

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR MORGAN STANLEY BANK OF
AMERICA MERRILL LYNCH TRUST 2013-C10,
COMMERCIAL MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2013-C10,**

PLAINTIFF,

VS.

**262 EAST FORDHAM REALTY LLC, HAIM
CHERA, EVOLUTION ELEVATOR &
ESCALATOR CORP., AND “JOHN DOE” NOS.
1-25,**

DEFENDANTS.

**THE NAMES OF THE “JOHN DOE”
DEFENDANTS BEING FICTITIOUS AND
UNKNOWN TO PLAINTIFF, THE PERSONS
AND ENTITIES INTENDED BEING THOSE
WHO HAVE POSSESSORY LIENS OR OTHER
INTERESTS IN, THE PREMISES HEREIN
DESCRIBED.**

CIVIL ACTION NO. _____

**MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR ORDER TO SHOW CAUSE**

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U.S. Bank National Association, as Trustee for Morgan Stanley Bank of America Merrill Lynch Trust 2013-C10, Commercial Mortgage Pass-Through Certificates, Series 2013-C10 (“Plaintiff” or “Trust” or “Lender”) acting by and through Midland Loan Services, a division of PNC Bank, National Association, as Special Servicer (“Special Servicer”) under the Pooling and Servicing Agreement dated as of July 1, 2013 (the “PSA”), and pursuant to Fed. R. Civ. P. 66, hereby files this brief in support of its request for the appointment of a receiver. In support of its motion by order to show cause, the Lender relies on and incorporates by reference its Verified Complaint [Docket No. 1] (the “Complaint”), Declaration of Cody Hilke in Support of Application for the Appointment of Receiver, and Declaration of Gregg Williams regarding Application for the Appointment of Receiver.

FACTUAL BACKGROUND

A. The Loan

1. On or about April 18, 2013, Original Lender agreed to make a loan or loans (the “Loan”) to Borrower, in accordance with the terms and conditions of that certain loan agreement (the “Loan Agreement”) dated April 18, 2013. See Complaint Exh. A. The Loan is in part evidenced by that certain Consolidated, Amended and Restated Promissory Note dated April 18, 2013 (the “Note”) in the original principal amount of Twelve Million Two Hundred Fifty Thousand and 00/100 Dollars (\$12,250,000.00) executed by Borrower in favor of Original Lender. See Complaint, Exh. B.¹

2. The Loan is secured by a mortgage on the Borrower’s real property. That mortgage was made on or about April 18, 2013, when Borrower executed and delivered to Original Lender that certain Consolidated, Amended and Restated Mortgage, Assignment of

¹ For ease of reference, as is done in the Complaint, all documents evidencing or security for the Loan, including those set forth herein, shall be collectively referred to as the “Loan Documents.”

Leases and Rents and Security Agreement dated April 18, 2013 (the “Mortgage”) securing the obligations under the Note. See Complaint, Exh. C. The Mortgage was recorded in the New York Office of the City Register on July 10, 2013, CRFN 2013000272917.

3. The Mortgage encumbers that certain real property described therein (all property given as security thereunder, the “Property”). In addition to being a real property mortgage, the Mortgage is a “security agreement” within the meaning of the Uniform Commercial Code. Section 1.3 of the Mortgage provides that the Mortgage is intended to be a security agreement pursuant to the Uniform Commercial Code for any of the items specified in Sections 1.1(a) through 1.1(q) of the Mortgage which, under applicable law, may be subject to a security interest pursuant to the Uniform Commercial Code, and under that section Borrower granted to Original Lender a security interest in said items.

4. As additional security for the payment of the Loan, on or about April 18, 2013, Mortgagor executed and delivered to Original Lender the following instruments: an Assignment of Leases and Rents securing the obligations under the Note (the “Assignment of Rents”) (see Complaint Exh. D²; from Guarantor, that certain Guaranty of Recourse Obligations of Borrower dated April 18, 2013 guaranteeing the payment of certain obligations under the Loan Documents (the “Guaranty”) (see Complaint, Exh. E); from Borrower, that certain Cash Management Agreement dated April 18, 2013 (see Complaint, Exh. F) (which provides for, *inter alia*, security interests in and control over cash proceeds of the Borrower’s operations on the terms and conditions set forth therein); and from Borrower, that certain Environmental Indemnity Agreement indemnifying Original Lender with respect to certain environmental representations,

² The Assignment of Rents was duly recorded in the New York Office of the City Register on July 10, 2013, CRFN 2013000272918.

warranties and covenants with respect to certain obligations under the Loan Documents (the “Environmental Indemnity Agreement”) (see Complaint, Exh. G).

B. Assignments of Loan Documents

5. Effective as of August 6, 2013 the Loan, the Note, the Mortgage and the Assignment of Rents were assigned to the Trust through execution and delivery of a series of instruments. These included an allonge to the Note and assignments of the Mortgage and Assignment of Leases. There are also filed of record UCC-1 financing statements in favor of Lender on file with the New York Department of State and with Bronx County, New York, enabling Lender to perfect its security interests in the Borrower’s personal property.

C. Provisions Common to the Loan Agreement, Note, and Mortgage

6. At all times prior to default, Borrower was obligated to pay each month through the Maturity Date of May 1, 2023, on the Monthly Payment Date (the first calendar day of each month, or, if such first day is not a Business Day as defined in the Loan Agreement, the next day prior to the first of the month that is not a Business Day), the amount equal to the Monthly Debt Service Payment Amount, a constant monthly amount of \$59,334.01. On the Maturity Date, all outstanding principal and all accrued and unpaid interest and all other amounts due under the Loan Agreement, the Note, the Mortgage and the other Loan Documents, including, without limitation, all interest that would accrue on the Note through and including the end of the Interest Period in which the Maturity Date occurs (even if such Interest Period extends beyond the Maturity Date) (the “Maturity Date Amount”).

7. At all times prior to default, Borrower was obligated to pay interest at a constant rate of 4.12% (the “Interest Rate”) per annum on the outstanding principal amounts under the

Loan Agreement. Upon an Event of Default, the interest rate increases by five (5%) percent. See Complaint, ¶¶ 28 to 30.

8. Upon an Event of Default, the Mortgage entitles Lender to apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, any guarantor or indemnitor with respect to the Loan or any Person liable for the payment of the Debt any part thereof. In addition, upon a Cash Management Sweep Period (which commences, *inter alia*, upon the occurrence of an Event of Default), the lender under the Cash Management Agreement is afforded additional protections and rights with respect to the Borrower's cash proceeds. See Complaint, ¶¶ 31 to 32.

D. Guaranty

9. Pursuant to the Guaranty, Guarantor absolutely and unconditionally guaranteed to Plaintiff the prompt and unconditional payment of the Guaranteed Recourse Obligations of Borrower (as defined in the Guaranty), which include, among other things, liabilities, costs, losses, damages, expenses or claims suffered or incurred by Plaintiff by reason of or in connection with any of the events or circumstances described in Section 11.22 of the Loan Agreement. In addition, the Guarantor under the Guaranty is liable for all legal fees and other costs and expenses incurred by the lender under the Note in enforcing any of the Guaranteed Recourse Obligations of Borrower. See Complaint, ¶ 33.

E. Defaults Under the Loan Documents

10. Borrower failed to pay the Maturity Date Amount due on May 1, 2023, an Event of Default. Accordingly, the Loan is and has been bearing interest at the Default Interest Rate

since then. Plaintiff provided written notice of Borrower's default to Borrower and Guarantor by letter dated May 10, 2023 (the "Default Letter"). See Complaint, Exh. K.

11. However, rather than rectify the Event of Default, Borrower has compounded the defaults. Though a Cash Management Sweep Period has been in effect since August 2021 (when the Debtor failed to satisfy the minimum debt service coverage ratio of 1.15 to 1 for the quarter ending September 30, 2020). Borrower has been required to deposit all revenues from the Mortgaged Property with Lender. Borrower has not deposited any such funds since February 2023. See Complaint, ¶ 36; Declaration of Cody Hilke dated July 18, 2023 ("Hilke Decl."), ¶ 7. This leads to Lender's inference that Borrower appears to be diverting the revenues of the Mortgaged Property. *Ibid.* Lender has a lien and security interest in, to and upon those funds. Those funds are at risk of dissipation, potentially irreparably harming Lender's lien and security interest in them. *Ibid.*

LEGAL ARGUMENT

POINT I

This Court Should Appoint a Receiver for the Mortgaged Property

12. It is appropriate to appoint a receiver to protect Plaintiff's interest in the Mortgaged Property. Section 6401 of the New York Civil Practice Law and Rules and principles of receivership authorize a court to appoint a receiver to preserve the collateral and avoid a substantial and preventable decline in value; provided, however, that the secure creditor intends to foreclose on the property. *U.S. Bank Nat. Ass'n v. Nesbitt Bellevue Prop. LLC*, 866 F. Supp. 2d 247, 257 (S.D.N.Y. 2012). The Plaintiff here intends to foreclose, as reflected in the relief sought in the Complaint.

13. A receiver should be appointed because the Borrower is in default under the Loan Documents, has failed to deposit into the Cash Management Account funds subject to Lender's lien and expressly consented to the *ex parte* appointment of a receiver in the event of default under the Loan Documents. Thus, cause exists to appoint a receiver for the Defendants' Hotels.

14. A leading treatise has observed, "Courts have held that the existence of an express contractual right to the appointment of a receiver, along with adequate prima facie evidence of a default, can suffice to justify appointment." *Baicker-McKee, Federal Civil Rules Handbook* 2011 at 1259 (Thomson Reuters/West 2010); *Pioneer Capital Corp. v. Environamics Corp.*, 2003 WL 345349, *9 (D. Me. 2003) ("the existence of an express contractual right to appointment of a receiver, coupled with 'adequate prima facie evidence of a default,' can be sufficient to warrant such an appointment Given Environamics' clear acknowledgement—in the context of an arms' length commercial transaction—that Pioneer's right to appointment of a receiver was intended to be unfettered by consideration of equitable principles, this approach seems to me the right one."); *Citibank v. Nyland (CF8) Ltd.*, 839 F.2d 93, 97 (2d Cir.1988) ("It is entirely appropriate for a mortgage holder to seek the appointment of a receiver where the mortgage authorizes such appointment, and the mortgagee has repeatedly defaulted on conditions of the mortgage which constitute one or more events of default."). Although a court may have discretion to deny the appointment of a receiver notwithstanding a contractual provision, such a provision "is a factor militating in plaintiff's favor and the party opposing the appointment bears the burden of demonstrating why a receiver should not be appointed." *See D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broadcasting, Inc.*, 550 F.Supp. 481, 491 (S.D.N.Y. 2008).

15. Appointment of a receiver is appropriate where the real property is insufficient to satisfy the debt and the borrower has failed to timely repay a loan. *See, e.g., Brill & Harrington*

Invs. v. Vernon Sav. & Loan Ass'n, 787 F. Supp. 250, 254 (D. D.C. 1992). The editors of Moore's Federal Practice has noted, "Receiverships are granted for numerous reasons There are certain recurring patterns which have developed over time, however, that facilitate the appointment of a receiver. Some of these circumstances include . . . [w]hen a secured creditor with an interest in real property seeks a receiver pending the foreclosure of a mortgage." Moore's Federal Practice - Civil (3d Ed.) § 66.04[2][c].

16. To aid federal courts in determining whether to appoint a receiver, the following non-exhaustive factors are often considered:

- a. Whether the plaintiff has a valid claim to the property;
- b. Whether there is danger that the property may be lost;
- c. Whether available legal remedies are inadequate to protect the plaintiff;
- d. The probability that harm to the plaintiff by denial of the appointment is greater than the injury to the parties opposing appointment;
- e. The plaintiff's probable success on the merits in the action;
- f. The possibility of irreparable injury to the plaintiff's interest in the property;
- and
- g. The probability that fraudulent conduct has occurred or will occur to frustrate the plaintiff's claim.

See, e.g., Gordon v. Washington, 295 U.S. 30, 37 (1935) ("Where a final decree involving the disposition of property is appropriately asked, the [federal] court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition. For that purpose, the court may appoint a receiver of mortgaged property to protect and conserve it pending foreclosure."); *Fleet Bus. Credit, L.L.C. v. Wings Rests., Inc.*, 291 B.R. 550, 556 (N.D. Okla.

2003) (appointing receiver where “several of the factors weigh in favor of the propriety of appointing a receiver”); *U.S. v. Berk & Berk*, 767 F. Supp 593, 598 (D. N.J. 1991) (ruling that, under federal law, appointment of a receiver is not a drastic remedy). An application of these factors supports the appointment of a receiver to protect and preserve the Defendants’ Hotels.

17. Moreover, such appointment is consistent with applicable New York law that holds that the starting premise on a motion to appoint a receiver is that, when the borrower has consented to appointment of a receiver upon default under a mortgage, such consent mandates the appointment of a receiver upon default regardless of proving the necessity for the appointment of a receiver. *Naar v. I.J. Litwak & Co., Inc.*, 260 A.D.2d 613, 614 (2d Dep’t 1999); see also 10 N.Y. RPL 254(10).

18. A borrower seeking to overcome that premise has the burden of showing that circumstances exist to override this premise, but those circumstances are not lightly found. *See Clinton Capital Corp. v. One Tiffany Place Developers*, 112 A.D.2d 911 (2d Dep’t. 1985). Here, given the Borrower’s default on maturity, failure to deposit the cash encumbered by Lender’s lien into the cash management account and likely diversion of funds, Borrower cannot demonstrate circumstances that exist to override the premise. The fact that Borrower has consented to the receiver’s appointment only reinforces the justification.

19. In addition, the factors cited above support appointment of a receiver. The Lender has commenced foreclosure proceedings with respect to the subject property. Lender will succeed in its foreclosure action because the Borrower is clearly in default, having failed to repay the Loan at maturity. Although the Lender is pursuing foreclosure in this action, that would be insufficient to protect and preserve its security interests in the cash flow pending the

ultimate foreclosure. This is particularly true given that the Borrower has failed to deposit the cash flow for several months prior to maturity.

20. The Borrower's assets that are subject to Lender's liens, including the rents and profits generated therefrom, are a principal source of income from which the Lender can obtain the satisfaction or reduction of the indebtedness secured thereby. Diversion of the cash that Lender's lien encumbers threatens the Lender with irreparable harm with respect to its lien on the diverted cash. Accordingly, unless a receiver is appointed, it is likely that the Lender will suffer irreparable harm.

21. In addition, given Borrower's default at maturity, Borrower's realization that foreclosure and judicial sale are likely creates a risk that Borrower will have no economic incentive to manage the Property properly. This, coupled with Borrower's funds diversion, gives rise to an inference that Borrower will not manage the Property properly, which could lead to its deterioration and decline in value, irreparably harming Lender (since the Property and the personal property assets encumbered by Lender's lien are the Borrower's only assets).

22. The Borrower will suffer no harm should a receiver be appointed because the Lender has nominated a highly qualified receiver to manage the Property. Should the Borrower prevail in this action (which is unlikely given the Lender's contractual right to foreclose upon the undisputed maturity default), the Property would be returned to the Borrower in good condition.

POINT II

This Court Should Issue a Preliminary Injunction To Assist the Appointment a Receiver for the Mortgaged Property

23. To fortify the receiver appointed by the Court and to protect the Lender's interest as a secured party, the Lender requests that the Court enter a preliminary injunction to enjoin the Defendants and their agents, employees, or representatives from, among other things:

- (i) Possessing or managing the Property and from interfering in any way with the possession or management of the Property by the receiver;
- (ii) Collecting, withdrawing, transferring, conveying, concealing, or otherwise disposing of funds or revenues derived from the operation of the property and from paying any such funds to or for the benefit of themselves or any other party;
- (iii) Removing any personal property from the Property and from removing, destroying, concealing, changing or altering in any manner any of the books or records relating to the ownership, possession or operation of the Property;
- h. Terminating or causing to be terminated any license, permit, lease, contract or agreement relating to the Property; and
- i. Otherwise interfering with the operation of the Property or the receiver's discharge of his duties under the Order appointing the receiver.

24. The issuance of a preliminary injunction is appropriate upon a showing that (a) the movant is likely to prevail on the merits; (b) the movant would suffer an irreparable injury if the court does not grant a preliminary injunction; (c) the preliminary injunction would not cause substantial harm to others; and (d) a preliminary injunction would be in the public interest. *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2nd Cir. 2010).

25. As discussed above and in the Complaint, the Lender will prevail on the merits. The Borrower has defaulted under the Loan Documents, failed to pay the Loan at maturity and is diverting rents.

26. The appointment of a receiver is necessary to prevent immediate and irreparable harm and to provide the receiver an opportunity to succeed. With each month, more cash in

which the Lender has a lien is diverted. That threatens irreparable harm to Lender's interest in the cash generated from the Property's operation.

27. Moreover, as noted above, Borrower will have no economic incentive to manage the Property properly given the maturity default and likelihood of foreclosure and judicial sale. This, coupled with Borrower's funds diversion, gives rise to an inference that Borrower will not manage the Property properly, threatening the Property with deterioration and decline in value, irreparably harming Lender.

28. The preliminary injunction would not do substantial harm to others, including the Defendants. Because they have defaulted under the Loan Documents, the preliminary injunction does not deprive the Defendants of any property or proceeds to which they have lawful claim. The preliminary injunction also furthers the agreement that the Defendants have already made that, upon default, a receiver would be appointed to operate the Property.

29. The preliminary injunction is in the public's best interest because it would provide the receiver with the ability to fulfill his responsibilities, to secure the cash that is subject to Lender's lien and to operate the Property consistent with applicable law. The public interest is also furthered by aiding the Lender in recovering on its claim, since lenders generally are more willing to lend when they know they have resort to courts to enforce their claims.

30. Accordingly, the Lender is entitled to the appointment of a receiver for the Defendants' Hotels pursuant to Fed. R. Civ. P. 66 and the Lender requests that the Court appoint Trident Pacific Real Estate Group, Inc. as receiver.

POINT III

This Court Should Appoint Trident As Receiver

31. Cause exists to appoint Trident Pacific Real Estate Group, Inc. or its principal receiver Gregg Williams (either, “Trident” or “Proposed Receiver”) as the receiver for the Mortgaged Property. Based on Trident’s experience and expertise, TPRG is well positioned to serve as the receiver or the property manager and to protect Plaintiff’s collateral for the benefit of Plaintiff and Defendants. See Declaration of Gregg Williams (“Williams Decl.”), ¶ 3.

32. Trident is capable, experienced and qualified. See Williams Decl. at ¶ 6. Significantly, Trident also has the background, experience and expertise to operate the Mortgaged Property, including collecting the Revenues so that the Plaintiff’s security is not dissipated. Appointing Trident as receiver will enable the Court to be assured that the appointed receiver capably fulfills the responsibilities a receiver has.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court enter the proposed Order for appointment of a receiver and related injunctive relief, granting the relief requested herein.

Dated: New York, New York.
July 18, 2023

Respectfully submitted,
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