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

**PRESENT:** HON. FRANCIS KAHN, III **PART** 32

*Justice*

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WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE REGISTERED HOLDERS OF BANK 2019-BNK24, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2019-BNK24, ACTING BY AND THROUGH ITS SPECIAL SERVICER, LNR PARTNERS, LLC,

Plaintiff,

- v -

3800 BROADWAY ASSOCIATES LLC,DAVID ISRAELI, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE # 1-50,

Defendant.

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**INDEX NO.** 850008/2022

**MOTION DATE**

**MOTION SEQ. NO.** 002 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 81, 82, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 168, 173

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 167, 174

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions are determined as follows:

The within matter is an action to foreclose on a commercial mortgage encumbering two parcels of real property located at 3800 Broadway, New York, New York. The mortgage secures a loan in an original principal amount of $16,000,000.00 which is memorialized by a consolidated, amended and restated note dated November 7, 2019. The note and mortgage were given by Defendant 3800 Broadway Associates, LLC ("3800"), the owner of the property. Defendant David Israeli ("Israeli") executed both documents as Managing Member of 325 Third. Concomitantly with the other documents, Defendant 3800 executed a loan agreement and Israeli executed a guaranty of the debt. By order dated February 24, 2022, the Court granted Plaintiff's *ex parte* motion (Motion Seq No 1) pursuant to RPL §254[10] and RPAPL §1325 and appointed a receiver and selected, at the request of the Plaintiff, Richard J. Madison ("Madison").

Now, Defendants 3800 Third and Israeli move by order to show cause (Motion Seq No 2) to vacate, set aside or stay the order of receivership. Defendants move by separate motion (Motion Seq No 3) to dismiss Plaintiff's complaint pursuant to CPLR §3211[a][1], [3] and [7]. Plaintiff opposes the motions.

As to Motion Sequence Number 3, a motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* Higgitt, CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers, 83 New York State Bar Journal 32, 34-35 [2011]).

Notwithstanding the foregoing, a court may consider such evidence on a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7] (*see eg Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). When evaluating the motion, the allegations contained in the complaint and the evidence in support thereof must be presumed to be true, liberally construed and the plaintiff must be accorded every possible favorable inference (*see eg Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]) and "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, supra). To succeed, a movant must proffer evidence which flatly contradicts the legal conclusions and factual claims in the complaint as a matter of law (*see Guggenheimer v Ginzburg*, supra; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, supra; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

As a first argument, Defendants 3800 and Israeli suggest that the action must be dismissed as Plaintiff failed to provide the required contract notice prior to accelerating the debt and commencing this action. In support, they rely on Article 2 of the note which provides:

> The Debt shall without notice become immediately due and payable (provided that Lender shall endeavor to give notice) at the option of Lender if any payment required in this Note is not paid on or prior to the date when due or if not paid on the Maturity Date or on the happening of any other Event of Default.

Movants claim that the default notices here, dated February 17, 2021, and August 10, 2021, are both defective. They posit the February notice is faulty since it was sent to Defendant 3800 and the Mortgagee's counsel, rather than the Mortgagor's counsel as required by Section 11.6 of the loan agreement. The August notice fails in their estimation as it was given by Plaintiff's counsel, not Plaintiff as lender.

These arguments are unavailing as, notwithstanding Article 2 of the note, a pre-foreclosure notice was not required. Under Section 10.1[b] of the loan agreement, Plaintiff was expressly

authorized to accelerate the debt and commence this action "without notice or demand". This section supersedes the provision relied upon by Defendants since Article 3 of the note states that "[i]n the event of a conflict or
inconsistency between the terms of this Note and the Loan Agreement, the terms and provisions of the Loan Agreement shall govern". In any event, the February notice in this action, unlike the one under an associated foreclosure action (NY Cty Index No. 850007/2022), is properly addressed.

As to the branch of the motion to dismiss pursuant to the COVID-19 Emergency Protect Our Small Business Act of 2021 (L. 2021, c. 73) ("CEPOSBA"), that legislation is not applicable herein as it is undisputed that the property at issue contains some 45 rental units, well more than the 10-unit ceiling specified in Subpart B of the Act. Additionally, concerning a remedy for the above non-compliance, it is important to note that CEPOSBA does not mandate dismissal for non-compliance. Other statutes using mandatory terms like "shall" (*see eg* RPAPL §§1303, 1304; RPL §§232-a, 735[1]; VTL §313; GML §50-e) and with remedial purposes have been interpreted to be conditions precedent with a consequence of dismissal of the action for non-compliance (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2d Dept 2010]). Unlike those statutes, CEPOSBA appears to contain a cure provision in Section 6 when a mortgagor has not received a hardship declaration which states:

> If the court determines a mortgagor has not received a hardship declaration, then the court shall stay the proceeding for a reasonable period of time, which shall be no less than ten business days or any longer period provided by law, to ensure the mortgagor received and fully considered whether to submit the hardship declaration.

Having the foregoing as a remedy as opposed to mandatory dismissal would seem consistent with the intended "limited" and "temporary" nature of the legislation (*see* CEPOSBA section 3 ["As such, it is necessary to *temporarily* allow small businesses impacted by COVID-19 to remain in their place of business. A *limited, temporary* stay is necessary to protect the public health, safety and morals of the people the Legislature represents from the dangers of the COVID-19 emergency pandemic] [emphasis added]). That legislative intent differs from those statutes enacted as more permanent solutions to perceived ills. For example, the Home Equity Theft Prevention Act (RPL §265-a) and its statutory progeny were enacted to serve enduring social policies (RPL §265-a[1][b]["it is the express policy of the state to preserve and guard the precious asset of home equity, and the social as well as the economic value of homeownership"]).

When standing is raised as a defense to a mortgage foreclosure action, it is ordinarily Plaintiff's obligation to prove same to be entitled to foreclose (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). However, Defendants have raised the defense in a pre-answer motion to dismiss, so it is Movant's obligation to demonstrate *prima facie* Plaintiff lacked standing as a matter of law (*see Wilmington Sav. Fund Socy., FSB v Matamoro*, ____AD3d____, 2021 NY Slip Op 05741 [2d Dept 2021]; *DLJ Mtge. Capital v Mahadeo*, 166 AD3d 512 [1st Dept 2018]). Standing in a foreclosure action is established in three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note with an allonge or indorsement in blank before the action is filed, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). "Thus, the defendants here, in moving to dismiss the complaint under CPLR 3211(a)(1) and (3), needed to affirmatively prove that the plaintiff was not in direct privity with them, was not in physical

possession of the note indorsed to it or in blank at the time of the commencement of the action, and that the assignment of the note . . . to the plaintiff was invalid." (*Wilmington Sav. Fund Socy., FSB v Matamoro,* supra). In support of its motion, Defendants' arguments are entirely conclusory and fail to establish *prima facie* that Plaintiff lacked all the potential foundations for standing herein.

Defendants also seek to vacate this Court's appointment of a receiver. Under Real Property Law §254[10], the appointment of a receiver in the event of a default is proper where the parties to the mortgage agree to same even without notice or without regard to the sufficiency of security (*see ADHY Advisors LLC. v 530 W. 152nd St. LLC*, 82 AD3d 619 [1st Dept 2011]; *366 Fourth St. Corp. v Foxfire Enters.*, 149 AD2d 692 [2nd Dept 1989]). Despite the parties' contractual assent, the court, in the exercise of it equitable power, retains the discretion to deny the appointment of a receiver (*see ADHY Advisors LLC. v 530 W. 152nd St. LLC*, supra; *Nechadim Corp. v Simmons*, 171 AD3d 1195, 1197 [2nd Dept 2019]).

The mortgage at issue contains the following provisions:

> Section 7 .1 Remedies. Upon the occurrence and during the continuance of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender:
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> . . .
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> (g) apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, any guarantor, indemnitor with respect to the Loan or of any Person liable for the payment of the Debt;

Movant's assertion that Plaintiff failed to demonstrate its entitlement to the appointment of a receiver is without merit. The pertinent provision expressly states that a receiver may be sought regardless of the adequacy of the security. Defendants' reliance on CPLR §6401 and the cases interpreting same is inapposite as that authority does not concern the situation as presented here where appointment of the receiver was sought under RPL §254[10] and pursuant to an express agreement (*see Mesa W. Real Estate Income Fund III, LLC v Sterling Portfolio 196 LP,* ___Misc3d___, 2021 NY Slip Op 30261[U][Sup Ct Kings Cty 2021]).

Based on the above, Plaintiff established its entitlement to the appointment of a receiver of the mortgaged premises (*see eg CSFB 2004-C3 Bronx Apts LLC v. Sinckler, Inc.*, 96 AD3d 680 [1st Dept 2012]) and Defendants have not demonstrated that vacating the appointment of the receiver is an appropriate exercise of the Court's discretion (*see eg Shaw Funding, LP v Bennett*, 185 AD3d 857, 858 [2nd Dept 2020]; *Nechadim Corp. v Simmons,* supra; *Naar v IJ Litwack & Co.*, 260 AD2d 613 [2d Dept 1999]).

Accordingly, it is

ORDERED that Defendants' motions (Mot Seq Nos 2 and 3) are denied in their entirety.

7/11/2022
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
| | | GRANTED | X | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |