

Wilmington Trust, N.A. v Elmwood NYT Owner, LLC
2022 NY Slip Op 31993(U)
June 24, 2022
Supreme Court, New York County
Docket Number: Index No. 850176/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE HOLDERS OF CD 2016-CD2 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-CD2, WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE REGISTERED HOLDERS OF JPMDB COMMERCIAL MORTGAGE SECURITIES TRUST 2017-C5, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-C5, DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CITIGROUP COMMERCIAL MORTGAGE TRUST 2017-P7, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-P7, and WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CD2017-CD3 MORTGAGE TRUST, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-CD3,

Plaintiffs,

- v -

ELMWOOD NYT OWNER, LLC, LANDINGS NYT OWNER, LLC, OAKWOOD NYT OWNER, LLC, WALLKILL NYT OWNER, LLC, BOARD OF MANAGERS 229 WEST 43RD STREET CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, GLOBAL SECURITY GROUP INC., and JOHN DOE NO. 1 THROUGH JOHN DOE NO. XXX,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 016) 200, 201, 202, 203, 204, 205, 207, 209, 211

were read on this motion to/for

MISCELLANEOUS

Upon the foregoing documents, it is

In motion sequence number 016, Receiver Klaus Kretschmann moves, by Order to Show Cause, to (i) redact NYSCEF Doc. No. (NYSCEF) 203 pursuant to Section

216.1(a) of the Uniform Rules for New York State Trial Courts and (ii) approve NYSCEF 203, a proposed lease agreement. There is no opposition to either branch of this motion and no indication that the press or public have an interest in this matter.

This action concerns the foreclosure of a mortgage lien on 229 West 43rd Street, New York, NY 10036 (Property). On March 17, 2021, Kretschmann was appointed Receiver of the Property by the court and was empowered to “rent or lease any part of the Property.” (NYSCEF 65, Order Appointing Receiver at 7.) Haru, a sushi restaurant and bar, is a current tenant of the Property and is affiliated with proposed tenant HRA Times Square, LLC, d/b/a RA Sushi (RA Sushi), also a sushi restaurant and bar. (NYSCEF 201, Kretschmann aff ¶¶ 1-2.) Haru was closed for a period of time during the COVID-19 pandemic and failed to meet its rent obligations. (*Id.* ¶ 2.) Haru sought to modify its lease but after negotiations with Receiver and RA Sushi, the parties agreed “it would be preferable to enter into a new lease with [RA Sushi], at which RA Sushi would commence operations, rather than to seek modification of Haru’s existing lease.” (*Id.*) Pursuant to the Order Appointing Receiver, the Receiver and RA Sushi entered into a new lease (RA Sushi Lease). (See NYSCEF 203, RA Sushi Lease.)

The Receiver now seeks court approval of the RA Sushi Lease, asserting that entering into the RA Sushi Lease was commercially reasonable and in the best interest of the Property given the uncertainties of the COVID-19 pandemic and its ongoing effects on the restaurant and retail businesses in New York City. (NYSCEF 201, Kretschmann aff ¶¶ 2, 5.) The Receiver and his colleague, Matthew Chmielecki, negotiated the proposed RA Sushi Lease. (*Id.* ¶ 4.) The Receiver and Chmielecki considered alternatives, such as replacing the tenant and the time and costs associated

with that option. (*Id.* ¶ 5.) However, with their experience in the commercial real estate industry, the Receiver and Chmielecki concluded that the proposed RA Sushi Lease and current arrangement with the parties is commercially reasonable and in the best interest of the Property given the ongoing pandemic and its aftereffects on the restaurant and retail industry. (*Id.*)

The Order Appointing the Receiver provides that the Receiver may, with the approval of the court, “rent or lease any part of the Property for terms not exceeding one (1) year or such longer terms.” (NYSCEF 65, Order Appoint Receiver at 7.) In the absence of opposition and given that the parties are sophisticated businesspeople who have entered into the agreement, the Receiver’s motion for court approval of the RA Sushi Lease is granted.

Receiver also moves the court to redact, from the RA Sushi Lease, confidential rental terms of the proposed lease, such as pricing and payment terms, and identifiable information of a third-party guarantor. The Receiver argues that the disclosure of such information to the public may adversely impair Receiver’s ability to negotiate competitive lease terms for the Property.

Section 216.1(a) of the Uniform Rules for Trial Courts empowers courts to seal documents upon a written finding of good cause. It provides:

“(a) [e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.”

In the business context, courts have sealed records where the disclosure of documents “could threaten a business’s competitive advantage.” (*Mosallem v Berenson*, 76 AD3d 345, 350-351 [1st Dept 2010] [citations omitted].) Records concerning financial information may be sealed where there has not been a showing of relevant public interest in the disclosure of that information. (See *Dawson v White & Case*, 184 AD2d 246, 247 [1st Dept 1992].) A party “ought not to be required to make their private financial information public ... where no substantial public interest would be furthered by public access to that information” and that “sealing a court file may be appropriate to preserve the confidentiality of materials which involve the internal finances of a party and are of minimal public interest.” (*D’Amour v. Ohrenstein & Brown*, 17 Misc.3d 1130[A], 1130[A], 2007 NY Slip Op 52207[U], *20 [Sup Ct, NY County 2007] [citations omitted].)

Here, good cause exists to redact the narrowly tailored portions of the RA Sushi Lease as the proposed redactions include confidential commercial and financial information, such as leasing, pricing, and payment terms and information, and identifiable information of the third-party guarantor. The disclosure of this information could damage the Receiver’s ability to negotiate competitive terms for future leases. The proposed redactions also pertain to other negotiated lease terms, for example, relating to insurance and liability provisions, the disclosure of which could further hurt its competitive advantage. Moreover, there is no showing of relevant public interest in the matter to counterbalance the Receiver’s and RA Sushi’s interest in keeping the terms of their lease and the third-party involved private. (*Dawson*, 184 AD2d at 247.)

Accordingly, it is

ORDERED that the Receiver’s motion for approval of the RA Sushi Lease is granted; and it is further

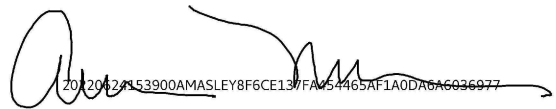
ORDERED that motion to redact NYSCEF Doc. No 203 is granted. As a redacted version of NYSCEF Doc. No. 203 has already been filed, the Receiver does not need to re-file duplicates; and it is further

ORDERED that the County Clerk, upon service to him of this order, shall seal NYSCEF Doc. No. 203; and it is further

ORDERED that the New York County Clerk shall restrict access to the sealed document with access to be granted only to the authorized court personnel and designees, the parties and counsel of record in the above-captioned action, and any representative of a party or of counsel of record upon presentation to the County Clerk of written authorization from counsel; and it is further

ORDERED that Receiver is to serve a copy of this order on the County Clerk in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-filing” page on the court’s website – www.nycourts.gov/supctmanh); and it is further

ORDERED that this order does not authorize sealing or redacting for purposes of trial.



6/24/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE