DB 215 Moore, LLC v DB 215 Moore, LLC
2020 NY Slip Op 31920(U)
May 22, 2020
Supreme Court, Kings County
Docket Number: 520671/19
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

----------x

DB 215 MOORE, LLC.,

Plaintiff, Decision and order
520671/19

- against -

DB 215 MOORE, LLC., 215 MOORE ST ACQUISITION, LLC., S & B MOORE, LLC., TOBY MOSKOVITS, MICHAEL LICHTENSTEIN, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, RENT A UNIT NY INC, ISSM PROTECTIVE SERVICES, INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOHN DOE "1" THROUGH "10" JANE DOE "1" THROUGH "10" the last 10 names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in this Verified Complaint,

Defendants, May 22, 2020

----------x

215 MOORE ST. ACQUISITION, LLC., S & B MOORE, LLC., TOBY MOSKOVITS AND MICHAEL LICHTENSTEIN,

Counterclaimants/
Third-Party Plaintiffs,

- against -

DB 215 MOORE, LLC.,

Counterclaim Defendant,

AND

FORTRESS INVESTMENT GROUP, LC., AND AXOS FINANCIAL INC.,

----------x

PRESENT: HON. LEON RUCHELSMAN

The plaintiff seeks the appointment of a receiver pursuant to RPL §254(1) and the relevant agreements entered into between

the parties. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On April 3, 2018 the defendants executed a mortgage and accompanying agreements in the amount of $32,600,000. The mortgage and note were assigned to the plaintiff on May 21, 2019. The mortgage and note concerned property located at 207-209 Moore Street, 208-214 Seigel Street, 216-226 Seigel Street, 228 Seigel Street, 223-231 Moore Street a/k/a 33-39 White Street, 203-205 Moore Street, 201 Moore Street, 195 Moore Street, 199 Moore Street and 191 Moore Street in Kings County. The plaintiff alleges that as of November 2019 the amount owing on the mortgage was $33,008,736 plus interest and late charges.

The plaintiff has moved seeking the appointment of a receiver both pursuant to statute and pursuant to the agreements between the parties. The plaintiff asserts the defendants are collecting rents, materially breached various components of the agreements, failed to remove all violations on the property, permitted Mechanic's Liens to be filed and failed to pay various governmental charges including water and sewage fees. The request for a receiver is opposed on the grounds the plaintiff has failed to establish an imminent threat of irreparable harm, no default has occurred and a receiver would interfere with construction and alienate the property and its target market.

Conclusions of Law

It is well settled that pursuant to RPL §254(10) where a mortgage specifically authorizes the appointment of a receiver upon any action to foreclose the mortgage then a receiver may be appointed without regard to the adequacy of the security (Essex v. Newman, 220 AD2d 639, 632 NYS2d 636 [2d Dept., 1995]). The purpose of appointing a receiver is to preserve the property for the owner's and mortgagee's benefit. Article VII of the Mortgage entitled 'Default Provisions and Remedies' states that upon a default the mortgagee shall have the right to "apply to a court of competent jurisdiction for and obtain the appointment of a receiver of the Property as a matter of strict right..." (see, Amended, restated, Consolidated and Reaffirmed Promissory Note, dated April 3, 2018). It is true that even where a mortgage authorizes the appointment of a receiver such appointment rests in the discretion of the court (Ridgewood Savings Bank v. New Line Realty VI Corp., 24 Misc3d 1227 (A), 897 NYS2d 672 [Supreme Court Bronx County 2009]) and a court in equity can vacate the appointment in appropriate circumstances (see, Naar v. I.J. Litwak & Co., Inc., 260 AD2d 613, 688 NYS2d 698 [2d Dept., 1999]). The 'appropriate circumstances' noted is difficult to quantify. In Home Title Insurance Company v. Isaac Scherman Holding Corp., 240 AD 851, 267 NYS 84 [2d Dept., 1933] one of the earliest cases finding the "possible exercise of discretion"

denying a receiver or curtailing the receiver's rights, the court held such discretion could be exercised "in the case of hardship or the like" (id). Essentially, the court should exercise its discretion and deny a receiver where the receiver would serve no useful purpose (Federal Home Loan Mortgage Corp., v. Jerwin Realty Associates, 1992 WL 390264 [E.D.N.Y. 1992]). For example, where the default was inadvertent the court denied the appointment of a receiver (Fairmont Associates v. Fairmont Estates, 99 AD2d 895, 472 NYS2d 208 [3rd Dept., 1984]).

Thus, other than the appropriate and unusual circumstances noted there is no analysis the court must engage in before appointing a receiver pursuant to RPL §254(10). There is no requirement, as argued by the defendants, that the mortgagee must demonstrate a risk of irreparable loss (see, Memorandum in Opposition, page 11) or present competent evidence the asset is being compromised or mismanaged or that harm will befall the property absent a receiver (see, Memorandum in Opposition, pages 12 and 14). Clearly, there is a difference when a receiver is appointed pursuant to RPL §254(10) where absent appropriate circumstances the request should be granted and a receiver appointed pursuant to CPLR §6401 which demands "clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (Board of Managers of Nob Hill Condominium Section II

v. Board of Managers of Nob Hill Condominium Section I, 100 AD3d 673, 954 NYS2d 145 [2d Dept., 2012]). The defendant's attempt to require the court to engage in such scrutiny even where the mortgage allows for a receiver upon a default fails to appreciate the unique allowances afforded by RPL §254(10) which requires no such scrutiny.

Further, in any event a review of the facts of this case clearly establish the defendants have failed to present any special circumstances why a receiver should not be appointed. Pursuant to RPL §254(10) a receiver may be appointed for "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" (id). Where there are substantial questions of fact or whether there are questions whether a default even occurred or there are questions regarding the validity of the note then a receiver is not warranted despite language pursuant to RPL §254(10) (Phoenix Grantor Trust v. Exclusive Hospitality LLC, 172 AD3d 926, 98 NYS3d 752 [2d Dept., 2018]).

The defendant's opposition to the appointment of a receiver is an elaborate account wherein the plaintiff as well as the prior mortgagee conspired to default against the defendants who were in the hopes of refinancing the debt. Thus, according to

the defendants in addition to the first and senior loan of $32,600,000 the defendants sought another loan in the amount of $2,400,000 called a construction loan from Axos Financial Inc. The defendants insist that Axos never funded that loan. Further, the defendants and Axos sought to refinance the loans. The defendants received a payoff statement valid from May 17, 2019 through May 24, 2018 which listed the outstanding balances and issues. On May 21, 2019 Axos sold the loans to the plaintiff and two days later the plaintiff issued a notice of default to the defendants which included eight additional defaults. The defendants sought a payoff letter from the plaintiff and on June 3, 2019 sent the defendants a payoff letter which contained nearly three millions dollars of additional debt. The defendants assert the additional debt was in error and was maliciously fabricated to create a default against them. The defendants further assert that Axos acted together with the plaintiff to cause the defaults to occur. The defendants assert defenses of waiver and estoppel including counterclaims of breach of contract and breaches of good faith and fair dealing.

An examination of the first payoff letter prepared May 17, 2019 reveals it listed a payoff amount of $32,640,652.37 and the payoff letter dated June 3, 2019 listed a payoff amount of $35,397,584. This discrepancy, only a few weeks apart, is explained by the fact the second payoff letter listed outstanding

