

3rd & 60th Assoc. Sub LLC v Zavolunov

2025 NY Slip Op 33170(U)

August 22, 2025

Supreme Court, New York County

Docket Number: Index No. 152736/2022

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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3rd AND 60th ASSOCIATES SUB LLC

Plaintiff,

- v -

ZAVOLUNOV, MICHAEL et al

Defendant.

-----X

INDEX NO. 152736/2022

MOTION DATE 12/26/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is denied, and the cross-motion is denied.

Background

Plaintiff 3rd and 60th Associates Sub LLC owns a commercial condominium unit in Manhattan. In 2017, Plaintiff leased the space to Third Avenue M&I LLC and 1011 Third Avenue M&I LLC (collectively, the “Tenants”). Defendants Michael Zavolunov and Ilya Zavolunov (collectively, the “Guarantors” or “Defendants”) signed a Good Guy Guaranty in relation to the commercial lease. The Tenants defaulted on various monetary obligations, leading to a summary non-payment eviction proceeding that resulted in a stipulation on February 21, 2020 (the “Stipulation”). In August of 2020, Plaintiff filed a related action against Tenants and Guarantors seeking past due rent and use and occupancy. Tenants vacated the premises in September of 2020, allegedly while in default of the lease.

Plaintiff brought this proceeding in March of 2022, seeking to recover from Defendants the amount of \$867,048.36. Two years later in March of 2024, Plaintiff allegedly defaulted on a mortgage held on the property in question. An amended complaint was filed in September of

2024, to which the Defendants have answered. In November of 2024, Plaintiff's mortgagee on the property in question initiated a foreclosure action that is currently ongoing. In December of 2024, the court in the Foreclosure Action ordered the appointment of a receiver for the property at issue in this action. Shortly thereafter, the present motion for summary judgment was brought by Plaintiff. Since then, the receiver order in the Foreclosure Action has been temporarily stayed while a new receiver is found as the first receiver was removed from the matter.

Standard of Review

Under CPLR § 3212, a party may move for summary judgment and the motion “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent to “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 [2016]. The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

Discussion

Plaintiff is moving for summary judgment in their favor on the complaint and to dismiss Defendants' ten affirmative defenses. Defendants oppose and have cross-moved for sanctions. For the reasons that follow, the summary judgment motion is denied as premature because the Plaintiff has not established that they have standing to pursue this action in light of the Receiver Order. The cross-motion seeking sanctions is also denied.

The Assignment Does Not Remove Plaintiff's Standing Here

Defendants have argued that the present motion must be denied on the grounds that Plaintiff lacks standing. In connection with the mortgage that is the subject of the Foreclosure Action, Plaintiff signed an assignment of leases and rents agreements (“ALR”). The ALR “absolutely and unequivocally” assigned the right to collect rents on the property to the lender and in turn Plaintiff was granted a revocable license to collect said rents. The ALR also contained an automatic revocation provision, stating that in the event Plaintiff defaulted, the license is “automatically revoked” and the lender is “immediately entitled to possession of all Rents and sums due under any Lease Guaranties.” Defendants argue that this provision means that since Plaintiff’s default in March of 2024, they have not had standing to pursue the present claims for amounts under a guaranty.

Both parties cite to non-binding federal decisions on the matter of the ALR. Plaintiff cites to *South Side* to support the argument that regardless of the language in the ALR, Plaintiff did not surrender title to the right to collect rents and therefore retains an enforceable interest in the rents it here seeks to collect on. In *South Side*, a bankruptcy case, the court there stated that under the lien theory, “New York courts interpret rent assignment clauses to be additional security even when they contain terms such as ‘absolute’ and ‘unconditional’.” *In re South Side House, LLC*, 474 B.R. 391, 403 [EDNY 2012]. The practical impact of an assignment being additional security is that “a mortgagee does not acquire title to the rents upon default.” *Id.*, at 405.

Defendants cite to *Wells Fargo*, which observed that “when an assignment is absolute, title to the rents vests in the lender upon execution of the agreement, and the borrower is granted a revocable license to collect the rents that may terminate immediately and permanently upon default.” *Wells Fargo Bank, N.A. v. 840 Westchester Ave. NMA, LLC*, 2025 U.S. Dist. LEXIS 97257, *24 [SDNY 2025]. The court in *Wells Fargo* held, without deciding if the assignment at

issue was for additional security or an absolute and unconditional assignment, that because the lender there instituted a foreclosure action then the lender had either way established an enforceable interest in the rents that terminated the borrower's license to collect rents. *Id.*, at 25. But in *South Side*, the court there examined other federal decisions from courts in New York and considered that instituting a foreclosure proceeding did not give the lender title in the rents, regardless of the assignment clause. *South Side* at 405.

In *Bailey*, several landlords initiated an action to recover possession of a premises. *Bailey v. Suarez*, 18 Misc. 3d 127(A), *127A [2nd Dept. App. Term 2007]. The tenants there argued that a similar assignment of rents deprived the landlords of standing. *Id.* The Appellate Term reasoned that because the assignment had been security for a mortgage, the landlords had retained standing to bring the action and regardless, because the tenants were not a third-party beneficiary to the mortgage that the assignment secured, they could not claim any rights under the assignment including the right to challenge the landlords' standing. The Court agrees with the Appellate Term and considers this matter analogous. Ultimately, however, the Court need not decide the rather unclear issue of whether binding New York law does not enforce the plain irrevocable language of the ALR.

The Receiver Order Removes Plaintiff's Standing in This Matter

Defendants have argued that Plaintiff does not have standing to pursue these claims due to the court order appointing a receiver in the Foreclosure Action. That order stated clearly that the "Receiver may institute and prosecute suits for the collection of rent, license fees and other charges now due or hereafter to become due or fixed." It also held that Plaintiff was "enjoined and restrained from collecting the rents, license fees and other charges of said Properties and from interfering in any manner with the Properties or their possession." Plaintiff argues that this

only restrains them from seeking rents and other amounts owed from current tenants, not past tenants and their guarantors (such as Defendants). But reading the provision enjoining Plaintiff from interfering in any way or collecting rents due on the property in question alongside the provisions charging the receiver with prosecuting any suits to collect unpaid dues, would naturally impact the present case, where the amended complaint that Plaintiff seeks summary judgment on was filed after the receiver order was issued.

Furthermore, the general rule about the rights between property owners and a foreclosure receiver regarding the collection of rents is that “a receiver in foreclosure as against the mortgagor is entitled to collect all rents, including those due but unpaid at the time of his appointment.” *Kane Associates v. Blumenson*, 30 A.D.2d 127, 128 [1st Dept. 1968]. Although it appears that the replacement receiver in the Foreclosure Action has not been appointed yet, the Plaintiff is still subject to the court order directing a receiver to take over the duties of collecting undue amounts. Therefore, Plaintiff has not established a prima facie case to summary judgment on their claims, because they have not established that they have standing to pursue these claims. The summary judgment motion is premature. Finally, Defendants have cross-moved for sanctions against Plaintiff for failing to disclose the Receiver Order or the Foreclosure Action to the Court. The Court declines to grant sanctions in this matter. Accordingly, it is hereby

ADJUDGED that the motion for summary judgment is denied; and it is further

ADJUDGED that the cross-motion is denied.

8/22/2025

DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE