

**Creif Lender LLC v Lucky of 195 Madison St.  
Roofing & Contr. Inc.**

2020 NY Slip Op 33412(U)

October 16, 2020

Supreme Court, New York County

Docket Number: 850028/2018

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

<b>PRESENT:</b> <u>HON. ARLENE P. BLUTH</u>	<b>PART</b>	<b>IAS MOTION 14</b>
<i>Justice</i>		
-----X	<b>INDEX NO.</b>	<u>850028/2018</u>
CREIF LENDER LLC, AS ASSIGNEE OF CREIF 109, LLC,	<b>MOTION DATE</b>	<u>N/A</u>
Plaintiff,	<b>MOTION SEQ. NO.</b>	<u>002</u>

- v -

LUCKY OF 195 MADISON STREET ROOFING &  
CONTRACTING INC., ALLAN STEVE, SRUN TAING,  
BANCO POPULAR NORTH AMERICA, THE PEOPLE OF  
THE STATE OF NEW YORK, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE,

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for MISCELLANEOUS.

The motion by defendant Lucky of 195 Madison Street Roofing & Contracting (“Lucky”) for an order directing the temporary receiver to distribute the net cash surplus from the four properties under receivership to defendant is denied. The cross-motion by plaintiff is denied and the cross-motion by the receiver to address issues with the building is granted in its entirety.

In this commercial foreclosure case, defendant Lucky contends that the ongoing pandemic has caused two of its properties that are not under receivership to face daunting challenges. It points out that the four properties currently under receivership are generating a surplus and it wants that money to help its other properties, which are losing money and have many tenants who are not paying rent. Lucky’s defense to this foreclosure case is that it is the victim of a massive fraud and it did not knowingly intend to enter into the loans upon which plaintiff brought this suit.

In opposition and in support of its cross-motion for a declaration that it has priority over the rents and profits, plaintiff claims that Lucky has no right to the profits of the properties under receivership. It contends that the purpose of a receiver is to hold the profits (if any exist) in trust so that they can be applied to a judgment. Plaintiff also points out that Justice Reed, in a related litigation, dismissed Lucky's fraud claims against plaintiff (NYSCEF Doc. No. 87). Justice Reed found that the complaint by Lucky failed to allege that plaintiff should have known that a certain individual was not authorized by Lucky to enter into the mortgages (*id.* at 3).

The receiver also submits a cross-motion in which she seeks authorization to expend sums in excess of \$5,000 to make improvements and repairs to gas piping at 35 and 37 Market Street, various appointments for repair work at 37 Orchard Street, 164 Orchard Street, 189 Orchard Street, and authorization to maintain reserves of at least \$100,000 before making any disbursements to defendant.

In reply, Lucky emphasizes that its properties cannot be encumbered if the mortgages were procured by fraud. It argues that the receiver has not set forth a sufficient evidence to support her request for the repairs demanded. Lucky claims that the Court should deny plaintiff's request for payment priority of the rents and profits generated from the properties because the cases plaintiff relies on are situations where the property was already sold at auction. Lucky also points to a confession of judgment in a criminal action which Lucky claims is proof that the mortgages were procured under false pretenses.

### **Lucky's Motion**

The Court denies Lucky's motion. Although the Court recognizes that the current pandemic has caused hardship on both landlords and tenants across New York City, that does not mean Lucky is entitled to receive profits from buildings that are under receivership. The purpose

of a receivership is to maintain a property so that if plaintiff successfully prosecutes the foreclosure case, it can receive fair value for the property at auction. In other words, a receiver ensures that a defendant cannot diminish the value of a property as the case continues.

This Court is aware that, in a conference before appointing a receiver, it advised defendant's counsel that if money was needed, it could make a motion. Defendant's principal is a senior citizen and this Court did not want him to be destitute while this litigation dragged on. The current application, however, seeks to divert funds from the receivership properties to fund his other investments. Here, it would not be equitable for the court-appointed receiver (who apparently is generating a profit at the buildings under receivership) to help out Lucky's other buildings which are purportedly not doing well. Moreover, as described below, the properties under receivership may not generate profits indefinitely. The receiver contends that she is having issues renting vacant apartments and serious repairs are needed. The Court declines to assume that the receiver will continue to generate profits and permit payments to Lucky, especially in light of the current rental market and the extensive work needed in the buildings under receivership. And it may be that if plaintiff is unable to recover the full amount it is due (assuming plaintiff prevails in this case), the profits generated might be used to eliminate a deficiency between the sale price and the amount due to plaintiff. Such an outcome is not inconceivable under these circumstances.

The confession of judgment is not a basis to grant Lucky's motion. It certainly aids Lucky's claim that it did not voluntarily enter into these mortgages but it is not conclusive proof that the mortgages should be nullified or a basis to modify the receivership. It certainly is not proof that the plaintiff was aware of or participated in any wrongdoing.

### **Plaintiff's Cross-Motion**

The Court denies plaintiff's cross-motion for an order that it has payment priority for the rents and profits of the mortgaged properties. As Lucky points out, plaintiff has not successfully prosecuted this case and at least one individual has admitted in criminal court to fraudulently obtaining a mortgage without Lucky's knowledge. The Court declines to make a premature and advisory ruling about what plaintiff might be entitled to if it secures a judgment of foreclosure and sale.

### **Receiver's Cross-Motion**

The receiver claims that she has become aware of numerous issues at the properties and points out that there have been violations issued by city agencies, stop work orders from DOB and inconsistencies between the use of the properties and existing certificates of occupancy. Lucky argues that the receiver is not an experienced property manager and has not met her burden to undertake the repairs she seeks permission to begin.

The Court grants the receiver's cross-motion. The receiver clearly points to serious gas piping issues and expired inspections. The Court appointed the receiver to maintain the buildings and does not intend to micromanage the details of every proposed expenditure sought by the receiver. The work the receiver wants done here relates to a safety issue—the gas piping—and the Court declines to make the receiver make another motion (as Lucky suggests) and delay this necessary work while a potentially dangerous situation persists. The Court grants the receiver the authorization to make the substantial and necessary repairs, including the appointment of the architect, the plumbing company and the electrical contractors identified on page 5 of her affirmation.

The receiver also directs the Court to stop work orders (NYSCEF Doc. Nos. 93, 94) and contends that certain buildings violate their certificates of occupancy. For instance, 164 Orchard Street’s certificate of occupancy claims that the second to sixth stories are supposed to be vacant when, in fact, they are occupied by residential tenants. Obviously, that is a problem that needs to be fixed. The Court grants the receiver’s request to appoint the project consultant, the architect, the expediting service and the plumbing company identified on page 7 of her affirmation.

The receiver points out that the current pandemic has also affected the rental units at the properties and rent receipts have dropped. When combined with the necessary work identified earlier, the receiver persuasively argues that no profits should be distributed to Lucky.


Accordingly, it is hereby

ORDERED that the motion by defendant Lucky of 195 Madison Street Roofing & Contracting Inc. for an order directing distribution of profits from the mortgaged properties is denied; and it is further

ORDERED that the cross-motion by plaintiff is denied; and it is further

ORDERED that the cross-motion by the receiver is granted in its entirety.

Remote Conference: October 19, 2020 at 10 a.m.

<u>10/16/2020</u> DATE			 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE