

Bank Leumi USA v FPG Maiden Lane, LLC
2021 NY Slip Op 30709(U)
March 5, 2021
Supreme Court, New York County
Docket Number: 657252/2020
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X

Bank Leumi USA,

Plaintiff,

- v -

FPG Maiden Lane, LLC, Maiden Rental Holdings, LLC, Maiden Rental Holdings II, LLC, Maiden Rental Holdings III, LLC, Fortis Property Group, LLC, Joel Kestenbaum, City Safety Compliance Corp., HD Supply Construction Supply Ltd., New York Concrete Washout, Neat Heat Climate Control LLC, TPE DBA Plumbing Exchange, Pizzarotti LLC, Cuetes Corp., Extech Building Materials, United Rentals (North America) Inc., Able Rigging Contractors Inc., Abbey Associates LLC, Gryphon Contracting Corp., BPRT Construction of NY LLC, Pearlgreen Corporation, Roman Labor Services Corp., Dura-Lift Inc., Pizzarotti IBC, LLC, Diamond Coring & Cutting Inc., Alboro National LLC, Horizon Interiors Inc., Silvercup Scaffolding I LLC, Quality Facility Solutions Corp., Aish Mechanical Corp., DHS Fraco, LLC, Swing Staging LLC, MCWI Inc., Guma Construction Corp., Hill West Architects, LLP, ADD Mechanical Inc., Berry's Cooling & Heating, LLC, Rent A Unit NY Inc., New York State Department of Taxation & Finance, New York City Department of Finance, JOHN DOE "1" through "10" and 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 the Verified Complaint,

INDEX NO. 657252/2020

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Defendants.

-----X

HON. BARRY R. OSTRAGER

This is an action brought pursuant to Article 13 of the New York Real Property Actions and Proceedings Law ("RPAPL") to foreclose certain mortgages owned and held by Plaintiff on the real property located at 161 Maiden Lane, New York, New York 10038. In Motion 001, Plaintiff moves for the appointment of a temporary receiver, pursuant to the

Mortgages' based on the alleged Default by Defendant FPG Maiden Lane LLC ("Borrower"). The Court heard oral argument on Motion 001 on February 25, 2021.

The first issue before the Court is whether an action to foreclose a mortgage on a commercial property can properly be brought at this time under the current New York State Executive Orders. As of today, March 5, 2021, the most recent Executive Order concerning a moratorium on some commercial foreclosure actions has expired. This Executive Order has not been superseded by any subsequent order or act of the New York state legislature as of today. Accordingly, this case may proceed.

The second issue is whether this case may proceed in light of the claims brought in the related case *FPG Maiden Lane, LLC et al v. Bank Leumi USA et al* Index No. 653584/2020, by which the FPG parties allege that Bank Leumi USA (and others) breached the operative Loan Agreements related to this project. This action and the related action can and will proceed simultaneously and no stay of either action is warranted. In the related action, the FPG parties have alleged breach of contract and other claims that, if proven, can be compensated with money damages and, perhaps, substantial money damages. These claims do not impede the Lender's right to foreclose on the property in the event of default.

Turning to the merits of the present motion, Lenders argue that a temporary receiver is called for under the express terms of the Mortgages. *See* NYSCEF Doc. No. 44 2016 Building Loan Mortgage, Sec. 7.5:

After the happening of any Event of Default and during its continuance, or upon the commencement of any proceedings to foreclose this Mortgage ... [Plaintiff] Mortgagee shall be entitled, as a matter of right, if it shall so elect, without the giving of notice to any other party and without regard to the adequacy or inadequacy of any security for the Mortgage indebtedness, forthwith either before or after declaring the unpaid principal of the Note to be due and payable, to the appointment of such a receiver or receivers.

All the Mortgages contain identical provisions authorizing the appointment of a receiver. *See* NYSCEF Doc. Nos. 41- 25. This provision implicates § 254(10), which states: “[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 ... in any action to foreclose the mortgage, shall be entitled, without notice and without regard to any adequacy of any security to the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage.” RPL § 254(10). Even where a property is not generating income, a temporary receiver may nevertheless be appointed to protect the property.

Lenders have alleged several different Events of Default by the FPG parties. Most relevant here is the failure to pay the Loan at maturity. At oral argument on February 25, 2021 there was no serious assertion that the Loan was paid at maturity. Thus, the Court is proceeding with the understanding that there was a maturity default when the FPG parties did not pay the Loan when it came due on December 31, 2020. The Court notes that on November 18, 2020 the Lender accelerated the payment date of the mortgage due to earlier non-amortization of the mortgage. NYSCEF Doc. No. 103. Significantly, there is no dispute that construction has stopped on the Project for the foreseeable future. There is no basis for the Lender to be denied the opportunity to foreclose on an outstanding mortgage in excess of \$90 million.

The FPG parties argue that the failure to pay at maturity is excused by Lender’s prior breach of the Loan Agreements – namely, those alleged in the related action – such as failure to fund Requests for Advances thereby slowing progress on the construction.

The Court finds that the breaches alleged by the FPG parties, even if proven, are not material breaches with respect to the scope of the entire construction project and the amount of the unpaid mortgage, and therefore cannot excuse the FPG parties’ obligation to pay the Loan at

maturity. The FPG parties cite only one case (at oral argument, not in briefing) which suggests that a prior breach by the foreclosing party can bar a foreclosure. This case, however, is not binding on this Court and there is no indication in the decision that the facts in *Builders Bank v. Charm Developments II, LLC*, No. 09-CV-3935 JG LB, 2010 WL 3463142 (E.D.N.Y. Aug. 30, 2010) are analogous to the facts of this case involving, as it does, a sophisticated major developer and a centi-million project.

The Court finds that it is in the best interest of the property to appoint a temporary receiver. The parties shall provide the Court with a list of proposed temporary receivers and a proposed order setting forth the duties of the receiver. Enforcement of this decision is stayed for 60 days to give the parties an opportunity to consensually resolve this action. A status conference is scheduled for April 28, 2021 at 2:00 pm.

Dated: March 5, 2021



 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE