MOTION FOR DISMISSAL, EQUITABLE SUBORDINATION OF A MORTGAGE'S PRIORITY, RECEIVERSHIP, RIGHTS OF SENIOR MORTGAGEE.

At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Court House in the City of Binghamton, New York, on the 8th day of January, 1993.

PRESENT: HONORABLE ROBERT S. ROSE,
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

DEPAN, EICHENBERGER & KNOWLES, INC.,

Plaintiff,

INDEX NO. 92-2153
RJI NO. 92-1407-M

v

GREENBRIAR PROPERTIES I, a New York Limited Partnership; DONALD D. SMITH; FRANCIS A. SCHOSGER; RAYMOND T. SCHALLER; JOHN R. BLOISE; DOUGLAS R. WILLIAMS; BINGHAMTON SAVINGS BANK; FIRST NATIONAL BANK OF CORTLAND; MARINE MIDLAND BANK NA; COMPTROLLER OF THE STATE OF NEW YORK, as Trustee of the Common Retirement Fund; SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, DC; COLUMBIA BANKING FEDERAL SAVINGS & LOAN ASSOCIATION; ASSOCIATES IN MEDICINE PC,

Defendants.

D E C I S I O N A N D O R D E R

TO COMMENCE THE STATUTORY TIME PERIOD FOR APPEALS AS OF RIGHT (CPLR 5513[a]), YOU ARE ADVISED TO SERVE A COPY OF THIS ORDER, WITH NOTICE OF ENTRY, UPON ALL PARTIES.

APPEARANCES:

HISCOCK & BARCLAY,
(Jon P. Devendorf of counsel),
Attorneys for Plaintiff,
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Post Office Box 4878,
Syracuse, New York 13211-4878.

BECKER, CARD & LEVY, P.C.,
(Bruce O. Becker of counsel),
Attorney for Defendant Douglas R. Williams,
148 Vestal Parkway East,
Vestal, New York 13850.

ROSE, J.

In 1983, plaintiff made a bridge loan to defendant Greenbriar Properties I (Greenbriar) to facilitate Greenbriar's purchase of certain commercial real property, known as the Valley View Apartments, from defendant Douglas R. Williams. Although plaintiff and Greenbriar apparently anticipated that the loan would be paid off within 6 months, it was not. In 1985, to provide security for the loan, Greenbriar gave a mortgage to Robert G. Richardson, the agent of Greenbriar through whom the bridge loan had been made, and that mortgage was then assigned to plaintiff. Under the terms of the Richardson mortgage, periodic payments by Greenbriar were entirely voluntary, but full payment was due on March 15, 1989.

The Richardson mortgage was expressly subordinated to an earlier second mortgage given to defendant Williams by Greenbriar as part of the original purchase in 1983. The note accompanying the Williams mortgage called for monthly payments with any unpaid balance and accrued interest to be paid on December 31, 1990. (The mortgage itself contained no payment terms.) In 1986, the Williams mortgage was assigned to defendant Binghamton Savings Bank (B.S.B.) as collateral security for other loans. An earlier first mortgage on the property is held by defendant Comptrolier of the State of New York and insured by defendant Secretary of Housing and Urban Development.

Although no payments were made on the Richardson mortgage, plaintiff took no action upon Greenbriar's default even after the March, 1989 call date of its mortgage apparently because plaintiff anticipated that the debt would be paid off in December of 1990, when the Williams mortgage would be called. However, without plaintiff's knowledge or

consent, defendants Greenbriar and Williams negotiated a five-year extension of the earlier Williams mortgage, with an increased interest rate and monthly payment, and Williams received a lump-sum payment in excess of $50,000.00 which was applied to both the principal and interest then owed. Thereafter, all required payments under the extended Williams mortgage were made by Greenbriar until August of 1992.

On August 18, 1992, plaintiff commenced this action against defendant Greenbriar to foreclose the Richardson mortgage, and a receiver was appointed by the order of the Hon. Stephen Smyk, dated August 25, 1992. The receiver was authorized to collect all rents during the pendency of the action and was permitted, but not required, to pay any of the senior mortgages.

Plaintiff's complaint, in addition to seeking foreclosure based upon Greenbriar's default, also contains allegations against defendant Williams claiming that the extension of the Williams mortgage impaired the position of plaintiff and resulted in the equitable subordination of the Williams mortgage to the Richardson mortgage. Specifically, plaintiff asserts that it had relied unsuccessfully on the original call date of the Williams mortgage to trigger repayment of its loan.

Defendants Williams and B.S.B. now move for dismissal of the complaint on the grounds that it fails to state a cause of action against them. Defendants also ask that the receiver be directed to apply the rents received, both past and future, to make the payments owed on the Williams mortgage, and for an award of sanctions based on plaintiff's maintenance of a frivolous claim.

Plaintiff opposes the motion, asserting that it has a valid claim for the subordination of the Williams mortgage. Plaintiff argues that

there is a question of fact as to whether the extension of the Williams mortgage without its consent adversely affected its rights as a junior lienholder. Plaintiff also resists any modification of the receivership and payment of collected rents to defendants on the grounds that they have not taken any affirmative action to foreclose the Williams mortgage or otherwise enforce the assignment of rents contained in that mortgage.

Plaintiff's claim for equitable subordination against defendants Williams and B.S.B. depends upon proof of its allegation that some detriment resulted from the extension of the Williams mortgage. Generally, the modification or extension of a senior mortgage does not affect its priority over a junior lien unless the modification prejudiced the rights or impaired the security of the junior mortgagee (see, Skaneateles Sav. Bank v Harrold, 50 AD2d 85, affd 40 NY2d 999).

Other than a bare allegation, there is no evidence here that defendant Williams induced plaintiff to loan money to defendant Greenbriar by a misrepresentation or fraudulent promise. Also, there is no basis to conclude that plaintiff's reliance on the ending date of the Williams mortgage was reasonable. To hold otherwise would make plaintiff an effective third-party beneficiary of the Williams mortgage without any indication that that was the intent of the contracting parties.

Instead, the undisputed facts establish that plaintiff merely had assumed that it would be paid when the Williams mortgage was called and then was frustrated after it had been extended. The only detriment or impairment alleged by plaintiff is that it did not get paid when it anticipated it would. There is no allegation or evidence that the extension of the Williams mortgage impaired the underlying security, the real property, or prejudiced plaintiff's rights to receive payment under,

or to enforce, its own mortgage (cf., Remodeling & Constr. Corp. v Melker, 65 NYS2d 738, affd 270 App Div 1053). While the extension did continue the priority of the earlier Williams mortgage lien, this was not a change from prior conditions and plaintiff has not shown that it decreased Greenbriar's ability to pay the Richards mortgage. If anything, the extension of the senior mortgage slightly reduced the likelihood of default and benefited plaintiff because it may have averted foreclosure of the second mortgage and did reduce the amount owed to Williams (see, Skaneateles Sav. Bank v Harrold, supra, at 90).

Since there is no evidence of the requisite impairment, the court finds that the Williams mortgage retains its original superiority and the complaint is subject to dismissal because it states no cause of action against defendant Williams (see, id.).

Having made this finding, the court can now address the request by defendants Williams and B.S.B. for payment of the rents being collected and held by the receiver. It is well settled that a receiver appointed upon the application of one mortgagee acts on behalf of that mortgagee and not generally on behalf of other lienholders (Vecchiarelli v Garsal Realty, 111 Misc 2d 157, 159, citing Sullivan v Rosson, 223 NY 217 [1918]). Thus, before the rental income from the Greenbriar property may be collected for, or paid to, defendants, they first must obtain either the appointment of their own receiver or an extension of the existing receivership (see, id.).

In their moving papers, defendants Williams and B.S.B. seek such an extension based solely on the fact that they have not received the monthly payments accruing on the Williams mortgage since the receiver began collecting the rents in August of 1992. Although they assert no

present right to possession of the rents other than Greenbriar's obligation to make payments on the Williams mortgage, it is not disputed that Greenbriar is in default and that the mortgage contains an assignment of rents as further security. Defendants' counsel, however, asserts that this default resulted solely from the court's appointment of the receiver and opines that his clients probably would not be entitled to assert a claim based upon such a default.

On this point, the court agrees with plaintiff's counsel and observes that Greenbriar's default would be actionable here or in a separate action because although the receiver's possession of the rents may have made it financially impossible for Greenbriar to make payments, the receivership did not make it legally impossible for Greenbriar to do so. Obviously, Greenbriar could have continued to pay the Williams mortgage if it had had other financial resources, and the receiver's activity in no way precluded it from doing so. In any event, it is undisputed that to this date, defendants have not asserted a claim for foreclosure or assignment of the rents based upon Greenbriar's default.

Although defendants Williams and B.S.B. have not yet relied upon it, they would have a claim to the rents based upon the assignment in the mortgage if it were triggered by Greenbriar's default. However, such a conditional assignment of rents is effective only as a consent to the appointment of a receiver upon default (Poughkeepsie Sav. Bank v R & G Sloane Mfg. Co., 84 AD2d 212, 214), and it has been held that "[a] senior mortgagee with a rent assignment has an equitable right to collect, but does not have legal title to rents automatically upon default. Rent is an incident of title which cannot be conveyed by a rent assignment clause in a mortgage prior to foreclosure." (Vecchiarelli v Garsal Realty, supra, at

159 [emphasis supplied].)

The court is aware of only one case where a non-foreclosing senior mortgagee was permitted to obtain payment of the rents collected by a receiver for a junior mortgagee. In Monica Realty Corp. v One Twenty-Two Fifth Ave. Corp. (264 NY 52 [1934]), the Court of Appeals held that the senior mortgagee was equitably entitled to the funds held by the junior mortgagee's receiver because the mortgagees had orally agreed that the senior mortgagee would forbear foreclosure of its mortgage in exchange for receipt of the balance of the receiver' collections after the payment of expenses. There is no evidence of any comparable agreement between the parties to do so here.

Defendants Williams and B.S.B. have not asserted a claim for foreclosure of the Williams mortgage or taken any other affirmative step to exercise their rights under the assignment, and they have shown no legal impediment to their doing so. Since there was no agreement between the mortgagees as to the disbursement of the rents held by the receiver, defendants have demonstrated no right to possession of those rents and their motion for a retroactive extension of the receivership must be denied. Since they also have taken no steps to foreclose the Williams mortgage, their motion for a prospective extension of the receivership for their benefit must be denied at this time (see, Vecchiarelli v Garsal Realty, supra, at 160). The court also notes that even if defendants were to assert grounds for foreclosure and obtain an extension of the receivership in the future, they still would not be entitled to benefit from plaintiff's diligence and receive the rents collected before they took action on their own mortgage (see, Sullivan v Rosson, supra, at 225).

Finally, with regard to the sanctions portion of defendants'

motion, the court finds that while plaintiff's claim of equitable subordination does lack a legally cognizable basis, its allegation was not so patently lacking in merit as to warrant an award of sanctions.

Accordingly, the motion by defendants Williams and B.S.B. is granted to the extent that it seeks dismissal and denied in all other respects. Motion costs of $200.00 are awarded to defendants. This decision shall also constitute the order of the court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts.

ROBERT S. ROSE
JUSTICE SUPREME COURT

DATED: February 2, 1993,
Binghamton, New York.

The following papers have been forwarded to the Clerk of the County of Broome for filing:

1. Notice of Motion dated October 26, 1992, with supporting papers.

2. Affidavit of Robert G. Richardson dated November 30, 1992.

3. Affidavit of John P. Sindoni dated November 30, 1992.

4. Affidavit of Bruce O. Becker dated December 3, 1992.

5. Decision and Order.