

JPMorgan Chase Bank, N.A. v Faith Ministries, Inc.

2010 NY Slip Op 31902(U)

July 12, 2010

Supreme Court, New York County

Docket Number: 600116/10

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

JPMorgan Chase Bank, N.A.

INDEX NO.

600116/10

MOTION DATE

MOTION SEQ. NO.

2

MOTION CAL. NO.

- v -

Faith Ministries, Inc., Et Al

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits

1-7

Answering Affidavits - Exhibits

8-13

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.**

Dated: 7/12/10

Joan M. Kenney
JOAN M. KENNEY J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

-----X

JPMORGAN CHASE BANK, N. A.,

Plaintiff,

Index # 600116/10

-against-

FAITH MINISTRIES, INC., NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, NEW
YORK CITY ENVIRONMENTAL CONTROL
BOARD, LYDIA WITHROW, "JOHN DOE NO. 1"
TO "JOHN DOES NO. XXX", inclusive the
last thirty names being fictitious
and unknown to plaintiff, the persons
or parties intended being tenants,
occupants, persons or corporations,
if any, having or claiming an interest
in or lien upon the premises described
in the complaint,

DECISION & ORDER

FILED
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Defendants.

-----X

HON. JOAN M. KENNEY, J.:

Papers considered in review of this motion to vacate the appointment of a receiver:

Papers	Numbered
Order To Show Cause, Affirmation, and Exhibits	1-7
Opposition Papers, Affirmation, Affidavit with Exhibits	8-13

Plaintiff's Counsel:
Jaspan & Schlesinger LLP
300 Garden City Plaza
Garden City, New York 11530
New York, NY 10036
(516) 746-8000

Defendant's Counsel:
Goldberg, Weprin, Finkel, Goldstein LLP
1501 Broadway
New York, New York 10036
(212) 221-5700

PROCEDURAL AND FACTUAL BACKGROUND

On January 15, 2010 plaintiff commenced the captioned action, seeking to foreclose on a \$9,000,000.00 promissory note (the note) and mortgage (the mortgage). On or about February 1, 2010, plaintiff moved by Order To Show Cause seeking, *inter alia*, the appointment of a temporary receiver for the mortgaged premises located at 329-331 East 94th Street, 333-335 East 94th Street, and

337-339 East 94th Street, all within the State, County and City of New York (the premises).

This Court signed plaintiff's ex parte Order To Show Cause on February 1, 2010, which among other things, appointed a temporary receiver for the premises (the receiver).¹

The following facts are uncontested. Defendant is indebted to plaintiff. The premises has carried a mortgage since 1982. During the course of the next 28 years, several mortgages were consolidated and assigned to various entities. On or about July 31, 2002, Washington Mutual Bank F.A., as part of one of the assets in receivership with the Federal Deposit Insurance Corporation, sold the mortgage to plaintiff, via a consolidation extension and modification agreement, which resulted in a single lien in the amount of \$9,000,000.00. The mortgage was recorded on August 30, 2002. In addition to the note and mortgage, defendant, Lydia Withrow, agreed, in writing, to guaranty payment of the full amount of the indebtedness.

The mortgage agreement contains an acceleration clause which in essence states that upon the occurrence of a default event, plaintiff may accelerate the payment of the note and foreclose upon the mortgage. The mortgage defines such an event as, among other

¹Shortly after the receiver's appointment, he discovered that he had a conflict of interest and had to resign, retroactive to the date of his appointment. Consequently, the instant motion (motion sequence 002) is being treated as opposition to the original Order To Show cause (motion sequence 001).

things, making late payments; failure to properly fund escrow for the payment of real estate taxes, etc..

The parties do not dispute that defendant made many early payments; however, on November 1, 2009, defendant failed to make any payment. On December 2, 2009, plaintiff served a default notice on defendant, wherein defendant was informed that plaintiff:

"declare[d] the entire principal amount of the Loan currently outstanding, together with all accrued and unpaid interest and additional interest thereon and all other sums and indebtedness due and payable by the Borrower under the Loan Documents or otherwise in connection with the Loan (including without limitation, all fees, expenses, late charges and penalties) to be immediately due and payable."

Prior to the default declaration, the parties had extensive discussions and negotiations regarding the assessment and payment of the real estate taxes for the premises. It is uncontested that defendant's inconsistent payment history, and plaintiff's waiver of certain fees, also occurred prior to the default being declared.

It is clear from the papers that the parties continually disputed the calculation of the amount to be due each month for a significant period of time between July 2009 and December 2, 2009. Defendants allege that plaintiff agreed to modify the mortgage, and accepted in excess of \$300,000.00 from defendant, after service of the default notice. It is at this point in the relationship between the parties that the factual history becomes muddled.

Plaintiff does not confirm, nor does it deny, that it was in the process of modifying the note and mortgage at the time the instant application was made. This is significant only to the extent that it is indicative that some sort of negotiation was taking place. However, plaintiff's exhibits indicate that the post-default payments did not apparently satisfy the arrearages that allegedly remained outstanding at the time this application was made to the Court. Defendant now seeks an Order pursuant to CPLR 5015, vacating the ex parte Order appointing a temporary receiver.

ARGUMENTS

In support of its motion to vacate the appointment of a receiver, defendant argues that: (1) that it is entitled to the relief sought pursuant to CPLR 5015, because plaintiff brought the application via an ex parte Order To Show Cause, without giving prior notice to defendant; (2) that plaintiff made representations that a loan modification was in the offing, and was being negotiated right up until the time the Order To Show Cause was filed and served; and (3) plaintiff's accounting of defendant's payment history is inaccurate, therefore, plaintiff was never in default, and consequently plaintiff commenced this action with unclean hands.

Plaintiff contends that it is entitled to have a receiver appointed because: (1) the terms of the note and mortgage unequivocally permit it to do so without notice; (2) defendant does not deny that short payments were made and deposited in a

"suspense" account²; and (3) because defendant's payment of the real estate taxes was continually delinquent.

DISCUSSION

The threshold questions to be determined are (1) did plaintiff have a right to seek its provisional remedy without notice to defendant and (2) was the appointment of a temporary receiver an inappropriate use of judicial discretion.

The parties do not deny that Article II paragraphs 2.1 (Events of Default and Remedies) and 2.5 (Appointment of a Receiver) of the mortgage are controlling. Paragraph 2.5 states in pertinent part as follows:

"After the occurrence of any Event of Default and during its continuance, ... Mortgagee shall be entitled, as a matter of right, without the giving notice to any other party ... to the appointment of a receiver ... of the Mortgaged Property and of all the Rents thereof."

Additionally, plaintiff relies on Real Property Law §254 [10] to support its application for the appointment of a receiver. The statute states in its entirety 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,

²The parties acknowledge that until the full amount of the monthly payment accumulated in the "suspense" account, plaintiff would not credit the payments to defendant's mortgage account.

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.

Defendant moves under CPLR 5015 (Relief from a judgment or order) rather than CPLR 6401(b). When appointing the receiver this Court relied upon, *inter alia*, CPLR 6401(b) which states:

Powers of temporary receiver.

The 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.

The court finds that the issuance of the ex-parte order was not defective. Plaintiff as the holder of the mortgage, has an interest in the premises. The creation of the receivership was a judicial act based on documentary evidence, and an affidavit demonstrating the existence of legal grounds for seeking said relief. Furthermore, a substantial bond was filed.

Defendant has not provided this Court with sufficient evidence that reasonable grounds did not exist at the time of the appointment, or that circumstances have changed so as to now warrant a different result. Subsequent to the appointment of a receiver, a court retains the equitable power to review the actions of the receiver and the propriety of continuing the receivership. In the event a receiver fails to fulfill his/her legal and statutory duties to preserve and protect the property, then this would be a proper basis for removal of a receiver (*See, 500 West 172nd Street Realty, Inc. v. Romax Properties Corp.*, 126 Misc2d 268, 270 (Sup. Ct., N.Y., 1984) (court retained equitable power to vacate receiver appointment), citing *Ardeb Realty Corp. v. East Estates, Inc.*, 12 Misc2d 167 (Sup. Ct., N.Y., 1984) (court declined to vacate receiver appointment). Defendant has not demonstrated that any of the of the foregoing factual circumstances exist, warranting a reversal of this Court's prior determination that a temporary receiver is necessary in this case.

The defendant was entitled to move immediately to vacate the receivership, and under CPLR 6401(b) and could seek to limit the receiver's powers. Defendant, is represented by able counsel dealing at arm's length with the plaintiff, could have agreed to the appointment of a receiver in the event of a foreclosure action, and that the interpretation of such clause in Section 254 of the Real Property Law would be effective. RPL §254 provides that a covenant providing for the appointment of a receiver must be

construed as meaning the plaintiff is entitled to an ex-parte appointment. Moreover, even if the appointment of a receiver ex-parte was defective, that defect was cured in this case by the subsequent motion, and the opportunity this Court has afforded the parties to be heard fully on the issues. Furthermore, because of the factual allegations made by defendant it must be noted that "[a] Receiver is an officer of the court and not an agent of the mortgagee or the owner * * * His duty is to preserve and operate the property, within the confines of the order of appointment and any subsequent authorization granted to him by the court (citations omitted)" (*Jacynicz v 73 Seaman Associates*, 270 AD2d 83 [1st Dept 2000]). A receiver is required to maintain itemized accounts of receipts and expenditures, which remain open to inspection by "any person having an apparent interest in the property" (CPLR 6404), a category that would clearly encompass the interest of a mortgagee (*Bank Leumi Trust Co. of New York v Lightning Park, Inc.*, 215 AD2d 246 [1st Dept 1995]); *Kaplan v 2108-2116 Walton Ave. Realty Co., Inc.*, 74 AD2d 786 [1st 1980]).

