SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

TWIN HOLDINGS OF DELAWARE LLC, HERALD SQUARE OF DELAWARE LLC and PAUL SOHAYEGH,

Plaintiffs,

-against-

CW CAPITAL, LLC, CW CAPITAL ASSET MANAGEMENT, LLC and OTERA CAPITAL,

Defendants.

INDEX No. 005193/09

MOTION DATE: Sept. 16, 2009
Motion Sequence #001, 003, 004

The following papers read on this motion:

Order to Show Cause..... X
Notice of Motion..... X
Cross-Motion..... X
Affirmation in Support..... X
Reply Affidavit..... X
Memorandum of Law..... XXXXXX
Reply Memorandum of Law..... XXX

This motion, by plaintiffs, for a preliminary injunction is **denied**; and a cross-motion, by defendants, to dismiss the complaint is **granted** in part and **denied** in part; and a motion, by plaintiffs, for leave to file an amended complaint is **granted** upon the conditions described below.

This is an action for breach of a loan agreement. On March 20, 2007, plaintiffs Twin

Holdings of Delaware, LLC and Herald Square of Delaware, LLC entered into a contract to purchase a commercial building located at 29 West 35th Street in Manhattan from defendant CW Capital LLC or its predecessor entity. The purchase price for the building was $30 million. The agreement provided that defendant would extend short term financing for plaintiffs to acquire title and to renovate the property.

A formal loan agreement has not been submitted to the court. Nevertheless, on July 16, 2007, plaintiffs issued a "gap note" in the amount of $13,830,000, payable to CW Capital LLC. On that date, plaintiffs also issued a new promissory note, consolidating the gap note with a series of "original"notes issued by plaintiffs' predecessors in title. According to the terms of the new note, plaintiffs promised to pay CW Capital $29,200,000. In the note, plaintiffs acknowledged that the portion of the loan advanced as of July 16, 2007 was $25,100,000. The note provided that the borrower had the right to receive additional advances in an amount not to exceed $4.1 million. $2 million of the additional advances could be used for debt service payments, and $2.1 million could be used for "tenant improvement and leasing commission obligations."

The note provided for a floating interest rate of 2.1% above the LIBOR rate. While the maturity date of the note was August 9, 2009, the borrower had the option to extend the note for two consecutive one year periods upon payment of an extension fee. If the borrower extended the note, it was also required to provide the lender with funds sufficient to allow the lender to purchase a "replacement interest rate cap agreement."

The note provided that the borrower was to comply with certain "minimum performance criteria," i.e. ratios of cash flow to debt service payment. The borrower's cash flow was to be calculated by the lender based upon the "trailing 12 month period." The debt service payment was to be calculated based upon an "8.5% loan constant." For the period August 9, 2008 to February 8, 2009, the ratio of cash flow to debt service was to be .7:1. From February 9, 2009 to August 8, 2009, the ratio was to be .9:1. Beginning August 9, 2009, the ratio was to be 1:1. If the borrower failed to generate sufficient cash flow, it was obligated to make a "balancing prepayment" of principal to maintain the required ratio of cash flow to debt service payment. Upon any prepayment of principal, the borrower was also to pay an "exit fee" of .5%.

The note was guaranteed by plaintiff Paul Sohayegh, a member of Twin Holdings of New York, LLC. In order to secure the indebtedness represented by the note, plaintiffs granted CW Capital a mortgage on the property.

On February 27, 2009, CW Capital wrote to plaintiffs advising them that they had not achieved the required ratio of cash flow to debt service payment as of February 9, 2009. CW Capital calculated the ratio based upon plaintiffs' operating statements for the "trailing 4 month period" ending January 31, 2009. Based upon the income and expense figures shown in those reports, CW Capital determined that plaintiffs had achieved a ratio of only .72:1 and were required to make a balancing prepayment, including exit fee, of $5,203,589. CW Capital further stated that plaintiffs' failure to make the balancing payment by March 6, 2009 would constitute a default on the note. On March 11, 2009, CW Capital transferred the servicing of the loan to a special servicer, defendant CW Capital Asset Management, LLC, based upon plaintiffs' failure to make the required payment.

This action was commenced on May 29, 2009. The plaintiffs allege that the defendants breached the loan agreement by calculating the required ratio based on a 4 month operating period, as opposed to the 12 month period provided by the contract. Plaintiffs assert that defendants breached the loan agreement by calculating the debt service ratio based upon an 8.5% loan constant, rather than an interest rate of LIBOR plus 2.1%; and that the defendants breached the loan agreement by refusing to advance additional sums to reimburse plaintiffs for improvements to the building unless plaintiffs made the demanded balancing payment. Plaintiffs allege that they have expended substantial sums to renovate the building and have succeeded in leasing 9.5 of the 12 floors of commercial space. Plaintiffs allege that because of defendants' wrongful conduct they are unable to continue renovating the building and offering space to prospective tenants.

In their first cause of action, plaintiffs request a judgment of specific performance "directing defendants to acknowledge that the loan is in balance." In the second cause of action, plaintiffs request a declaratory judgment that they have complied with the minimum performance criteria and that defendants failed to provide "adequate notice pursuant to the note." In the third cause of action, plaintiffs seek a permanent injunction, restraining defendants from declaring the loan in default or attempting to recover on the guaranty.

In the fourth cause of action, plaintiffs allege that defendants breached the loan agreement by calculating the debt service ratio based on a 4 month operating period and failing to calculate the ratio based upon a "reasonable interest rate." The fifth cause of action is for breach of the implied covenant of good faith and fair dealing based on defendants' calculation of the debt service ratio and the corresponding balancing prepayment.

The sixth cause of action is for breach of fiduciary duty. Plaintiffs allege that

defendants were under a fiduciary duty to plaintiffs, which they breached by failing to advance additional funds pursuant to the loan agreement. In the seventh cause of action, plaintiffs seek a declaratory judgment that they are "temporarily excused" from performance under the note based on the doctrines of impracticability or frustration. Plaintiffs allege that an "unforeseeable sharp decline in real estate" and the "worldwide financial crisis" make payment of the note impracticable at this time. In the eighth cause of action, plaintiffs allege that defendants have tortiously interfered with its economic and contractual relations with tenants, vendors, and other parties.

Plaintiffs move for a preliminary injunction, prohibiting defendants from declaring the loan in default, and directing defendants to continue funding the loan, during the pendency of the action. Plaintiffs assert that they will suffer irreparable harm if a preliminary injunction is not granted because defendants' declaring the loan in default will impair plaintiffs' ability to market the remaining space in the building.

Defendants cross-move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) on the ground that a defense is founded upon documentary evidence and for failure to state a cause of action. Defendants assert that they correctly calculated the debt service ratio based upon an 8.5% loan constant pursuant to the terms of the contract. Defendants assert that they were required to utilize a 4 month period because plaintiffs did not provide sufficient financial information to calculate cash flow over a full 12 months. Defendants claim that the shorter period gave a more accurate picture of plaintiffs' financial position because the more recent leases resulted in "substantial increases in income" and cash flow.

Defendants argue that plaintiffs' cause of action for breach of the implied covenant of good faith is redundant of their claim for breach of contract; that the conventional business relationship between debtor and creditor does not give rise to a fiduciary obligation; and that a change in market conditions is insufficient to excuse performance on the ground of impracticability or frustration. Defendants assert that plaintiffs' cause of action for tortious interference is insufficient because defendants acted based on their financial interest; and that the complaint should be dismissed as against defendant Otera Capital because it is not the holder of the note. Finally, defendants argue that specific performance, declaratory judgment, and injunctive relief are not appropriate remedies.

Plaintiffs cross move for leave to serve an amended complaint. In the proposed amended pleading, plaintiffs allege that, in addition to the other breaches, defendants breached the loan agreement by failing to apply a 5.5% rate cap which plaintiffs purchased

at a cost of approximately $100,000. The proposed pleading includes a ninth cause of action for fraud in the inducement, in which the plaintiffs allege that they were induced to enter into the loan by defendants' false representations that they would provide the necessary funding to renovate the building. Plaintiffs argue that defendants originally planned to gain the property for themselves and never intended to honor the loan agreement; plaintiffs seek to name two additional defendants, CW Capital Mortgage Securities IV LLC and Cadim Note Inc. These parties have an ownership interest in the loans pursuant to a "participation agreement."

It is a basic contract principle that when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms (***TAG 380 v COMMET 380, Inc.***, 10 NY3d 507, 512-13, 2008). This rule is particularly applicable to real property transactions, where commercial certainty is a paramount concern, and the instrument is negotiated between sophisticated, counseled business people negotiating at arm's length.

