

Intervest Natl. Bank v 414 Cent. Ave., Inc.

2010 NY Slip Op 30415(U)

February 17, 2010

Supreme Court, Nassau County

Docket Number: 5720/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

INTERVEST NATIONAL BANK,

Plaintiff,

- against -

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 5720/09
Motion Seq. No.: 02
Motion Date: 12/09/09

414 CENTRAL AVENUE, INC., ELIAS GROISMAN
NEW YORK STATE DEPARTMENT OF TAXATION and
FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE,
"JOHN DOE #1" through "JOHN DOE #12", THE LAST
TWELVE 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.

The following papers have been read on this motion:

	<u>Papers Numbered</u>
<u>Order to Show Cause, Affirmation, Affidavit and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibit</u>	<u>2</u>
<u>Reply Affirmation and Exhibit</u>	<u>3</u>

Motion by receiver Michael H. Sahn for an order, cancelling and annulling the purported lease between defendant 414 Central Avenue, Inc.(hereinafter "414") and Mamesh, LLC for the premises located at 414 Central Avenue Cedarhurst, NY 11516 (hereinafter "the premises"), declaring that Mamaesh, LLC occupies the premises on a month-to-month premises basis, declaring that any other defendant using or occupying the premises as a tenant or otherwise occupies the premises only on a month-to-month basis, fixing the fair use and occupancy value

of the premises at eight thousand four hundred seventy-nine and 16/100 (\$8,479.16) dollars per month or any other amount that the Court determines to be fair and reasonable, directing Mamesh, LLC and any other defendant using and occupying the premises to pay the receiver its pro rata share of the fair use and occupancy value of the premises determined by the Court from September 1, 2009 to the present and declaring that the receiver is entitled to all additional fees, costs and expenses incurred in the making of this motion including but not limited to reasonable attorney's fees, is determined as hereinafter provided.

As a general rule, a receiver of rents and profits in a mortgage foreclosure is bound by the agreement between the tenant and the mortgagor landlord, and notwithstanding that the amount fixed as rent under the lease is less than the fair and reasonable rental value of the premises, the tenant may not be required to pay to the receiver a greater amount, even though the lease is subordinate to the lien of the mortgage. *New York City Community Preservation Corp. v. Michelin Associates*, 115 A.D.2d 715, 496 N.Y.S.2d 530 (2d Dept. 1985) citing *Prudence Co. v. 160 West Seventy-Third St. Corp.*, 260 N.Y. 205 (1932); *Markantonis v. Madlan Realty Corp.*, 262 N.Y. 354 (1933); *Central Sav. Bank v. Chatham Associates Inc.*, 54 A.D.2d 873, 338 N.Y.S.2d 908 (1st Dept. 1976); *Bank for Savings in City of New York v. Shenk Realty & Constr. Co.*, 265 A.D. 72, 37 N.Y.S.2d 597 (1st Dept. 1942); *Bank of Manhattan Trust Co. v. Twenty-One Sixty-Six Broadway Corp.*, 237 A.D. 734, 262 N.Y.S. 730 (1st Dept. 1933); *Flatbush Sav. Bank v. Levy*, 109 N.Y.S.2d 247 (Sup. Ct., Kings County 1951); 15 Carmody-Wait 2d, NY Prac § 92:490, at 461. However, this rule presupposes the existence of a bona fide lease, and a court has "broad power" to prevent frustration of an order appointing a receiver of rents "by a collusive or fraudulent lease" for an inadequate rental or advance payment of rent in anticipation of a foreclosure action." *New York City Community Preservation Corp.*, *supra*, citing *Prudence Co. v. Seventy-Third St. Corp.*, *supra*, at p 213. Moreover, even in the absence of fraud or collusion, an agreement by the mortgagor with respect to the mortgaged premises is not conclusive upon the mortgagee, or the receiver, where such agreement contravenes an express covenant or the necessary implications of a prior recorded mortgage. *New York City Community Preservation Corp.*, *supra* citing *Bank of Manhattan Trust Co. v. 571 Park Ave. Corporation*, 263 N.Y. 57 (1933); *Colter Realty v.*

Primer Realty Corp., 262 A.D. 77, 27 N.Y.S.2d 850 (1st Dept. 1941). For example, in *Bank of Manhattan Trust Co. v 571 Park Ave. Corp.*, *supra* at pp 62-63, the mortgage contained an assignment of rents as security for the mortgage indebtedness in the event of default, and a covenant proscribing impairment of the mortgage lien by the mortgagor. The court held that the mortgagor could not contractually assign the rents collectible from the rents to a general creditor, or contractually eliminate its right to collect rent, because such an agreement would impair the lien of the mortgage upon the rents. The Court of Appeals in *Bank of Manhattan Trust Co. v 571 Park Ave. Corporation*, *supra*, at p 63, stated: "It is not necessary to find any collusion in making such an agreement; it was simply beyond the power of the parties either to appropriate the pledged rents to a different indebtedness, or to defeat the pledge by granting the use of the premises rent free. This was not only expressly forbidden by the mortgage, but it seems a necessary consequence of the assignment of rents contained in it. These rents were expressly made security for the mortgage indebtedness in the event of a default, and the scope of the contracts the mortgagor or its successors might make was necessarily limited to that extent. The pledge of these rents could not subsequently be rendered worthless either by another assignment of rents to be received, or by contracting away the right to collect any rent."

Here, the Court need not find that the lease between Mamesh, LLC and defendant 414, the landlord mortgagor, was fraudulent, collusive and made in anticipation of foreclosure of the mortgage. Pursuant to paragraph 21(a) of the mortgage, mortgagor and defendant 414 assigned all of the existing and future leases and rents, issues and profits of the premises to the plaintiff as security for the mortgage indebtedness. Therefore, the agreement by defendant 414 to lease the premises to Mamesh, LLC at a monthly rent of only one-hundred dollars with a one percent annual increase is in clear contravention of the mortgage, regardless of whether that agreement had been made with fraudulent intent. Defendant 414 lacked the power to defeat its pledge of the rents as security by granting the use of the premises at a nominal rent. *Bank of Manhattan Trust Co. v 571 Park Ave. Corp.*, *supra*; *Colter Realty*, *supra*. The Court finds defendant's argument that the payment of property taxes pursuant to said lease is "rent" to be without merit.

Accordingly, motion by receiver for an order cancelling and annulling the undated lease between defendant 414 and Mamesh, LLC is granted.

Pursuant to paragraph 21(c) of the mortgage made by defendant 414 to plaintiff Intervest National Bank:

In the event the mortgagor or any person controlled by, controlling, or under common control with, mortgagor, is an occupant of the premises, then upon any default under this mortgage (after the expiration of any applicable notice and/or cure period provided in this mortgage), mortgagor or such person will pay monthly in advance to the mortgagee, or to any receiver appointed to collect said rents, issues and profits, the fair and reasonable rental value for the use and occupation of the premises or of such part thereof as may be in the possession of the mortgagor or such person, and upon failure to make any such payment will vacate and surrender the possession of the premises to the mortgagee or to such receiver, and upon failure to vacate and surrender possession may be evicted by summary proceedings.

Pursuant to paragraph 1(k) of said mortgage, "mortgagor" shall mean the persons executing this mortgage as mortgagor, and in the event of any transfer, shall mean the persons who at any time are the record owners of the premises. Pursuant to paragraph 1(m) of said mortgage, "person" shall mean any individual, corporation, partnership, trust, estate, or other form of entity or association.

Pursuant to the second full paragraph on page three of the Order Appointing Temporary Receiver in Mortgage Foreclosure Action signed by Nassau Supreme Court Justice Edward G. McCabe on May 8, 2009 in this matter it was "ordered that said temporary receiver be and is hereby directed to demand, collect and receive from the occupants, tenants and licensees in possession of said premises, or other persons liable therefor, inclusive of the mortgagor, all the rents and license fees thereof now due and unpaid or hereafter to become fixed or due; and that said temporary receiver be and hereby is authorized to institute and carry on all legal proceedings necessary for the protection of said premises or to recover possession of the whole, or any part thereof, and/or apply to the Court to fix reasonable rental value and license fee value and to compel the tenants and occupant(s) to attorn to the Receiver; and it is further directed that the Receiver may institute and prosecute suits for the collections of rents, license fees and other charges now due or hereafter to become due or fixed, and summary proceedings for the removal of any tenant or tenants or licensees or other persons therefrom, and to employ counsel."

Here, the Court finds that issues of fact exist as to: whether Mamesh, LLC is an entity that was and/or is now controlled or under common control by defendant Elias Groisman and/or

defendant 414 ; what portion of the premises is occupied by Mamesh, LLC; and what amount is the fair use and occupancy value of the premises.


Accordingly, motion by receiver fixing the fair use and occupancy value of the premises at eight thousand four hundred seventy-nine and 16/100 (\$8,479.16) or any other amount that the Court determines to be reasonable and motion directing Mamesh, LLC to pay the receiver its pro rata share of the fair use and occupancy value of the premises determined by the Court from September 2, 2009 is set down for a hearing for the determination thereof. This matter is referred to the Calendar Control Part for said hearing on April 6, 2010 at 9:30 a.m.

In his Order to Show Cause and the wherefore paragraph at the end of his Affirmation in Support, receiver seeks an order: declaring Mamesh, LLC, to be a month-to-month tenant of the premises; declaring any other defendant using or occupying the premises, as a tenant or otherwise, to be a month-to-month tenant; and declaring that the receiver is entitled to additional fees, costs and expenses incurred in the making of this motion, including but not limited to, reasonable attorney's fees. However, receiver fails to make any argument in fact or law in support of the relief sought.

Accordingly, motion by receiver for the relief set forth in the preceding paragraph is denied in its entirety.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
February 17, 2010

ENTERED

FEB 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE