

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB -08-37

Androscoggin Valley Council of Governments, et al.,

Plaintiffs

v.

Linda Hertell, et al.,

Defendants

DECISION AND ORDER

This matter is before the Court on the Motion of Plaintiffs Androscoggin Valley Council of Governments ("AVCOG") and Lewiston-Auburn Economic Growth Council ("LAEGC") (collectively, "Plaintiffs") to Order Sweetser to Turn Over Funds Held by Sweetser as Trustee Pursuant to an Assignment of Lease Payments. Intervenor KeyBank opposes the motion.

Factual Background

On November 17, 2000, Defendant Hertell, n/k/a Snyder, signed a Collateral Assignment of Leases and Rentals (the "Assignment") in favor of AVCOG and LAEGC. By its terms, the Assignment was made for the purpose of securing, among other things:

The payment of the indebtedness evidenced by two promissory notes . . . one to LAEGC in the original aggregate amount of Seventy-Five Thousand Dollars (\$75,000), and the other to AVCOG in the original aggregate principal amount of Seventy-Five Thousand Dollars (\$75,000). . . which obligations are secured by a Mortgage from the Assignor to the Assignee . . . [and]

...

The performance and discharge of each and every obligation, covenant and agreement of the Assignor contained herein or in said Note or the Mortgage or any other document or agreement evidencing, securing or governing such obligations.

The Assignment to Plaintiffs “grant[ed], transfer[red] and assign[ed] to the Assignee, its successors and assigns:”

All of Assignor’s interest in any existing and future leases pertaining to the premises located at 646 Main Street and 650 Main Street in Lewiston, Maine, . . . [t]ogether with all rents, income and profits arising from said leases and from existing tenancies upon said premises . . . and together with all rents, income and profits for the use and occupation of the premises . . . from leases which may be executed or tenancies which may arise in the future and during the term of the assignment.

Under the Assignment, “the Assignor shall have the right to collect . . . all rents, income and profits arising under said leases or from the premises . . . and to retain, use and enjoy the same” so long as “there shall exist no default in the payment of any indebtedness secured hereby or in the performance of” obligations under the note or mortgage. Upon default, however,

Assignee . . . may at its option without notice . . . with or without bringing any action or proceeding, or by a receiver appointed by a court, take possession of the premises and have, hold, manage, lease and operate the premises on such terms and for such period of time as the Assignee may deem proper and either with or without taking possession of said premises in its own name, sue for or otherwise collect and receive all rents, income and profits of said premises, including those past due and unpaid.

Also on November 17, 2000, Defendant signed two notes evidencing a debt to KeyBank. The two notes were secured by two mortgages on Defendant’s real estate located at 646 and 650 Main Street in Lewiston. By their terms, the mortgages were to secure payment of two loans made by KeyBank to Defendant, one loan in the principal amount of \$160,500 and the other loan in principal the amount of \$142,500. The mortgages provided that Defendant Hertell, as Grantor, “presently assign[ed] to Lender all of Grantor’s right, title, and interest in and to all leases of the Property and all Rents from the Property. In addition, Grantor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents.” “Rents” is defined under the mortgages to mean “all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.” *Id.* at 2.

In the event of Defendant Hertell's default on the mortgages, KeyBank as the Lender:

"[s]hall have the right, without notice to Grantor or Borrower, to take possession of the Property and, with or without taking possession of the Property, to collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the indebtedness. In furtherance of this right, Lender may require any tenant or other use of the Property to make payments of rent or use fees directly to Lender.

Procedural Background

KeyBank apparently filed a separate foreclosure complaint against Defendant following her alleged default on her debt obligations to KeyBank. The Court understands that the foreclosure action remains pending.

Plaintiffs filed this action following Defendant's alleged default on her debt obligations to Plaintiffs. In connection with their Complaint, Plaintiffs sought and were granted a pre-judgment attachment on trustee process pursuant to M.R. Civ. P. 4A and 14 M.R.S. §§ 2601-2901. Plaintiffs then served a trustee summons on Sweetser, a tenant of one of the subject Properties. Sweetser, in turn, disclosed that it had in its possession rent monies owed to Defendant Boondocks Androscoggin LLC, which is a successor-in-interest to Defendant Hertell.

Following the grant of Plaintiffs' Motion for Attachment on Trustee Process and the trustee disclosure by Sweetser, but prior to judgment, Plaintiffs filed the instant Motion to Compel Sweetser to Turn Over the rent funds. Although KeyBank was not made a party to this action, after learning of Plaintiffs' Motion, KeyBank filed a Motion to Intervene and an objection to Plaintiffs' motion. On May 1, 2009, the Court granted KeyBank's motion to intervene. Judgment has also been entered against Defendants and in favor of Plaintiffs in this action.

Discussion

As explained above, in consideration of the loans made by Plaintiffs and KeyBank, in order to secure payment of the loans, Defendant Hertell granted Plaintiffs and KeyBank mortgages in certain property. In addition, through her transactions with both parties, Defendant Hertell granted to Plaintiffs and KeyBank an interest in the rental payments generated by the properties that are the subject of the mortgages.

