STATE OF MICHIGAN

SAGINAW COUNTY CIRCUIT COURT

THE BANK OF NEW YORK MELLON TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY CAPITAL I, INC, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-IQ14, acting by and through C-III ASSET MANAGEMENT LLC, as Special Servicer,

Plaintiff,

v.

CAMPUS VILLAGE SAGINAW, LLC, a Michigan limited liability company,

Defendant.
_____/

Case No. 14-023086-CH

Judge: M. Randall Jurrens (P27637)

OPINION RE: PLAINTIFF'S MOTION FOR ORDER APPOINTING RECEIVER

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The plaintiff seeks appointment of a receiver of the defendant's apartment complex located adjacent to Saginaw Valley State University. The defendant argues there is no basis for such extraordinary relief: e.g. there is no waste or damage, the monthly installments on the indebtedness secured by the property are paid current, any prior delinquency was payable from proceeds of a letter of credit in the plaintiff's possession, the plaintiff is adequately protected by funds on hand, and a receivership would be detrimental to tenants.

For the reasons stated in this Opinion, the court concludes that, notwithstanding the defendant's present objections, the parties' mortgage contract directs appointment of a receiver.

Background[1]

On March 1, 2007, the defendant entered in to a commercial loan transaction with LaSalle Bank that included several documents:

- Promissory Note in the principal amount of $11,400,000, payable with interest at the non-default rate of 5.62%, in monthly installments on the 1st day of each month until March 1, 2017; and, in the event of default continuing for 5 days, interest rises to 10.62% plus a 5% late charge on the past due amount, but, subject to specified exceptions, with enforcement being limited to collateral and without recourse to the defendant (plaintiff's complaint, Exhibit A)
- Mortgage granting a mortgage on a parcel of real property located in Kochville Township, Saginaw County, Michigan, commonly described as 2207 Pierce Road, dated March 1, 2007 and recorded March 7, 2007, in Liber 2428, Page 2113, Saginaw County Records (plaintiff's complaint, Exhibit B)
- Assignment of Leases and Rents assigning all leases and rents related to the mortgaged property, recorded March 7, 2007, in Liber 2428, Page 2166, Saginaw County Records (plaintiff's complaint, Exhibit C)
- Letter of Credit Agreement requiring the defendant provide a $325,000 letter of credit in form and issued by a financial institution acceptable to plaintiff, and continuously renewed for successive 12 month periods (defendant's counterclaim, Exhibit 2)
- Allonge assigning the Note to the plaintiff (plaintiff's complaint, Exhibit H)
- Assignment assigning the Mortgage and the Assignment of Rents to the plaintiff, recorded July 23, 2007 in Liber 2451, Page 1995, Saginaw County Records (plaintiff's complaint, Exhibit I)

After nearly four years of prompt payments, the defendant's monthly installments were commonly paid after the due date and expiration of the 5-day cure period.

As time and events of default progressed, the plaintiff began sending periodic demand letters, beginning June 6, 2011 (and in 13 of the succeeding 30 months).

On October 24, 2011, Bank of America advised the plaintiff and the defendant that it was electing to not extend the letter of credit which was to expire by its terms on January 14, 2012.

On December 19, 2011, the plaintiff presented the letter of credit to Bank of America for payment. The plaintiff continues to hold the proceeds of the letter of credit. The defendant never provided a replacement letter of credit.

[1] This is an abridged, and slightly supplemented, version of the factual and procedural background presented in the court's Opinion Re: Plaintiff's Motion for Partial Summary Disposition on Count 1 of Complaint and Summary Disposition on Defendant's Counterclaim, which, to the extent necessary, is incorporated by reference.

On December 2, 2013, in the last of the series of monthly default letters, the plaintiff advised the defendant it was in arrears for three months (October – December 2013).

When the defendant failed to cure the December 1, 2013 delinquency and failed to pay the January 1, 2014 installment, plaintiff's then-legal counsel, on January 15, 2014, sent a letter notifying the defendant that as a result of "failure to make timely and complete payment of the amounts due under the Note" demand was being made for "[i]mmediate payment of the entire indebtedness including late charges, interest, prepayment charge, default interest and expenses of collection".

