

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

CARVER FEDERAL SAVINGS BANK,

Plaintiff,

- against -

TRIAL/IAS PART 5

Index No. 605303-2024

Motion Date: 5-31-2024

Sequence No.: 001

NEW YORK BEACH CLUB, LTD., OCEAN BLVD., LLC, ALEXANDER V. JACOBSON, NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND "JOHN DOE" #1 THROUGH "JOHN DOE" #10, THE LAST TEN (10) DEFENDANTS BEING FICTITIOUS, REAL NAMES BEING UNKNOWN, THE PARTIES INTENDED BEING PERSONS OR ENTITIES HAVING ANY RIGHT, TITLE OR INTEREST IN, OR LIEN UPON, OR TENANTS OR PERSONS IN POSSESSION OF PORTIONS OF THE MORTGAGED PROPERTY DESCRIBED IN THE COMPLAINT,

Defendants.

DECISION AND ORDER

The following papers have been read on this motion:

Motion Sequence 001

Order to Show Cause, Affirmations, with Exhibits.....	1
Memorandum of Law In Support.....	2
Affirmations in Opposition with Exhibits.....	3
Memorandum of Law in Opposition.....	4

PRELIMINARY STATEMENT

In Motion Sequence 001, plaintiff moves, by order to show cause: 1) for access to that portion of the mortgaged property consisting of the real property located at 1751 Ocean Boulevard, Atlantic Beach, New York 11509; 2) for the appointment of a temporary receiver for the

aforementioned property; and 3) for such other and further relief as may be just and proper. Opposition has been submitted by defendants New York Beach Club, Ltd., Ocean Blvd., LLC, and Alexander V. Jacobson.

BACKGROUND

In March 2024, plaintiff commenced this action to foreclose two commercial mortgages on certain real property located at 1751 Ocean Boulevard, in Atlantic Beach (hereinafter the subject property), which is owned by defendant Ocean Blvd., LLC (*see* NYSCEF Doc. Nos. 1, 41). A beach club is operated on the subject property by defendant New York Beach, Ltd. pursuant to a lease (*see* NYSCEF Doc. No. 41). Defendant Alexander V. Jacobson executed the mortgages as manager of Ocean Blvd., LLC, and as president of New York Beach Club, Ltd., in addition to being identified as the guarantor in the loan documents (*see* NYSCEF Doc. Nos. 6, 18).

Plaintiff now moves for access to the subject property and for the appointment of a temporary receiver. Plaintiff argues that it is entitled to inspect the property in light of damage which occurred on January 10, 2024, for which Wright National Flood Insurance Company issued a check in the amount of \$199,906.42 for a claim concerning that damage. Plaintiff further argues that it is entitled to the appointment of a receiver pursuant to the language of the agreements entered into concerning the subject loans, as well as asserting that the circumstances warrant the appointment of a receiver pursuant to statute.

In opposition, defendants New York Beach Club, Ltd., Ocean Blvd., LLC, and Alexander V. Jacobson (hereinafter defendants) argue that plaintiff has not demonstrated irreparable harm warranting the appointment of a receiver of the beach club which has opened for the current summer season with a high membership. Defendants also maintain that the branch of plaintiff's motion which seeks access to inspect the subject property has been rendered moot since plaintiff has recently been given such access to inspect the property.

DISCUSSION

By overnight and first class mail, plaintiff served defendants with a demand, dated April 17, 2024, for an inspection of the subject property (*see* NYSCEF Doc. No. 51). According to the demand, plaintiff sought to inspect the subject property on the morning of May 7, 2024, May 8, 2024, or May 15, 2024, all dates subsequent to the date that plaintiff filed this motion (*see id.*). According to the affidavit of Jacobson, submitted in opposition to this motion, in accordance with plaintiff's demand, access to inspect the property was provided to a representative of plaintiff on May 15, 2024, one of the dates requested by plaintiff (*see* NYSCEF Doc. No. 81). In light of the fact that plaintiff has been given access to inspect the subject property on one of the dates requested by plaintiff which was subsequent to the filing of this motion, that branch of plaintiff's motion which is for access to the subject property for the purpose of an inspection has been rendered moot.

With respect to the branch of plaintiff's motion which seeks the appointment of a temporary receiver, that branch of plaintiff's motion is denied. In support of the appointment of a temporary receiver based upon the language of loan documents, plaintiff relies on paragraphs one and two in the separate Assignments of Lease and Rents entered into between Ocean Blvd., LLC and New York Beach Club, Ltd., as assignors, and plaintiff, as assignee, on March 31, 2022, related to each mortgage (*see* NYSCEF Doc. Nos. 9, 19). Plaintiff cites to the following language in the Assignments of Lease and Rents:

"Upon an Event of Default, the license granted to Assignors herein shall be automatically revoked by Assignee and Assignee shall immediately be entitled to receive and apply all Rents, whether or not Assignee enters upon and takes control of the Mortgaged Property. Assignee is hereby granted and assigned by Assignors the right, at its option, upon the revocation of the license granted herein to enter upon the Mortgaged Property in person, by agent or by court-appointed receiver to collect the Rents" (NYSCEF Doc. Nos. 9, 19, at p. 4, ¶1).

"Upon or at any time after an Event of Default, Assignee may, at its option, without waiving such Event of Default, without notice and without regard to the adequacy of the security for the Loan, either in person or by agent, with or without bringing any action or proceeding, or by a receiver appointed

by a court, enforce its interest in the Leases and Rents and take possession of the Mortgaged Property and have, hold, manage, lease and operate the Mortgaged Property on such terms and for such period of time as Assignee may deem proper and either with or without taking possession of the Mortgaged Property in its own name, demand, sue for or otherwise collect and receive all Rent” (*id.* at ¶2).

However, the cited provisions do not specifically provide for or expressly authorize the appointment of a temporary receiver rather it simply references that certain action can be taken “by a receiver appointed by the court” (*id.*). Further, any corresponding language in the mortgages also does not specifically provide for or expressly authorize such appointment. Consequently, the language of loan documents does not demonstrate that the parties consented to the appointment of a temporary receiver.

Real Property Law § 254 provides that where there is a covenant in a mortgage that provides “that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver”, that covenant “must be construed as meaning that the mortgagee . . . in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage” (Real Property Law § 254[10]; *see HSBC Bank USA, N.A. v Rubin*, 210 AD3d 73, 81 [2nd Dept. 2022]). Since the language set forth in the separate Assignments of Lease and Rents entered into between Ocean Blvd., LLC and New York Beach Club, Ltd., as assignors, and plaintiff, as assignee, on March 31, 2022, related to each mortgage does not contain such a covenant stating that plaintiff, as holder of the mortgages, is entitled to the appointment of a receiver, the appointment of such receiver is governed by CPLR 6401 (*see HSBC Bank USA, N.A. v Rubin*, 210 AD3d at 82; *First Nat. Bank of Glens Falls v Caputo*, 124 AD2d 417, 417 [3rd Dept. 1986]).

CPLR 6401 provides that, “[u]pon motion of a person having an apparent interest in property, which is the subject of an action in the supreme . . . court, a temporary receiver of the property may be appointed . . . where there is danger that the property will be . . . lost, materially injured or destroyed” (CPLR 6401[a]). “[T]he appointment of a temporary receiver ‘is an extreme remedy resulting in the taking and withholding of possession of property from a party without an

adjudication on the merits” (*Cyngiel v Krigsman*, 192 AD3d 760, 762 [2nd Dept. 2021], quoting *Schachner v Sikowitz*, 94 AD2d 709, 709 [2nd Dept. 1983]; see *Manning-Kranes v Manning-Franzman*, 175 AD3d 1403, 1403 [2nd Dept. 2019]). A motion for the appointment of a temporary receiver should be granted only where the movant sets forth a “‘clear and convincing’ evidentiary showing of ‘irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests’” (*Cyngiel v Krigsman*, 192 AD3d at 762, quoting *Magee v Magee*, 120 AD3d 637, 638 [2nd Dept. 2014]). Here, the evidence set forth by the plaintiff does meet the requisite showing needed for the appointment of a temporary receiver pursuant to CPLR 6401 as it does not show that the subject property is in danger of irreparable loss or material injury warranting such an extreme remedy (see *American Cancer Society, Inc. v Ashby*, 228 AD3d 805, 807 [2nd Dept. 2024]; *Cyngiel v Krigsman*, 192 AD3d at 762; *Magee v Magee*, 120 AD3d at 638).

Additionally, from defense counsel’s statements made on August 21, 2024 in a conference call, it appears that there are members of this Beach Club that start prepaying for their cabanas and lockers months before the club opens in May of each year. However, none of these individuals are named as parties and none have been served. The motion papers indicate that there may be 1200 member/renters. Clearly, they have rental agreements and an interest in this proceeding, including what will happen to their rents. Thus, they are necessary parties to this proceeding, who should have been given a say in this motion; but they have not been named or served.

Accordingly, it is

ORDERED that Motion Sequence 001 is DENIED.

To the extent that requested relief has not been granted, it is expressly denied.

This shall constitute the Decision and Order of the Court.

Dated: Mineola, New York
August 22, 2024

ENTER:


HON. JEROME C. MURPHY, J.S.C.

ENTERED

Aug 23 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE