

Mesa W. Real Estate Income Fund III, LLC v Sterling Portfolio 196 LP
2021 NY Slip Op 30261(U)
January 22, 2021
Supreme Court, Kings County
Docket Number: 522267/19
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of January, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
MESA WEST REAL ESTATE INCOME FUND III, LLC,

Plaintiff,

- against -

STERLING PORTFOLIO 196 LP,
STERLING PORTFOLIO 189 LP,
STERLING PORTFOLIO 429 LP,
STERLING PORTFOLIO 442 LP,
STERLING PORTFOLIO 743 LP,
STERLING PORTFOLIO 801 LP,
MESA WEST REAL ESTATE INCOME FUND III, LLC,
LORI J. CASEY,
JEFFREY J. HERTZ,
STEVEN E. LUDWIG,
JUAN ALVAREZ, ENVIRONMENTAL CONTROL
BOARD OF THE CITY OF NEW YORK,
NEW YORK CITY DEPARTMENT OF FINANCE,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, and "JOHN DOE" NOS. 1-50,

Defendants.

The Names of the "John Doe" Defendants Being Fictitious and Unknown to Plaintiff, the Persons and Entities Intended Being Those Who Have Possessory Liens or Other Interests in, the Premises Herein Described.
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DECISION AND ORDER

Index No. 522267/19

Mot. Seq. Nos. 3-4

The following e-filed papers read herein:

NYSCEF#:

Notice of Motion, Affirmation (Affidavit), Memoranda of Law,
and Exhibits Annexed _____
Affirmation (Affidavit) in Opposition/Reply, Exhibits Annexed,
and Memoranda of Law _____
Parties' Letters to the Court _____

54-74; 79-92
95; 98-115
76-78; 93-94, 97

In this action to foreclose a commercial mortgage, plaintiff Mesa West Real Estate Income Fund III, LLC (plaintiff) moves in Seq. No. 3 for an order: (1) pursuant to CPLR 3212, granting it summary judgment as against: (i) defendants Sterling Portfolio 196 LP, Sterling Portfolio 189 LP, Sterling Portfolio 429 LP, Sterling Portfolio 442 LP, Sterling Portfolio 743 LP, and Sterling Portfolio 801 LP (collectively, the Sterling Portfolio

defendants); and (ii) Lori J. Casey, Jeffrey J. Hertz, and Steven E. Ludwig (collectively, the guarantor defendants), in each instance, for the relief demanded in plaintiff's complaint and striking the Sterling Portfolio defendants' and guarantor defendants' respective answers on the ground that there are no triable issues of fact and no legal merit to their defenses; (2) pursuant to CPLR 3215, granting it leave to enter a default judgment as against defendants Juan Alvarez, Environmental Control Board of the City of New York, New York City Department of Finance, and New York State Department of Taxation and Finance (collectively, the non-appearing defendants); (3) pursuant to RPAPL 1321, appointing a referee to compute the amount due to plaintiff for principal and interest, and other amounts, on its note and mortgage set forth in its complaint; (4) amending the caption to delete the reference to the "John Doe" defendants; (5) holding the Sterling Portfolio defendants and the guarantor defendants liable for any deficiency that may remain after the sale of the subject properties at a public auction following the application of the proceeds thereof pursuant to a judgment of foreclosure and sale; and (6) granting plaintiff such other and further relief as may be just and proper, together with the costs and disbursements of this action, including reasonable attorneys' fees. Guarantor defendant Lori J. Casey (Casey) cross-moves in Seq. No. 4, in effect pursuant to CPLR 2221 (d) and 6405, to vacate the order, dated Jan. 27, 2020 (NYSCEF #48), appointing a temporary receiver for the real property secured by the subject mortgages. Plaintiff opposes Casey's cross motion and, in addition, by letters to the Court, requests the appointment of a substitute receiver for the subject properties.

Disposition Of Plaintiff's Motion (Seq No. 3)

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 1080 [2d Dept 2010] [internal quotation marks omitted]). Here, plaintiff has established its prima facie entitlement to judgment as a matter of law on its complaint by submitting the subject commercial mortgages and the underlying unpaid notes executed by the Sterling Portfolio defendants, together with the evidence that the Sterling Portfolio defendants are in default (*see Emigrant Funding Corp. v Agard*, 121 AD3d 935, 936 [2d Dept 2014]).

