At a Term of the Supreme Court held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, Binghamton, New York on November 20, 2009.

PRESENT: HON. FERRIS D. LEBOUS
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT :: COUNTY OF BROOME

In the Matter of the Non-Judicial Foreclosure by Power of Sale Pursuant to RPAPL Article 14 of Premises Located at Section 159.09, Block 2, Lot 9

WELLS FARGO BANK, N.A. SUCCESSOR BY CONSOLIDATION TO WELLS FARGO BANK MINNESOTA, N.A. (F/K/A NORWEST BANK MINNESOTA, NATIONAL ASSOCIATION) AS TRUSTEE FOR THE REGISTERED CERTIFICATEHOLDERS OF SALOMON BROTHERS MORTGAGE SECURITIES VII, INC. COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2000-C1,

Mortgagee,

-against-

TAMARIND HOTELS USA INC.,

Mortgagor.

DECISION & ORDER

Index No.: 2009-1594
RJI No.: 2009-1398-M

APPEARANCES:

COUNSEL FOR PLAINTIFF:

McCARTER & ENGLISH, LLP
BY: PETER KNOB, ESQ., OF COUNSEL
FOUR GATEWAY CENTER
100 MULBERRY STREET
NEWARK, NJ 07102

COUNSEL FOR DEFENDANTS:

COUGHLIN & GERHART, LLP
BY: GORDON E. THOMPSON, ESQ., OF COUNSEL
19 CHENANGO STREET
BINGHAMTON, NY 13901

FERRIS D. LEBOUS, J.S.C.

This is an action to foreclose a mortgage upon certain real property by power of sale pursuant to RPAPL Article 14. Plaintiff-mortgagee, Wells Fargo et al., claims that defendant-mortgagor, Tamarind Hotels USA Inc., is in default as a result of failing to make the required loan payments since September 2008. The mortgage covers real property known as the Quality Inn & Suites located at 4105 Vestal Parkway East, Vestal, New York.

By Order to Show Cause dated October 22, 2009, defendant Tamarind Hotels USA Inc. moved for an order directing the foreclosure proceed, if at all, pursuant to RPAPL Article 13. This court stayed any further proceedings to foreclosure pursuant to RPAPL Article 14 pending a hearing and determination of this application.

The court has issued a nearly identical Decision & Order this date on a related case entitled *Wells Fargo et al. v Arena Hotel Corp*. under Broome Index No. 2009-1591.

BACKGROUND

On March 29, 1993, defendant-mortgagor, Tamarind Hotels USA Inc., purchased this property and executed a $1.97 million Note and Mortgage to Coast Federal Bank, Federal Savings Bank. Subsequent thereto, Washington Mutual Bank F.A. became the holder of the mortgage as successor-in-interest by merger to Home Savings of America F.S.B., successor-in-interest by merger to Coast Federal.

On April 14, 1999, said mortgage was assigned by Washington Mutual Bank F.A. to Wingate Realty Finance Corporation.

On April 27, 1999, defendant refinanced the original loan into a $5.5 million loan from Wingate Realty Finance Corporation by executing an Amended, Restated and Consolidated Promissory Note, as well as an Amended, Restated and Consolidated Mortgage, Assignment of Leases and Rents and Security Agreement (hereinafter collectively sometimes referred to as the "Loan Documents"). Also in April 1999, Wingate executed an Assignment of the Loan Documents in blank.

In June of 2000, GMAC Commercial Mortgage Corporation (the predecessor-in-interest to Capmark Finance Inc.) was designated as the Master Servicer and Special Servicer for the lender Wells Fargo.

In or about February 2001, The Bank of New York Mellon Trust Company, N.A., as document custodian for Wells Fargo, took physical custody of the Loan Documents including the Assignments (Cormier Affidavit, ¶ 2).

Defendant made payments for nearly ten years, but stopped making payments in February 2009.

In March of 2009, Capmark Finance Inc. obtained a temporary release of the Loan

Documents from The Bank of New York Mellon Trust Company, N.A., as document custodian, but said documents were returned shortly thereafter (Barnett Affidavit, ¶ 7).

On June 30, 2009, this Non-Judicial Foreclosure action was commenced by way of the filing of the Notice of Pendency and the Notice of Intention to Foreclose pursuant to RPAPL Article 14. The next day, July 1, 2009, RPAPL Article 14 expired.

On July 2, 2009, Capmark Finance Inc. obtained a final release of the Loan Documents from The Bank of New York Mellon Trust Company, N.A., as document custodian (Barnett Affidavit, ¶ 7; Cormier Affidavit, ¶ 3).

On July 6, 2009, Capmark Finance Inc. released the Loan Documents to the attorneys for the lender Wells Fargo.

On July 22, 2009, an Assignment of Amended, Restated and Consolidated Mortgage and Security Agreement was executed from CWCapital LLC, successor by merger to Wingate Realty Finance Corporation, assignor, to Wells Fargo Bank, N.A. successor by consolidation to Wells Fargo Bank Minnesota, N.A. et al., assignee. Said document specifically states, in pertinent part, "[t]his Assignment acknowledges, ratifies and confirms that certain Assignment of Amended, Restated and Consolidated Mortgage and Security Agreement attached hereto as Exhibit B" (emphasis in original).[1]

[1]Exhibit B is the 1999 Assignment by Wingate in blank.

On August 5, 2009, an Amended Notice of Pendency dated August 3, 2009 with an original Notice of Intention to Foreclose was recorded. The Amended Notice of Pendency was re-served on defendant.

On October 22, 2009, this court signed an Order to Show Cause submitted by defendant including a temporary restraining order staying any further proceedings to foreclose pursuant to RPAPL Article 14 pending a hearing and/or determination of this application.

DISCUSSION

I. STANDING

Defendant argues that plaintiff-mortgagee does not have standing to pursue this action since it was not the holder of *record* of the mortgage on June 30, 2009 (the date of commencement). Defendant relies upon the fact that the Assignment of Amended, Restated and Consolidated Mortgage and Security Agreement dated July 22, 2009 and an Amended Notice of Pendency dated August 3, 2009 were both executed after June 30, 2009 (the date of commencement).

In opposition, plaintiff contends that the relevant inquiry is ownership, not recording, of the mortgage as of the date of commencement. Plaintiff has submitted supporting affidavits from Jeffery Cormier, a senior associate with The Bank of New York Mellon Trust Company, N.A., as document custodian, and Don Barnett, vice president of Capmark Finance Inc., outlining the history of the transfer of physical possession of these Loan Documents, as well as the assignment

history thereof.

First and foremost, the court finds that the relevant inquiry is indeed whether plaintiff had ownership of the note and mortgage as of the date of commencement, not whether the mortgage was recorded as of that date (*Deutsche Bank Trust Co. Ams. v Peabody*, 20 Misc 3d 1108[A] [2008]). Mr. Cormier avers that The Bank of New York Mellon Trust Company, N.A., as document custodian, has had physical custody of the Loan Documents for plaintiff since in or about February 2001. To the extent that defendant attempts to cast doubt on plaintiff's proof, defendant does not offer any proof to contradict plaintiff's documentation. In this court's view, Mr. Cormier's affidavit, as well as Mr. Barnett's affidavit, stand unrefuted regarding plaintiff's possession of the Loan Documents and Assignments prior to the commencement of this action. As such, the court finds that this Lender was in possession of the Loan Documents long before the commencement of this action.

Moreover, the court finds that the Note and Mortgage were assigned to the Lender by a written assignment effective prior to the commencement of this action (*Indymac Bank, FSB v Boyd*, 22 Misc 3d 1112[A] [2009]). Stated another way, the Assignment dated July 22, 2009 is a valid retroactive assignment which confirms and ratifies a prior assignment from April 1999 (*Bankers Trust Co. v Hoovis*, 263 AD2d 937, 939 [3rd Dept 1999]).

In sum, the court finds that the Lender was the owner and holder of the Note and Mortgage before the commencement of this action based upon the physical transfer of the Loan

Documents and that the Assignment dated July 22, 2009 ratifies a prior assignment. Taken together, the court finds that the Lender has standing.

II. UNDUE HARDSHIP

In 1998, the legislature enacted RPAPL Article 14 ("Power of Sale") which permits foreclosure by a non-judicial proceeding. The legislation was enacted as a more efficient alternative to the traditional and lengthier mortgage foreclosure framework under RPAPL Article 13 caused by congested court calendars downstate. Resort to the streamlined Article 14 action is, however, conditioned upon strict compliance with RPAPL § 1401. RPAPL expired July 1, 2009 and applies only to those actions in which the lis pendens was filed before that date.

Defendant argues that plaintiff has failed to comply with RPAPL Article 14 and that proceeding by way of a non-judicial foreclosure would cause defendant to suffer "undue hardship" (RPAPL §§ 1423 [2] [b] [4] & [5]). Defendant concedes it is "underwater" in relation to its financing (its debt significantly exceeds the value of its collateral), but that it would suffer undue hardship given the history of extensive settlement negotiations between the parties. Defendant argues a further delay (which will happen if converted to an Article 13 action) might allow for a settlement of this matter.