This leaves for consideration the question whether the receivership should be allowed to continue or be discharged in the exercise of the court's discretion, or whether there should be any limitation or extension of the receiver's powers. "[T]he powers and duties of the receiver appointed pursuant to the court's equity powers are formulated as a matter of judicial discretion and the court 'is vested with inherent plenary power to fashion any remedy

necessary for the proper administration of justice.'" (*Domansky v Berkovitch*, 259 AD2d 331 [1st Dept 1999]; *64 B Venture v American Realty Co.*, 194 AD2d 504 [1st Dept 1993]). In this case the appointment of the receiver was indeed appropriate.

Finally, it is proper to deny a mortgagor's motion to vacate the appointment of a receiver where the appointment is authorized upon [an alleged] default by the terms of the mortgage (*Crossland Sav., FSB v. LoGuidice-Chatwal Real Estate Investments Co.*, 157 AD2d 504, 549 [1st Dept. 1990]). Consequently defendant's motion is denied.

Accordingly, it is

ORDERED that defendant's motion is denied; and it is further

ORDERED, that Michael G. Zapson, Esq. of Davidoff Malito & Hutcher, LLP is hereby appointed with the usual powers and direction as Receiver for the benefit of the plaintiff of all the rents and profits now due and to become due during the pendency of this action and issuing out of the mortgaged premises all as set forth in the Complaint and known as 329-331 East 94th Street, 333-335 East 94th Street and 337-339 East 94th Street, New York, New York ("Mortgaged Premises"); and it is further

ORDERED, that the Receiver is authorized to forthwith take charge and enter into possession of the property; and it further

ORDERED, that the said Receiver, prior to engaging in any action that may result in expenses being incurred, be and he hereby

is directed to contact the plaintiff's attorney, Jessica L. Soderberg, of Jaspan Schlesinger LLP, 300 Garden City Plaza, Garden City, New York 11530, to ascertain the status of the foreclosure action and whether he should proceed with his duties; and it is further

ORDERED, that before entering upon his duties, said Receiver shall be sworn faithfully and fairly to discharge the trust committed to him/her, and said Receiver execute to THE PEOPLE STATE OF NEW YORK and file with the Clerk of the Court a with sufficient sureties to be in the sum of \$473,004.00 conditioned for the faithful performance of his duties as such Receiver; and it is further

ORDERED, that the Receiver file an oath with the County Clerk; and it is further

ORDERED, that the said Receiver be and he/she hereby is directed to demand, collect and receive from the occupants, tenants, and licensees in possession of said premises or others liable therefore, inclusive of the mortgagor, all the rents and license fees thereof to become fixed and due now due and unpaid, and hereafter to become due and that said Receiver be and he/she 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 to compel the tenants and occupant(s) to attorn to the Receiver;

and it is further

ORDERED that the Receiver may institute and prosecute suits for the collection of rent, license fees and other charges now due or hereafter to become due or fixed, and summary proceedings for the removal of any tenants or licenses or other persons therefrom; and it is further

ORDERED, that pursuant to the provisions of the General Obligations Law section 7-105, anybody holding any deposits or advances of rental as security under any lease or license agreement affecting space in the premises affected by this action shall turn over to said Receiver within five (5) days after said Receiver shall have qualified; and thereupon the said Receiver shall hold such security subject to such disposition thereof as shall be provided in an Order of this Court to be made and entered in this action; and it is further

ORDERED, that anybody in possession of same shall turn over to said Receiver all rent lists, orders, unexpired and expired leases, agreements, correspondence, notices and registration statements relating to rental spaces or facilities in the premises; and it is further

ORDERED, that the defendants and their agents, officers, employees and contractors are hereby directed to deliver and attorn to the receiver all rent lists, shareholder lists, unexpired and expired leases, proprietary leases, agreements, contracts, recognition agreements, corporate by-laws, correspondence, notices

registration statements, tenants, securities, shareholders, escrows, and lists of current rent or other monies, arrears, relating to space in the Mortgaged Premises; and it is further

