At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of July, 2022.

P R E S E N T:
HON. CENCERIA P. EDWARDS, CPA,
Justice.

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HSBC BANK USA, NATIONAL,

Plaintiff(s),

-against-

Antoine Y. Cherestal, at al.,

Defendant(s).

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DECISION

Calendar #(s): 25

Index #: 511359/2014

Mot. Seq. #(s): 7

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/Petition/Cross-Motion and Affidavits (Affirmations) and Exhibits	214-228
Opposing Affidavits (Affirmations) and Exhibits	231-238
Reply Affidavits (Affirmations) and Exhibits	248-256

This is an action to foreclose on the mortgage encumbering the residential real property known as 761 Hart Street, in Brooklyn, New York. Defendant-borrower Antoine Y. Cherestal failed to timely answer the complaint, and by order dated September 6, 2016, the Court (Noach Dear, J.) denied his motion to vacate his default and compel Plaintiff to accept his late answer. The Court (Dear, J.) granted Plaintiff's subsequent motion for an order of reference and, by order dated March 27, 2018, granted Plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale ("JFS"), and also denied Mr. Cherestal's cross-motion to reject the report. On December 4, 2019, the Appellate Division, Second Department, affirmed so much of Justice Dear's orders as denied Mr. Cherestal's motion to vacate his default, but reversed the award of a JFS to Plaintiff because the referee's computations regarding the tax disbursements

and hazard insurance disbursements due to Plaintiff were based on business records that were never submitted to the referee (*see* NYSCEF doc. #235).

Plaintiff now moves, pursuant to RPAPL 1325, CPLR Article 64, and RPL 254(10), for an order appointing a temporary receiver. CPLR § 6401(a) provides, in pertinent part, that "a temporary receiver of the property may be appointed [] at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." It is well-settled that this "is an extreme remedy which can only be invoked in cases in which the moving party has made a clear evidentiary showing of the necessity for conservation of the property and protection of the interests of the movant" (*Hoffman v Hoffman*, 81 AD3d 600, 600 [2d Dept 2011]). However, "[w]hen the mortgage entitles the mortgagee to the judicial appointment of a temporary receiver, Real Property Law § 254(10) and RPAPL 1325(1) are the controlling statutes, which displace CPLR 6401, and which allow for the appointment 'without regard to the adequacy of any security of the debt'" (*HSBC Bank USA, N.A. v Rubin*, 210 AD3d 73, 81 [2d Dept 2022] [internal citations omitted], quoting Real Property Law § 254[10]).

Here, Plaintiff relies on paragraph "H" of the "1-4 Family Rider" to the subject mortgage, which provides, in relevant part, that "Lender shall be entitled to have a receiver appointed to take possession of and manage the Property and collect Rents and profits derived from the Property without any showing as to the inadequacy of the Property as security." Plaintiff, thus, contends that the more stringent showing required to obtain a temporary receiver under a traditional CPLR § 6401 analysis is inapplicable (*see Rubin*, 210 AD3d at 81).

In opposition to Plaintiff's motion, Samuel Katz, Esq., of the Law Office of Samuel Katz, PLLC, which is counsel of record to defendant-borrower Cherestal, contends that the "1-4 Family Rider" does not control because, by its own terms, it applies only to 1-to-4-family residences, and the subject premises is a 6-unit apartment building. In support, Mr. Katz submits a purported document from the New York City Department of City Planning identifying the building class of the subject premises as "Walk-up Apartments – Five to Six Families" (*see* NYSCEF doc. #236), as well as an affirmation from Ari Fromowitz, a manager of Hart Living LLC, the present owner of the subject premises (*see* NYSCEF doc. #232). Mr. Fromowitz states, *inter alia*, that the property is not at any risk of disrepair or deterioration, as it has been well-managed since the LLC acquired it, and appointment of a receiver would harm the LLC by

depriving it of the rental income needed to run the property, as well as force him to incur all of the additional fees attendant to the appointment. Mr. Katz also argues that Plaintiff did not submit proof on this motion that it satisfied a condition-precedent to invoking the receivership appointment provision, namely, that it sent notice of default to the borrower. Tellingly, defendant-borrower Mr. Cherestal did not submit an affidavit or affirmation in his opposition to the instant motion, even though Mr. Katz, in his own opposing affirmation, identifies himself and his firm only as the attorneys for Mr. Cherestal and does not explain what relationship, if any, his law firm has to Mr. Fromowitz or the LLC.

