At an IAS Term, Part 38 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of May, 2010.

P R E S E N T:

HON. MARTIN M. SOLOMON
Justice.

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DORIT LEVY,
Plaintiff,

- against -

Index No. 38793/05

PRIME EAST 15TH LLC, JACOB FRANK, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK ENVIRONMENTAL CONTROL BOARD AND "JOHN DOE #1" THROUGH "JOHN DOE #12", THE LAST TWELVE NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSON OR PARTIES INTENDED BEING THE TENANTS , OCCUPANTS, PERSONS OR CORPORATION , IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PREMISES BEING FORECLOSED HEREIN ,
Defendants.

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The following papers numbered 1 to 12 read on this motion and cross motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 7-8
Opposing Affidavits (Affirmations)	4 9-11
Reply Affidavits (Affirmations)	5-6 12
____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff, Dorit Levy (Levy) moves in this foreclosure action regarding 1711 East 15th Street in Brooklyn (the premises) for an order, (a) pursuant

to CPLR 6401, appointing a temporary receiver to collect rents, issues and profits of the property as well as to manage it; (b) pursuant to CPLR 3124 and 3126, compelling defendants to produce certain documents, or, alternatively, striking defendants' verified answer and counterclaims as well as precluding defendants from offering evidence and testimony at trial; (c) extending the current control dates, including discovery cutoff and note of issue dates; and (d) awarding plaintiff $25,000 interim attorney fees and costs concerning this action and the filing of her motion. Defendants Prime East 15th LLC (Prime) and Jacob Frank (Frank), Prime's principal, cross-move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint.

Factual Background and Procedural History

(1)

This foreclosure action stems from the September 22, 2005 sale of the 12 unit, multiple dwelling premises, by Gaad Realty Corp. (Gaad) to defendant Prime for $1,320,000 with $400,000 paid by check. A $920,000 purchase-money mortgage taken by Prime and payable to plaintiff, the wife of Gaad's president, Gary Schebovitz (Schebovitz), financed the remainder of the transaction.[1] The contract execution and closing concurrently occurred on September 22, 2005 together with Prime's execution of the purchase-money mortgage and mortgage note as well as defendant Frank's execution of a personal, written guaranty of payment (guaranty). Prime received a bargain and sale deed with covenant against grantor's

[1]A July 28, 2005 memorandum from Massey Knakal Realty Services, the real estate broker for this transaction, had initially outlined the relevant terms and conditions.

acts from Gaad at the closing and also was given a rent roll showing five of the 12 apartments as vacant with the remaining seven identified as month-to-month tenancies.

Defendants made the first payment due October 22, 2005 with a covering letter dated October 21, 2005 which explained that they had "deducted $1,893.30 from the regular payment of $6,000 per your instructions, equal to the amount owed to us by you for the September rent that you collected from the tenants . . ." Plaintiff accepted and cashed that payment, but she neither deposited nor returned the November 22, 2005 payment which defendants had sent, during the 10 day grace period, with a November 24, 2005 covering letter that similarly explained that "[w]e have deducted $1,508.52 from the regular payment of $6,000.00 per your instructions, equal to the amount owed to us by you for the rents paid to you . . ."

(2)

Ms. Levy then instituted this foreclosure action by summons and complaint, dated December 23, 2005 and filed December 27, 2005,during the ten day grace period for the December 22, 2005 payment. She thereafter moved for summary judgment and to appoint a referee in April 2006, less than two months after defendants answered and counterclaimed. This court's August 7, 2006 decision and order denied that motion without prejudice to renew after discovery. The opinion noted that "there are issues of fact that cannot be determined by way of the instant motion."

Plaintiff's attorney thereafter moved to be relieved as counsel, and the court granted that request in a July 11, 2007 short form order. The succeeding counsel has now brought the main motion for a temporary receiver and other relief outlined above, and defendants have both opposed that motion and cross-moved for a summary judgment dismissal of the complaint.

The Parties' Positions

Plaintiff's Position

Ms. Levy seeks appointment of a temporary receiver pursuant to the mortgage and CPLR 6401 (a) by alleging that defendants have collected nearly four years of rent and not made any mortgage payment in over three and a half years while allegedly failing to meet their tax obligations and allegedly causing cancellation of the property insurance. She argues that a memorandum or letter(s) presented to defendants at the closing by their prior counsel and then signed by defendants allegedly show defendants' willingness to make the transaction and their counsel's advice (or disclaimer) about possible ramifications of the purchase. Ms. Levy regards such material as relevant in addressing defendants' counterclaims alleging a fraudulent conveyance, and she concurrently views the material as not privileged considering that the documents were openly discussed in the presence of others.

In addition, she notes that Justice Ellen Spodek's February 11, 2009 Central Compliance Conference Part order mandated "[d]efendants to produce a letter prepared by

Al Fazio, Esq. [defendants' counsel at closing] for Frank's signature at closing . . ." That order further provided that "[f]ailure to produce will result in order of preclusion." Ms. Levy further observes that defendants have neither produced the documents, sought to reargue the order nor applied for a protective order. These circumstances have led plaintiff to seek extensions of the discovery cutoff and note of issue filing dates and to pursue counsel fees under the mortgage rider.

Defendants' Position

Defendant Frank opposes plaintiff's motion and, together with defendant Prime, seeks summary judgment dismissal of the foreclosure action in their cross motion by contending (1) that no mortgage default has occurred; (2) that no default notice was given; (3) that Gaad, the seller, in any event, had been dissolved by state proclamation before the sale of the premises and thus did not convey good title; (4) that plaintiff gave no consideration for the mortgage; (5) that Gaad and/or its president, Mr. Schebovitz, materially misrepresented the status of the premises' tenants and grossly inflated the rent roll; and (6) that the premises are fully insured, that retained tax counsel is addressing disputed real estate taxes and therefore plaintiff has failed to demonstrate an imminent risk to the premises thus negating appointment of a temporary receiver and interim counsel fees.

In addition, defendant Frank denies possessing the document(s) which plaintiff's counsel alleges "memorialize and acknowledge that Frank was advised as to all aspects of

the transaction . . ." Frank concurrently cites his former counsel's privilege assertion regarding such document(s).

Plaintiff's Rebuttal

Plaintiff as well as Mr. Schebovitz seek to rebut defendants' arguments by claiming (1) that no agreements existed to accept lesser amounts of mortgage payments; (2) that a mortgage default letter was sent to Prime; (3) that Frank's failure to annex his guaranty to his moving papers negates the summary judgment cross motion; (4) that the guaranty makes notice of default or similar notices irrelevant; (5) that Gaad did not inflate the rent roll and misrepresent the status of the premises' tenants and their rent; (6) that defendants had an opportunity to exercise due diligence and contact the New York State Division of Housing and Community Renewal about the status of the premises' tenants; (7) that the sale contract did not include the rent roll document; (8) that Gaad had authority to convey title; (9) that Gaad's franchise taxes were escrowed at closing by Regal Title Agency, the title company which arguably provided insurable title to Frank; (10) that allegations about Gaad's ability to convey title, in any event, are immaterial to the foreclosure action; (11) that defendants accepted the deed without objections; (12) that defendants were precluded after accepting title and after closing from raising claims against Gaad; (13) that court-ordered depositions of Frank, Frank's sale counsel and the sale broker should occur; and (14) that the court should search the record and sua sponte award plaintiff summary judgment.

Discussion

(1)

Preliminarily, defendants err regarding the impact of Gaad's dissolution on its ability to convey title. The Appellate Division, Second Department has noted that "dissolution of a business corporation for failure to pay franchise taxes does not affect the corporation's right to collect or distribute its assets (*Matter of Sullivan*, 31 AD3d 651, 652 [2006]; see also Tax Law § 203-a [10]; Business Corporation Law §§ 1006 and 1009). Hence, Gaad could sell the premises to defendants despite its dissolution, and Gaad's tax liability remains (*Id.* at 653 ["(t)he tax liability survives the dissolution and attaches to the real and personal property of the dissolved corporation or of a transferee liable to pay the same"] [internal quotation marks omitted]; *see also* Tax Law § 1092 [j]).

