

<b>Phoenix Grantor Trust v Exclusive Hospitality, LLC</b>
2016 NY Slip Op 32917(U)
August 2, 2016
Supreme Court, Queens County
Docket Number: 710949/15
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

\_\_\_\_\_  
PHOENIX GRANTOR TRUST,

Plaintiff,

-against-

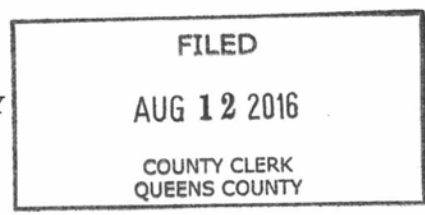
EXCLUSIVE HOSPITALITY, LLC, HIREN SHAH,  
VISHNU PATEL, DINESHCHANDRA G. PATEL,  
MUKESH I. PATEL, VIKAS B. PATEL,  
MAULESHKUMAR PATEL, AMRUT PATEL,  
KANAIYALAL K. PATEL, DILIPKUMAR I. PATEL,  
VIKRAM G. PATEL, CHANDRESH M. PATEL,  
KAUSHIK PATEL, NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE, THE NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW YORK  
CITY DEPARTMENT OF FINANCE, AND  
JOHN AND JANE DOES 1-10, ABC LLC 1-10  
XYZ CORP, 1-10,

Defendants.

Index No: 710949/15

Motion Date: 5/9/16

Motion Seq. No.: 3



The following numbered papers read on this motion by plaintiff for appointment of a receiver

PAPERS  
EF NUMBERED

Notice of Motion-Affidavits-Exhibits .....	73 - 97
Answering Affidavits-Exhibits.....	111 - 120
Replying Affidavits.....	121 - 123

Upon the foregoing papers it is ordered that this motion is denied.

The plaintiff, the alleged successor by assignment to Phoenix NPL, LLC (Phoenix), the assignee of the Federal Deposit Insurance Corp. (FDIC) in its capacity as the receiver for National Republic Bank of Chicago (NRBC), the original lender, seeks to foreclose a mortgage and personal guarantees encumbering real property located at 53-01 and 53-05 Queens Boulevard, Queens, New York, which is a hotel known as Quality Inn Woodside,

(the Hotel) given to secured an "Amended, Restated and Consolidated" note dated May 20, 2008 in the principal amount of \$10,500,000.00 given by defendant, Exclusive Hospitality LLC (Exclusive). The complaint alleges that the defendant, Exclusive, and the individual guarantors, defaulted under the loan documents by failing to make payment of the balance of the mortgage debt at maturity on October 18, 2015, and to pay real estate taxes and assessments.

Plaintiff now moves for the appointment of a receiver pursuant to Section 6.1 of the mortgage which provides in pertinent part that "Upon the occurrence of any Event of Default" the lender may take such action as it deems necessary to protect its rights in and to the property by applying for the appointment of a receiver (Section 6.1, subd. [g])

In opposition, the defendants submitted the affidavit of the defendant Kaushik Patel, the manager of the Hotel, a copy of the insurance policy declarations page, a check payable to the NYC Dept. of Finance, dated December 27, 2015, and a page of the franchise agreement and contend that the plaintiff is not entitled to the appointment of a receiver since there is no default under any provision of the mortgage.

With respect to the alleged default in payment of the principal balance of the note defendants assert that the consolidated note relied upon by plaintiff to demonstrate the maturity date of the mortgage loan is not the genuine note executed by Kaushik Patel, Chandresh M. Patel and Vishnu Patel as managers of Exclusive, but rather is the product of a fraudulent alteration, whereby the second page of the genuine note has been substituted for the original one, without the consent of defendant Exclusive, so as to modify the term of the loan from ten years to five years.

With respect to the failure to pay taxes, the defendants assert that prior to the commencement of this action in October, 2015, they paid every monthly installment due under the mortgage which included principal, interest and taxes escrow to NRB. Until contacted by the plaintiff, defendants were unaware that the taxes were not paid out of escrow, despite defendants' monthly payments. Defendants assert that upon learning of the tax arrears, they promptly paid all taxes due as evidence by the check annexed to the opposition papers.

With respect to the issue of insurance, defendants assert that contrary to plaintiff's claim there is a valid policy of insurance in effect which, inter alia, names the plaintiff as an

additional insured.

In addition, defendants maintain that there is no need for the appointment of a receiver to protect the plaintiff's interests as the Hotel is not distressed property, but rather a fully operational, well maintained and managed hotel. Finally, defendants assert that the appointment of a receiver would likely result in the loss of their franchise which would destroy the business they have worked very hard to develop and maintain.

In reply, and plaintiff asserts that this application must be granted as the mortgage pursuant the express provisions of the mortgage which must be interpreted in accordance with Real Property Law (RPL) §254(10) without considering the standards for appointment of a receiver contained in CPLR 6401.

RPL §254(10) provides,

"In mortgages of real property, \* \* \* the following or similar clauses and covenants must be construed as follows:

10. 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, \* \* \* 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."

However, this entitlement must be viewed together with other protections afforded mortgagors including CPLR 6401 as well as the principals of equity applicable to an action to foreclose a mortgage (see Foxfire Enterprises, Inc. v. Enterprise Holding Corp., 837 F.2d 597, 598 (2d Cir.1988). Under New York law, even where the appointment is authorized under the mortgages, the court retains the authority, in its discretion, to deny the appointment of a receiver where appropriate (see GECMC 2007-C1 Ditmars Lodging, LLC v Mohola, LLC, 84 AD3d 1311 [2011]; Clinton Capital Corp. v One Tiffany Place Developers, 112 AD2d 911, 912 [1985]; Ridgewood Sav. Bank v New Line Realty VI Corp., 24 Misc 3d 1227 [A], 2009 NY Slip Op 51646[U], \*3 [Sup Ct, Bronx County 2009]).

In view of the substantial issues of fact raised by the conflicting affidavits, including whether the defendants are in default under the mortgage<sup>1</sup> so as to trigger Section 6.1, the court, in the exercise of its equity jurisdiction, finds that appointment of a receiver under the facts of this case is unwarranted and inappropriate.

Dated: August 2, 2016  
D# 54

  
.....  
J.S.C.

FILED  
AUG 12 2016  
COUNTY CLERK  
QUEENS COUNTY

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<sup>1</sup>See the court's Order dated June 20, 2016 which determined the defendants' prior motions to dismiss.