Further complicating matters, Plaintiff discloses in its moving papers-in-chief that Mr. Cherestal transferred the subject property to the LLC in December of 2015, and notes that Mr. Cherestal did not submit an opposing affirmation or affidavit. Yet, in both sides' respective moving papers, Plaintiff and Mr. Katz indiscriminately use the term "Defendant" in reference to both Mr. Cherestal and the LLC, even when referencing arguments or factual assertions made by the LLC's manager, Mr. Fromowitz. This unnecessarily breeds confusion, as the Court cannot be sure which arguments are being made against, or on behalf of, Mr. Cherestal, and which are being made against, or on behalf of, the LLC. This is important because it is unclear whether the LLC, as a non-signatory to the subject note and mortgage agreement, has standing to raise the purported inapplicability of the "1-4 Family Rider" containing the provision that permits the appointment of a temporary receiver, or of Plaintiff's purported failure to provide Mr. Cherestal with notice of the default. Conversely, since the rider expressly provides that it is between the lender and the borrower, *i.e.*, Mr. Cherestal, it is unclear whether Plaintiff, in arguing that "Defendant" is bound by the rider irrespective of its title because both parties signed it, may properly argue that the LLC, which did not sign the subject agreements, can be bound by the receivership appointment provision. To this point, it is noted that the provision speaks of rents and profits received or collected by the "Borrower," but the only evidence in this record regarding same is from the LLC's Mr. Fromowitz, who states that he collects the tenants' rents, which he describes as his income, but he does not reference Mr. Cherestal or indicate that Mr. Cherestal is involved with the subject premises in any way. Since Mr. Cherestal no longer owns the subject premises and does not collect the rents, it would appear that he lacks standing to oppose the appointment of a temporary receiver on any of the grounds asserted in the opposing papers submitted by Mr. Katz. However, that Mr. Cherestal's attorney of record nonetheless

opposes Plaintiff's motion on his behalf, relying on evidence submitted by a representative of the present owner of the subject premises, raises suspicions as to whether Mr. Cherestal may still be involved with the LLC and/or the property in a manner suggestive of a *de facto* or residual ownership interest.[1] It is noted that the affirmations of Mr. Katz and Mr. Fromowitz are silent as to Mr. Cherestal's relationship (if any) to the LLC, and Mr. Katz also fails to explain Mr. Cherestal's interest in objecting to the appointment of a temporary receiver over a property that he purportedly no longer owns.

In any event, the Court need not definitively resolve the issues discussed above regarding the mortgage's receivership appointment provision, in light of Plaintiff's alternative argument that it has shown entitlement to the appointment of a temporary receiver under a CPLR § 6401(a) analysis. It has been held that a party's failure to pay real property taxes, thereby placing the subject premises at risk of being subjected to tax foreclosure proceedings, qualifies as a danger that the property may be materially injured or destroyed, within the meaning of the statute (*see Le Febvre v Shea*, 212 AD2d 884, 885 [3d Dept 1995]). In support of the motion, Samantha Moreno, an assistant vice president for Plaintiff's loan servicing agent, states that the real property taxes for the subject premises have not been paid by Mr. Cherestal or the present owner since 2005, which necessitated Plaintiff's paying of $139,431.91 to cover the owed taxes, as well as delinquent water and ERP charges (*see* NYSCEF doc. # 215, p. 3). Ms. Moreno further avers that there are additional outstanding real property taxes due and owing, which continue to accrue and remain unpaid. As noted, Mr. Cherestal did not submit an affidavit or affirmation in opposition to the motion, and Mr. Fromowitz did not specifically controvert Ms. Moreno's averment in his own affirmation. The Court, thus, deems this factual assertion to have been admitted for the purposes of this motion, and rejects the opposition's contention that there is no "evidence or any danger of deterioration to the property or that the financial stability is affected."

Additionally, defendant-borrower Mr. Cherestal, as per the opposing papers purportedly submitted on his behalf by Mr. Katz, contends that issues of fact regarding the allegedly outstanding property taxes preclude the appointing of a temporary receiver because, in reversing the award of a JFS to Plaintiff, the Appellate Division found that Plaintiff had failed to provide

[1] According to the real property transfer report submitted with the December 2015 deed, appended to Plaintiff's moving papers as Exhibit "B," the LLC purchased the subject premises from Mr. Cherestal for $100,000.00 (*see* NYSCEF doc. #220, p. 7)

admissible evidence of the amounts it has paid in tax disbursements. It is noted that the Honorable Larry D. Martin, J., has recently denied Plaintiff's subsequent motion to confirm the referee's report and for a JFS, finding that Plaintiff had not cured the evidentiary deficiencies identified by the Appellate Division (*see* NYSCEF doc. # 305). However, Plaintiff's failures to demonstrate the amounts it has previously paid on prior delinquent real estate taxes has no bearing on its entitlement to the appointment of a temporary receiver whose role will be to ensure payment of these and other necessary expenses prospectively.

Accordingly, the above-referenced motion by Plaintiff for the appointment of a temporary receiver over the subject mortgaged premises is **GRANTED**.

The foregoing constitutes the Decision of this Court. **Settle order on notice**.

E N T E R,

Dated: June 27, 2024

Hon. Cenceria P. Edwards, JSC, CPA