

**Federal Home Loan Mtge. Corp. v Campus Walk
One, LLC**

2023 NY Slip Op 30434(U)

January 19, 2023

Supreme Court, Erie County

Docket Number: Index No. 809152/2022

Judge: Betty Calvo-Torres

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STATE OF NEW YORK

SUPREME COURT: COUNTY OF ERIE

FEDERAL HOME LOAN MORTGAGE CORPORATION

V.

CAMPUS WALK ONE, LLC

DECISION

INDEX# 809152/2022

MORTGAGED PREMISES:

643 Grant Street
Buffalo, NY 14213

APPEARANCES:

ALEXANDRA R. HEANEY, ESQ.
GROSS POLOWY, LLC
Appearing for the Plaintiff

DAVID J. McNAMARA, ESQ.
PHILLIPS LYTTLE LLP
Appearing for the Defendant

Calvo-Torres, A.S.C.J.

Plaintiff requests that the Court appoint a receiver in this foreclosure action. After reviewing plaintiff's Notice of Motion dated September 20, 2022, defendant's Memorandum of Law in Opposition to Motion for the Appointment of a Receiver and Property Manager dated October 5, 2022, plaintiff's Reply in Response to Defendant's Memorandum of Law in Opposition to the Motion for the Appointment of a Receiver and Property Manager dated October 17, 2022, the Affidavit of Demetrios Morakis dated November 16, 2022, and the Affidavit of James R. Swezy dated November 29, 2022, the Court finds as follows:

RPL 254(10) states that if a mortgage contains a covenant stating that " 'the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver', [it] must be construed as meaning that the mortgagee, his heirs, successors or assigns, 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 of the rents and profits of the premises covered by the mortgage;...", (see also Home Title Ins. Co. v Isaac Scherman Holding Corp., 240 AD 851). By this statute, the holder of a mortgage is entitled to the appointment of a receiver if two conditions are met: 1. A foreclosure action is commenced, and 2. The mortgage contains a covenant stating that the holder of the mortgage shall be entitled to the appointment of a receiver if a foreclosure action is commenced.

The Court finds that plaintiff has brought an action to foreclose on the property in question, thus satisfying the initial requirement of the statute. By alleging that defendant failed to make full payments every month in the 2022 calendar year, and that defendant failed to make a required "pre-payment" of at least \$250,000.00 and less than \$500,000.00, allegedly due on August 1, 2022, pursuant

to paragraph 4.b. of the "Note Modification Agreement" dated September 8, 2020, and listed as Exhibit # 33 in the NYSEF system, plaintiff has made a prima facie showing that defendant is in default.

Defendant contends that he is not in actual default based on an alleged agreement between himself and plaintiff that was never reduced to a written contract. He claims that he relied upon promises made by plaintiff, to his own detriment, and to plaintiff's benefit. For this reason, defendant argues that plaintiff should be estopped from the present action. The Court finds this argument to be unpersuasive. Defendant's argument pertains to the underlying issue of the merit of the foreclosure, and not to the instant issue of the appointment of a receiver.

The Court further finds that a covenant of the kind specified in RPL 245(10) exists in this case. Paragraph 3(c)(ii) of the "Multifamily Assignment of Rents and Security Agreement", dated November 15, 2018, and listed as Exhibit # 18 in the NYSEF system, states:

"Alternatively, if an Event of Default has occurred and is continuing, regardless of the adequacy of Lender's security, without regard to Borrower's solvency and without necessity of giving prior notice (oral or written) to Borrower, Lender may apply to any court having jurisdiction for the appointment of a receiver for the Mortgaged Property to take any or all of the actions set forth in the preceding sentence. If Lender elects to seek the appointment of a receiver for the Mortgaged Property at any time after an Event of Default has occurred and is continuing, Borrower, by its execution of this Instrument, expressly consents to the appointment of such receiver, including the appointment of a receiver ex parte if permitted by applicable law."

The Court finds that in executing the Agreement of November 15, 2018 (the Mortgage), defendant (the Borrower) expressly consented to the appointment of a receiver. Pursuant to RPL 254(10), and pursuant to the express agreement of the parties, plaintiff is entitled to the relief requested.

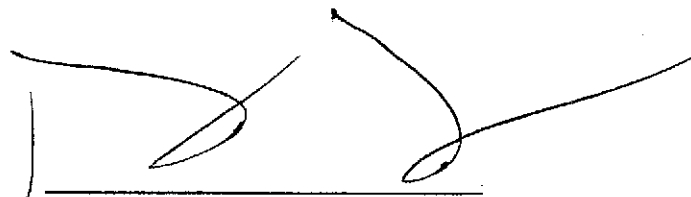
Accordingly, plaintiff's motion requesting the appointment of a receiver is **GRANTED**.

A separate **ORDER** in accordance with this **DECISION** will be signed by the Court and provided to the parties.

This constitutes the **DECISION** of the Court.

Dated: January 19, 2023

Buffalo, NY



HON. BETTY CALVO-TORRES, A.S.C.J.