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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Charles Edward Ramos** PART **53**

Index Number : 601562/2005
WELLS FARGO BANK, N.A.
vs
ZURICH AMERICAN INSURANCE
Sequence Number : 003
SJ

EX NO. _____
TION DATE _____
TION SEQ. NO. _____
TION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/23/06

CHARLES E. RAMOS J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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WELLS FARGO BANK, N.A. (f/k/a Wells Fargo Bank Minnesota, N.A., successor by merger to and f/k/a Norwest Bank Minnesota, National Association), as Trustee for the registered holders of DLJ Commercial Mortgage Corp., Commercial Pass-Through Certificates, Series 1998-CF2,

Plaintiff,

-against- Index No.601562/05

ZURICH AMERICAN INSURANCE COMPANY, successor to Kemper Environmental, Ltd. and LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendant.

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Charles Edward Ramos, J.S.C.:

Motion sequence numbers 003 and 004 are consolidated herein for disposition. This matter raises an insurance coverage question in relation to a transaction in which plaintiff allegedly became assignee of a claims-made environmental damages policy that was taken out to secure the value of certain properties, which may have been at risk for environmental pollution, and were pledged as collateral for a loan.

In motion sequence number 003, plaintiff Wells Fargo Bank, N.A., as Trustee for the registered holders of DLJ Commercial Mortgage Corp., Commercial Pass-Through Certificates, Series 1998-CF2 (REMIC Trust[1]) moves, pursuant to CPLR 3212, for summary judgment as to liability on its first cause of action for breach of a contract to insure, for an order directing an

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[1] Plaintiff is a Real Estate Mortgage Investment Conduit (REMIC) as defined under Internal Revenue Code §860D.

immediate trial of damages under the first cause of action, and, under the second cause of action, for a declaration of entitlement to coverage under that insurance policy.

In motion sequence number 004, plaintiff moves for an order: (i) striking the affidavit of Karen Lubovinsky (the Lubovinsky Affidavit) submitted in opposition to REMIC Trust's motion for summary judgment; or (in the alternative) (ii) compelling defendant to produce Lubovinsky for further deposition, with costs, including reasonable attorneys' fees to be borne by Lumbermens. Defendant Zurich American Insurance Company is the successor to Kemper Environmental, Ltd. and Lumbermens Mutual Casualty Company (Lumbermens)

BACKGROUND

On May 14, 1998, Kemper Environmental Ltd. (Kemper) countersigned a claims-made insurance policy covering creditor reimbursement for environmental damages (number 4LS001084, hereinafter the Policy) with Convenience Mortgage Corp. (Convenience). Convenience and its successors or assigns were named as the insured.

Convenience was the underwriter for a loan (the Loan or Loan Agreement), in the amount of $8.7 million, made by Column Financial, Inc. (Column) to Solomon Partners Inc. and Run In Food Stores #2, Inc. (collectively, the Borrowers). The Loan was secured by sixteen properties (the Mortgaged Property), that were pledged as collateral for the Loan. See Slahor Affidavit, Exhibit 2, Mortgage (hereinafter the Mortgage). The Mortgaged

Property consisted of gas stations/convenience stores in the Tampa, Florida area. The Policy was apparently taken out to insure that in the event of a default, the value of the Mortgaged Property, if adversely affected by environmental pollution, would remain sufficient to secure the Loan.

As part of a securitization under a Pooling and Service Agreement, dated December 1, 1998 (the PSA), involving DLJ Commercial Mortgage Corp. (DLJ), Column assigned the Loan through DLJ to the REMIC Trust, plaintiff in this matter. The PSA identifies non-party ORIX Capital Markets, LLC (ORIX) as Special Servicer of the REMIC Trust.

The Borrowers failed to make May, June, July, and August 2002 payments on the Loan. The Policy states that a default "means any occurrence which legally permits the INSURED to take exclusive possession of any real estate pledged by mortgagor as collateral for the COVERED LOAN." Slahor Affidavit, Exhibit 1, Policy, at 3. Among other potential occurrences, under the Loan Agreement, Borrower's failure to make payments within five calendar days after the due date constitutes an "Event of Default." Slahor Affidavit, Exhibit 15, Loan Agreement, at ¶5.1(a)(i).

The Mortgage provided that an Event of Default would, at the option of the mortgagee (i.e. Column), subject the Mortgaged Property to foreclosure. See Mortgage, §V.1. After the default, ORIX, in its capacity as Special Servicer of the REMIC Trust, gave notice to Kemper of the potential triggering of the Policy,

and began foreclosure proceedings. Environmental site assessments were conducted in connection with the foreclosure. Those assessments revealed that the Mortgaged Property had been affected by the releases from on-site underground storage tanks in alleged excess of applicable regulatory limitations, as determined by the Florida Department of Environmental Protection. On August 26, 2002, ORIX made a claim as successor to the Policy.

The parties agree that the Policy provides coverage for "Collateral Value Loss" resulting from the existence of an Event of Default coupled with the presence of a "Pollution Condition." Thus, the party having an insurable interest in the Mortgaged Property would be entitled to a consideration of coverage under the Policy from Lumbermens.

However, Lumbermens argues that the Policy has not been triggered because the Policy was issued to Convenience, not Column, and Convenience was the party that agreed to issue the Loan to the Borrowers in the first place. Lumbermens maintains that as Convenience never issued any loan whatsoever to Borrowers, but only served as underwriter to the Loan Agreement, the Policy was void from the outset, because Convenience lacked an insurable interest in the Policy. Moreover, Lumbermens asserts that REMIC Trust is not a successor or assignee of Convenience under the Policy, but a successor to a stranger to the Policy, namely, Column, and coverage is not required. Finally, Lumbermens argues that the Policy contains a clause requiring written consent to any assignment, and as that consent

was never given, the Policy is not in effect on behalf of REMIC Trust.

REMIC Trust argues that Convenience, as an underwriter, had an insurable interest in the Policy, and that REMIC Trust, as an assignee of that interest, is entitled to coverage. In addition, REMIC Trust notes that on February 5, 2004, Kemper issued Endorsement No. 16 of the assignment of the Policy (see Slahor Affidavit, Exhibit 30, hereinafter Endorsement 16), in which it acknowledged the assignment of the Policy from Convenience to Column, from Column to DLJ, and from DLJ to Wells Fargo (i.e. REMIC Trust), and established December 17, 2003 as the effective date of the assignee interests.

As of May 4, 2004, Kemper issued Endorsement No. 16a, modifying the effective date of Endorsement 16 (see Slahor Affidavit, Exhibit 12, hereinafter Endorsement 16a) to retroactively provide coverage from the second day of the policy period (April 21, 1998), and again acknowledging the chain of assignment of the Policy from Convenience to REMIC Trust.

REMIC Trust maintains that Endorsement 16a estops Lumbermens from asserting the invalidity of the assignment, and, in any event, REMIC Trust has detrimentally relied upon the recognition of the assignment by failing to pursue a breach of contract action against Column.

Lumbermens maintains that REMIC Trust cannot become an insured after the occurrence for which it seeks insurance. Thus, with regard to Endorsement 16a, Lumbermens asserts that since

Convenience never had an insurable interest in the Mortgaged Property, the purported assignment, in fact, assigned no rights at all to REMIC Trust. With regard to REMIC Trust's allegation that it detrimentally relied upon Endorsement 16a, Lumbermens convincingly observes that a breach of contract cause of action against Column is not barred by the statute of limitations, but is still timely, so any forbearance to sue in reliance upon the acknowledgment of the assignment was, and is, not detrimental.

In opposition to REMIC Trust's motion for summary judgment, Lumbermens has submitted the Rule 19-a Statement of Controverted Facts and Additional Material Facts of Karen Lubovinsky (the 19-a Statement). Lubovinsky is a former claims director for, and currently of counsel to, Kemper.

REMIC Trust moves to strike the 19-a Statement because Lubovinsky was responsible for the claim in this matter, and investigating whether coverage existed. At her deposition, when questioned regarding her communications with Weldon Omori, the Kemper employee who issued Endorsement 16a to the Policy, Lumbermens' counsel asserted "attorney-client privilege" and instructed her not to answer any questions with regard to her investigation and contacts with the Kemper underwriting and claims departments. In addition, Lumbermens' counsel asserted attorney-client privilege as to Lubovinsky's investigation and communication with Kemper employee Mary Kay Reardon.

Summary judgment is governed by CPLR 3212. Under subsection [b] REMIC Trust must show that there is no defense to the causes

of action for breach of the Policy and for a declaration that REMIC Trust is entitled to coverage under it. To do so, REMIC Trust must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957).

If this prima facie showing is made, the burden shifts to Lumbermens to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. Zuckerman v City of New York, 49 NY2d at 562. Further, on the motion for summary judgment. Lumbermens is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties. Myers v Fir Cab Corp., 64 NY2d 806 (1985).

ANALYSIS

Both parties devote considerable argumentation to the question of whether Convenience had an insurable interest in the Mortgaged Property. Lumbermens, largely citing to cases that involve life insurance, maintains that "... policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction - are void, as against public policy." Connecticut Mut. Life Ins. Co. v Schaefer, 94 US 457, 460 (1876); see also Ruse v Mutual Ben. Life

Ins. Co., 23 NY 516, 523 (1861).

Indeed, Insurance Law §3401 provides that "[n]o contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured." See also Stainless, Inc. v Employers Fire Ins. Co., 69 AD2d 27 (1st Dept 1979), affd 49 NY2d 924 (1980) (policy on property wherein insured has no interest or title is void).

Generally, an insurable interest is defined broadly, as any lawful and substantial economic interest in the safety or preservation of property from loss, destruction, or pecuniary damage. See Insurance Law §3401; Scarola v Insurance Co. of N. Am., 31 NY2d 411, 412 (1972) Stainless, Inc., 69 AD2d at 31.

On its motion for summary judgment, REMIC Trust looks to the underwriting fee paid to Convenience to demonstrate that Convenience had an insurable interest in the Policy. The court concurs. The Policy became effective on April 20, 1998, and the closing on the Loan took place on April 21, 1998. Any loss, destruction, or pecuniary damage to the Mortgaged Property may have caused the cancellation of the closing, and eliminated Convenience's underwriting fee. Convenience had no manifest interest in the loss or destruction of the Mortgaged Property. See Connecticut Mut. Life Ins. Co., 94 US at 460.

Rather, Convenience had a material interest in the Mortgaged Property retaining its value; that interest was sufficient to

negative the idea of speculation, and, ergo, sufficient to demonstrate that the interest was an insurable one. See Scarola, 31 NY2d at 412; Sturm v Atlantic Mut. Ins. Co., 63 NY 77, 80 (1875); compare New England Mut. Life Ins. Co. v Caruso, 73 NY2d 74, 78 (1989) (setting forth standard with respect to life insurance).

Convenience having an insurable interest is not, however, sufficient cause to mandate coverage for REMIC Trust. Notwithstanding, Lumbermens is required to provide coverage because: (i) Lumbermens issued a valid and enforceable endorsement under the Policy; (ii) REMIC Trust, as a party with an interest in the Mortgaged Property is entitled, in its own right, to coverage; and (iii) Lumbermens is estopped from denying that coverage.

The Policy states that it is issued in reliance upon the truth of the Declarations and applications, and that the Policy "embodies all agreements existing between the INSURED and the Company ...." As such, Lumbermens' arguments concerning Convenience's alleged promise to become the issuer of the Loan are specious: Lumbermens has not identified any portion of the Policy that even mentions any such promise.

In any event, Endorsement 16a, which Lumbermens admittedly considered and elected to issue, names REMIC Trust as an additional insured. The Policy states that it "applies ... as if each INSURED were the only INSURED; and separately to each INSURED against whom a CLAIM is made or suit is brought." REMIC

Trust is listed as an insured; the Policy, by its own terms, applies to REMIC Trust. US Fid. & Guar. Co. v Annunziata, 67 NY2d 229, 232 (1986) (provisions of policy must be given their plain and ordinary meaning).

Moreover, as the Policy is a claims-made policy, it covers any "liability for injury or damage that the insured is legally obligated to pay (including injury or damage occurring prior to the effective date of the policy, but subsequent to the retroactive date, if any), arising out of incidents, acts or omissions, as long as the claim is first made during the policy period or any extended reporting period." 11 NYCRR §73.1(a) (emphasis added).

Therefore Lumbermens' argument that the Policy cannot contemplate retroactive coverage for the insured is obviated by statute. That statute, in 11 NYCRR §73.1(b), goes on to define "retroactive date," thus explicitly addressing the possibility that the insurer and insured may agree upon a date prior to the effective date of the policy from which coverage may begin. Thus, even if REMIC Trust had no coverage before Endorsement 16a, there is no public policy against coverage for REMIC Trust from the date listed in Endorsement 16a. See e.g. Joseph R. Loring & Assoc., Inc. v Continental Cas. Co., 56 NY2d 848 (1982) (clause must violate statutory mandate or prohibition, or regulation of Superintendent of Insurance, to be deemed violative of public policy).

In addition, REMIC Trust is entitled to coverage in its own

right. Policies of insurance are to be construed liberally in favor of the insured and strictly against the insurer. US Fid. & Guar. Co., 67 NY2d at 232; Government Emp. Ins. Co. v Kliqler, 42 NY2d 863, 864 (1977). As noted above, the Policy "applies ... as if each INSURED were the only INSURED; and separately to each INSURED against whom a CLAIM is made or suit is brought."

It is settled law that "[i]f the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, ... [coverage] will be held to apply to the interests intended to be covered by it, and they will be deemed to be comprehended within it who were in the mind of the parties when the contract was made." Clinton v Hope Ins. Co., 45 NY 454, 460 (1871) (citations omitted).

Here, all parties intended that the Mortgaged Property would be insured for the benefit of the issuer of the Loan. While Lumbermens may argue that Convenience promised to issue the Loan and never did, Lumbermens cannot, under the law, be heard to say that they issued the Policy and accepted premiums without the intention of covering the interests applicable to the Mortgaged Property. Those interests were identified by Lumbermens itself through the issuance of Endorsement 16a. As such, those interests should be covered. Compare Howell v Globe & Rutgers Fire Ins. Co., 133 Misc 193, 196 (Sup Ct, NY County 1928) (where insurer knows that the insured intends interests other than his own to be covered, coverage is appropriate).

This is a proper conclusion because "[a]n insurer undertakes

a separate and distinct obligation to the various insured parties, whether named as the principal insured or as an additional insured." BMW Fin. Servs. NA, Inc. v Hassan, 273 AD2d 428, 429 (2nd Dept 2000)(citations omitted); see also Morgan v Greater N.Y. Taxpayers Mut. Ins. Assn., 305 NY 243, 248-249 (1953) (establishing "Morgan Rule," that ordinary meaning is to be applied to statement of additional insured, and that insurer undertakes individual and separate obligations to each additional insured).

Lumbermens is equitably estopped from denying coverage to REMIC Trust. Lumbermens accepted and retained premiums for covering the Mortgaged Property, and ratified the existence of coverage by issuing Endorsement 16a, despite knowledge that the Policy had been assigned without Lumbermens' permission. In equity then, Lumbermens should be estopped from altogether disclaiming coverage. See Bible v John Hancock Mut. Life Ins. Co. of Boston, Mass., 256 NY 458, 462 (1931) (accepting premiums with knowledge of existing breach works an estoppel against the insurer); Continental Ins. Co. v Helmsley Enters., Inc., 211 AD2d 589, 589 (1st Dept 1995) ("[w]here an insurer accepts premiums after learning of an event allowing for cancellation of the policy, the insurer has waived the right to cancel or rescind"); McNaught v Equitable Life Assur. Socy. of United States, 136 App Div 774, 780 (2nd Dept 1910) (retention of benefits under a contract ratifies it).

REMIC Trust has made a prima facie showing of entitlement to

coverage under the Policy and that Lumbermens' defenses are without merit. Lumbermens has failed to raise any issues of material fact requiring trial of the matter. Winegrad, 64 NY2d at 853. As such REMIC Trust is entitled to summary judgment as to liability on the first cause of action for breach of the Policy, and on the second cause of action for a declaration that coverage is required by the terms of the Policy.

As the Court did not rely upon the Lubovinsky Affidavit to determine motion sequence number 003, the application to strike the 19-a Statement is denied as moot.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Wells Fargo Bank, N.A., as Trustee for the registered holders of DLJ Commercial Mortgage Corp., Commercial Pass-Through Certificates, Series 1998-CF2, for summary judgment as to liability on its first cause of action for breach of contract is granted; and it is further

ORDERED that the motion for an order directing an immediate trial of damages under the first cause of action is granted, and an assessment of damages against defendant Zurich American Insurance Company, successor to Kemper Environmental, Ltd. and Lumbermens Mutual Casualty Company is directed; and it is further

ORDERED that within 60 days from the date hereof, a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate

trial calendar for the assessment hereinabove directed; and it is further

ORDERED that if the plaintiff fails to comply with the immediately preceding paragraph, the action will be dismissed; and it is further

ORDERED that the motion of plaintiff for a declaration of entitlement to coverage under the Creditor Reimbursement for Environmental Damages Insurance Policy (number 4LS001084) is granted to the extent that it is hereby:

ADJUDGED and **DECLARED** that plaintiff Wells Fargo Bank, N.A., as Trustee for the registered holders of DLJ Commercial Mortgage Corp., Commercial Pass-Through Certificates, Series 1998-CF2 is entitled to such coverage; and it is further

ORDERED that the motion of defendants for an order striking the affidavit of Karen Lubovinsky or and compelling her to attend further deposition (motion sequence number 004) is denied as moot.

Dated: May 23, 2006

CHARLES E. RAMOS, J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Charles Edward Ramos** PART **53**

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SUPREME COURT OF THE STATE OF NEW YORK
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Motion sequence numbers 003 and 004 are consolidated herein for disposition. This matter raises an insurance coverage question in relation to a transaction in which plaintiff allegedly became assignee of a claims-made environmental damages policy that was taken out to secure the value of certain properties, which may have been at risk for environmental pollution, and were pledged as collateral for a loan.

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BACKGROUND

On May 14, 1998, Kemper Environmental Ltd. (Kemper) countersigned a claims-made insurance policy covering creditor reimbursement for environmental damages (number 4LS001084, hereinafter the Policy) with Convenience Mortgage Corp. (Convenience). Convenience and its successors or assigns were named as the insured.

Convenience was the underwriter for a loan (the Loan or Loan Agreement), in the amount of $8.7 million, made by Column Financial, Inc. (Column) to Solomon Partners Inc. and Run In Food Stores #2, Inc. (collectively, the Borrowers). The Loan was secured by sixteen properties (the Mortgaged Property), that were pledged as collateral for the Loan. See Slahor Affidavit, Exhibit 2, Mortgage (hereinafter the Mortgage). The Mortgaged

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As part of a securitization under a Pooling and Service Agreement, dated December 1, 1998 (the PSA), involving DLJ Commercial Mortgage Corp. (DLJ), Column assigned the Loan through DLJ to the REMIC Trust, plaintiff in this matter. The PSA identifies non-party ORIX Capital Markets, LLC (ORIX) as Special Servicer of the REMIC Trust.

The Borrowers failed to make May, June, July, and August 2002 payments on the Loan. The Policy states that a default "means any occurrence which legally permits the INSURED to take exclusive possession of any real estate pledged by mortgagor as collateral for the COVERED LOAN." Slahor Affidavit, Exhibit 1, Policy, at 3. Among other potential occurrences, under the Loan Agreement, Borrower's failure to make payments within five calendar days after the due date constitutes an "Event of Default." Slahor Affidavit, Exhibit 15, Loan Agreement, at ¶5.1(a)(i).

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and began foreclosure proceedings. Environmental site assessments were conducted in connection with the foreclosure. Those assessments revealed that the Mortgaged Property had been affected by the releases from on-site underground storage tanks in alleged excess of applicable regulatory limitations, as determined by the Florida Department of Environmental Protection. On August 26, 2002, ORIX made a claim as successor to the Policy.

The parties agree that the Policy provides coverage for "Collateral Value Loss" resulting from the existence of an Event of Default coupled with the presence of a "Pollution Condition." Thus, the party having an insurable interest in the Mortgaged Property would be entitled to a consideration of coverage under the Policy from Lumbermens.

However, Lumbermens argues that the Policy has not been triggered because the Policy was issued to Convenience, not Column, and Convenience was the party that agreed to issue the Loan to the Borrowers in the first place. Lumbermens maintains that as Convenience never issued any loan whatsoever to Borrowers, but only served as underwriter to the Loan Agreement, the Policy was void from the outset, because Convenience lacked an insurable interest in the Policy. Moreover, Lumbermens asserts that REMIC Trust is not a successor or assignee of Convenience under the Policy, but a successor to a stranger to the Policy, namely, Column, and coverage is not required. Finally, Lumbermens argues that the Policy contains a clause requiring written consent to any assignment, and as that consent

was never given, the Policy is not in effect on behalf of REMIC Trust.

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REMIC Trust moves to strike the 19-a Statement because Lubovinsky was responsible for the claim in this matter, and investigating whether coverage existed. At her deposition, when questioned regarding her communications with Weldon Omori, the Kemper employee who issued Endorsement 16a to the Policy, Lumbermens' counsel asserted "attorney-client privilege" and instructed her not to answer any questions with regard to her investigation and contacts with the Kemper underwriting and claims departments. In addition, Lumbermens' counsel asserted attorney-client privilege as to Lubovinsky's investigation and communication with Kemper employee Mary Kay Reardon.

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ANALYSIS

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Indeed, Insurance Law §3401 provides that "[n]o contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured." See also Stainless, Inc. v Employers Fire Ins. Co., 69 AD2d 27 (1st Dept 1979), affd 49 NY2d 924 (1980) (policy on property wherein insured has no interest or title is void).

Generally, an insurable interest is defined broadly, as any lawful and substantial economic interest in the safety or preservation of property from loss, destruction, or pecuniary damage. See Insurance Law §3401; Scarola v Insurance Co. of N. Am., 31 NY2d 411, 412 (1972) Stainless, Inc., 69 AD2d at 31.

On its motion for summary judgment, REMIC Trust looks to the underwriting fee paid to Convenience to demonstrate that Convenience had an insurable interest in the Policy. The court concurs. The Policy became effective on April 20, 1998, and the closing on the Loan took place on April 21, 1998. Any loss, destruction, or pecuniary damage to the Mortgaged Property may have caused the cancellation of the closing, and eliminated Convenience's underwriting fee. Convenience had no manifest interest in the loss or destruction of the Mortgaged Property. See Connecticut Mut. Life Ins. Co., 94 US at 460.

Rather, Convenience had a material interest in the Mortgaged Property retaining its value; that interest was sufficient to

negative the idea of speculation, and, ergo, sufficient to demonstrate that the interest was an insurable one. See Scarola, 31 NY2d at 412; Sturm v Atlantic Mut. Ins. Co., 63 NY 77, 80 (1875); compare New England Mut. Life Ins. Co. v Caruso, 73 NY2d 74, 78 (1989) (setting forth standard with respect to life insurance).

Convenience having an insurable interest is not, however, sufficient cause to mandate coverage for REMIC Trust. Notwithstanding, Lumbermens is required to provide coverage because: (i) Lumbermens issued a valid and enforceable endorsement under the Policy; (ii) REMIC Trust, as a party with an interest in the Mortgaged Property is entitled, in its own right, to coverage; and (iii) Lumbermens is estopped from denying that coverage.

The Policy states that it is issued in reliance upon the truth of the Declarations and applications, and that the Policy "embodies all agreements existing between the INSURED and the Company ...." As such, Lumbermens' arguments concerning Convenience's alleged promise to become the issuer of the Loan are specious: Lumbermens has not identified any portion of the Policy that even mentions any such promise.

In any event, Endorsement 16a, which Lumbermens admittedly considered and elected to issue, names REMIC Trust as an additional insured. The Policy states that it "applies ... as if each INSURED were the only INSURED; and separately to each INSURED against whom a CLAIM is made or suit is brought." REMIC

Trust is listed as an insured; the Policy, by its own terms, applies to REMIC Trust. US Fid. & Guar. Co. v Annunziata, 67 NY2d 229, 232 (1986) (provisions of policy must be given their plain and ordinary meaning).

Moreover, as the Policy is a claims-made policy, it covers any "liability for injury or damage that the insured is legally obligated to pay (including injury or damage occurring prior to the effective date of the policy, but subsequent to the retroactive date, if any), arising out of incidents, acts or omissions, as long as the claim is first made during the policy period or any extended reporting period." 11 NYCRR §73.1(a) (emphasis added).

Therefore Lumbermens' argument that the Policy cannot contemplate retroactive coverage for the insured is obviated by statute. That statute, in 11 NYCRR §73.1(b), goes on to define "retroactive date," thus explicitly addressing the possibility that the insurer and insured may agree upon a date prior to the effective date of the policy from which coverage may begin. Thus, even if REMIC Trust had no coverage before Endorsement 16a, there is no public policy against coverage for REMIC Trust from the date listed in Endorsement 16a. See e.g. Joseph R. Loring & Assoc., Inc. v Continental Cas. Co., 56 NY2d 848 (1982) (clause must violate statutory mandate or prohibition, or regulation of Superintendent of Insurance, to be deemed violative of public policy).

In addition, REMIC Trust is entitled to coverage in its own

right. Policies of insurance are to be construed liberally in favor of the insured and strictly against the insurer. US Fid. & Guar. Co., 67 NY2d at 232; Government Emp. Ins. Co. v Kligler, 42 NY2d 863, 864 (1977). As noted above, the Policy "applies ... as if each INSURED were the only INSURED; and separately to each INSURED against whom a CLAIM is made or suit is brought."

It is settled law that "[i]f the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, ... [coverage] will be held to apply to the interests intended to be covered by it, and they will be deemed to be comprehended within it who were in the mind of the parties when the contract was made." Clinton v Hope Ins. Co., 45 NY 454, 460 (1871) (citations omitted).

