

U.S. Bank N.A. v 310 W 115th St. LLC
2023 NY Slip Op 33849(U)
October 24, 2023
Supreme Court, New York County
Docket Number: Index No. 850370/2015
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III

PART

32

Justice

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INDEX NO. 850370/2015

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR
GSAA HOME EQUITY TRUST 2006-9 ASSET-BACKED
CERTIFICATES SERIES 2006-9,

MOTION DATE _____

MOTION SEQ. NO. 005

Plaintiff,

- v -

310 W 115TH STREET LLC A/K/A 310 W 115TH ST LLC, A
NEW YORK LIMITED LIABILITY CO., U.S BANK N.A., 125
MAIDEN EQUITIES LLC, GRAKE LLC, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY
PARKING VIOLATIONS BUREAU, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC., INDYMAC
BANK, FSB., JOHN DOE #1 THROUGH JOHN DOE #12,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 208, 209, 210, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 225, 226, 227, 228, 229, 230

were read on this motion to/for

RENEW/REARGUE/RESETTLE/RECONSIDER

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a mortgage encumbering residential real property. The mortgage, dated January 26, 2006, was given by former Defendant Terry Gray ("Gray") to secure a loan of \$1,000,000.00 which is memorialized by a note of the same date. By deed dated May 29, 2014, Gray transferred the entire premises to Defendant 310 W 115th Street LLC ("310 W 115"). Shortly thereafter, Defendant 310 W 115 commenced an action pursuant to RPAPL §1501[4] to discharge the mortgage herein on the basis that the statute of limitations expired (*see 310 W 115 LLC v Greenpoint Mgt. Funding, Inc.*, NY Cty Index No 156309/2014).

Approximately eighteen months later, Plaintiff U.S. Bank National Association as Trustee for GSAA Home Equity Trust 2006-9 Asset-Backed Certificates Series 2006-9 ("US Bank") commenced this action to foreclose on the mortgage. A motion by Defendant 310 W 115 to dismiss pursuant to CPLR §3211[a][4] was denied by order of Justice Geoffrey D. Wright, dated June 10, 2016. Also in that order, US Bank's cross-motion to consolidate this matter with the RPAPL §1501[4] action was initially granted. By amended order, dated October 18, 2016, Justice Wright vacated the order of consolidation and transferred this action to Justice Gerald Lebovits, who was assigned the RPAPL §1501[4] action.

While both matters were assigned to Justice Lebovits, it seems both this and the RPAPL §1501[4] action were adjudicated and prosecuted together despite there being no formal order of consolidation. This is apparent from numerous orders issued by Justice Lebovits which contained the captions for both actions. During this period, Defendant 310 W 115 continued to actively litigate the RPAPL §1501[4] action. By order dated March 22, 2018, Justice Lebovits granted the motion by US Bank, Defendant therein, to dismiss the RPAPL §1501[4] action pursuant to CPLR §3211[a][7]. Justice Lebovits held that 310 W 115's complaint failed to state a claim

because the statute of limitations to foreclose on the subject mortgage was not expired (NY Cty Index No 156309/2014; NYSCEF Doc No 217). A motion to renew based upon an alleged change in the law—to wit the Appellate Division, Second Department’s decision in *Freedom Mortgage Corp. v Engel*, 163 AD3d 631 [2d Dept 2018]—was denied by order of Justice Lebovits October 5, 2018.

After dismissal of the RPAPL §1501[4] action, the within foreclosure action remained with Justice Lebovits until about March 6, 2020, when it was reassigned to Justice Judith N. McMahon. About a year later, the action was transferred to this Court and, by correspondence filed on November 9, 2020, former counsel for Gray claimed his client died on January 7, 2020, in Dubai. Defendant Gray’s death was not confirmed until Plaintiff’s counsel informed the Court of same on July 1, 2021. Plaintiff’s counsel also informed the Court that Defendant Gray was not served with the summons and complaint before he died. Counsel for Defendant 310 W 115 filed a notice of appearance in this action on July 19, 2022, and participated in status conference with the Court on July 20, 2022.

Now, Defendant 310 W 115 moves for renewal, pursuant to CPLR §2221[e], of the order dated June 10, 2016, and to dismiss the complaint based upon expiration of the statute of limitations. Defendants assert renewal should be granted based upon a change in the law that occurred with the enactment of the Foreclosure Abuse Prevention Act (“FAPA”)(L 2022, ch 821 [eff Dec. 30, 2022]). Plaintiff opposes the motion and cross-moves for the appointment of a receiver. Defendant opposes the cross-motion.

“Renewal is granted sparingly . . . it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987]). As relevant here, CPLR §2221[e][2] provides that a motion for leave to renew “shall demonstrate that there has been a change in the law that would change the prior determination”. Change in law can be a “new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis” (CPLR Practice Commentaries, by Professor Patrick M. Connors, McKinney’s Cons. Laws of NY Annotated, CPLR 2221:9A, Time to Make Renewal Motion; 2020, citing Siegel & Connors, New York Practice § 449 [6th ed. 2018]). Even if a change in the law is found, unless it would alter the prior determination, it is of no moment (*see eg 515 Ave. I Corp. v 515 Ave. I Tenants Corp.*, 44 AD3d 707, 708 [2d Dept 2007]).

FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. FAPA is comprised of multiple amendments to existing statutes and the enactment of new edicts. The express purpose of FAPA, according to the Senate Sponsor Memo, was to “overrule the Court of Appeals’ recent decision in *Freedom Mtge. Corp. v Engel*” as well as certain other judicial decisions perceived to be “inconsistent with the intent of the Legislature” (NY State Senate Bill S5473D at Sponsor Memo, Justification). Similarly, the Assembly Memorandum in Support of Legislation states enactment of FAPA was necessary “to clarify the existing law and overturn certain court decisions to ensure the laws of this state apply equally to all litigants, including those currently involved in mortgage foreclosure actions” (NY State Assembly Bill A7737B at Sponsor Memo, Purpose and Intent of Bill). The decision in *Freedom Mtge. Corp. v Engel*, 37 NY3d 1 (2021) is specifically targeted by FAPA’s legislative “response” which “restore[s] longstanding law that made it clear that a lenders’ discontinuance of a foreclosure action that accelerated a mortgage loan does not serve to reset the statute of limitations” (*id.*). As to its applicability, Section 10 of FAPA provides that it “shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced” (*see* L 2022, ch 821 [eff Dec. 30, 2022]).

As relevant here, the applicable statute of limitations, CPLR §213[4], was amended to provide that “[i]n any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.” (CPLR §214[4][a]). Further, CPLR §3217 was amended to add a new subdivision [e] which states that “[i]n any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute” (CPLR §3217[e]).

Accepting that FAPA constitutes a change in the law from when the June 10, 2016, decision was issued, Defendant failed to establish that its application would change the outcome thereunder. The motion which resulted in the order at issue requested dismissal of this action based upon the pendency of a prior action for the same relief, the RPAPL §1501[4] action, pursuant to CPLR §3211[a][4]. No request for dismissal of the action as time barred under CPLR §3211[a][5] was proffered and no ruling on that issue was rendered. As such, the enactment of FAPA would have absolutely no effect on the June 10, 2016, decision.

In any event, Defendant 310 W 115 is collaterally estopped from raising the statute of limitations herein as a defense. 310 W 115’s action pursuant to RPAPL §1501[4] was dismissed upon a finding that this foreclosure action is timely. While the within motion was *sub judice*, Justice Lebovits, by order dated June 21, 2023, denied 310 W 115’s motion to renew and vacate his order dismissing the RPAPL §1501[4] action based on the enactment of FAPA (NY Cty Index No 156309/2014; NYSCEF Doc No 314). Justice Lebovits determined that with the entry of a final judgment and the expiration of the time to appeal, the matter was absolute despite any seeming harshness of the result. Even before the issuance of this last decision, the timeliness of this action to foreclose was determined against Defendant 310 W 115, after a full and fair opportunity to litigate the issue, which precludes further litigation of the issue in this action (*see Grossman v Federal Natl. Mtge. Assn.*, 213 AD3d 811 [2d Dept 2023]; *9th St., LLC v. Deutsche Bank Natl. Trust Co.*, 210 AD3d 613 [2d Dept 2022]).

Concerning the parties’ arguments regarding the constitutionality of the application of FAPA to this matter, this Court must bypass that issue since it decided the matter in some other fashion (*see People of the State of New York v Felix*, 58 NY2d 156 [1983]).

Plaintiff cross-moves pursuant to RPL §254[10] and RPAPL §1325 for the appointment of a temporary receiver of the rents of the mortgaged premises. In section H of a rider to the mortgage at issue it is provided, in pertinent part, as follows:

If Leader gives notices of delimit to Borrower: . . . (vi) Lender shall be entitled to have a receiver appointed to take possession of and manage the Property and collect the Rents and profits derived from the Property without any showing as to the inadequacy of the Property as security.

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 Defendants defaulted in repayment. Accordingly, Plaintiff established its entitlement to the appointment of a receiver of the mortgaged premises (*see eg SKW Hillside Bleeker Lender LLC v 145 Bleeker LLC*, 217 AD3d 536 [1st Dept 2023]; *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]). The cases relied on by Defendants regarding what circumstances must exist before a court exercises its discretion to appoint a referee are inapposite. The cited authority predominantly concerns appointment of a receiver absent an express agreement to same pursuant to CPLR §6401 (*see eg Groh v Halloran*, 86 AD2d 30 [1st Dept 1982]). The Appellate Division cases are clear that where, as here, the mortgage contains a provision that a lender may "without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower", under RPL §254[10], that provision denotes that a mortgagee may apply for a receiver "regardless of proving the necessity for the appointment" (*see GECMC 2007-C1 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 SKW Hillside Bleeker Lender LLC v 145 Bleeker LLC*, supra).

However, the branch of the motion for an accounting of the rents received to date by Defendant is not warranted under the circumstances. An assignment of rents clause upon default, as contained in the above rider, affords Plaintiff the right to collect rents, not title to them (*see In re South Side House, LLC*, 474 BR 391, 403 [Bankr. EDNY 2012]). Further, the only provision in the mortgage regarding an accounting of rents applies to a judicially appointed receiver and is limited to only those rents received.

Accordingly, it is

ORDERED that Defendant 310 W 115's motion to renew is denied, and it is further

ORDERED that the cross-motion for the appointment of a Temporary Receiver is granted, but the demand for an accounting of rents is denied; and it is further

ORDERED that **Roberta Ashkin, Esq., 400 East 70th Street New York New York 10021, (646) 779-8520** is, at the Plaintiff's request, 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 the street addresses as : 310 WEST 115 STREET, New York, New York; 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 **\$50,000.00** 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 \$2,000.00, except that in an emergency, if funds need to be expended in excess of \$2,000.00 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 five (5) years 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.

ORDERED that this matter is set down for a status conference on **January 4, 2024 @ 11:40 am** via Microsoft Teams.

10/24/2023

DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

SUBMIT ORDER

☒

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

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

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