Accordingly, the burden shifts to the Sterling Portfolio defendants to lay bare their proof in opposition to plaintiff's prima facie showing. In response, the Sterling Portfolio defendants concede that, with the exception of any recourse and/or deficiency claims against them and the guarantor defendants, plaintiff is entitled to summary judgment on its non-recourse, non-deficiency claims against the Sterling Portfolio defendants (*see* Response to Statement of Material Facts and Counter-Statement of Material Facts, dated Nov. 13, 2020 [NYSCEF #99], ¶¶ 1-16). With respect to plaintiff's recourse and deficiency claims, however, the Sterling Portfolio defendants correctly point out that plaintiff has failed to show – or even allege – that any of the events have occurred triggering the recourse and/or deficiency claims as against the Sterling Portfolio defendants in accordance with Section 2.13 (“Recourse Limitation”) of the senior loan agreement, building loan agreement and project loan agreement (collectively, the loan agreements), and as against the guarantor defendants

in accordance with the guaranty agreement, carry cost guaranty agreement and completion guaranty agreement (collectively, the guaranty agreements) (*see generally G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37 [2d Dept 2012]). There being no objection or response to the remaining branches of plaintiff's motion, it is granted to the extent and as more fully set forth in the long-form order issued concurrently herewith.

Disposition Of Casey's Cross Motion (Seq No. 4)

It is undisputed that the Sterling Portfolio defendants have defaulted under the terms of the senior loan mortgage, building loan mortgage, and project loan mortgage (collectively, the mortgages). The mortgages each contain (in Section 6.2 [d] thereof) a covenant which mandates the appointment of a receiver upon default. Accordingly, plaintiff was entitled to the appointment of a receiver for the subject properties regardless of proving the necessity for the appointment (*see Real Property Law § 254 [10]; see also GECMC 2007-C1 Ditmars Lodging, LLC v Mohola, LLC*, 84 AD3d 1311, 1312 [2d Dept 2011]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 890, 891 [2d Dept 2010]; *Naar v I.J. Litwak & Co., Inc.*, 260 AD2d 613, 614 [2d Dept 1999]).

It is true, as Casey posits, that a court of equity, in its discretion and under appropriate circumstances, may vacate an order appointing a receiver. On the current record, however, the Court finds no reason to disturb its original determination (*see Clinton Capital Corp. v One Tiffany Place Developers, Inc.*, 112 AD2d 911, 912 [2d Dept 1985]). Casey's reliance on *Phoenix Grantor Tr. v Exclusive Hosp., LLC*, (172 AD3d 926 [2d Dept 2019]), is misplaced. Unlike *Phoenix Grantor Tr.*, the validity of the underlying notes and whether

a default has in fact occurred are not disputed here. Further misplaced is Casey's reliance on *Board of Managers of Nob Hill Condominium Section II v Board of Managers of Nob Hill Condominium Section I* (100 AD3d 673 [2d Dept 2012]), where, unlike the case here, a motion for the appointment of a receiver under CPLR 6401 was considered. Accordingly, Casey's cross motion is denied. Plaintiff's letter request seeking appointment of a successor receiver is not in the form of a motion (or an order to show cause) and, hence, cannot be considered by the Court (*see Maurino v Maurino*, 23 AD2d 504 [2d Dept 1965]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion in Seq. No. 3 is *granted to the extent* set forth in the Order Granting Summary Judgment and of Reference to Compute and Other Relief issued concurrently herein (the long-form order); and the remainder of plaintiff's motion is denied; and it is further

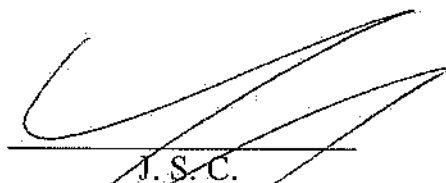
ORDERED that nothing in this decision and order or in the concurrently issued long-form order shall permit plaintiff to pursue any recourse and/or deficiency claims against the Sterling Portfolio defendants and/or the guarantor defendants, *except* upon strict compliance with: (1) the terms of the transaction documents, including the loan documents and guaranty documents; and (2) the applicable provisions of the Real Property Actions & Proceedings Law; and it is further

ORDERED that Casey's cross motion in Seq. No. 4 is *denied*; and it is further

ORDERED that plaintiff's counsel is directed to serve a copy of this decision and order with notice of entry electronically on the respective counsel to the Sterling Portfolio defendants, the guarantor defendants Lori J. Casey and Jeffrey J. Hertz, and the guarantor defendant Steven E. Ludwig, as well as by certified mail, return receipt requested, on Receiver Simon Shamoun, Esq., c/o Kampessis & Shamoun, PLLC, 430 Bay Ridge Parkway, Brooklyn, New York 11209; and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER,



J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE