

Roys Realty Group LLC v Eighth Ave. 154 LLC

2022 NY Slip Op 32822(U)

August 18, 2022

Supreme Court, New York County

Docket Number: Index No. 850022/2022

Judge: Francis A. Kahn III

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. FRANCIS KAHN, III PART 32

Justice

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INDEX NO. 850022/2022

ROY'S REALTY GROUP LLC,
Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

EIGHTH AVENUE 154 LLC, DAVID SHELME, NEW YORK
STATE DEPT. OF TAXATION & FINANCE, NEW YORK
CITY DEPT. OF FINANCE, JOHN DOE NOS. 1-25

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 24, 26, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47

were read on this motion to/for MISCELLANEOUS

Upon the foregoing documents, the motion is determined as follows:

The within matter is an action to foreclose on a commercial mortgage dated January 12, 2016, encumbering a parcel of real property located at 154 8th Avenue, New York, New York (Section 3, Block 787, Lot 74). The mortgages secure a loan in the original principal amount of \$4,750,000.00 given by Plaintiff to Defendant Eighth Avenue 154 LLC ("Eighth Avenue") and memorialized by a mortgage note of the same date as the mortgage. The note and mortgage were executed by Defendant David Shemel ("Shemel") as an authorized signatory of Eight Avenue. Concomitantly therewith, Defendant Shemel executed a carveout guarantee of the debt. The mortgage states in section 21 that in "any action to foreclose this Mortgage the Mortgagee shall be entitled to the appointment of a receiver without notice, and without regard to the adequacy of the security".

Now, Plaintiff moves pursuant to RPL §254[10] and RPAPL §1325 for the appointment of a temporary receiver of the rents of the mortgaged premises. Defendants oppose the motion.

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 appointment is not perfunctory and the court, in the exercise of its 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]).

In the present case, it is undisputed that the parties' mortgage provided Plaintiff may apply for the appointment of a receiver regardless of the adequacy of the property as security and Plaintiff commenced an action to foreclose on the mortgage. Accordingly, 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 [2nd Dept 2012]).

In opposition, Defendants' assertion that Plaintiff cannot seek appointment of a receiver as it has failed to establish its default, is without merit. The mortgage does not require proof of same and the mortgagee may seek this relief in "any action to foreclose this Mortgage". Defendants' claim Plaintiff's lack of standing prohibits seeking this relief is misplaced. A plaintiff in a mortgage foreclosure action is not required to prove its standing unless a defendant pleads an affirmative defense or establishes its entitlement to dismissal under CPLR §3211 (*see Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]; *Ditech Fin., LLC v Rapuzzi*, 187 AD3d 715 [2^d Dept 2020]; *DLJ Mtge. Capital v Mahadeo*, 166 AD3d 512 [1st Dept 2018]). Here, Defendants have yet to answer and their motion pursuant to CPLR §3211 did not seek dismissal of the foreclosure cause of action based upon lack of standing.

Any 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]). Substantively, Defendants have not demonstrated that denial of the appointment of a 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).

Contrary to Defendants' assertion, submission of a rent roll in evidentiary form is not a prerequisite to the appointment of a receiver. No such requirement is contained in Part 26 or 36 of the Rules of the Chief Judge [22 NYCRR] as claimed. Article 64 of the Civil Practice Law and Rules, which governs receiverships, also lists no such obligation. The purpose of submitting a rent roll is to assist the Court in determining the amount of the undertaking to be furnished by the receiver pursuant to CPLR §6403. The amount of the undertaking is within the discretion of the Court and need only be rationally related to its purpose which is the "faithful discharge [of the receiver's] duties" (*Matter of Witham v Finance Invs., Inc.*, 52 AD3d 403 [1st Dept 2008]).

Accordingly, it is

ORDERED that the motion for the appointment of a Temporary Receiver is granted; and it is further

ORDERED that, **Roberta Ashkin, Esq., 400 East 70th Street New York New York 10021, (646) 779-8520 (ra@ashkinlaw.com)** is hereby appointed with the usual powers and directions of a Temporary Receiver for the benefit of Plaintiff of all the rents and profits now due and unpaid or become due during the pendency of this action and issuing out the mortgaged property mentioned in the complaint, known by as 154 8th Avenue, New York, New York (Section 3, Block 787, Lot 74); and it is further

ORDERED that the Temporary Receiver is authorized to take charge and enter into possession of the property; and it is further

ORDERED that before entering her/his duties, the Temporary Receiver shall be sworn to fairly and faithfully discharge the duties committed to him and shall execute to the People of the State of New

York and file with the Clerk of the Court an undertaking in the sum of \$20,000.00 conditioned for the faithful discharge of the duties of Temporary Receiver; and it is further

ORDERED that the Temporary Receiver is hereby directed to demand, collect and receive from the occupants, tenants and licensees in possession of said premises, or other persons liable therefor, inclusive of the mortgagor, all the rents and license fees thereof now due or unpaid or hereafter that become fixed or due and the Temporary Receiver is authorized to institute and carry on all legal proceedings necessary for the protection of said premises or to recover possession of the whole, or any part thereof, and apply to this Court to fix reasonable rental value and license fee value and to compel the tenants and occupants to attorn to the Temporary Receiver; and it is further

ORDERED that the Temporary Receiver may institute and prosecute suits for the collection of rent, license fees and other charges now due or hereafter to become due and fixed, and summary proceedings for the removal of any tenants or licensees or other persons therefrom; and it is further

ORDERED that pursuant to the General Obligation Law section 7-105, anybody holding any deposits or advances of rental as security under any lease or license agreement affecting space in the premises affected by this action shall turn same over to said Temporary Receiver within five (5) days after said Temporary Receiver shall be qualified; and thereupon the said Temporary Receiver shall hold such security subject to such disposition thereof as shall be provided in an Order of the Court to be made and entered in this action; and it is further

ORDERED that anybody in possession of same shall turn over to said Temporary Receiver all rent lists, orders, unexpired and expired leases, agreements, correspondence, notices and registration statements relating to rental spaces or facilities in the premises; and it is further

ORDERED that notwithstanding anything to the contrary contained in this order, the Temporary Receiver shall not, without the further, prior order of this Court, upon prior notice to the plaintiff, make improvements or substantial repairs to the property at a cost in excess of \$2,500.00, *except* that in an emergency, if funds need to be expended in excess of \$2,500 or would otherwise require Court intervention, no Court approval will be necessary if counsel for plaintiff agrees in writing that the receiver may make such disbursement; and it is further

ORDERED that the Temporary Receiver shall deposit all monies received by her/him into any FDIC-insured bank where she has an account for this purpose and such account shall show the name of this action and the Temporary Receiver shall furnish plaintiff's attorneys with monthly statements of the receipts and expenditures of the Receivership together with a photocopy of the monthly statements received from said depository and no withdrawals shall be made therefrom except as directed by the Court or on a draft or check signed by the Temporary Receiver; and it is further

ORDERED that the Temporary Receiver is authorized from time to time to rent and lease any part of the premises for terms not exceeding one (1) year or such longer terms as may be required by applicable laws or regulations; to keep the premises insured against loss by damage or fire; to pay the taxes, assessments, water rates, sewer rates, vault rents, salaries of employees, supplies and other charges; to comply with all lawful requirements of any municipal department or other authority of the municipality in which the mortgaged premises are situated and to procure such fire, liability and other insurance as may be reasonably necessary; and it is further

ORDERED, that the tenants, licensees or other persons in possession of said premises attorn to the Temporary Receiver and pay over to the Temporary Receiver all rents, license fees, and other charges of such premises now due and unpaid or that may hereafter become due; and that the defendants be enjoined and restrained from collecting the rents, license fees and other charges of said premises from interfering in any manner with the property or its possession; and from transferring, removing or in any way disturbing and of the occupants or employees; and that all tenants, occupants, employees and licensees of the premises and other persons liable for the rents be and hereby are enjoined and restrained from paying any rent or license fees or other charges for such premises to the defendants, their agents, servants or attorneys; and it is further

ORDERED that the Temporary Receiver is prohibited from incurring obligations in excess of the monies in her hands without further Order of this Court or written consent of Plaintiff's attorney and Plaintiff may advance money, which can be recouped in this litigation; and it is further

ORDERED that the Owner turn over to the Temporary Receiver all rents collected from and after the date of this Order; and it is further

ORDERED that all persons now and hereafter in possession of said premises, or any part thereof, and not holding such possession under valid and existing leases or tendencies, do forthwith surrender such possession to the Temporary Receiver, subject to emergency laws, if any, and it is further

ORDERED that the Temporary Receiver after paying the expenses of the management and care of the said premises as above provided retain the balance of the monies which may come into his hands until the sale of the said premises under the judgment to be entered in this action and/or until further Order of this Court, and it is further

ORDERED that the Temporary Receiver, or any party hereto, may at any time, on proper notice to all parties who have appeared in this action, apply to the Court for further and other instructions or powers necessary to enable the Temporary Receiver to properly fulfill her duties or for interim fee payments; and it is further

ORDERED that the appointed named herein shall comply with Section 35a of the Judiciary Law, Sections 6401-6404 of the CPLR, Section 1325 of RPAPL and Rule 36 of the Chief Judge; and it is further

ORDERED that notwithstanding any other provision of this order, the Temporary Receiver shall not appoint an attorney, managing agent, appraiser, auctioneer or accountant without prior order of this Court, and that the receiver shall apply to the court and file a separate application for appointment of a managing agent, attorney or other managing services pursuant to 36.1 of the Uniform Court Rules.

8/18/2022
DATE

CHECK ONE: CASE DISPOSED DENIED GRANTED

APPLICATION: SETTLE ORDER SUBMIT ORDER FIDUCIARY APPOINTMENT

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN OTHER REFERENCE

Francis A. Kahn III
FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
NON-FINAL DISPOSITION **J.S.C.**