Here, all parties intended that the Mortgaged Property would be insured for the benefit of the issuer of the Loan. While Lumbermens may argue that Convenience promised to issue the Loan and never did, Lumbermens cannot, under the law, be heard to say that they issued the Policy and accepted premiums without the intention of covering the interests applicable to the Mortgaged Property. Those interests were identified by Lumbermens itself through the issuance of Endorsement 16a. As such, those interests should be covered. Compare Howell v Globe & Rutgers Fire Ins. Co., 133 Misc 193, 196 (Sup Ct, NY County 1928) (where insurer knows that the insured intends interests other than his own to be covered, coverage is appropriate).

This is a proper conclusion because "[a]n insurer undertakes

a separate and distinct obligation to the various insured parties, whether named as the principal insured or as an additional insured." BMW Fin. Servs. NA, Inc. v Hassan, 273 AD2d 428, 429 (2nd Dept 2000)(citations omitted); see also Morgan v Greater N.Y. Taxpayers Mut. Ins. Assn., 305 NY 243, 248-249 (1953) (establishing "Morgan Rule," that ordinary meaning is to be applied to statement of additional insured, and that insurer undertakes individual and separate obligations to each additional insured).

Lumbermens is equitably estopped from denying coverage to REMIC Trust. Lumbermens accepted and retained premiums for covering the Mortgaged Property, and ratified the existence of coverage by issuing Endorsement 16a, despite knowledge that the Policy had been assigned without Lumbermens' permission. In equity then, Lumbermens should be estopped from altogether disclaiming coverage. See Bible v John Hancock Mut. Life Ins. Co. of Boston, Mass., 256 NY 458, 462 (1931) (accepting premiums with knowledge of existing breach works an estoppel against the insurer); Continental Ins. Co. v Helmsley Enters., Inc., 211 AD2d 589, 589 (1st Dept 1995) ("[w]here an insurer accepts premiums after learning of an event allowing for cancellation of the policy, the insurer has waived the right to cancel or rescind"); McNaught v Equitable Life Assur. Socy. of United States, 136 App Div 774, 780 (2nd Dept 1910) (retention of benefits under a contract ratifies it).

REMIC Trust has made a prima facie showing of entitlement to

coverage under the Policy and that Lumbermens' defenses are without merit. Lumbermens has failed to raise any issues of material fact requiring trial of the matter. Winegrad, 64 NY2d at 853. As such REMIC Trust is entitled to summary judgment as to liability on the first cause of action for breach of the Policy, and on the second cause of action for a declaration that coverage is required by the terms of the Policy.

As the Court did not rely upon the Lubovinsky Affidavit to determine motion sequence number 003, the application to strike the 19-a Statement is denied as moot.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Wells Fargo Bank, N.A., as Trustee for the registered holders of DLJ Commercial Mortgage Corp., Commercial Pass-Through Certificates, Series 1998-CF2, for summary judgment as to liability on its first cause of action for breach of contract is granted; and it is further

ORDERED that the motion for an order directing an immediate trial of damages under the first cause of action is granted, and an assessment of damages against defendant Zurich American Insurance Company, successor to Kemper Environmental, Ltd. and Lumbermens Mutual Casualty Company is directed; and it is further

ORDERED that within 60 days from the date hereof, a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate

trial calendar for the assessment hereinabove directed; and it is further

ORDERED that if the plaintiff fails to comply with the immediately preceding paragraph, the action will be dismissed; and it is further

ORDERED that the motion of plaintiff for a declaration of entitlement to coverage under the Creditor Reimbursement for Environmental Damages Insurance Policy (number 4LS001084) is granted to the extent that it is hereby:

ADJUDGED and **DECLARED** that plaintiff Wells Fargo Bank, N.A., as Trustee for the registered holders of DLJ Commercial Mortgage Corp., Commercial Pass-Through Certificates, Series 1998-CF2 is entitled to such coverage; and it is further

ORDERED that the motion of defendants for an order striking the affidavit of Karen Lubovinsky or and compelling her to attend further deposition (motion sequence number 004) is denied as moot.

Dated: May 23, 2006

CHARLES E. RAMOS,

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.