interest in an amount of $2,754,983 while the first payoff letter listed accrued interest in an amount of $140,181.36. That difference comprises almost the entire additional amount of the second payoff letter. The defendants assert the plaintiff was attempting to "retroactively apply default interest rates to alleged defaults that either did not exist or were otherwise invalid" (see, Affidavit of Toby Moskovits, ¶38). Notwithstanding this anomaly it has no real bearing on whether a receiver should be appointed. Thus, the plaintiff notes seven distinct defaults committed by the defendants which demand a receiver be appointed. The defaults are that the defendants failed to deposit net cash flows into net cash flow restricted accounts and failed to provide required monthly net cash flow statements since May 2018, that they failed to complete construction by the date set forth in the agreement, that they failed to resolve fire department and building department violations, that they permitted mechanic's liens to be filed on the property, that they permitted New York City Environmental Control Board judgements to be filed against the property, that they have not paid real estate taxes since July 2018 and that they have not repaid the loan even though the maturity date has already passed. The defendants dispute many of these defaults and argue that a receiver is not appropriate because the property is valued at almost double the amount owed and is therefore

overcapitalized. However, even if true, that is not a special circumstance demanding a denial of the appointment of a receiver. The defendants further argue that the alleged defaults which form the basis of this lawsuit "were deliberately manufactured by Plaintiff in order to thwart Defendants' refinancing efforts" and that "***Defendants were repeatedly and specifically assured by Axos in the September 2018 Confirmation Email and the May 17 Payoff Statement (four days before Fortress*** [plaintiff] ***bought the Loans) that none of the defaults set forth in Plaintiff's Complaint and Notice of Default existed***" (see, Memorandum in Opposition, page 15, emphasis in original). The defendants proceed to present five arguments why the defaults were fabricated. First, the defendants assert Axos never funded the construction loan. Second, they assert the defendants and Axos agreed to modify the terms of the loans to use net cash flows to fund construction. Third, Axos and the defendants agreed to use the $3 million defendants deposited as a reserve to be used to pay expenses. Fourth, the defendants were diligently resolving judgements, mechanic's liens and violations. Lastly, the construction deadline was waived when Axos agreed with the defendants to change the zoning of the property.

In evaluating these claims it must be noted the e-mail confirmation dated September 14, 2018 merely stated that "upon receipt of the $3 million today you will be in compliance and

default interest will not [sic] implemented" (see, e-mail dated September 14, 2018 sent at 12:12 PM from Patrick Walsh SVP-CRE Specialty Leading Bofl Federal Bank). That e-mail did not confirm the defendants "were in full compliance with their obligations under the Loans" (see, Affidavit of Toby Moskovits, ¶17) but rather that upon depositing the funds there would be no default interest. The e-mail, thus, did not serve to insulate the defendants from any defaults, but rather that there would be no interest default. The May 17 payoff letter did not indicate there were no defaults either. On the contrary, the letter specifically noted there were outstanding balances of $32,600,000 plus interest, legal fees and an exit fee. Thus, far from confirming no defaults contained in the complaint existed, the payoff letter highlighted them.

Moreover, concerning the five defenses raised, even if true that Axos never funded the construction loan, the defendants have still failed to demonstrate any special circumstances present sufficient to deny the appointment of a receiver pursuant to RPL §254(10). The second, third and fifth arguments stem from the same root, namely that the parties agreed to modify the written agreement. However, Section 10.22 of the Agreement provides that the documents may not be "contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no oral unwritten agreements between the parties" (id).

It is well settled that an agreement that prohibits oral modifications is valid and any changes must be in writing (Calica v. Reisman Peirez & Reisman LLP, 296 AD2d 367, 744 NYS2d 495 [2d Dept., 2002]). Therefore, the allegations there are oral modifications do not establish any special circumstances. Likewise, the mere fact the defendants were trying to remove any judgements and liens does not mean no such defaults existed. On the contrary, they surely did and while the defendants sought to remove them, their presence constituted defaults. Therefore, the defendants have failed to present any special circumstances sufficient to warrant denial of the appointment of a receiver.

Consequently, the motion seeking to appoint a receiver is granted. The specific powers of the receiver will be outlined in a separate order.

So ordered.

ENTER:

DATED: May 22, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC