

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART ____

COMM 2006 C8 TAYLOR AVE., LLC,

Plaintiff,

Index No. 380454-09

- against -

NY BRONX I, LLC, ET AL.,

Defendants.

TENANT-DEFENDANTS MEMORANDUM OF LAW

Respectfully Submitted,

April 20, 2010

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I PRELIMINARY STATEMENT

This action was commenced to foreclose on 10 apartment buildings, containing over 500 apartments. The court appointed a receiver to manage the buildings. Because the buildings are in terrible condition, mostly rented to lower-income rent stabilized tenants, and nearly 20% vacant, the receivership's income has been inadequate to maintain and repair the buildings. Thus, there are over 4,000 housing code violations placed against the buildings. By this motion, tenant-defendants of the subject building are asking this court for orders directing the receiver to correct the violations in their buildings, and the plaintiff – who requested the receiver in the first place – to advance the necessary funds to accomplish the repairs.

II STATEMENT OF FACTS

A The Milbank Defendants' Acquisition of the Properties and the Portfolio's Rapid Collapse

In 2006 - 2007, Los Angeles based Milbank Real Estate Services acquired a large portfolio of rent-stabilized apartment buildings in the Bronx, including the ten buildings that are the subject of this foreclosure proceeding.

Milbank's purchase of the subject buildings was financed with a 35 million loan originated by Deutsche Bank in connection with a 3 billion dollar mortgage backed securities trust called COMM 2006 C8.¹ Believing the Bronx was "positioned to undergo significant gentrification," and that its experience with "litigation related to evictions, collections and other legal general matters," could help "improve[the] tenant base", Milbank gambled it could increase rents enough to support the staggering mortgage amount.² Milbank created defendants

¹ Reg. No. 333-130930-03, available at www.sec.gov.

² <http://www.milbankre.com/portfolio.php>.

NY Bronx I –VI, LLC, (The Milbank Defendants) to directly own the buildings, and managed them itself.

Reasonable estimates of the income and expenses on the subject buildings show they could sustain a mortgage of 19.5 million, if they were in good condition.³ But the buildings were in poor condition,⁴ and Milbank borrowed over 15 million dollars more than that estimate. Because the rental income could not come close to supporting the debt burden placed on the properties, Milbank allowed the buildings to fall into disrepair, and defaulted on its mortgage. Today, there are 4300 code violations, including 756 immediately hazardous violations, placed against the 548 apartments in the subject buildings.⁵

Milbank's failed business practices exemplify the recent phenomenon dubbed "predatory equity" by housing analysts.⁶ Private equity purchasers have acquired over 90,000 rent regulated units in New York City over the past 5 years, paying unsustainable prices using loans that are either securitized or federally backed, so the initial lender passes the risk onto other investors or the taxpayers. The predatory equity model leads inevitably to widespread defaults that undermine the financial system while causing displacement of low income families. The lending institutions, including Deutsche Bank, Wells Fargo, and Plaintiff herein, that allowed the over-leveraging of the Milbank Buildings and hundreds like it, were either reckless in their underwriting or gambling – like Milbank – that rent regulated tenants could be displaced and rents dramatically increased.

The collapse of the Milbank portfolio represents a dramatic early example of what will likely become a wave of multifamily foreclosures that will pose a serious threat to the stability of

³ Affirmation of Jonathan Levy, ¶12, and Exhibit C.

⁴ <http://www.milbankre.com/portfolio.php>.

⁵ Exhibits D – M, to Levy Affirmation.

⁶ See, "The Sub Prime Loan Crisis in NY Apartment Housing," ANHD, October 2008.

affordable housing in New York City. The response of the courts will determine whether the coming crisis can be successfully confronted. It is therefore imperative that the courts help craft a coherent response to Milbank's collapse that will insure the rapid rehabilitation of the properties, forestall a new cycle of speculation and disinvestment, and protect the tenants – the victims of the owners' and the lenders' business practices. The tenants of the subject buildings, sued herein by pseudonym, therefore make this motion for an order requiring the plaintiff, who has asked for a receiver to manage the properties, to fully fund the repairs needed to make these buildings habitable.

B The Tenants Are Living in Horrible Conditions

The defendant tenants are living in horrid conditions as a result of Milbank's business practices and the reckless lenders who financed it. Because of the low rent rolls, high vacancy rate, and sheer scope of the work needed to make these buildings habitable, the receiver's efforts to date have been inadequate. Today, there are over 4300 housing code violations placed against the subject buildings, of which 756 are C violations – defined as immediately hazardous.⁷

Marisol De La Cruz, and her husband, for instance, live with concealed leaks that cause her ceilings to collapse. Water bugs, and other insects, exploit the collapsed ceiling to gain entry to her home. She and her neighbors have to live with intercoms that don't work, windows in the common hallways that are broken and boarded over, and leaks in the common hallways.⁸

Similarly, Gladys Rivera, who has lived in her building for sixteen years, is suffering through a nightmare. About a year and a half ago, a fire rendered the entire "C line" of her building uninhabitable. She was 'temporarily' relocated, with her two children, from a three

⁷ Levy Affirmation, Exhibits D – M.)

⁸ Affidavit of Marisol De La Cruz., dated April 1, 2010

bedroom to a one bedroom apartment. The damage to her original apartment still hasn't been repaired, and her temporary apartment features a rusted, moldy, bathroom; holes in the walls and cracked, peeling paint. She and her neighbors contend with an elevator that doesn't work, hallways full of graffiti, and broken intercoms and entry locks. The pavement in the building courtyard is cracked and uneven, and when it rains standing water builds up to make it even more hazardous. Ms. Rivera's family subsists on SSI and foster care subsidies and has no ability to move.⁹

Without court intervention, the tenants will have to live with these conditions indefinitely as the foreclosure process works through and a new owner eventually takes charge. But the conditions in the tenant-defendants apartments are hazardous and require immediate correction.

C The Proceedings

1 The Case in Chief

This action was commenced by the filing of a summons and complaint on, or about, March 17, 2009.¹⁰ All of the defendants, except the People of the State of New York and those named by pseudonym, answered or appeared¹¹, and on March 11, 2010, the court granted Plaintiff's motion for summary judgment, noting the Defendants defenses were frivolous and delay in the proceedings was untenable because "the buildings ... are in a state of disrepair and the tenants are the victims of defendants' inability ... to maintain the buildings."¹²

⁹ Affidavit of Gladys Rivera, dated March 31, 2010.

¹⁰ See Exhibit N to Levy Affirmation.

¹¹ *Id.*

¹² Exhibit S to Levy Affirmation

2 **The Receiver**

On, or about, March 29, 2009, the court appointed Consalato Ciccui receiver for the subject properties.¹³ Since his appointment, the receiver has evidently struggled to secure the resources to properly maintain the subject buildings. The receiver apparently had a number of disputes with the owner, and on September 11, 2009, the court amended its order appointing the receiver to address those disputes.¹⁴ On, November 10, 2009, upon the receiver's affidavit noting the "sheer volume of time and effort" required to manage the buildings, the court further amended it to provide the receiver could appoint an agent to assist in his duties.¹⁵ In October 2009, the receiver moved for contempt against the New York City Housing Authority for withholding rent payments due to collection efforts of another lienor.¹⁶ The motion was eventually withdrawn, presumably because it was settled. On, or about January 19, 2010, the receiver moved for contempt against the Milbank defendants for their interference in the building's operations and for their failure to account for, or turn over, funds.¹⁷

III ARGUMENT

A The receiver stands in the shoes of the landlord

Pursuant to R.P.A.P.L. § 1325(3) a receiver's first priority is to correct housing code violations. The First Department, in *Fourth Federal Savings Bank v. 32-22 Owners Corp.*, has made clear that a court appointed receiver in a foreclosure proceedings has a duty to maintain residential premises in habitable condition under the warranty of habitability, as required by Real

¹³ Exhibit O to Levy Affirmation.

¹⁴ Exhibit P to Levy Affirmation.

¹⁵ Exhibit Q to Levy Affirmation.

¹⁶ Exhibit R to Levy Affirmation.

¹⁷ Exhibit T to Levy Affirmation.

Property Law § 235-b.¹⁸ A receiver in a foreclosure action “stands in the shoes of the owner, and has a legal duty to maintain the property in good repair and is liable for damages for the failure to meet that duty...”¹⁹ This duty of the receiver is coextensive and interdependent with duty to pay the rent, even after responsibility for maintenance shifts from the landlord to the receiver by court order and consequent attornment.²⁰ The receiver’s obligation to maintain premises in a habitable condition is not only contractual, but also statutory. Both the Multiple Dwelling Law § 4, and the Housing Maintenance Code § 27-2004 (45), define a receiver as an owner, responsible for code compliance and the keeping of properties in good repair. H.M.C. § 27 – 2005.