The court concludes that the consolidated note is a clear and complete document. Because plaintiffs are sophisticated real estate developers, they must have understood the term "8.5% loan constant" according to its accepted meaning in the industry. Thus, plaintiffs must have understood the term to mean that the unpaid principal balance on the loan would be multiplied by 8.5% to determine the debt service payment. Indeed, plaintiffs do not claim that the term is ambiguous or offer parole evidence as to a contrary meaning.

The parties might have agreed that the debt service ratio would be based upon the actual interest payable during the 12 month operating period rather than a constant percentage of the loan's outstanding balance. However, because the interest rate was variable, it would have been in the borrower's interest to have debt service calculated on a constant basis in a period of rising rates. In any event, the court must enforce the consolidated note according to its terms. Because the note called for debt service to be calculated at a constant rate of 8.5%, defendants did not breach the agreement by calculating the debt service ratio in this manner, regardless of whether the constant is consistent with current rates. Accordingly, the fourth cause of action, alleging breach of contract, is **dismissed** for failure to state a cause of action to the extent that it is based upon defendants' failure to apply a reasonable interest rate in the calculation of the debt service payment.

The court reaches a contrary conclusion with respect to plaintiffs' claim for breach of contract founded on defendants' calculation of cash flow based upon a 4 month operating

period. On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (***AG Capital Funding Partners v. State Street Bank and Trust Co.***, 5 NY3d 582, 591, 2005). Defendants argue that they are excused from calculating cash flow based upon a 12-month period because plaintiffs submitted insufficient financial information and the more recent leases more accurately reflected the profitability of the property. However, for the purposes of this dismissal motion, the court must assume that defendants were not justified in departing from the operating period required by the contract. Thus, the court must assume that plaintiffs provided sufficient information to calculate a 12-month period of cash flow and this information accurately reflected the profitability of the building. Defendants' motion to dismiss the fourth cause of action is **denied** to the extent that plaintiffs' claim of breach of contract is based upon defendants' calculating cash flow, and the debt service ratio, based upon a 4-month operating period.

The implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract (***Moran v Erk***, 11 NY3d 452, 456, 2008). However, the implied obligation is in "aid and furtherance" of the other terms of the contract (***Horn v New York Times***, 100 NY2d 85, 92, 2003). No obligation can be implied which would be inconsistent with other terms of the contractual relationship.

The note requires the lender to calculate cash flow according to "standard CMBS industry" practice in its reasonable discretion. Thus, defendants might have breached the implied covenant of good faith by adopting an overly restrictive definition of "cash flow." However, plaintiffs allege that defendants breached the implied covenant, not with respect to the definition of cash flow, but with respect to the period over which it was calculated. Plaintiffs further allege that defendants breached the implied covenant by calculating the debt service payment based upon a loan constant of 8.5%, rather than a constant more in keeping with prevailing interest rates. The court cannot imply an obligation to calculate cash flow or the debt service payment in a manner inconsistent with the express provision in the contract. Since the manner of calculating these terms is provided by the contract, plaintiffs' claim for breach of the implied covenant is redundant of their claims for breach of contract. Accordingly, defendants' motion to dismiss the fifth cause of action for failure to state a cause of action is **granted**.

The doctrine of frustration of purpose is "a narrow one which does not apply unless the frustration is substantial" (***Crown It Services v Koval-Olsen***, 11 AD3d 263, 1st Dept., 2004). "In order to invoke this defense, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense". The defense of impracticability has been developed to ameliorate the limited applicability of the frustration doctrine.

"Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary" (Restatement 2d of Contracts § 261; ***Hester v District of Columbia***, 505 F.3d 1283, 1286, D.C. Cir. 2007). Plaintiffs allege that the decline in the real estate market, a factor outside their control, has made it more difficult to lease out space in their building. The complaint may also be read as alleging that the "financial crisis" has made it more difficult for plaintiffs to obtain long term, fixed rate financing in order to pay off the loan made by defendants.

However, because the parties are sophisticated entities with knowledge of the real estate industry, they clearly understood the cyclical nature of the real estate market and could not have assumed that demand for space would not decline. Moreover, they were certainly aware of the possibility of volatility in the financial markets and could not have assumed that banks would not become unwilling to extend credit. The parties' awareness of fluctuations in the financial markets is confirmed by the fact that the note carried a variable interest rate. Thus, the non-occurrence of a decline in the real estate market and tight credit was clearly not a basic assumption on which the loan was made. The seventh cause of action, seeking a declaration that plaintiffs are temporarily excused from performance on the ground of impracticability or frustration, is **dismissed** for failure to state a cause of action.

While an injunction is a remedy, contrary to defendants' position, a request for an injunction may be stated in the complaint as a separate cause of action (CPLR 3014; See also ***Rainbow Coop v New York***, 63 AD3d 415, 1st Dept., 2009). In the third cause of action, plaintiffs seek a permanent injunction, restraining defendants from declaring the loan in default or attempting to recover on the guaranty.

A commercial tenant who has received notice of default from its landlord and whose lease has not terminated may request a preliminary injunction, staying the cure period provided by the lease, while the merits of the underlying dispute are being litigated

(***Graubard v 600 Third Avenue Assoc.***, 93 NY2d 508, 1999). This type of preliminary injunction is referred to as a *Yellowstone* injunction and is designed to protect the tenant's interest in the leasehold from forfeiture. In theory, a mortgagor who has received notice of default could obtain a similar preliminary injunction, staying a cure period provided by the mortgage, provided an action to foreclose the mortgage has not yet been commenced (See ***Baypoint Mtge Corp. v Crest Premium Real Estate Investments***, 168 Cal. App. 3d 818, 2d AD 1985). However, in the third cause of action, plaintiffs seek not a preliminary injunction, staying a cure period, but a permanent injunction, prohibiting defendants from declaring the loan in default. Such an injunction would render the promissory note unenforceable, regardless of the borrower's failure to comply with the note's terms. Because plaintiffs cannot obtain a permanent injunction prohibiting defendants from declaring the loan in default, defendants' motion to dismiss the third cause of action for failure to state a cause of action is **granted**.

A declaratory judgment action may be an appropriate vehicle for settling justiciable disputes as to contract rights and obligations (***Kalisch-Jarcho v New York***, 72 NY2d 727, 731, 1988). A request for a declaratory judgment is ordinarily premature where a future event affecting the obligations of the contracting parties is uncertain of occurrence and beyond the parties control (***Buller v Goldberg***, 40 AD3d 333, 1st Dept., 2007). A declaratory judgment issued in such circumstances would resemble an advisory opinion. However, declaratory relief is available where the court's judgment will have the immediate and practical effect of influencing the parties' current conduct.

Since plaintiffs seek a declaration that they have complied with the performance criteria specified by the note, there is no future event affecting the parties' obligations. A declaration that the loan is "in balance," and not in default, may be of benefit to plaintiffs in refinancing the loan. Additionally, although the mortgage provides that the lender may declare the debt immediately due upon a transfer of the mortgagor's interest, a declaration that the loan is in balance might assist plaintiffs in selling the property. Thus, a declaration by the court as to whether the loan is in default will have an immediate and practical effect on the parties' current conduct.

Resolution of the issue, of whether the loan is in balance, will depend upon whether plaintiffs provided sufficient information to determine 12 months of cash flow and whether plaintiffs met the performance criteria based upon those figures. Defendants assert that 12 months of cash flow would have produced an even lower ratio. However, giving plaintiffs the benefit of every possible favorable inference, the court must assume that 12 months of

cash flow would have met the performance criteria. In any event, the existence of these factual issues does not preclude the court from issuing a declaratory judgment (McKinney's CPLR Practice Commentary C3001:16). Defendants' motion to dismiss the second cause of action on the ground of a defense founded upon documentary evidence or failure to state a cause of action is **denied**.

In general, specific performance will not be ordered where money damages would be adequate to protect the expectation interest of the injured party (***Sokoloff v Harriman Estates***, 96 NY2d 409, 415, 2001). However, specific performance is a proper remedy where the subject matter of the particular contract is unique and has no established market value. The decision whether to award specific performance rests in the sound discretion of the trial court. The court must consider, among other factors, the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award.

If plaintiffs were able to refinance their loan, their out-of-pocket damages would be readily provable based upon the difference in the interest rate. In that circumstance, the remedy of specific performance would not be available. However, in view of plaintiffs' allegations as to the "worldwide financial crisis," the court must assume that substitute short-term financing cannot be obtained. Since specific performance may be an available remedy, defendants' motion to dismiss the first cause of action on the grounds of a defense founded upon documentary evidence and failure to state a cause of action is **denied**.

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (***EBC I v Goldman Sachs***, 5 NY3d 11, 19, 2005). Such a relationship, necessarily fact-specific, "is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (Id). Generally, where parties have entered into a contract, courts look to that agreement to determine where one of them is under a duty to act for or give advice for the benefit of the other. If the parties do not create their own relationship of higher trust, courts should not ordinarily do it for them. However, it is fundamental that fiduciary liability is not dependent solely upon a contract but results from a fiduciary relationship.

Plaintiffs allege that defendants' "position of control" gave rise to a fiduciary relationship. However, a mere debtor and creditor relationship does not give rise to a fiduciary obligation (***Shisgal v Brown***, 21 AD3d 845, 1st Dept., 2005). Section 8(c) of the

mortgage provides that the borrower shall not enter into a lease of more than 7,800 rentable square feet or for a term longer than five years without the consent of the lender. This provision gives the lender more control over the operation of the building than would ordinarily arise from the debtor-creditor relationship. While a major lease approval provision may give the mortgagee additional security with respect to its investment, such a provision does not give the mortgagee the obligation to act for, or give advice to, the borrower with respect to the loan or the operation of the building (See ***CFSC Capital Corp. v W.J. Bachman Mechanical Sheet Metal***, 247 AD2d 502, 504, 2d Dept., 1998) Defendants' motion to dismiss the sixth cause of action, alleging breach of fiduciary duty, for failure to state a cause of action, is **granted**.

To state a claim of tortious interference with contract, plaintiffs must allege the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages (***White Plains Coat & Apron v Cintas Corp.***, 8 NY3d 422, 426, 2007). In response to such a claim, a defendant may raise the economic interest defense, that it acted to protect its own legal or financial stake in the breaching party's business. The defense may apply where defendant was the breaching party's creditor.

Where there has been no breach of an existing contract, but only interference with prospective contract rights, the plaintiffs must show more culpable conduct on the part of the defendant (***Carvel Corp. v Noonan***, 3 NY3d 182, 190, 2004). Wrongful means includes some degree of "economic pressure," but defendant's conduct must be directed at the third party with whom plaintiff seeks to have a business relationship.

In the eighth cause of action, plaintiffs allege that defendants tortiously interfered with their existing contracts with both tenants and vendors. Plaintiffs allege that defendants were not seeking solely to protect their investment, or "legal stake," in the property but were attempting to obtain plaintiffs' interest. Giving the plaintiffs the benefit of every possible favorable inference, the court must assume that defendants were not acting merely in their economic interest. Defendants' motion to dismiss the eighth cause of action, based on a defense founded on documentary evidence or for failure to state a cause of action, is **denied** to the extent that the claim is based on tortious interference with contract.

The eighth cause of action may also be read as asserting a claim for interference with prospective contract rights in that defendants interfered with plaintiffs' relationships with prospective vendors and tenants. The court reaches a contrary conclusion with respect to

defendants' motion to dismiss plaintiffs' interference with prospective contract rights claim. The wrongful conduct which plaintiffs allege, defendants' calculation of the debt service ratio and balancing prepayment, refusal to fund additional advances, and declaring the loan in default, was all directed to plaintiffs. Plaintiffs do not allege that defendants directed any activity towards prospective vendors or tenants. Accordingly, defendants' motion to dismiss the eighth cause of action for failure to state a cause of action is **granted** to the extent of dismissing plaintiffs' interference with prospective contract rights claim.

Although plaintiffs initially alleged that the note had been assigned to defendant Otera Capital, plaintiffs now assert that Otera is defendants' parent company. In attempting to assert their breach of contract claim against Otera, plaintiffs essentially seek to pierce CW Capital's veil as a limited liability company. In ruling upon the legal sufficiency of this claim, the court will treat the limited liability company as though it were a corporation.

A party seeking to pierce the corporate veil must establish that 1) the owners exercised complete domination of the corporation in respect to the transaction on which the claim is based, and 2) such domination was used to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury (***Gateway I Group v Park Avenue Physicians***, 62 AD2d 141, 145, 2d Dept., 2009). The party seeking to pierce the corporate veil must further establish that the controlling corporation abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court of equity will intervene. A variety of factors are relevant to determining whether the controlling corporation abused the privilege of doing business in corporate form. However, the absence of corporate formalities, inadequate capitalization, and use of corporate funds for personal purposes are among the primary considerations. While the doctrine may be more applicable where the controlled entity is a lessee or other debtor, it will rarely be applicable where the controlled corporation is a lender or other creditor.

Plaintiffs allege no facts suggesting that Otera or CW Capital abused the privilege of doing business in the form of a limited liability company. Accordingly, defendant Otera's motion to dismiss for failure to state a cause of action is **granted** as to plaintiffs' breach of contract claim.

The court reaches a contrary conclusion as to plaintiffs' claim for tortious interference with contract. When one person engages in an intentional tort, another person may be liable for the tort, if he intentionally aids the other person or participates in a scheme to engage in the tortious activity (***Velazquez v. Decaudin***, 49 AD3d 712, 2d Dept., 2008). As the parent

corporation, Otera may have engaged in a scheme to tortiously interfere with plaintiffs' leases, even though the limited liability company form was scrupulously respected. Defendant Otera's motion to dismiss for failure to state a cause of action is **denied** as to plaintiffs' claim for tortious interference with contact.

In order to be entitled to a preliminary injunction, plaintiffs must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 1990). Plaintiffs' only viable claims are breach of contract based on defendants' calculation of the debt service ratio based upon a 4-month operating period and tortious interference with contract. To establish a likelihood of success as to either of those claims, plaintiffs must show that they submitted sufficient information to measure cash flow over 2 months and plaintiffs met the performance criteria on that basis.

Plaintiffs have not produced the financial documents which they submitted to CW Capital or attempted to show how those documents would have been sufficient to calculate cash flow on a 12 month basis. Nor have plaintiffs shown that they met the required ratio of cash flow to debt service payment. Plaintiff Sohayegh asserts in his affidavit that "borrower is current on all of its scheduled payment obligations." The only document which plaintiffs submit to substantiate their claim to having met the required ratio is a "leasing performance report." However, the leasing performance report appears to be merely a projection of income to be earned on six leases, rather than an income statement based upon historical data. Although the report purports to state an "annual income surplus," it does not specify a time period or contain any expense figures. Thus, the court concludes that plaintiffs have failed to show a likelihood of success as to their claims to having submitted the required documents or having achieved the required ratio of cash flow to debt service payment. Plaintiffs' motion for a preliminary injunction, directing defendants to continue funding the loan, is **denied**.

Where, in response to a motion to dismiss, plaintiff amends his complaint as of right, the amendment does not have effect of automatically abating the dismissal motion (***Sage Realty Corp. v Proskauer Rose***, 251 AD2d 35, 1st Dept., 1998). In that circumstance, defendant has the option of applying its motion to the new pleading. In the present case, plaintiffs did not amend as of right, but rather filed a motion for leave to file an amended pleading. CPLR 3025(b) provides that leave to amend shall be freely given upon such terms as may be just. However, if leave is granted, the motion to dismiss should be applied to the amended complaint, at least as to causes of action that were also asserted in the original

pleading.

Accordingly, plaintiffs motion for leave to serve an amended complaint is **granted** to the extent that the proposed amended complaint set forth as exhibit B to plaintiffs' motion is deemed timely filed. However, defendants' motion to dismiss is applied to the amended complaint. The following causes of action in the amended complaint are **dismissed** for failure to state a cause of action: the third cause of action for an injunction, so much of the fourth cause of action as asserts a claim for breach of contract based upon the interest rate used to calculate the debt service payment, the fifth cause of action asserting a claim for breach of the implied covenant of good faith, the sixth cause of action asserting a claim for breach of fiduciary duty, the seventh cause of action seeking a declaration that plaintiffs are temporarily excused from performance based on impracticability or frustration, and so much of the eighth cause of action as asserts a claim for interference with prospective contract rights. Additionally, the remainder of the fourth cause of action is **dismissed** as to defendant Otera Capital for failure to state a cause of action.

Defendants shall serve their answer to the amended complaint, or move to dismiss with respect to the ninth cause of action and with respect to the entire amended complaint as to defendants CW Capital Mortgage Securities IV LLC and Cadim Note Inc., within 15 days from service of a copy of this order with notice of entry.

This shall constitute the decision and order of the court.

A Preliminary Conference has been scheduled for January 12, 2010 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated NOV 09 2009

Stephen A. Bucaria
J.S.C.