

Supreme Court, Appellate Division, Second
 Department, New York.
 Jacob B. NAAR, et al., plaintiffs-respondents,
 Bernard Stein, et al., appellants,
 v.
 I.J. LITWAK & CO., INC., et al.,
 defendants-respondents,
 et al., defendants.

April 26, 1999.

In action to foreclose three mortgages, the Supreme Court, Kings County, [Dowd, J.](#), granted mortgagee's motion to substitute counsel and granted cross-motion of mortgagor to vacate appointments of receiver and substitute receiver. Mortgagees appealed. The Supreme Court, Appellate Division, held that: (1) finding of fact made in connection with order allowing substitution of counsel was not independently appealable, and (2) mortgagees had right to appointment of receiver without proof of necessity under terms of mortgage covenant.

Appeal dismissed in part; reversed.

West Headnotes

[1] Appeal and Error  123

[30k123 Most Cited Cases](#)

Findings of fact are not independently appealable.

[2] Appeal and Error  123

[30k123 Most Cited Cases](#)

Finding of fact contained in order granting application for substitution of counsel was not independently appealable, where appellants did not request or otherwise seek vacatur or modification of any decretal provision of order.

[3] Mortgages  468(1)

[266k468\(1\) Most Cited Cases](#)

Mortgagee was entitled to the appointment of receiver upon mortgagor's default without proving necessity for appointment where mortgage covenant mandated appointment of receiver upon default. [McKinney's Real Property Law § 254, subd. 10.](#)

[4] Mortgages  471

[266k471 Most Cited Cases](#)

Under mandatory language of mortgage covenant, mortgagees were entitled to relief expanding powers

of receiver of rents in order to adequately protect subject property during foreclosure process. [McKinney's Real Property Law § 254, subd. 10.](#) ****698** Begos & Horgan, L.L.P., Bronxville, N.Y. ([Patrick W. Begos](#) of counsel), for appellants.

Finkel Goldstein Berzow Rosenbloom & Nash, L.L.P., New York, N.Y. (Kevin J. Nash and [Harvey L. Goldstein](#) of counsel), for plaintiffs-respondents.

[C. Raymond Nelson](#), Douglaston, N.Y., for defendants-respondents.

****699** [SONDRA MILLER](#), J.P., [CORNELIUS J. O'BRIEN](#), [DAVID S. RITTER](#) and [FRED T. SANTUCCI](#), JJ.

MEMORANDUM BY THE COURT.

***613** In an action to foreclose three mortgages on certain real property, the plaintiffs Bernard Stein, Robert Stein, Lynn Igel, and Peggy Stein appeal from so much of an order of the Supreme Court, Kings County (Dowd, J.), dated February 27, 1998, as (1) denied their motion to permit the receiver of rents to employ counsel and a managing agent, (2) upon granting their application for a substitution of counsel, determined that no attorney-client relationship existed between them and Finkel Goldstein Berzow & Rosenbloom ***614** as of August 16, 1996, and (3) granted the cross motion of the defendant I.J. & J. Management Corp. to vacate two prior orders of the same court dated November 18, 1996, and May 19, 1997, which appointed a receiver and substitute receiver of rents, respectively.

ORDERED that the appeal from so much of the order as, upon granting the appellants' application for a substitution of counsel, determined that no attorney-client relationship existed between them and Finkel Goldstein Berzow & Rosenbloom as of August 16, 1996, is dismissed; and it is further,

ORDERED that the order is reversed insofar as reviewed, the motion is granted, and the cross motion is denied; and it is further,

ORDERED that the appellants are awarded one bill of costs, payable by the defendants-respondents.

[\[1\]\[2\]](#) The appeal from so much of the order as, upon

granting the appellants' application for a substitution of counsel, determined that no attorney-client relationship existed between them and Finkel Goldstein Berzow & Rosenbloom as of August 16, 1996, must be dismissed, as findings of fact are not independently appealable (see, [Matter of County of Westchester v. O'Neill](#), 191 A.D.2d 556, 594 N.Y.S.2d 814; [Benedetto v. O'Grady](#), 10 A.D.2d 628, 196 N.Y.S.2d 319). The appellants do not request vacatur or modification of any decretal provision of the order appealed from regarding this specific issue, nor have they alleged that any such vacatur or modification or any other corrective measure would be warranted in the event that this court were to agree with their argument. Therefore, their appeal from that part of the order must be dismissed.

[3] The defendants-respondents clearly defaulted under the terms of the mortgage agreements and were admittedly in arrears on taxes and water and sewer charges. The mortgage agreements at issue each contain a covenant which mandates the appointment of a receiver upon default. Accordingly, the mortgagee was entitled to the appointment of a receiver regardless of proving the necessity for the appointment (see, [Real Property Law § 254\[10\]](#); [Febbraro v. Febbraro](#), 70 A.D.2d 584, 416 N.Y.S.2d 59).

[4] Although a court of equity may deny or vacate the appointment of a receiver under appropriate circumstances (see, [Clinton Capital Corp. v. One Tiffany Place Developers](#), 112 A.D.2d 911, 492 N.Y.S.2d 427; [Febbraro v. Febbraro](#), *supra*; [Home Title Ins. Co. v. Isaac Scherman Holding Corp.](#), 240 App.Div. 851, 267 N.Y.S. 84), it was an improvident exercise of discretion for the court to vacate the prior orders of appointment upon this record. Moreover, based on this record and the mandatory language of the mortgage covenant, the Supreme Court should have granted the appellants' motion to *615 expand the powers of the substitute receiver in order to adequately protect the subject property (see, [Real Property Law § 254\[10\]](#)).

260 A.D.2d 613, 688 N.Y.S.2d 698, 1999 N.Y. Slip Op. 03746

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