The powers of a receiver are strictly limited to those authorized by the court. “[T]he oversight of the actions of a receiver is the sole responsibility of its appointing court.”²¹ Thus, the First Department has held the appointing court, rather than the civil court, is the preferred forum for resolution of habitability claims where a receiver has been appointed.²²

B THE PLAINTIFF, HAVING REQUESTED THE RECEIVER BE APPOINTED SHOULD BE COMPELLED TO ADVANCE FUNDS NECESSARY TO THE RECEIVER’S DUTIES

In *Fourth Federal* the First Department, held that “the court ... may order the person who applied for the receiver--in this case, plaintiff bank--to pay for [necessary repairs] in cases where the receiver lacks the funds to do so.”²³ In *Bankers FSB v. Off West Broadway*, the First Department explained that in determining whether to assess expenses “[t]he real question is whether there were special circumstances that make it equitable to impose additional

¹⁸ 236 A.D.2d 300, 302 (1st Dep’t 1997).

¹⁹ *Id.* at 302.

²⁰ *Id.* at 301-303. (According to the court, attornment is “the act of the tenant putting a person in the place of another as his landlord.” Therefore, “the tenant who has attorned continues to hold upon the same terms as he held of his former landlord” and “in the absence of fraud, the terms of a landlord’s rental agreement with a tenant binds a receiver in foreclosure.”) *Id.* at 302.

²¹ *103rd Funding Associates v. Salinas Realty Corp.*, 276 A.D.2d 340 (1st Dep’t 2000).

²² *Id.*

²³ *First Franklin*, 236 A.D.2d at 302.

receivership expenses on [the party seeking the appointment] even though the expenses exceeded the rent collected”.²⁴ In a mortgage foreclosure case, the court should:

[E]ntertain[] no qualms about imposing the cost of litigation occasioned by the defendants on plaintiff mortgagee. The immediate benefit of the appointment of a receiver of rents is that the holder of the mortgage is spared the exposure to liability which would result from assuming control of the property as a mortgagee in possession. . . . Having derived such obvious benefit from the appointment, it is only equitable that plaintiff should bear the cost incident to the benefit conferred.²⁵

Likewise, the Second Department, in *Long Island City Sav. and Loan v Bertsman Bldg.*, upheld the award of costs to the receiver in a mortgage foreclosure where “the receiver demonstrated that the money which she expended towards the upkeep of the subject premises was, for the most part, judiciously spent; these expenditures were both necessary and beneficial to the plaintiff.”²⁶

In this case, it is obvious that the receiver has been unable to restore and repair the properties to habitable condition. The receiver has gone to great lengths to recover moneys from the owners and from third parties, going so far as to file multiple motions for contempt. But, as of April 17, 2010, the New York City Department of Housing Preservation and Development still lists over 4300 open violations in the subject buildings. The receiver for these buildings simply lacks the funds necessary to address the severe and numerous violations plaguing the subject premises.

Further, the equities favor an order compelling the Plaintiff to fund the urgently needed repairs. As this court has noted, the tenants of the subject buildings “are the victims” of

²⁴638 N.Y.S.2d 72, 74-75 (1st Dep’t 1996)

²⁵ *Id.* at 378-79.

²⁶ 507 N.Y.S.2d 640 (2d Dep’t 1986); *see also Sun Beam v. Liza*, 210 AD2d 153 (1st Dep’t 1994)(“the money expended for legal fees and the upkeep of the subject premises, which was in a ‘dilapidated condition’ with numerous violations, and which required “extensive emergency repairs”, were both necessary and beneficial to [plaintiff].)

Milbank's overleveraging of the subject buildings, and consequent inability to maintain them.²⁷ But the tenants are also the victims of the financial institutions including plaintiff who facilitated Milbank's predatory business practices – practices plan predicated on their displacement in favor of higher paying tenants. Meanwhile, the plaintiff securities trust is still rated investment grade,²⁸ and the Trustee, Well Fargo, has had one of its “best year[s] ... ever ... in terms of positioning ... for the future.”²⁹ Finally, repair of the code violations will improve the value of plaintiff's security and ultimately inure to its benefit. The tenants should not to continue to suffer the horrific consequences. Under these circumstances the court should have no qualms about directing the plaintiff to advance the funds needed to restore the buildings to habitability.

Therefore, the court should grant defendant-tenant's motion and issue an order directing the receivers to correct violations, and the plaintiff to advance sufficient funds.

IV CONCLUSION

For all of the foregoing reasons, defendant-tenant's motion should be granted in all respects.

Dated: April 18, 2010
Bronx, New York



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²⁷ Exhibit S to Levy Affirmation.

²⁸ See e.g. COMM, Series 2006-C8 First-Quarter 2010 Update -- U.S. CMBS Focus Performance Report, available at http://www.fitchratings.com/index_fitchratings.cfm.

²⁹ <http://seekingalpha.com/article/183514-wells-fargo-amp-company-q4-2009-earnings-call-transcript>