When the defendant failed to pay the accelerated debt (or tender even partial payments/installments), the plaintiff filed its Verified Complaint for Appointment of Receiver and Injunctive Relief, together with a Motion for Ex Parte Order Appointing Receiver on May 16, 2014. The court heard the receivership motion on June 4, 2014. Rather than grant the requested relief at that time, the court issued a June 5, 2004 Order Regarding Motion for Appointment of Receiver to maintain the status quo by requiring payment of delinquent installments (and the court understands the defendant has been paying monthly installments ever since).

On the heels of a motion for summary disposition filed July 14, 2014, the plaintiff filed a renewed Motion for Order Appointing Receiver on August 7, 2014. Following oral arguments on both motions on August 14, 2014, the matters were taken under advisement.

Analysis

The plaintiff seeks appointment of a receiver of the mortgaged property pursuant to MCL 600.2926.

The plaintiff's motion identifies several subjective reasons for requesting a receiver: preserve property, prevent damage/waste, protect against hazardous/dangerous conditions, conduct an environmental assessment, manage the property/units/leases, and repair the property.

The defendant counters the plaintiff has produced no evidence supporting its allegations, the defendant is current in its installment payments, the plaintiff is adequately protected by funds on hand[2], and a receiver would be detrimental to the student tenants.

Whatever the merit of these arguments, the question of whether a receiver is appropriate is less of an exercise of the court's discretion in this case than it is application of the parties' express agreement. In this regard, the Mortgage includes the following material provisions:

> **20. <u>Events of Default; Acceleration of Indebtedness; Remedies</u>**. The occurrence of any one or more of the following events shall constitute an "Event of Default" under this Mortgage:

[2] The defendant asserts the "[p]laintiff is holding over $500,000 of [the defendant's] money in reserve accounts, with approximately $400,000 contained in a maintenance reserve account, and the rest contained in an overfunded escrow account for taxes and insurance" (defendant's brief, p 3, n 2).

(a) Failure of Borrower to pay (i) within 5 days of the due date, any of the Indebtedness, including any payment due under the Note or (ii) the outstanding Indebtedness, including all accrued and unpaid interest, in full on the Maturity Date; or

* * *

(g) the occurrence of an "Event of Default" under and as defined in any other Loan Document; [ ]

* * *

Upon the occurrence of an Event of Default, the Indebtedness, at the option of the Lender, shall become immediately due and payable without notice to Borrower; and Lender shall be entitled to immediately exercise and pursue any or all of the rights and remedies contained in this Mortgage and any other Loan Document or otherwise available at law or in equity. Each remedy provided in the Loan Documents is distinct and cumulative to all other rights or remedies under the Loan Documents or afforded by law or equity, and may be exercised concurrently, independently, or successively, in any order whatsoever.

* * *

24. <u>Appointment of Receiver or Mortgagee in Possession</u>. If an Event of Default is continuing or if Lender shall have accelerated the Indebtedness, Lender, upon application to a court of competent jurisdiction, shall be entitled as a matter of strict right, without notice, and without regard to the occupancy or value of any security for the Indebtedness, without any showing of fraud or mismanagement on the part of Borrower or the insolvency of any party bound for its payment, without regard to the existence of a declaration that the Indebtedness, or any portion thereof, is immediately due and payable, and without regard to the filing of a notice of default, to the appointment of a receiver or the immediate appointment of Lender to take possession of and to operate the Property, and to collect and apply the rents, issues, profits and revenues thereof, and Borrower consents to such appointment.

So, since the defendant contractually agreed to appointment of a receiver "[i]f an Event of Default is continuing or if Lender shall have accelerated the Indebtedness", the issue turns on an objective test.

Here, it is undisputed that, following then-continuing non-payment of installments due 12-1-13 and 1-1-14 (and a 12-2-13 demand letter to defendant going unanswered), the plaintiff accelerated the underlying indebtedness on January 15, 2014 and, additionally, that the defendant had not paid intervening installments when the plaintiff's complaint was filed on May 16, 2014. Thus, regardless of "an Event of Default continuing", the plain language of the alternate condition that the defendant agreed to – "if Lender shall have accelerated the Indebtedness" – justifies appointment of a receiver[3].

[3] That the defendant paid delinquent installments subsequent to acceleration does not un-accelerate the indebtedness. *Oakland Nat'l Bank v Anderson*, 81 Mich App 432 (1978). Once accelerated,

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Further, the parties' dispensed with factors that courts might otherwise consider when entertaining receivership requests: i.e. adequacy of security, mortgagor's financial position, presence of fraud, diminution in value of property, etc. *Fannie Mae v Maple Creek Gardens, LLC*, 2010 US Dist LEXIS 5342; 2010 WL 374033 (ED Mich, 2010). Here, without more, the plaintiff is entitled to appointment of a receiver, upon acceleration (or a continuing default) as a matter of contract; specifically, as "a matter of strict right, without notice, and without regard to the occupancy or value of any security for the Indebtedness, without any showing of fraud or mismanagement on the part of Borrower or the insolvency of any party bound for its payment".[4]

Nonetheless, the defendant argues that any failure to affirmatively pay monthly installments was satisfied by the proceeds of a $325,000 letter of credit the plaintiff is holding. This issue has been addressed in the court's opinion regarding the plaintiff's motion for summary disposition, where the court concluded, "the defendant unambiguously agreed that, if it failed to renew or replace the letter of credit, the plaintiff could, in its sole and absolute discretion, apply the proceeds of the letter of credit or hold such security, but expressly without any obligation to apply the proceeds to cure any default".

Finally, the defendant argues that the doctrines of waiver/estoppel/laches bar the plaintiff's declaration of default based on the history of [acceptance of] late payments. While this is a variation of the theme the defendant semi-successfully employed in its argument against assessment of default interest incidental to the plaintiff's motion for summary disposition, it fails in the present context: at the operable time here, the plaintiff did not forsake its right to prompt payment but, rather, affirmatively sent demand letters when monthly payments were late (including, particularly, the plaintiff's letter of December 2, 2013); upon the defendant's failure to cure, the plaintiff accelerated the indebtedness; absent satisfactory response by the defendant, the plaintiff promptly filed the present complaint; and payment of delinquent installments occurred only following acceleration, (indeed, only upon court order). Accordingly, considering the elements of the defenses more fully addressed in the court's opinion on the plaintiff's motion for summary disposition, the doctrines of waiver/estoppel/laches do not apply to the present facts.

The court concludes that, regardless of an event of default continuing, the parties' mortgage contract unambiguously directs appointment of a receiver upon acceleration of the underlying indebtedness (obviating the need to consider subjective factors that might otherwise apply in an exercise of the court's discretion), and the defendant has demonstrated no reason to not enforce the agreement.

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> [t]he acceptance of defendant's check by the bank served to reduce defendant's indebtedness on the note but it did not cure all the defaults which existed at the time, . . . nor did it waive the acceleration of the balance which had already occurred. [*Id* at 436]

[4] The court notes that counsel failed to respond to its request for briefing on this issue (i.e. the enforceability of the parties' apparent agreement to preclude exercise of judicial discretion), made in the course of the August 27, 2014 status conference.

Conclusion

The plaintiff requests appointment of a receiver for the defendant's apartment complex. The defendant demurs, arguing that circumstances do not justify imposition of such a severe remedy.

The court concludes that, given the terms and conditions of the parties' mortgage contract, it is constrained to grant the plaintiff's request.

However, the court having reservations regarding the form of Order Appointing Receiver accompanying the plaintiff's motion, it must be noticed for settlement (assuming another procedure for entry of orders is not satisfied), *MCR 2.602(B).*

Date: November 4, 2014 /s/ (P27637)
M. Randall Jurrens, Circuit Judge