The parties appear to agree that KeyBank's mortgages have priority because they were recorded in the registry of deeds earlier than Plaintiffs' mortgages. Plaintiffs argue, however, that their interest in the rental payments is superior to KeyBank's interest in part because unlike the assignment of rents clause in the KeyBank mortgages, Plaintiffs' Assignment is distinct from their note and mortgage, and represents a separate obligation that is not dependent upon a default of the mortgage. More specifically, Plaintiffs argue that through the Assignment they received an immediate right to possession of the rental payments without the need to foreclose upon Defendant's real property while under the assignment of rent provision in KeyBank's mortgages, KeyBank's entitlement to the rent money is contingent upon foreclosure and possession of the real property. Plaintiffs contend, therefore, that KeyBank's right to the Sweetser rents "does not come into existence until default and compliance with the entire foreclosure process by KeyBank." Pls.' Reply at 3. The Court disagrees.

According to its express terms, Plaintiffs' Assignment was to secure Defendant Hertell's debt to Plaintiffs. Plaintiffs' ability to collect the rents is expressly conditioned upon Defendant's default. In this respect, the assignment is identical to KeyBank's assignment. That is, both parties' entitlement to the rental payments is contingent upon Defendant's default under the terms of the parties' loan agreements.

In addition, contrary to Plaintiffs' assertion, both the KeyBank mortgages and Plaintiffs' Assignment include an interest in future rents. Further, both Plaintiffs' Assignment and KeyBank's mortgages make clear that the parties' respective rights in the rents are not contingent upon possession of Defendant's real estate. Thus, in these important respects, the property interest in the rental payments that was granted to Plaintiffs and KeyBank is the same.

Plaintiffs nevertheless suggest that KeyBank's interest in the rents has not been and cannot be sufficiently perfected or enforced until such time as KeyBank prevails in its foreclosure action and takes possession of Defendant's real property. In support of this proposition, Plaintiffs cite the following excerpt from *In re Citicorp Park Assocs.*, 180 B.R. 15, 17 (D. Me. 1995):

[u]nder Maine law, unless the parties modify the mortgage agreement, "the right to rents and profits . . . can derive only from those rights that a mortgagee has incidental to foreclosure upon default. Under these circumstances a mortgagee may be entitled to rents and profits upon a default if it either takes possession of the property or has a receiver appointed to collect the rents and profits."

Plaintiffs maintain that *Citicorp.* supports their contention that KeyBank's entitlement to the rental payments is contingent upon the completion of the foreclosure process while Plaintiffs' right to the rents is absolute. Plaintiffs' reliance on *Citicorp.* is misplaced.

The issue in *Citicorp.* was whether a mortgagee has a right to the rental payments prior to default by the mortgagor and the completion of the foreclosure process. The United States Bankruptcy Court for the District of Maine concluded that in the absence of an express provision in a mortgage granting to a mortgagee the right to take possession of rents prior to default and the mortgagee's legal entitlement to possession of the subject property (i.e., after foreclosure), the right to the rental payments has not yet matured.¹

¹ The court in *Citicorp.* went on to note that "[t]he assignee's right to collect rents or take them as they are collected matures, at the earliest, upon the assignor's default of the obligation secured by the assignment."

Unlike the issue in *Citicorp.*, however, in this case both of the assignments at issue expressly granted the assignees the right to collect rents upon the Defendant's default and without the need to first take possession of the premises. Further, because the Court has concluded that Plaintiffs and KeyBank each have a security interest in the same property – the rent monies owed to Defendant - and because both of those rights matured upon Defendant's default, the question in this case is not when a party can take possession of the rental payments, but, rather, which party's secured interest has priority. In other words, while the parties might be at different procedural stages with respect to their efforts to enforce their rights vis-à-vis the Defendants, the question presented here is whether Plaintiffs' interest in the rents is superior to a competing interest such that they are entitled defeat KeyBank's interest and compel the turn over of the property. Because *Citicorp* addressed the question of the time at which a party could enforce a right to rental payments, and did not decide the question of the priority of two parties with secured interests in the rental payments, *Citicorp.* is not controlling in this case.

Instead, given (1) that by their express terms, both Plaintiffs' and KeyBank's assignments constitute security interests in the same real estate; (2) that each of the assignees' right to take possession of the rents depends upon Defendants' default; (3) and that the assignees' right to possession of the rents is not conditioned upon possession of the premises, the Court concludes that the priority determination and thus the parties' right to collect the rents is controlled by the time at which each party's security interest was perfected. As the court in *In re Somero*, 122 B.R. 634 (D. Me. 1991), the case upon which the bankruptcy court relied in part in *Citicorp.*, stated, a "security interest in the rents and profits is an agreement perfected under Maine law by a recording in the registry of deeds where the mortgage on the real property from which the rents are derived would be recorded." *Id.* at 638.

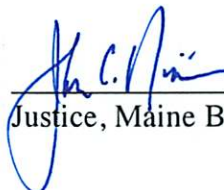
Contrary to Plaintiffs' argument, the date or time at which KeyBank or Plaintiffs obtain a judgment against Defendants or otherwise become legally entitled to recover the rental payments does not determine priority between KeyBank and Plaintiffs. A party's interest in the rental payments is secured upon the filing of the mortgage in the registry of deeds. No further action is necessary in order to establish priority. In this case, because KeyBank's mortgages were recorded first, KeyBank has the superior interest in rental money derived from the mortgaged premises after Defendant's default.²

Conclusion

Based on the foregoing analysis, the Court denies the Motion of Plaintiffs to Order Sweetser to Turn Over Funds Held by Sweetser as Trustee Pursuant to an Assignment of Lease Payments.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 7/14/09



Justice, Maine Business and Consumer Court

² Because the Court is unaware of the status of KeyBank's foreclosure action, the Court offers no opinion as to whether KeyBank is entitled to recover the rental payments at this time.