

Atlantic Ave. Capital LLC v 980 Atl. Holdings LLC
2022 NY Slip Op 31674(U)
May 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 500917/19
Judge: Lawrence Knipel
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At an IAS Term, Part Comm 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 19th day of May, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
ATLANTIC AVENUE CAPITAL LLC,

Plaintiff,

- against -

Index No. 500917/19

980 ATLANTIC HOLDINGS LLC, TRANSIT WIRELESS, LLC, CHASKIEL STRULOVICH, "JOHN DOE #1" through "JOHN DOE #60"

inclusive, the true names of said defendants being unknown to plaintiff, the parties being intended to be those persons having or claiming an interest in the mortgaged premises described in the complaint by virtue of being tenants, occupants, owners, judgment creditors, or lienors of any type or nature, and/or their heirs, successors or assigns in all or part of said premises,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

55-61

Opposing Affidavits (Affirmations) _____

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Reply Affidavits (Affirmations) _____

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Upon the foregoing papers in this action to foreclose a leasehold mortgage on the commercial properties at 976/984 Atlantic Avenue, 534 Grand Avenue and 971/973 Pacific Street in Brooklyn (Rental Properties), defendants 980 Atlantic Holdings LLC (980 Atlantic or borrower) and Chaskiel Strulovich (Strulovich or guarantor) (collectively, defendants) move (in motion sequence [mot. seq.] two) for an order granting them equitable relief. Specifically, defendants seek an order directing plaintiff to turn over the rental income that it collected pursuant to an Assignment of Leases and Rents to 980 Atlantic's landlord.

On January 14, 2019, plaintiff Atlantic Avenue Capital LLC (plaintiff) commenced this action against defendants to foreclose a \$2,700,000.00 leasehold mortgage on the Rental Properties, which secured a September 19, 2016 note executed by 980 Atlantic and guaranteed by Strulovich in favor of Prospect Place Capital LLC (Prospect). Contemporaneously with the loan, 980 Atlantic executed an Assignment of Leases and Rents. In January 2018, Prospect elected to accelerate the loan based on 980 Atlantic's payment default. On or about December 14, 2018, Prospect assigned the loan, the guaranty and the Assignment of Leases and Rents to plaintiff.

On or about March 5, 2019, defendants collectively answered the complaint and asserted nine affirmative defenses, none of which sought equitable relief regarding the Assignment of Leases and Rents. By a January 24, 2020 order, this court granted plaintiff's summary judgment.

Defendants now move for equitable relief. Defendants assert that they lease the Rental Properties from Bldg Oceanside LLC (Oceanside) and, in turn, sub-lease the Rental Properties to various businesses. Defendants assert that “when 980 Atlantic defaulted on the loan, plaintiff began to collect the rents directly from the various businesses, pursuant to the Assignment of Leases and Rents.” Defendants also assert that “because the rents were diverted to plaintiff, defendants 980 Atlantic and Strulovich were unable to pay Oceanside [rent]” which resulted in Oceanside commencing a Landlord and Tenant action to evict defendants.

Defendants argue that “plaintiff is looking for a double award by taking the rental proceeds before a final determination is made as to what is owed” and that “the rental proceeds should be used to maintain the *status quo* by paying for the rent defendants owe to Oceanside until a final determination can be made as to what plaintiff is entitled.” Defendants asserts that “[w]ithout the Court’s equitable use of its power, plaintiff will force defendants to fall further behind on the mortgage and the rental arrears.”

Plaintiff, in opposition, argues that defendants’ motion should be denied because it requests “extraordinary relief, outside of the usual procedures in a mortgage foreclosure.” Plaintiff notes that defendants answered the complaint and “did not plead any equitable defenses relating to the rents.” Plaintiff argues that “[e]quitable relief arises only when plaintiff has done something wrong” and that it “did not cause defendant’s mortgage default, and the Assignment of Leases and Rents was triggered only after the defendant

defaulted on the loan.” Plaintiff argues that it “has a legal right to the subtenant rents[,]” “the amount of the subtenant rents are miniscule compared to the amount which defendant owes [it]” and “[t]here is no risk that [it] will recover more in subtenant rents than what defendant owes [it].” Plaintiff asserts that defendants’ inability to pay its creditors is not a reason for the court to prevent plaintiff’s enforcement of its right to the subtenant rents.

Defendants, in reply, clarify that “[p]laintiff is permitted to retain the amounts of rent collected over and above what is due to Oceanside” under the Assignment of Leases and Rents, but argues that plaintiff should be required to turn over that portion of the subtenants’ rent needed to pay its landlord, Oceanside.

The Assignment of Leases and Rents provides, in relevant part:

“1. It is agreed that this is an absolute assignment of rents, income and profits; however, Assignee grants and deems unto Assignor a license to collect **all rents**, issues and profits for so long as Assignor is not in default under any provisions of the Note or any other agreements which secure the Note . . .” (emphasis added).

Plaintiff correctly argues that the Assignment of Leases and Rents, having been recorded with the mortgage, is not just a contract right, but an enforceable lien that plaintiff is explicitly entitled to enforce against “all rents.” Defendants have failed to establish that there are any extraordinary circumstances warranting the equitable relief they now seek. Accordingly, it is hereby

ORDERED that defendants' motion (in mot. seq. two) is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE