CADWALADER

REAL ESTATE FINANCE news and views

Ex Parte Appointment of a Receiver Confirmed

April 1, 2024

By **Steven M. Herman**
Senior Counsel | Real Estate

By **Alexis Narotzky**
Associate | Real Estate

The New York County Supreme Court recently held that in the event of foreclosure, a receiver can be appointed, regardless of necessity, when the parties have contracted for such appointment.

24 West 57 APF LLC ("Defendant") refinanced outstanding debt by obtaining a mortgage of $60 million dollars from Wells Fargo ("Plaintiff"), secured by the property located at 24/26 W 57th Street, New York, NY. The parties signed the loan documents in 2019, and specifically a mortgage and security agreement (the "Agreement") on September 27, 2019. After multiple extensions, the loan matured on August 1, 2023. Defendant failed to repay the loan in full on the maturity date. Thus, Plaintiff declared an event of default on August 3, 2023. On January 25, 2024, Plaintiff filed a complaint with the New York County Supreme Court to foreclose on the property and appoint a receiver.[1]

The Agreement allowed Plaintiff to apply for the appointment of a receiver, regardless of circumstance. A receiver takes possession of the property, collects rent and otherwise operates and preserves the property during foreclosure. The applicable provision of the Agreement is as follows:

Upon the occurrence and during the continuance of any Event of Default, Borrower agrees that Lender may [. . .] in its sole discretion [. . .] apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice to Borrower, which notice Borrower expressly waives, 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 and whose appointment Borrower expressly consents to take possession of and to operate the Property and to collect the Rents and to otherwise protect and preserve the Property.

Plaintiff filed an *ex parte* motion to appoint a receiver on February 6, 2024. The Court granted this motion on February 13, 2024.[2] The Court granted Plaintiff's motion because (1) the parties' mortgage provided for it and (2) there was an event of default. In support of its decision, the Court relied on Real Property Law § 254(10), which states that "the appointment of a receiver in the event of a default is proper where parties to a mortgage agree to same even without notice or regard to the sufficiency of security."[3] The Court further relied on Real Property Actions and Proceedings Law § 1325 which states that in the case of foreclosure, if the mortgage allows a receiver to be appointed without notice, then notice of a motion for such appointment is not required.

Defendant argued that Plaintiff's motion should be denied because Plaintiff did not make the requisite showing of necessity.[4] Justice Khan rejected this argument and NY CPLR § 6401's need for cause because the cases referenced by Defendant lacked an express contractual right to an *ex parte* receivership. The Court stated that precedent is clear; when there is an express right to appoint a receiver, a mortgagee does not have to prove necessity.

Justice Khan stated that Defendant had not demonstrated that a denial of the appointment would be an appropriate exercise of the Court's discretion. This case affirms settled case law that when parties have contracted for the appointment of a receiver, one will be appointed, regardless of necessity.

[1] Complaint, *Wells Fargo Bank, Nat'l. Ass'n v. 24 West 57 APF LLC et. al.*, (Index No. 850014/2024).

[2] *Wells Fargo Bank, Nat'l Ass'n. v. 24 West 57 APF LLC,* 2024 N.Y. Slip Op. 30483(U) (Trial Order), (2024).

[3] *Id.*

[4] Memorandum of Law of Defendant at 1, *Wells Fargo Bank, Nat'l Ass'n. v. 24 West 57 APF LLC,* 2024 N.Y. Slip Op. 30483(U) (Trial Order), (2024).