ORDERED, that notwithstanding anything to the contrary contained in this order, the receiver shall not, without the further, prior order of this Court, upon prior notice to plaintiff, make improvements or substantial repairs to the property at a cost in excess of \$1000; and it is further

ORDERED, that said Receiver forthwith deposit all monies received by him at the time he receives the same in his own name as Receiver in Sterling Bank, 622 Third Avenue, New York, New York and such account shall show the name of this action, and no withdrawals shall be made therefrom except as directed by the Court or on a draft or check signed by the Receiver; Receiver shall furnish the Plaintiff's attorneys with monthly statements of the receipts and expenditures of the Receivership, together with a photocopy of the monthly statements received from said depository; and it is further

ORDERED, that said Receiver is prohibited from incurring obligations in excess of the monies in his hands without further order of the Court; and it is further

ORDERED, that said Receiver is not "authorized to appoint a managing agent to rent and collect the rents of the Premises without the Court's consent, or to pay the reasonable use of such agent's services out of the rents received; and it is further

ORDERED, that the Receiver shall procure liability insurance

and from time to time, rent or lease all or any part of the Mortgaged Premises for terms of two (2) years or such longer terms as may be required by the City and State of New York pursuant to applicable rent rules; and keep said Mortgaged Premises insured against loss or damage by fire and other hazards for the benefit of the plaintiff in the event plaintiff is not the beneficiary of the owner's insurance or plaintiff does not have its own insurance therefore; and to keep said Mortgaged Premises in repair; and to pay the taxes, assessments, water and sewer rents vault charges, salaries of employees, supplies and other charges; to comply with all the lawful requirements of any municipal department or other authority of the municipality in which the mortgaged premises are situated; to procure such fire, plate glass, liability and other insurance as may be reasonably necessary thereon; all in compliance with Section 5228(a) of the Civil Practice Law and Rules; and it is further

ORDERED, that the tenants, subtenants or other persons in possession of said Mortgaged Premises attorn to said Receiver and pay over to said Receiver all rents, license fees and other charges of such premises or other monies of said Mortgaged Premises now due and unpaid or that may hereafter become due; and that the defendants and their agents, officers, employees and attorneys are enjoined and restrained from: (i) collecting the rents, license fees and other charges of said Mortgaged Premises; (ii) interfering in any manner with the Mortgaged Premises or its possession, or

with the receiver's management thereof; (iii) and from transferring, removing or in any way disturbing any of the occupants or employees; and that all the tenants of the Mortgaged Premises and other persons liable for the rents be and they hereby are enjoined and restrained from paying any rents for said Mortgaged Premises to the defendants, their agents, servants or attorneys; and it is further

ORDERED, that all persons now or hereafter in possession of the Mortgaged Premises or any part thereof, and not holding such possession under valid and existing leases, do forthwith surrender such possession to the Receiver at the option of the Receiver, subject to Emergency Rent laws, if any; and it is further

ORDERED, that the Receiver, after paying the expenses of the management and care of said Mortgaged Premises, retain the balance of the money which may come into his hands until the sale of the said premises under the judgment to be entered in this action and/or until further order of the Court; and it is further

ORDERED, that the Owner turn over to the Receiver all rents collected from and after the date of this Order; and it is further

ORDERED, that the Receiver comply with all lawful requirements of any municipal department or other authority of the municipality in which the Mortgage Premises are situated; and it is further

ORDERED, that the said Receiver or any party hereto may at any time, on proper notice to all parties who may have appeared in this action, apply to this Court for an order or for instructions or

powers necessary to enable such Receiver to properly and faithfully perform his duties; and it is further

ORDERED, that the Receiver appointed herein shall file a monthly accounting from the date of this Order, and each and every month thereafter during the pendency and existence of this receivership, with copies of said accounting to be forwarded to plaintiff's attorneys; and it is further

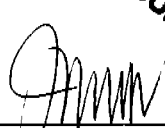
ORDERED, that the Receiver, upon receiving written notification from plaintiff's attorneys that the borrower has entered into a forbearance agreement with plaintiff, shall cease from his/her duties until further notification from plaintiff's attorneys; and it is further

ORDERED, that the appointee named herein shall comply with Section 35a of the Judiciary Law, CPLR Sections 6401-6404, RPAPL Section 1325, and Part 36 of the Rules of the Chief Judge.

NOTWITHSTANDING AND OTHER PROVISION OF THIS ORDER TO THE CONTRARY, THE RECEIVER SHALL NOT APPOINT AN ATTORNEY, AGENT, APPRAISER, AUCTIONEER OR ACCOUNTANT WITHOUT PRIOR ORDER OF THIS COURT.

Dated: July 12, 2010

ENTER:



 Hon. Joan M. Kenney
 J.S.C.

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