Plaintiff argues that it has complied with RPAPL Article 14 in all respects and that defendant has not alleged any basis for a finding of undue hardship. Plaintiff contends that undue hardship means more than the normal consequences of foreclosure and that failed

settlement negotiations do not amount to undue hardship.

Initially, the court rejects defendant's argument that defendant failed somehow to comply with RPAPL Article 14 (see Points I and III). The court will address the substance of defendant's primary argument that proceeding under Article 14 will impose an undue hardship.

RPAPL § 1421(2) states, in pertinent part, that a mortgagor, not later than forty days after the date it receives the notice of intention to foreclose, may apply by order to show cause for an order directing further proceedings be conducted pursuant to Article 13 and for a stay of proceedings pending a hearing. However, such an application must be supported by one or more affidavits stating facts alleging, as applicable here, "[t]hat under the facts and circumstances, allowing the foreclosure to proceed under article 14 would cause an *undue hardship* to the mortgagor" (RPAPL §1421 [2] [b] [5]; emphasis added).

The statute does not provide a definition of undue hardship. By way of comparison in other context, however, undue hardship has been defined to mean significantly more than the "good cause" or "interest of justice" standards (*Yellow Book Co. v Rose*, 182 Misc 2d 263 [1999]; *Abitol v Schiff*, 180 Misc 2d 949 [1999], *affd as mod* 276 AD2d 571 [2nd Dept 2000] [undue hardship under CPLR § 3211 (e)]).

While the court is sympathetic to defendant's investments - financial and otherwise - in this property for the past ten years, defendant has simply not made the monetary payments it is

obligated to under the Loan Documents. Additionally, nearly nine months have elapsed since defendant last made a payment and there is no indication that during this time defendant has found options for refinancing or other investors interested in providing funds to pay off this debt. While defendant may well have hopes that proceeding by the more time consuming RPAPL Article 13 would somehow encourage finalization of settlement talks, plaintiff has an equally valid concern regarding the adverse impact additional time would have given the allegedly distressed condition of the property and lack of capital available to properly fund the ongoing franchise. What the court finds most telling in this regard are defendant's own words as follows:

> [t]he foregoing [underwater status] is an untenable circumstance which cannot continue indefinitely as hotel operators, including Mortgagor, are under constant pressure to make capital infusions into their properties to remain competitive and to meet demands from their franchisors.
>
> During the last quarter of 2008 and all of 2009, Mortgagor has been struggling mightily to meet its debt repayment responsibilities while trying to get relief from Mortgagee by the 'marking to market' of its existing debt.....but found that it was difficult to achieve until Mortgagor was no longer able to meet its debt service, which occurred in February, 2009. Since February 2009 defendant-Mortgagor has been meeting all operating expenses, including payroll for its employees. Unfortunately, the property cannot sustain debt service or any form of significant capital expenditures.

(Mortgagor's Affidavit, ¶¶ 5 & 6).

The state of the economy makes it unlikely that directing the mortgagee to proceed by judicial foreclosure will improve either parties position, rather it may merely devalue the property further.

In sum, the court finds that defendant's allegations that proceeding under Article 14 would cause it undue hardship to be wholly unsubstantiated on this record.

III. MISCELLANEOUS ISSUES

1. Servicer

Defendant's demand for an accounting of servicer fees and property-protection payments is now moot. Plaintiff has elected to waive its right to collect those fees which amount to less than $6,000 on an unpaid balance of over $4.5 million.

To the extent defendant also argues that plaintiff has not complied with paragraph 60 of the Mortgage which states the Loan may be serviced by a servicer/truster "at the option of Mortgagor", the court finds that said omission, if any, does not equate to non-compliance with RPAPL Article 14.

2. Authorized to sue in New York

Defendant's argument that Wells Fargo may not be qualified to do business in New York is without basis. Plaintiff properly relies upon 12 U.S.C. § 24 [Fourth] which states that a national banking association has the power "[t]o sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons."

CONCLUSION

Accordingly, in view of the foregoing, defendant's motion to stay this non-judicial

foreclosure under RPAPL Article 14 and direct plaintiff to proceed by judicial foreclosure under RPAPL Article 13 is DENIED. The temporary restraining order issued by way of the Order to Show Cause dated October 22, 2009 is hereby vacated.

This constitutes the decision and order of the court.

DATED: December 10, 2009
Binghamton, New York

s/ Ferris D. Lebous
HON. FERRIS D. LEBOUS, J.S.C.