

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

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WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF SBALR COMMERCIAL MORTGAGE 2020-RR1 TRUST, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2020-RR1, Civil Action No. 1:23-cv-10796

Plaintiff,

-against-

BRONX 741-743 HUNTS POINT AVENUE L.P., BRONX 801 FREEMAN STREET L.P., ISAAC KASSIRER, ELMAX BUILDERS SUPPLY LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES,

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF EX PARTE APPLICATION
FOR THE APPOINTMENT OF A RENT RECEIVER**

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INTRODUCTION

This action¹ involves a defaulted commercial mortgage loan in the original principal amount of \$11,876,257, secured by two properties in the Bronx comprised of 66 residential apartment units and four (4) retail units in the aggregate. Based on the most recent rent roll data available to Plaintiff lender, the total aggregate rent roll across the two properties is approximately \$100,000 per month. Despite their continued collection of such rents, however, Defendant borrowers have not made a monthly debt service payment (approximately \$42,230 per month) to the lender in any of the past eight (8) months. And further, the borrowers have neglected their payment obligations to governmental authorities, resulting in *substantial* outstanding amounts due, which continue to increase and accrue interest, such as:

- New York City Water Board charges in excess of \$173,839 as of November 3, 2023;
- New York City Department of Housing Preservation & Development violations of at least \$24,252;
- New York City Department of Buildings penalties of at least \$6,000; and
- New York City Environmental Control Board violations in excess of \$43,000.

The borrowers' ongoing failure to address and pay these outstanding obligations, along with their failure to make monthly debt service payments to the lender, constitute events of default under the subject loan documents and threaten to result in liens against the mortgaged properties. Quite clearly, the mortgaged properties are being mismanaged by the borrowers.

By this *ex parte* application, the lender seeks the appointment of an experienced rent

¹ Plaintiff lender is simultaneously commencing seven (7) additional foreclosure actions, each involving different properties but related parties.

receiver to ensure that all rents are being properly collected, accounted for, and applied toward the operating expenses of the mortgaged properties and the outstanding amounts owed to the lender. In the subject loan documents, the borrowers assigned and transferred all rents and leases to the lender, consented to the appointment of a rent receiver and agreed that the lender may apply for the appointment of a rent receiver on an *ex parte* basis. The appointment of a rent receiver is necessary in this case to ensure that the mortgaged property is maintained and the rents inure to the benefit of the lender.

STATEMENT OF FACTS

This action seeks to enforce remedies under certain loan documents executed by Defendants Bronx 741-743 Hunts Point Avenue L.P. (“Hunts Point Borrower”) and Bronx 801 Freeman Street L.P. (“Freeman Borrower”, and together with Hunts Point Borrower, “Borrowers”).

A. The Loan and the Loan Documents

On or around October 11, 2019, Sabal Capital II, LLC (“Sabal”) made a loan to Borrowers in the original principal amount of \$11,876,257 (the “Loan”) pursuant to a Loan Agreement executed and delivered by Borrowers to Sabal (the “Loan Agreement”). Declaration of Ryan Harvey (“Harvey Decl.”) submitted herewith, ¶¶8, 10, Exhibit C. To evidence the Loan, Borrowers executed a Consolidated, Amended and Restated Promissory Note (the “Note”) dated October 11, 2019 in favor of Sabal. Id., ¶8 and Exhibit B.

To secure repayment of the Loan, Borrowers executed and delivered to Sabal a Consolidated, Amended and Restated Mortgage and Security Agreement (the “Mortgage”; collectively with the Loan Agreement, the Note, and all other documents executed in connection with the Loan, the “Loan Documents”), dated October 11, 2019. Id., ¶6, Exhibit A. The

Mortgage was recorded with the Office of the City Register of the City of New York on October 31, 2019 as CRFN 2019000355440. Id., ¶6 and Exhibit A. The Mortgage encumbers certain real property located at (i) 741 Hunts Point Avenue, designated as Block 2763 and Lot 150 on the current Tax Map of the County of Bronx (the “Hunts Point Property”); and (ii) 801 Freeman Street, designated as Block 2968 and Lot 28 on the current Tax Map of the County of Bronx (the “Freeman Property”, and together with the Hunts Point Property, the “Mortgaged Property”). Id., ¶7. The Hunts Point Property is a five-story walk-up building consisting of fifty-six (56) residential units and three (3) retail units. Id., ¶27. The Freeman Property is a five-story walk-up building consisting of ten (10) residential units and one (1) retail unit. Id., ¶28. Based on the most recent rent roll data available to Lender, the rent obligations of the tenants of the Mortgaged Property total approximately \$100,000 per month in the aggregate. Id., ¶¶28-29.

Sabal assigned all of its interest in the Loan, the Loan Documents and the Mortgaged Property to SDOF II SPV, LLC (“SDOF”) by way of: (i) an Allonge to the Note making the Note payable to SDOF (id., Exhibit B), (ii) an Omnibus Assignment dated October 11, 2019 (id., Exhibit D), and (iii) an Assignment of Consolidated, Amended and Restated Mortgage and Security Agreement dated October 11, 2019 and recorded with the Office of the City Register of the City of New York on October 31, 2019 as CRFN 2019000355443 (id., Exhibit E). Id., ¶11.

SDOF assigned all of its interest in the Loan, the Loan Documents and the Mortgaged Property back to Sabal by way of: (i) an Allonge to the Note making the Note payable to Sabal (id., Exhibit B) and (ii) an Assignment of Mortgage effective as of March 4, 2020 and recorded with the Office of the City Register of the City of New York on April 16, 2020 as CRFN 2020000125959 (id., Exhibit F). Id., ¶12.

Sabal, in turn, assigned all of its interest in the Loan, the Loan Documents and the Mortgaged Property to Plaintiff Wells Fargo Bank, National Association, as Trustee, on Behalf of the Registered Holders of SBALR Commercial Mortgage 2020-RR1 Trust, Commercial Mortgage Pass-Through Certificates, Series 2020-RR1 (“Lender”), by executing the following documents: (i) an Allonge to the Note making the Note payable to Lender (id., Exhibit B), and (ii) an Assignment of Mortgage effective as of March 4, 2020 and recorded with the Office of the City Register of the City of New York on April 16, 2020 as CRFN 2020000125960 (id., Exhibit G). *Id.*, ¶13. Lender is the present holder of the Loan Documents. *Id.*, ¶14.

B. Lender’s Remedies Under the Loan Documents

Pursuant to the Loan Documents, Borrowers have provided Lender with an absolute and unconditional assignment of all rents and leases upon or affecting the Mortgaged Property. In particular, under the Mortgage, Borrowers “absolutely and unconditionally assign[ed] to Lender all of Borrower’s right, title and interest in and to all current and future Leases and Rents” (id., Exhibit A (Mortgage), §1.2), it being Borrowers’ intention that the assignment “constitutes a present, absolute assignment and not an assignment for additional security only.” Ibid. Although Lender granted Borrowers a revocable license to collect such Rents in the absence of a default (see ibid.), Borrowers agreed that, upon the occurrence of a default under the Loan Documents, the license to collect Rents would be automatically terminated and Lender would have the right to “exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof.” Id. at Exhibit A, §8.1(h).

In addition to its immediate entitlement to the Rents derived from the Mortgaged Property by virtue of Borrowers' defaults (discussed below), Borrowers expressly consented to the appointment of a receiver on an *ex parte* basis. Specifically, the Mortgage provides as follows:

Upon the occurrence and during the continuance of any Event of Default, Borrower agrees that Lender may . . . (g) seek and obtain 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 under the Loan or any other Person liable for the payment of the Debt.

Id. at Exhibit A, §8.1(g).

As set forth below, Borrowers are in default of their obligations under the Loan Documents. Accordingly, Lender is entitled to the appointment of a receiver on an *ex parte* basis.

C. Borrowers' Defaults

Pursuant to the Loan Agreement, beginning on December 6, 2019 (defined as the "First Monthly Payment Date"), and continuing on the sixth (6th) day of every calendar month thereafter during the term of the Loan (each defined as a "Monthly Payment Date"), Borrowers shall make a payment of interest only in the Monthly Debt Service Payment Amount (as defined therein). See id., Exhibit C, §2.6(a). Additionally, Borrowers are required to pay when due all Taxes (defined on page 15 as "all taxes, assessments, water rates, sewer rents, and other governmental impositions . . . now or hereafter levied or assessed or imposed against the Property or any part thereof") and Other Charges now or hereafter levied or assessed or imposed against the Mortgaged Property or any part thereof. Id., Exhibit C, §4.5(a). Further, Borrowers shall not replace the Manager (defined in the Loan Agreement as York Property Management LLC) or consent to the assignment of Manager's rights under the Management Agreement (as

defined in the Loan Agreement) without satisfying certain conditions, including the provision of at least sixty (60) days' prior written notice to Lender, nor shall Borrowers increase or consent to the increase of management fees payable to Manager under the Management Agreement. Id., Exhibit C, §4.14.

Pursuant to the Loan Agreement, if Borrowers fail to pay when due any Monthly Debt Service Payment, or if Borrowers fail to pay when due any of the Taxes or Other Charges, then Borrowers will be in default. See id., Exhibit C, §§10.1(a), (b). Both events of default have been triggered by Borrowers here. Specifically, despite continuing to collect rents from tenants of the Mortgaged Property:

- Borrowers have failed to make a Monthly Debt Service Payment to Lender since March 6, 2023. Id., ¶¶23, 26;
- Borrowers have failed to pay water charges assessed by the New York City Water Board in the amount of at least \$173,839, which amount continues to increase and accrue interest, and which threatens to result in liens against the Mortgaged Property (ibid.);
- Borrowers have failed to pay outstanding violations assessed by the New York City Department of Housing Preservation & Development of at least \$24,252, which may also result in liens against the Mortgaged Property (ibid.); and
- Borrowers have failed to pay outstanding violations and penalties assessed by the New York City Department of Buildings and the New York City Environmental Control Board, totaling approximately \$50,000, which may also result in liens against the Mortgaged Property (ibid.).

Borrowers have further defaulted under the Loan Documents by replacing the Manager (and increasing the management fee percentage) without prior written notice to, and consent of, Lender. Ibid.

Due to Borrowers' foregoing Defaults, which include the failure to pay water bills, violations and assessments that may become liens against the Mortgaged Property, Lender hereby seeks the appointment of a rent receiver to ensure that its interest in the Mortgaged Property and the Rents is protected, and that all Rents are being properly collected and applied to maintain the Mortgaged Property and pay the Loan.

LEGAL ARGUMENT

LENDER IS ENTITLED TO THE APPOINTMENT OF A RENT RECEIVER

By way of this application, Lender seeks the appointment of Ian Lagowitz of Trigild IVL as rent receiver for the Mortgaged Property during the pendency of the instant foreclosure action. “Whether a federal court should appoint a receiver in a diversity action is governed by federal law.” U.S. Bank Nat’l Ass’n v. Nesbitt Bellevue Prop. LLC, 866 F. Supp. 2d 247, 249 (S.D.N.Y. 2012). Pursuant to Federal Rule of Civil Procedure 66, district courts have the equitable power to appoint a receiver in order to protect a party’s interest. Fed. R. Civ. P. 66.

Upon the occurrence of an Event of Default, it is well established that federal courts may appoint a receiver where a note and security agreement authorize the remedy. See Brill & Harrington Invs. v. Vernon Sav. & Loan Ass’n, 787 F. Supp. 250, 253-54 (D.D.C. 1992 (citing 12 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2983 (1973) (“Creditors with a security interest in real property have a well-established interest in the property sufficient to support the appointment of a receiver.”))). “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.” Citibank, N.A. v. Nyland (CF8) Ltd., 839 F.2d 93, 97-98 (2d Cir. 1988) (citing Mancuso v. Kamboureli, 72 A.D.2d 636, 637, 421 N.Y.S.2d 130, 131 (3d Dep’t 1979)). Indeed, “the existence of a provision authorizing the application for a receiver in the event of a default ‘strongly supports the appointment of a receiver’ when there is a default.” Nesbitt Bellevue Prop., 866 F. Supp. 2d at 250.

Here, by the express terms of the Loan Documents, Borrowers have previously consented to the appointment of a rent receiver on an *ex parte* basis should they default thereunder, which they unquestionably have. Specifically, the Mortgage provides as follows:

Upon the occurrence and during the continuance of any Event of Default, *Borrower agrees that Lender may . . . (g) seek and obtain 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 under the Loan or any other Person liable for the payment of the Debt.

Harvey Decl., Exhibit A, §8.1(g) (emphasis added). As set forth in the Harvey Decl. submitted herewith, Lender has demonstrated Borrowers’ defaults, which include failing to make Monthly Debt Service Payments due under the Loan Documents since March 2023 and failing to pay substantial outstanding New York City Water Board charges, New York City Department of Housing Preservation & Development violations and New York City Environmental Control Board violations. Id., ¶¶22, 25.

In addition to the foregoing, federal courts will often consider, in determining whether the appointment of a receiver is warranted, the following factors:

Fraudulent conduct on the part of defendant; the imminent danger of the property being lost, concealed, injured, diminished in value, or squandered; the inadequacy of the available legal remedies; the probability that harm to plaintiff by denial of the appointment would be greater than the injury to the parties opposing

appointment; and in more general terms, plaintiff's probable success in the action and the possibility of irreparable injury to his interests in the property.

Nesbitt Bellevue Prop. at 250. While there are currently no allegations of fraud in this case, courts have "appointed receivers even where there was no evidence of fraud." D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broadcasting, Inc., 550 F. Supp 481, 491 & n. 64 (citing United States v. Trusty Capital, Inc., 2007 WL 44015, at *8 (S.D.N.Y. Jan. 6, 2007)). All other factors weigh in favor of the appointment of a receiver for the Mortgaged Property.

First, there is imminent danger that the Mortgaged Property will suffer waste and diminish in value in the absence of a court-appointed receiver. Although Borrowers' license to collect the rents generated by the Mortgaged Property was automatically revoked at least eight (8) months ago when Borrowers stopped making Monthly Debt Service Payments to Lender (see Harvey Decl., Exhibit A (Mortgage), §8.1(h)), Borrowers have continued collecting substantial rents on a monthly basis, have not remitted any such rents to Lender, and have not utilized the rents to satisfy Borrowers' outstanding obligations to governmental authorities. Borrowers have jeopardized Lender's security interest by allowing substantial obligations to accrue which may become liens against the Mortgaged Property. In order to preserve the value of the Mortgaged Property, a receiver is clearly needed to take immediate control and to operate the Mortgaged Property during the pendency of this action.

Second, Lender's legal remedies would be inadequate in the absence of a receiver. Because the Loan is generally non-recourse (see Harvey Decl., Exhibit C (Loan Agreement), §13.1), neither Borrowers nor Defendant Isaac Kassirer, who personally guaranteed the Loan, have personal liability for its repayment except under those limited circumstances set forth in the Loan Documents. Accordingly, Lender's primary, if not sole, source of recovery on the Loan is the rental revenue and the Mortgaged Property. Once rents are spent, they are gone. Borrowers'

continued neglect of their obligations to governmental entities threatens to dissipate the value of the value of the Mortgaged Property. A receiver is needed to immediately take possession of and preserve the Mortgaged Property until this action is resolved or until Lender coordinates the liquidation of the Mortgaged Property. Given the limited avenues to recourse liability under the Loan Documents, the harm that Lender would suffer in the absence of a receiver far outweighs the harm that Borrowers would suffer from such an appointment – particularly in light of Borrowers’ prior consent to the appointment of a receiver under precisely these circumstances.

Third, by virtue of Borrowers’ execution of the Loan Documents and their subsequent defaults thereunder, Lender has established its likelihood of success on the merits of its mortgage foreclosure claim under New York law. See Gustavia Home, LLC v. Ruty, 720 Fed.Appx. 27, 28 (2d Cir. 2017) (“In a foreclosure action under New York law, a plaintiff established its prima facie entitlement to summary judgment by producing evidence of the mortgage, the unpaid note and the defendant’s default.”) (citations omitted).

Finally, appointment of Ian Lagowitz as receiver would aid in the protection of the Mortgaged Property and the preservation of its value. Mr. Lagowitz is the Managing Partner of Trigild IVL, which boasts tremendous experience managing and acting as court-appointed receiver for properties such as the Mortgaged Property at issue here. See Harvey Decl., Exhibit H. With such experience, Mr. Lagowitz and Trigild IVL are uniquely situated to take possession of the Mortgaged Property, preserve its value and potentially avoid irreparable harm to Lender’s collateral.

In Federal Deposit Insurance Corp. v. Vernon Real Estate Investments, Ltd., this Court appointed a rent receiver, reasoning that “where the mortgagor has defaulted, the mortgagee has accelerated the entire debt pursuant to the mortgage, and full payment has not been tendered,

proof of the necessity of a receiver is not required.” 798 F. Supp. 1009, 1013 (S.D.N.Y. 1992)(emphasis added). This Court furthermore recognized that a lender

is granted broad powers to have a receiver appointed in a foreclosure action where the underlying mortgage so provides. In particular, New York law provides:

A covenant “that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,” 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 security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage; and the rents and profits in the event of any default or defaults in paying the principal, interest, taxes, water rents, assessments or premiums of insurance, are assigned to the holder of the mortgage as further security for the payment of the indebtedness.

New York Real Property Law (“RPL”) § 254 (McKinney 1989); *see also* New York Real Property Actions and Procedures Law § 1325(1)[“Where the action is for the foreclosure of a mortgage providing that a receiver may be appointed without notice, notice of a motion for such appointment shall not be required.”].

Id. at 1012.

Indeed, it is well-settled under New York law that a “mortgagee is under no duty to prove the necessity for the appointment of a receiver since the language of the mortgage and of subdivision 10 of section 254 of the Real Property Law clearly entitle [the mortgagee] to the appointment of a receiver of the rental income of the mortgaged property.” See Febraro v. Febraro, 70 A.D.2d 584, 585 (2d Dep’t 1979); Clinton Capital Corp. v. One Tiffany Place Developers, Inc., 112 A.D.2d 911, 912 (2d Dep’t 1985)(“the mortgage in question specifically authorized the appointment of a receiver on application by the mortgagee in an action to foreclose the mortgage. Such a clause authorizes the appointment of a receiver without notice

and without regard to the adequacy of the security”); GECMC 2007-C1 Ditmars Lodging, LLC v. Mohola, LLC, 84 A.D.3d 1311, 1312 (2d Dep’t 2011)(“The mortgage agreement at issue includes a provision expressly authorizing, in an action to foreclose the mortgage, the appointment of a receiver ‘without notice and without regard to the adequacy of the security for the Debt and without regard for the solvency of the Borrower.’ Thus, *the plaintiff was entitled to the appointment of a temporary receiver without notice and without regard to the adequacy of the security for the loan, ‘regardless of proving the necessity for the appointment.’* ”)(emphasis added); Meyer v. Indian Hill Farm, Inc., 258 F.2d 287, 289, 294 (2d Cir. 1958)(holding that the mortgagee “was entitled to the appointment of a receiver of the rents without notice. *Proof of the inadequacy of the security and of the probability of success of the action is not required.*”)(emphasis added).