In addition, Gaad's dissolution fails to prevent Ms. Levy's foreclosure action. A prohibition against bringing suit only applies to Gaad, a non-party, dissolved corporation herein (*see Moran Enters., Inc. v Hurst*, 66 AD3d 972, 975 [2009]), not to Ms. Levy, the party who gave the purchase-money mortgage. The Court of Appeals has explained that "[a] purchase-money mortgage is generally defined as a mortgage executed at the time of purchase of the land and contemporaneously with the acquisition of the legal title, or afterward, but as part of the same transaction, to secure an unpaid balance of the purchase price" (*Matter of 10 E. Realty, LLC v Incorporated Vil. of Val. Stream*, 12 NY3d 212, 215 [2009]). Here, plaintiff gave the $900,000 purchase-money mortgage, requested by

defendants, to enable the transaction between defendants and Gaad, and such loan, itself, which reduced defendants' cash payment, constitutes valid consideration for the transaction thus allowing plaintiff to maintain the foreclosure action.

(2)

The Appellate Division, Second Department recently reiterated that "[t]he court's function on a motion [or cross motion] for summary judgment is to determine whether material factual issues exist, not to resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal citations and quotation marks omitted]). The opinion also recounted that "[a] motion [or cross motion] for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*id.*) (internal citations and internal quotation marks omitted).

Here, myriad factual issues abound. Most fundamentally, defendant Frank claims that an agreement to deduct collected rents allowed less than the full $6,000 monthly mortgage payment and thus no mortgage default occurred regarding the October 22, 2005 payment. However, Mr. Schebovitz, president of Gaad, the seller, flatly contradicts this purported arrangement. He states (in paragraph 11 of his affidavit accompanying plaintiff's opposition) that Frank has "falsely asserted that Dorit Levy and I had instructed him to deduct monies from his mortgage payment. I never had any such discussions with Frank, nor am I advised does Dorit Levy recollect any such discussions or agreements." Indeed, Ms. Levy states in her affidavit opposing the summary judgment cross motion that "I don't recall . . . an

agreement to withhold payments," and further notes that "I said at my deposition . . . I couldn't recall such an agreement." This factual dispute, alone negates the summary judgment cross motion to dismiss the complaint (as well as plaintiff's request for the court to sua sponte search the record and award her summary judgment on the foreclosure action).

(3)

The rent deductibility dispute necessarily raises the question whether a mortgage default occurred. That question, in turn, preempts utilizing the mortgage as a basis for appointing a receiver considering that the mortgage first requires proving a default for such relief.[2]

CPLR 6401 (a), which statutorily authorizes appointing a receiver, similarly provides plaintiff no present panacea for that relief. The provision pertinently provides that "a temporary receiver of the property may be appointed . . . where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." Here, defendant Frank has presented proof of insurance for the premises, albeit effective October 8, 2009, the date of his affidavit opposing plaintiff's motion for a receiver's appointment. Nonetheless, the insurance has been obtained, and the documentation shows an expiration

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[2]Indeed, paragraph 13 of the mortgage states that "[t]he mortgagor. . . in the event of any *default* under this mortgage will pay monthly in advance to the mortgagee, or to any receiver . . . the fair and reasonable rental value for the use and occupation of said premises . . ." (emphasis added). This default prerequisite equally impacts paragraph 5 of the mortgage which states that "the holder of this mortgage, in any action to foreclose it, shall be *entitled* to the appointment of a receiver" (emphasis added). Alternatively, reasonably construing paragraph 5 at least requires first showing the court in a foreclosure action that the mortgage holder satisfies the statutory standard for a receiver's appointment, as discussed infra, and is thus "entitled" to such relief.

date of October 8, 2012, three years from its effective date and nearly two and a half years from now.

Defendant Frank's papers also show that he retained counsel to address the premises' tax liability, and, more importantly, plaintiff's papers fail to show a tax foreclosure proceeding regarding the premises which would demonstrate, as CPLR 6401 (a) requires, "danger that the property will be . . . lost." The Appellate Division, Second Department has very recently reiterated that "[t]he appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits" (*Quick v Quick*, 69 AD3d 828, 829 [2010] [internal citation and internal quotation marks omitted]). Hence, the appellate opinion explained that "a temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party's interests in that property" (*id.*) (internal citations omitted). Here, as in the *Quick* case and others, "the record did not clearly establish [such] necessity" (*id.*). Indeed, defendant Frank claims that he and Prime have upgraded the premises' electrical services, installed a new buzzer intercom system, upgraded the heating and plumbing system and installed a new roof.

Rejecting plaintiff's effort to presently appoint a receiver, in turn, undercuts her accompanying request for counsel fees under the mortgage rider.[3] This rejection also moots

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[3]Paragraph 23 of that document burdens defendants for counsel fees "incidental to the enforcement of any provision hereof." Plaintiff, though, has not presently prevailed either on her foreclosure action or concerning her application for a receiver. Therefore, enforcement of the mortgage remedies, the basis for attorney fees, has not occurred, and plaintiff has prematurely sought such fees.

whether defendant Prime defaulted in opposing plaintiffs' motion. The factual dispute negating a receiver in other words made defendant Prime's alleged default regarding plaintiff's motion irrelevant.[4]

The rent deductibility and default disputes preempt addressing plaintiff's numerous other arguments against summary judgment for defendants. In addition, a jury can also determine whether a mortgage default letter was sent to Prime as plaintiff claims and defendants deny, whether the seller, Gaad, inflated the rent roll and misrepresented the status of the premises' tenants, as defendants claim and plaintiff denies and whether Mr. Schebovitz initialed the rent roll as defendants claim and he denies.

(4)

No valid opposition has been presented regarding plaintiff's request for the memorandum or letter(s) signed at the closing that concern defendant Frank being advised about executing the contract and then immediately closing the transaction. No dispute exists that this information appears relevant to plaintiff's defense against defendants' counterclaims alleging a fraudulent conveyance or that defendant Frank openly and publicly discussed such document at the closing. Case law recognizes that "communications between a client and an attorney made in the presence of third parties are not privileged" (*Doe v Poe*, 92 NY2d 864, 867 [1998]); *see also People v Harris*, 57 NY2d 335, 343 [1982], *cert denied* 460 US

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[4]Denying the cross motion equally moots any controversy about defendant Prime's participation therein. The court notes, in any event, that the notice of cross motion is titled "Defendants' Notice of Cross Motion For Summary Judgment" and identifies defendants as the movants.

1047 [1983]; *Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834, 835 [1983] ["a client . . . who publicly discloses such [privileged communications] . . . is deemed to have impliedly waived the attorney-client privilege"]).

Likewise, no dispute exists that Justice Ellen Spodek already directed "[d]efendants to produce a letter prepared by Al Fazio, Esq., [defendants' counsel at closing] for Frank's signature at closing . . ." and that no compliance has occurred. Justice Spodek's unchallenged order constitutes law of the case (*see People v Bilsky*, 95 NY2d 172, 175 [2000]; *People v Evans,* 94 NY2d 499, 502 [2000], *rearg denied* 96 NY2d 755 [2001]). Therefore, defendants' shall produce such letter or furnish plaintiff's counsel with an authorization to obtain such document from Mr. Fazio within 30 days after service of this decision and order with notice of entry, or an affidavit from Mr. Fazio that states to the best of his knowledge that the letter sought by plaintiff does not exist and never existed, or plaintiff can move for appropriate discovery sanctions. Defendants shall also produce all other presently outstanding documents, if any, requested by plaintiff within 30 days after service of this decision and order with notice of entry.

In addition, defendant Frank, who professes a willingness to be deposed, shall be deposed within 30 days after service of the court-ordered document described herein. Plaintiffs may, if so advised, similarly subpoena Mr. Fazio as well as the sale broker, Massey Knakal Realty Services (Massey) and Regal Title Agency to collectively produce relevant documents and/or appear for depositions within 60 days after defendant Frank's deposition.

Consequently, the court extends the note of issue filing date through October 15, 2010. Accordingly, it is

ORDERED that the branch of plaintiff's motion to appoint a receiver is denied; and it is further

ORDERED that the discovery branch of plaintiff's motion is granted to the extent that within 30 days after service of this decision and order with notice of entry: (a) defendant Frank shall produce the document prepared by Al Fazio, Esq., or furnish plaintiff's counsel with an authorization for Mr. Fazio to produce such document, or an affidavit from Mr. Fazio that states to the best of his knowledge that the letter sought by plaintiff does not exist and never existed, or plaintiff can move for appropriate discovery sanctions; (b) defendants shall produce all other presently outstanding documents, if any, requested by plaintiff; and (c) defendant Frank shall appear for deposition within 30 days after service of the court-ordered document described herein. The note of issue filing date herein is extended through October 15, 2010; and it is further

ORDERED that the branch of plaintiff's motion for attorney fees is denied as premature; and it is further

ORDERED that defendants' summary judgment cross motion to dismiss the complaint is denied.

This constitutes the decision and order of this court.

E N T E R,

Hon. Martin M. Solomon S.C.J.