

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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NEW YORK COMMUNITY BANK,

Plaintiff,

- against -

163-165 BRIDGE ROAD LLC, ET AL.,

Defendants.  
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RICHARD J. PILSON, an attorney at law duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

1. I am a partner in the firm of Berliner & Pilson Esqs., attorneys for the Plaintiff in the within action, and as such am fully familiar with the facts, circumstances and proceedings herein.

2. This action is brought to foreclose a certain Mortgage (hereafter, the "Mortgage"), bearing the date October 9, 2007, executed by 163-165 Bridge Road, LLC to Plaintiff, New York Community Bank, to secure the sum of \$1,450,000.00, recorded in the Office of the Clerk of the County of Suffolk on October 24, 2007 in Liber 21624, Page 616 covering the Premises known as and by the street address 163 Bridge Road, Hauppauge, NY 11788 a/k/a 163-165 Bridge Road, Hauppauge, NY 11788 a/k/a 163 Bridge Road, Islandia, NY 11749 a/k/a 163-165 Bridge Road, Islandia, NY 11749, and more fully described in Exhibit "A" annexed hereto. My firm was substituted as attorney in place of the original attorney for New York Community Bank, Stagg, Terenzi, Confusione & Wabnik, LLP by Assignment of Action

and Stipulation Substituting Plaintiffs and Attorneys for Plaintiff dated August 25, 2017, duly e-filed with the Court (Exhibit "B").

3. The Mortgage lien is a first mortgage lien. The entire amount owing on the Mortgage lien is past due and the present unpaid principal balance is \$1,249,087.32, plus interest from March 1, 2017, plus advances made for real estate taxes and legal fees incurred pursuant to the Mortgage.

4. The Summons, Complaint and Notice of Pendency of this action were filed in the Office of the County Clerk of Suffolk County on August 2, 2017 (see Exhibit "C").

5. The interest of the Plaintiff in said Property more fully appears in the Complaint, a copy of which, along with a copy of the Notice of Pendency, are hereto annexed as Exhibit "C" and incorporated by referenced with the same force and effect as if set forth at length herein.

6. A copy of the Mortgage is annexed hereto as Exhibit "D". A copy of the Mortgage Note, along with Allonge endorsing same to AV CAPITAL FUNDING LLC, is annexed as Exhibit "E". Said Mortgage contains, among other provisions, the following express paragraph:

"30. Upon default, the holder of this Mortgage, at its option is entitled to commence either a judicial or a non-judicial foreclosure proceeding pursuant to Article 14 of the New York Real Property Actions and Proceedings Law. In any action to foreclose the Mortgagee shall be entitled to the appointment of a Receiver without notice and without regard to the adequacy of any security for the debt. Should the Mortgagor be an occupant of the mortgaged premises and a Receiver is appointed, the Mortgagor will pay rent equal to the fair market rent at the time the Receiver commenced their duties. Mortgagor agrees that the Receiver may evict the Mortgagor should the Mortgagor fail to make payments as

demanded. In the event of a foreclosure sale the mortgaged property may be sold in one parcel.”

7. A copy of the Assignment of Mortgage, dated August 22, 2017, whereby New York Community Bank assigned the Mortgage to AV CAPITAL FUNDING LCC, and Assignment of Assignment of Leases and Rents, also dated August 22, 2017, which Assignment were recorded with the Suffolk County Clerk on November 3, 2017 at Liber 22870, Page 953 (Assignment of Mortgage) and Liber 12936, Page 617 (Assignment of Assignment of Leases and Rents), and are annexed hereto as Exhibits “F” and “G”, respectively.

8. Upon information and belief, and a search of public records, the present fee owner of the said Mortgaged Premises is Defendant 163-165 Bridge Road, LLC.

9. That Plaintiff is entitled to the appointment of a receiver, without notice, is made absolutely clear both by the express language of Article 30 of the Mortgage (Exhibit “D”) as set forth above and by the statutory construction of the above-quoted Mortgage provision as set forth in RPL§254(10).<sup>1</sup> Moreover, this issue has been litigated and the Courts have held that the language in the Subject Mortgage does indeed mean the Plaintiff is entitled to the appointment of a receiver without notice. In this regard, the Court’s attention is respectfully invited to the rulings in the following cases: Clinton Capital Corp. v. One Tiffany Place Developers, Inc., 112 A.D.2d 911, 492 N.Y.S.2d 427 (2d Dept. 1985); Kestenberg v. Platinum Properties Corp., 112 A.D.2d 268, 491 N.Y.S.2d 670 (2d Dept. 1985); Holmes v. Gravenhorst,

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<sup>1</sup> RPL§254(10) construes said paragraph 5 as follows: “10. Mortgagee entitled to appointment of a receiver. 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 any 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

238 A.D. 313, 263 N.Y.S. 738, reversed on other grounds, 263 N.Y. 148, 188 N.E. 258, 91 A.L.R. 1230 (2d Dept. 1933); Home Title Ins. Co. v. Isaac Scherman Holding Corp., 240 A.D. 851, 267 N.Y.S. 84 (2d Dept. 1933); Febbraro v. Febbraro, 70 A.D.2d 584, 416 N.Y.S.2d 59 (2d Dept. 1979); Mandel v. Nero, 52 Misc. 2d 604, 277 N.Y.S.2d 247 (1967); Wolf v. 120 Middleton Realty Corp., 221 N.Y.S.2d 110 (1961); Ardeb Realty Corp. v. East Estates, Inc., 12 Misc. 2d 167, 178 N.Y.S.2d 972 (1957). Not incidentally, this *ex parte* aspect has also resisted constitutional. See, Friedman v. Gerax Realty Associates, 100 Misc. 2d 820, 420 N.Y.S.2d 247 (1979); Massachusetts Mut. Life Ins. V. Avon Associates, Inc., 83 Misc. 2d 829, 373 N.Y.S.2d 464 (1975); City Partners Ltd. BMG v. Jamaica Savings Bank, 454 F. Supp. 1269(E.D.N.Y. 1978).

10. Upon information and belief, the Mortgaged Premises is a stone and gravel yard which 163-165 Bridge Road, LLC rents out. While the Plaintiff is not privy to any lease agreements with possible tenants, the mortgagor 163-165 Bridge Road LLC executed a Springing Lease agreement with Borrower's Principals, Rose Migliore and Donna Migliore Brown, as collateral for the within mortgage loan calling for rent payments totaling \$227,212.00 per year or \$18,934.33 per month, which, as a result of the mortgage defaults of the Borrower Defendant, has "sprung" into effect. A copy of said Springing Lease is annexed hereto as Exhibit "H".

11. To protect Plaintiff's lien and interest in the aforesaid Mortgaged Premises, it is necessary that a receiver be appointed by the Court to collect all rents and be authorized to make necessary disbursements for the maintenance of the Premises, payment of taxes, interest on mortgages, water and sewer rates, meter charges and insurance, as these

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profits in the event of any default or defaults in paying the principal, interest, and taxes."

payments become due.

12. I further submit this Affidavit in support of AV CAPITAL FUNDING LLC (“AV”) application to substitute AV as the Plaintiff in this action, pursuant to CPLR 1018 and 1021, on the grounds that, effective on August 22, 2017, AV acquired from New York Community Bank (NYCB) (a) the Mortgage, which is the subject of this action (“Mortgage”), made by 163-165 Bridge Road, LLC (“Borrower”), and (b) the Borrower’s Promissory Note (“Note”) secured by the Mortgage.

13. NYCB supports this Motion as it has assigned all of its interest in the subject Mortgage and Note to AV and no longer has any interest in this matter. A copy of the Assignment and other documents evidencing the transaction by which AV acquired the Mortgage and Note from NYCB are annexed as Exhibit “I” to this Affirmation.

14. No party will be prejudiced by this relief. There is no claim alleged in this action personal to New York Community Bank. All of NYCB’s right, title and interest in the Mortgage and Note at issue have been sold and transferred to AV, such that NYCB has no remaining interest in the subject of this action. Moreover, NYCB assigned its Cause of Action to AV.

15. NYCB and AV are entitled to the relief sought herein. See generally, Community Lumber Co. v. Albans Holding Corp., 257 A.D. 850, 12 N.Y.S.2d 398 (2d Dep’t 1939).

As Professor Alexander states in his Practice Commentary to McKinney’s CPLR 1018 (p. 222):

“CPLR 1018 addresses the situation in which a party

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