Furthermore, “Courts applying New York law routinely grant *ex parte* applications for the appointment of a receiver[.]” Fortress Credit Corp. v. Alarm One, Inc., 511 F. Supp. 2d 367, 371 (S.D.N.Y. 2007). An applicant shall comply with two basic requirements:

First, the applicant must demonstrate that there has been a default. No general allegations of default will be assumed to be true: rather, there must be some proof in the form of an affidavit of a person with knowledge, or a complaint verified by a person with knowledge. This requirement does not mean, however, that the applicant must irrefutably establish that a default occurred: probability of success of the action is not required.

Second, New York courts will not appoint a receiver until an action has been commenced. . . .

Moreover, courts appoint receivers *ex parte* in the mortgage foreclosure context where the parties’ mortgage agreement permits such action. *See, e.g., United Chelsea Nat. Bank v. Rumican 190 Corp.*, 228 A.D.2d 279, 643 N.Y.S.2d 586, 587 (1st Dep’t 1996) (“since the mortgage [agreement] provided for an *ex parte* appointment of a receiver, the appointment . . . was proper”); Crossland Sav., FSB v. LoGuidice-Chatwal Real Estate Invs. Co.,

157 A.D.2d 504, 549 N.Y.S.2d 697, 697 (1st Dep't 1990) (affirming “*ex parte* order appointing a receiver, pursuant to the provisions of the mortgage [agreement]”).

Id. (internal citations and quotations omitted). Likewise, in Federal Home Loan Mortgage Corporation v. Spark Tarrytown, Inc., this Court dispensed with notice to the borrower and appointed a rent receiver *ex parte* because

the defendants could not be located, rents are about to come due and their disposition is unknown, and plaintiffs offer proof that they are entitled to receive rents and that the defendants have failed to make monthly payments of principal, interest and escrow due beginning October 1991 despite repeated requests giving notice since January 1992.

813 F. Supp. 234, 236-37 (S.D.N.Y. 1993); id. at 235 (“Where such relief [to appoint a rent receiver] is sought *ex parte*, it is particularly important that adequate factual support be provided to indicate that dispensing with notice is warranted.”).

Under the circumstances of this case, where Borrowers consented to the appointment of a rent receiver on default, the Mortgaged Property is being mismanaged by failure to pay governmental assessments and violations in a way that threatens Lender’s interest therein and rents are being used without explanation, both federal and New York law support the appointment of a rent receiver to preserve the value of the Mortgaged Property and ensure Borrowers’ compliance with applicable law and its contractual obligations, such that the rents are preserved for the benefit of the Mortgaged Property and the Lender, to be applied to property expenses and the indebtedness due under the Loan Documents.

CONCLUSION

Borrowers agreed in the Loan Documents to the appointment of a rent receiver. Under both federal and New York law, Lender is thus entitled to the appointment of a rent receiver. Furthermore, Borrowers have collected rental revenue for the past eight (8) months and have not

used that rental revenue to pay their mortgage, pay obligations due the government, or satisfy any of their financial obligations under the Loan Documents. A rent receiver is warranted in this case to ensure that the rents generated by the Mortgaged Property are used for the Mortgaged Property and the payment of Borrowers' debt to Lender.

Dated: December 12, 2023
Newark, New Jersey

McCarter & English, LLP
Attorneys for Plaintiff
Wells Fargo Bank, National Association, as
Trustee, on Behalf of the Registered Holders of
SBALR Commercial Mortgage 2020-RR1
Trust, Commercial Mortgage Pass-Through
Certificates, Series 2020-RR1

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