

CIT Lending Servs. Corp. v East Houston Partners, LLC
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2010 NY Slip Op 34105(U)

March 10, 2010

Supreme Court, New York County

Docket Number: 113222/09

Judge: Judith J. Gische

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Supreme Court of the State of New York
County of New York: Trial Part 10

CIT Lending Services Corporation,

Plaintiff,

Decision/Order

-against-

Index #113222/09
Mot. Seq. # 001

East Houston Partners LLC, Kyle Ransford,
Trevor Stahelski, A & B Caulking Company, Inc.
Bayport Construction Corp., FSM Electrical
Corporation, Saramac International Inc.,
Stone Diversified Services, Park Avenue
Building and Roofing Supplies, LLC, Kiska Group,
Ltd., Rotavele Elevator, Inc., United Rental North
America, Solco Plumbing Supply, Inc., Malota
Plumbing contracting Corp., Thomas S. Brown
Associates, Inc., ERA_USA Contracting LLC,
Colgate Scaffolding & Equipment Corp., A & E
Surfaces, Co., and John does #1 through
John Doe # 10,

Defendants.

Gische, J.:

Pursuant to CPLR 2219(a) the following numbered papers were considered by
the court on this motion:

PAPERS	NUMBERED
Ex Parte Motion SAC affd., exhibits.....	1
BCK declaration, exhibit.....	2
TS affd. in Opp., exhibits.....	3
TS supplemental affd. In Opp., exhibits.....	4

Upon the foregoing papers, the decision and order of the Court is as follows:

The underlying action is to foreclose certain mortgages made by plaintiff, CIT
Lending Services ("CIT") to defendant East Houston Partners, LLC in connection with
developing the properties located at 41 and 45 East Houston Street, New York, New

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York ("properties"). CIT originally presented an ex-parte order for the appointment of a receiver for the properties, based upon its claim that East Houston Partners, LLC was in default on the mortgages. The Court converted the application to a motion on notice to defendants. The motion is opposed only by defendants East Houston Partners, LLC, its principal, Trevor Stahelski ("Stahelski") and Kyle Ransford ("Ransford") (collectively "EHP").

EHP obtained financing to develop the properties into an eleven story building consisting of condominium units and retail space on the first floor. CIT provided approximately \$17,000,000.00 of financing for the project, which consisted of: [1] a Project Loan Mortgage dated 12/29/06; [2] an Acquisition Loan Mortgage dated 12/29/06; [3] a Building Loan Mortgage dated 12/29/06; [4] a Substitute Building Loan Mortgage dated 4/27/07 and [5] a Substitute Project Loan Mortgage dated 4/27/07 (collectively "mortgages"). Each of the mortgages provides that in the event of a default by East Houston Partners, LLC, CIT has the right to secure the appointment of a receiver.

CIT claims that East Houston Partners, LLC defaulted on the mortgages by: [1] failing to pay the principal sum of \$16,992,151.72 which came due on January 1, 2009; [2] failing to maintain insurance; and [3] failing to pay materialmen, mechanics and laborers.

A significant amount of the project has been completed. The parties report that the project is 95% completed. At some point, however, EHP stopped construction and CIT claims that its collateral is currently being compromised. It claims that the properties are not properly secured, which has led to and creates a risk that materials

will be removed from the site. It claims that certain permits have expired and that systems, like sidewalks are in need of repair. The properties currently produce no income.

In opposition to the application EHP argues that it has a prior action filed against CIT for breach of contract, breach of the covenant of good faith and fair dealing and other claims arising from CIT's failure to timely and fully fund the lending commitments. It further argues that, based upon its own observations, the property is not deteriorating since CIT halted funding was in March 2009 and that it too has an interest in protecting its \$7,000,000.00 investment in the properties. EHP claims that a receiver will add an unnecessary level of expense to the project and that the Court should, in its discretion, deny the application. EHP also argues the receiver is being sought under false pretenses since CIT originally sought a receiver to collect rents and pay expenses, but there are no such expenses to pay.

A mortgage provision which provides for the ex parte appointment of a receiver upon default is valid and binding on the parties. RPL §254.10. The court, however, still maintains discretion over such appointment. Naar v. I.J. Litwak & Co., 260 AD2d 613 (2nd dept. 1999); Clinton Capital Corp. v. One Tiffany Place Developers, Inc., 112 AD2d 911 (2nd dept. 1985).

The problem with this application for a receiver in this case is two fold. First, it is unclear what CIT would want the receiver to do. Since this is not an operating property, but one that it is still in development, it would seem that any Receiver's role would be limited to protection of the property until the foreclosure action is concluded. Secondly, since the property produces no income, CIT has not set forth what financial

arrangements, if any, it is willing to make to pay for the services that may be required to preserve its collateral.

Where, as here, the monies available from the building are insufficient to meet the expenses, the plaintiff cannot be compelled to advance the necessary funds. Litho Fund Equities, Inc. v. Alley Spring Apartment Corp., 94 AD2d 13 (1st dept. 1983); East Chatham Corp. v. Iacovone, 25 AD2d 622 (1st dept. 1966). CPLR § 8004(b) permits a Court to order, at the end of the receivership, that the party who sought the appointment in the first place pay the receiver's commissions under certain circumstances (Sun Beam Enterprises, Inc. v. Liza Realty Corp., 210 AD2d 153 [1st dept. 1994]). We already know that the building does not produce any income to pay receivership commissions. There is no similar provision that allows the Court to order that other ongoing receivership expenses be so paid.

Accordingly, the motion is denied without prejudice to renew upon an application by CIT indicating the specific duties and obligations it seeks for any appointed receiver in connection with preserving the collateral and a financial commitment to pay the expenses attendant to fulfilling the duties and responsibilities assigned, including reasonable compensation for the receiver, to the extent there are no funds available in running the building.

Dated: New York, New York
March 10, 2010

SO ORDERED:

J.G. J.S.C.