER GRANTING DEFAULT  
JUDGMENT AND AN ORDER  
OF REFERENCE IN  
COMMERCIAL  
FORECLOSURE**

Commercial Mortgaged

Premises:

692A King Avenue  
Bronx, NY 10464

Block: 5648 Lot: 1201

**UPON**, the Summons, Complaint and Notice of Pendency filed in this action on March 9, 2021, the Notice of Motion dated September 28, 2021, the Affidavit in Support of RICK FAVELA dated April 13, 2021, the affirmation dated September 28, 2021 of RICHARD D. FEMANO, ESQ. of STERN & EISENBERG, PC the attorneys of record for plaintiff U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2017-2 ("Plaintiff"), and the exhibits annexed thereto, together with the exhibits attached hereto, and all prior papers filed in this action and prior proceedings had herein; and

UPON, proof that each of the defendants herein has been duly served with the Summons and Complaint in this action and required notices;

AND, it appearing to the satisfaction of the Court this action was brought to foreclose a Commercial Mortgage on real property located at: 692A KING AVENUE, BRONX, NY 10464; Block: 5648; Lot: 1201;

AND, as the property secured by this Commercial Mortgage is not a residential property, RPAPL 1304 and 1306 is not applicable, and a mandatory settlement conference pursuant to CPLR 3408 is not required;

AND, it appearing that the time for all Defendants to answer the complaint has expired; and no other defendant has appeared or answered the Complaint;

NOW, on motion by STERN & EISENBERG. PC, attorneys for the Plaintiff, it is hereby

**ORDERED**, that tenant ANDREW MCGUIRE be substituted into this action as party defendants in the place and stead of the fictitiously named "JOHN DOE" defendants, and that the action and the caption of this action be amended accordingly, all without prejudice to any of the proceedings heretofore had herein; and that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR VELOCITY COMMERCIAL  
CAPITAL LOAN TRUST 2017-2,

Index No. 803230/2021E

Plaintiff,

-vs-

687 KING LLC; FRANCIS C. MCGUIRE,  
INDIVIDUALLY; ANDREW MCGUIRE;

Defendants.

-----X

And that the action be maintained under the same Index Number; and it is further

**ORDERED**, that defendant(s): 687 KING LLC; FRANCIS C. MCGUIRE and ANDREW MCGUIRE and are determined to be in default; and it is further

**ORDERED**, that Stephen B. Kaufman with an address of Stephen B. Kaufman, PC, 3397 E. Tremont, Bronx, NY 10461 718-822-0500, is hereby appointed referee, in accordance with RPAPL §1321, to compute the amount due to Plaintiff and to examine whether the mortgaged property may be sold in parcels; and it is further

**ORDERED**, that the Referee make his/her computation and report with all convenient speed; and it is further

**ORDERED**, that if necessary, the Referee may take testimony pursuant to RPAPL §1321; and it is further

**ORDERED**, that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §26.2(c) ("Disqualifications from appointment"), and §36.2(d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

~~**ORDERED**, that pursuant to CPLR 8003(a), the statutory fee of \$50.00, and in the discretion of the court, a fee of \$\_\_\_\_\_, shall be paid to the Referee for the computation of the amount due and upon the filing of his/her report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(a), and it is further~~

~~**ORDERED**, that a rent receiver be appointed without notice and that Defendant 687 KING LLC turn over and/or assign all leases and rents in Defendant 687 KING LLC's possession with respect to the Property located at 692A KING AVENUE, BRONX, NY 10464, to~~

FG

J.S.C.

FG

J.S.C.



~~satisfy Plaintiff's judgment, plus interest, late charges, other fees, penalties and advances and attorneys' fees and costs that continue to accrue due to the Default; and it is further~~

**ORDERED**, that Defendant 687 KING LLC's possession of all equipment and fixtures with respect to the Property located at 692A KING AVENUE, BRONX, NY 10464, be turned over to Plaintiff to satisfy its judgment against Defendants, plus interest, late charges, other fees, penalties and advances and attorneys' fees and costs that continue to accrue due to the Default; and it is further

**ORDERED**, the sale of the Property located at 692A KING AVENUE, BRONX, NY 10464, to satisfy Plaintiff's lien of the principal amount, plus interest, late charges, other fees, penalties and advances and attorneys' fees and costs that continue to accrue due to the default; directing defendants and all parties claiming by, through or under them and every other person or entity whose right, title, conveyance or encumbrance is subsequent to or subsequently recorded, or whose lien is being challenged by being a Defendant in this action, be barred and foreclosed of and from all right, claim, lien, interest or equity of redemption in and to said Property and directing that Plaintiff be entitled to a deficiency judgment against Defendants 687 KING LLC and FRANCIS C. MCGUIRE for the amounts due and owing in the event a sale of the Property located at 692A KING AVENUE, BRONX, NY 10464 yield less than the amount of the judgment owed to Plaintiff, unless the debt has been listed and discharged in a bankruptcy proceeding at which time no deficiency judgment will be sought; and it is further

**ORDERED**, that Plaintiff be awarded judgment against Defendants 687 KING LLC and FRANCIS C. MCGUIRE for Plaintiff's attorneys' fees and costs, incurred as a result of the Default in an amount to be determined by the Court; and it is further

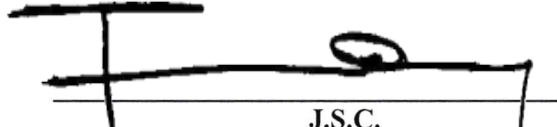


**ORDERED**, that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

This constitutes the decision and order of the Court.

Pursuant to CPLR §8003 (a) and in the discretion of the court, a fee of \$30.00 shall be paid to the Referee upon the filing of his report, and in accordance with CPLR §8003 (b), the statutory fee shall be paid to the Referee at the time of the foreclosure sale.

ENTER:

  
J.S.C.  
FIDEL E. GOMEZ

FG  
J.S.C.