

SIG CRE 2023 Venture LLC v REF 46 St. LLC

2025 NY Slip Op 33140(U)

August 15, 2025

Supreme Court, New York County

Docket Number: Index No. 850419/2024

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

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INDEX NO. 850419/2024

SIG CRE 2023 VENTURE LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

REF 46 STREET LLC, ROEY HAYON, NEW YORK CITY
DEPARTMENT OF BUILDINGS, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, 'JOHN DOE #1'
THROUGH 'JOHN DOE #10', 'DOE ASSOCIATIONS,' AND
'DOE CORPS.,' THE NAMES BEING FICTITIOUS AND
BEING INTENDED TO REFER TO ANY AND ALL ADULT
NATURAL PERSONS AND ALL PARTNERSHIPS,
CORPORATIONS AND OTHER LEGAL ENTITIES HAVING,
OR WHICH MAY CLAIM

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 120, 121, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 144, 145, 147, 148, 149, 150, 151, 152, 153, 154

were read on this motion to/for MISCELLANEOUS

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

In this action, Plaintiff seeks to foreclose on a mortgage encumbering a parcel of improved real property located at 334 & 336 West 46th Street, New York, New York. Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment of the note. Now, Plaintiff moves pursuant to RPL §254[10] and RPAPL §1325[1] for the appointment of a temporary receiver of the rents of the mortgaged premises. Mortgagor and Guarantor Defendants oppose the motion and cross-move to dismiss the complaint pursuant to CPLR §3211[a][1], [3] and [7] as well as to cancel the notice of pendency. Plaintiff opposes the cross-motion.

Beginning with the cross-motion, it violates the single-motion rule as Defendants made a prior motion to dismiss pursuant to CPLR §3211[a][8] which is presently sub judice (see CPLR §3211[e]; Landes v Provident Realty Partners II, L.P., 137 AD3d 694 [1st Dept 2016]). Substantively, when evaluating a request for dismissal under CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (see eg. Chanko v American Broadcasting Cos. Inc., 27 NY3d 46 [2016]; M & E 73-75, LLC v 57 Fusion LLC, 189 AD3d 1, 5 [1st Dept 2020]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (298 Humboldt,

LLC, v Torres, 197 AD3d 1081, 1083 [2d Dept 2021], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

When standing is placed at issue by a defendant's answer to a mortgage foreclosure action, it is Plaintiff's obligation to prove same to be entitled to foreclose (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]). However, Defendants have raised the defense in a motion to dismiss, so it is Movant's obligation to demonstrate *prima facie* Plaintiff lacked standing as a matter of law (*see Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79 [2d Dept 2021]; *DLJ Mtge. Capital v Mahadeo*, 166 AD3d 512 [1st Dept 2018]).

Standing in a foreclosure action is established in three ways: [1] direct privity between mortgagor and mortgagee, [2] physical possession of the note with an allonge or indorsement in blank before the action is filed, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). "Thus, the defendants here, in moving to dismiss the complaint under CPLR 3211(a) . . . (3), needed to affirmatively prove that the plaintiff was not in direct privity with them, was not in physical possession of the note indorsed to it or in blank at the time of the commencement of the action, and that the assignment of the note . . . to the plaintiff was invalid." (*Wilmington Sav. Fund Socy., FSB v Matamoro*, supra). "To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 60 [2d Dept 2015]; *DLJ Mtge. Capital v Mahadeo*, supra).

Plaintiff did not originate the loan and is not in direct privity with the Mortgagor. Defendants' assertion that the written assignments annexed to the complaint are defective on their face is without merit. The authority of a signatory to a written assignment to act is not required to be demonstrated at the pleading stage since signatures of bank officers or their agents are entitled to a "presumption of regularity" (*JP Morgan Chase Bank NA v Newton*, 203 AD3d 902, 905 [2d Dept 2022]). Indeed, proof of authority to act can even be submitted in reply when the issue is raised in opposition to a motion for summary judgment (*see Deutsche Bank Natl. Trust Co. v Rudman*, 170 AD3d 950 [2d Dept 2019]; *Bank of N.Y. Mellon v Hoshmand*, 158 AD3d 600 [2d Dept 2018]).

As to its attempt to negate any claimed holder status, Defendants' reliance on *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015] and its so-called progeny is entirely misplaced. In that case, the mortgagor's motion was based upon "plaintiff's response to their demand for documents supporting the plaintiff's purported basis for standing set forth in the complaint" (*id.* at 985). Here, Defendants' motion is founded solely on Plaintiff's complaint and the documents annexed thereto as exhibits. Nothing in *Roumiantseva*, nor those cases that followed, stands for the proposition that a well pleaded complaint in a foreclosure action requires sufficient proof of a plaintiff's standing. The opposite is true and a plaintiff "need not allege standing . . . to state a cause of action to foreclose upon a mortgage" (*Wilmington Sav. Fund Socy., FSB v Matamoro*, supra at 92 [emphasis added]).

The purported inconsistencies in the dates on the allonges and the assignments do not, at present, show Plaintiff lacked standing. Defendants' argument is based upon an assumption that physical possession of the note was transferred on the same date as the allonge, which is dated before the written assignment. In this procedural context, the Court must construe such an irregularity in favor of Plaintiff absent unmistakable contradictory evidence. Further, should Plaintiff establish it had "physical possession" of the note when the action was commenced, the arguments regarding the validity and

timing of the mortgage assignments would be moot (*see JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]).

Defendant's assertion that the complaint and/documentary evidence demonstrate, as a matter of law, that Plaintiff failed to comply with any contractual pre-foreclosure notice requirements is also meritless. A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see Higgitt*, CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers, 83 New York State Bar Journal 32, 34-35 [2011]).

As this this branch of the motion is crucially dependent on an affidavit, which is not documentary evidence, the motion fails (*see eg Pineda v. 525 SMA Owner LLC*, 216 AD3d 475 [1st Dept 2023]; *Melrose Assoc. L.P. v Floral Assoc. L.P.*, 212 AD3d 482 [1st Dept 2023]; *Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]). To the extent Defendant asserts Plaintiff was required to plead its compliance with any notice requirement misconstrues an affirmative defense, which a defendant must assert, for an element of a cause of action for foreclosure (*see One W. Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602). In any event, Plaintiff pled in the complaint, which must be presumed to be true, that it served pre-foreclosure notices, and Defendants' naked denial of receipt of a contractual pre-foreclosure notice does not meet its burden on this motion (*see generally United Nations Fed. Credit Union v Diarra*, 194 AD3d 506, 507 [1st Dept 2021]; *In Rem Tax Foreclosure Action No. 53*, 216 AD3d 1064 [2d Dept 2023]; *City of New York v Melamed (In Rem Tax Foreclosure Action No. 47)*, 19 AD3d 547, 548 [2d Dept 2005]).

Accordingly, Defendants' motion to dismiss is denied in its entirety.

As to Plaintiff's 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]).

Section 2.04 of the mortgage provides, in pertinent part, as follows:

After the happening of any Event of Default and immediately upon the commencement of any action, suit or other legal proceedings by Mortgagee to obtain judgment for the principal of, or interest on, the Note and other sums required to be paid by Mortgagor pursuant to any provision of this Mortgage, or of any other nature in aid of the enforcement of the Note or of this Mortgage, Mortgagor will if required by Mortgagee, consent to the appointment of a receiver or receivers of the Mortgaged Property and of all the earnings, revenues, Rents, issues, profits and income thereof. After the happening of any Event of Default and during its continuance, and upon the commencement of any proceedings to foreclose this Mortgage or to enforce the specific performance hereof, or in aid thereof, or upon the commencement of any other judicial proceeding to enforce any

right of Mortgagee, Mortgagee shall be entitled, as a matter of right, if it shall so elect, without the giving of notice to any other party and without regard to the adequacy or inadequacy of any security for the indebtedness secured hereby, forthwith either before or after declaring the unpaid principal of the Note to be due and payable, to the appointment of such a receiver or receivers.

In the present case, it is undisputed that the parties' mortgage provides that Plaintiff may apply for the appointment of a receiver and Plaintiff pled that Defendants, *inter alia*, defaulted in repayment of the indebtedness, a default event under the loan documents. 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 argument that Plaintiff has not made an evidentiary showing to support the appointment of a receiver is inapposite. Under the circumstances, a plaintiff "may apply for the appointment of a receiver . . . without requirement that plaintiff demonstrate more than what is required by Real Property Law § 254(10)" (*SKW Hillside Bleeker Lender, LLC v 145 Bleeker LLC*, 217 AD3d 536, 537 [1st Dept 2023][emphasis added]). Indeed, "[c]ases hold that a receiver may be appointed so long as an action has been commenced" (*HSBC Bank USA, N.A. v Rubin*, 210 AD3d 73, 83 [2d Dept 2022]). To the extent Defendants' opposition is based on cases where appointment of a receiver was sought pursuant to CPLR §6401 it is unavailing (*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 apply for a receiver, the mortgagor may seek such relief "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*).

Accordingly, it is

ORDERED that the motion for the appointment of a Temporary Receiver is granted and the cross-motion to dismiss is denied; and it is further

ORDERED that **Angela Ortiz (Fiduciary Identification No. 209967)** 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 located at 13 West 38th 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 \$5,000.00, *except* that in an emergency, if funds need to be expended in excess of \$5,000.00 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.

8/15/2025

DATE

FRANCIS A. KAHN, III, A.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