

**SKW-B Acquisitions Seller C, LLC v 79 Mercer St.
LLC**

2022 NY Slip Op 33308(U)

September 27, 2022

Supreme Court, New York County

Docket Number: Index No. 850014/2022

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 A. KAHN, III PART 32

Justice

-----X
 SKW - B ACQUISITIONS SELLER C, LLC, INDEX NO. 850014/2022
 Plaintiff, MOTION DATE _____
 MOTION SEQ. NO. 001

- v -

79 MERCER STREET LLC, THOMAS MAKKOS, NEW
 YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW
 YORK CITY DEPARTMENT OF FINANCE, NEW YORK
 STATE DEPARTMENT OF TAXATION AND FINANCE,
 GEORGE MAKKOS, JOHN DOE

**DECISION + ORDER ON
MOTION**

Defendant.

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59
 were read on this motion to/for APPOINT - FIDUCIARY

Upon the foregoing documents the motion is determined as follows:

The within action is to foreclose on a consolidated, extended, and modified mortgage encumbering a parcel of real property located at 79 Mercer Street, New York, New York (Block 485; Lot 29). The mortgage secures an indebtedness of \$9,000,000.00 which is memorialized by a consolidated and restated mortgage note dated April 8, 2016. Plaintiff commenced this action alleging Defendant, 79 Mercer Street, LLC (“Mercer”), *inter alia*, defaulted in making installment payments under the note. Defendants Mercer, Thomas Makkos and George Makkos (“Makkos”), personal guarantors, answered jointly and pled twenty-six affirmative defenses. Naomi Kaltman and Christopher Bowers, served as “John Doe” Defendants also answered.

Section 13.1 of the mortgage agreement provides, in pertinent part, as follows:

(9) Receiver or Possession.

- (a) Lender shall be entitled, as a matter of strict right, without notice to any Person and ex parte, and without regard to the value, condition or occupancy of the security or of the Property, or the solvency of Borrower or of any Guarantor or Indemnitor, or the adequacy of the Property as security for the Note, to have a receiver appointed to enter upon and take possession of the Property, collect the Rents and apply the same in accordance with the terms of this Mortgage, such receiver to have all the rights and powers permitted under the Laws of the jurisdiction in which the Property is located.

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. Only Defendants Mercer and Makkos 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' 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 [2d Dept 2019]).

In the present case, it is undisputed that the parties' mortgage provides that Plaintiff may apply for the appointment of a receiver regardless of the adequacy of the property as security and Plaintiff pled that Defendant Mortgagor defaulted in repayment. 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 [1st Dept 2012]).

In opposition, Defendants have not demonstrated that denial of the appointment of a receiver is an appropriate exercise of the Court's discretion (*see id.*; *US Bank, N.A. v Rufai*, 202 AD3d 719, 721 [2d Dept 2022]; *Shaw Funding, LP v Bennett*, 185 AD3d 857, 858 [2nd Dept 2020]). Notably, Defendants have not demonstrated that issues exist as to the validity of the mortgage or whether a default has in fact occurred (*cf. Phoenix Grantor Trust v Exclusive Hospitality, LLC*, 172 AD3d 926 [2d Dept 2019]).

Defendants' attempt to analogize the relief sought to an injunction and have the Court apply the requirements for issuance of same is inapposite. The purpose of an injunction is to preserve the *status quo* between the parties (*see eg Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052 [2d Dept 2009]). On the other hand, the purpose of a receivership is to "protect and preserve the collateral property" (1 Bergman on New York Mortgage Foreclosures §§ 10.01 and 10.02 [2018]). Further, entitlement to injunctive relief requires demonstrating the existence of irreparable harm (*see CPLR §6301*). But where, as here, the mortgage contains a provision that a lender make application for a receiver without notice and without regard for the adequacy of the security, under RPL §254[10], that provision denotes that a receiver may be appointed "regardless of proving the necessity for the appointment" (*see GECMC 2007-CI Ditmars Lodging, LLC v Mohola, LLC*, 84 AD3d 1311, 1312 [2d Dept 2011], *citing Naar v. I.J. Litwak & Co.*, 260 AD2d 613 [2d Dept 1999]; *see also CSFB 2004-C3 Bronx Apts LLC v Sinckler, Inc.*, supra).

Accordingly, it is

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

ORDERED that, at Plaintiff's request, **Adam Jernow of Wayfinder PM, 20 West 20th Street, Ste. 1102, New York, New York 10011** 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 as 79 Mercer Street, New York, New York (Block 485; Lot 29); 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 \$217,682.96 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 \$1,000.00, *except* that in an emergency, if funds need to be expended in excess of \$1,000.00 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

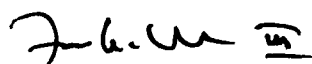
ORDERED that all persons now and hereafter in possession of said premises, or any part thereof, and not holding such possession under valid and existing leases or tendencies, do forthwith surrender such possession to the Temporary Receiver, subject to emergency laws, if any, and it is further

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.

<u>9/27/2022</u> DATE			 FRANCIS A. KAHN, III, A.J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NOT IN DISORDER	HON. FRANCIS A. KAHN III J.S.C.
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE	