

**Wells Fargo Bank, N.A. v JTRE 240 E. 54th St. LLC**

2022 NY Slip Op 34145(U)

December 1, 2022

Supreme Court, New York County

Docket Number: Index No. 850091/2022

Judge: Joel M. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF COMM 2018-COR3 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2018-COR3,

INDEX NO. 850091/2022

MOTION DATE 09/16/2022

MOTION SEQ. NO. 001

Plaintiffs,

- v -

**DECISION + ORDER ON MOTION**

JTRE 240 EAST 54TH STREET LLC, JACK TERZI, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, ABECO CONSTRUCTION, LLC, JOHN DOES 1 THROUGH 10

Defendants.

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56 were read on this motion to APPOINT REFEREE.

This is an action to foreclose a mortgage securing a loan in the original principal amount of \$42,000,000.00 against, among other collateral, property located at 240 East 54 Street in the City of New York, Block 1327, Lot 29 (the "Property"). Plaintiff, Wells Fargo Bank, National Association, as Trustee, for the Benefit of the Holders of COMM 2018-COR3 Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2018-COR3 ("Lender") seeks an Order appointing a receiver for the Property pursuant to RPL § 254(10) and CPLR § 6401.

Lender argues that a receiver is necessary under RPL Law § 254(10) and CPLR 6401(a) Because defendant JTRE 240 East 54 Street LLC ("Borrower") has defaulted under the Mortgage and the other Loan Documents by: (i) failing to pay the regularly scheduled monthly payments of

interest, tax and insurance escrows and reserves due under the Loan Documents; (ii) allowing the Property to be encumbered by a mechanic's lien filed by Abeco Construction LLC on June 18, 2020; and (iii) failing to pay the taxes on the Property since 2020.

Section 10(a)(vii) of the Mortgage provides that upon the occurrence and during the continuance of any Event of Default, the Lender can “apply for the appointment of a trustee, receiver, liquidator or conservator of the Mortgaged Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of the Mortgagor or of any Person liable for the payment of the Debt” (NYSCEF 36 ¶ 10 (a)(vii)). When a receiver agreement exists between the parties, RPL Law § 254(10) applies to a motion seeking the appointment of a receiver (*Ridgewood Sav. Bank v New Line Realty VI Corp.*, 24 Misc 3d 1227(A) [Sup Ct, Bronx County 2009]).

In relevant part, RPL Law § 254(10) provides that: “(i)n mortgages of real property. . .the following or similar clauses and covenants must be construed as follows:...A covenant that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,' must be construed as meaning that the mortgagee...in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver...in the event of any default or defaults in paying the principal, interest, taxes...” (*Ridgewood*, 24 Misc 3d 1227(A)). However, “[i]t is a well-established principle of law that even where ‘covenants in mortgages by their terms purport to give an absolute right to the appointment of a receiver, the propriety of such [an] appointment rests in the sound discretion of the Court’” (*id.*).

Under CPLR 6401(a), a temporary receiver of the property may be appointed “where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.”

Contrary to the cases cited by Lender (*Sovereign Bank v 347 E. 173 LLC*, 11 CIV. 1061 LBS, 2011 WL 2693525, at \*3 [SDNY 2011]; *Bronx Broadway Funding v Mike's Pipe Yard Nad Bldg. Supply Corp.*, 2018 NY Misc LEXIS 11577 [Sup Ct, Bronx County 2018]), wherein despite default, the property was occupied by renters and generating rents and profits, here, Borrower submits that its four commercial tenants are not paying rent despite being operational (NYSCEF 54 ¶¶ 2–3 [Jack Terzi Affirmation]). Borrower further submits that Lender has thwarted its efforts to renegotiate its leases with the commercial tenants, and it has retained Cushman & Wakefield, as its commercial real estate broker and for management purposes, to assist in negotiating with current tenants as well as simultaneously looking for new tenants for the spaces, should negotiations fail with the current tenants (*id.* ¶¶ 5–9).

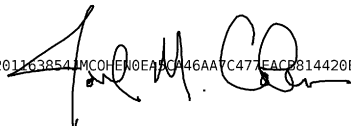
“The appointment of a Receiver is often not the least intrusive, most economical and most effective method of preserving the property” (*Bronx Broadway Funding*, 2018 NY Misc LEXIS 11577, at \*4). Although Lender suggests a well-qualified receiver (NYSCEF 30), Lender fails to demonstrate that the appointment of a receiver would, on balance, be beneficial at this point. Furthermore, there is no evidence that the filing of a mechanic’s lien threatens Lender’s collateral as Lender submits that “the Mortgage creates a first priority lien on and security interest in all of Borrower’s right, title and interest in and to the Premises . . .” (NYSCEF 31 ¶ 11 [James Henderson Affidavit]). Lender has not demonstrated that there is danger that the property will be removed from the state, or lost, materially injured or destroyed. Finally, no

judgment has been entered, and Lender has yet to prove its case. The Court can reassess the situation as the case proceeds.

Accordingly, it is

**ORDERED** that the motion to appoint a receiver is **denied without prejudice**.

This constitutes the Decision and Order of the Court.

20221201163854 JMC0HEN0EAFC046AA7C477EACFB14420E394A4C  


12/1/2022  
DATE

\_\_\_\_\_  
JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE