

Wells Fargo Bank, N.A. v 1129 Lanz LLC

2010 NY Slip Op 30269(U)

February 1, 2010

Supreme Court, Nassau County

Docket Number: 8516/09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

WELLS FARGO BANK, N.A., AS TRUSTEE
FOR THE REGISTERED HOLDERS OF
JPMORGAN CHASE COMMERCIAL
MORTGAGE SECURITIES CORP.,
COMMERCIAL MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2005-
LDP3, in its individual capacity and as lead
lender for CBA-MEZZANINE CAPITAL
FINANCE, LLC,

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 8516/09

Motion Sequence No. 002, 003

Plaintiffs,

- against -

1129 LANZ LLC and LUIS NUNEZ,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4</u>
Briefs: Plaintiff's / Petitioner's	<u>5</u>
Defendant's / Respondent's	_____

Wells Fargo Bank, N.A., as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2005-LDP3, in its individual capacity and as lead lender for CBA-Mezzanine Capital Finance, LLC, the Plaintiff in the within mortgage-foreclosure action, moves this court for an order pursuant to R.P.A.P.L. § 1325(2) authorizing and directing the Receiver herein to pay from the rents received by him to Plaintiff towards the payment

of accrued, and accruing, interest on the mortgage that is the subject of this action.

MICHAEL H. SAHN, the Receiver appointed in this action cross-moves for an order pursuant to CPLR § 6401 and 8004:

1) Approving the payment of interim fees to MICHAEL H. SAHN, as receiver, in the amount of five (5%) percent of the funds received in the Receivership account from May 8, 2009 to October 29, 2009, pursuant to the authority provided in the Order of the Court, dated May 8, 2009, appointing Michael H. Sahn as Receiver as amended by Amendment to Order Appointing Receiver in Mortgage Foreclosure Action entered September 29, 2009 and CPLR § 8004(a), which interim fees amount to the sum of \$62,909.59, together with the reimbursement of disbursements of \$908.40 for various expenses incurred by the Receiver;

2) Approving the payment of interim fees to the Managing Agent, Sutton & Edwards Management, LLC, for the months of May 2009 through September 2009 pursuant to the terms of the Management Contract previously approved by the Court, in the amount of \$38,404.04; and

3) Approving the retention of Rosenberg Fortuna & Laitman, LLP, as counsel to the Receiver in connection with the preparation and execution of a License Agreement with Griffin Investments Corporation (“Griffin”), granting permission to use and occupy Suite 303 in the subject building on a month to month basis commencing September 1, 2009, and the payment of legal fees to Rosenberg Fortuna & Laitman, LLP, for services rendered in the sum of \$5,640.00.

The plaintiff opposes the motion by the Receiver for (1) a five (5%) commission on all sums collected by him as Receiver that total \$1,258,191.91; (2) opposes any commission on the sum of \$499,802.38 collected by the Receiver from the Defendants’ Operation Account at the time of the appointment of the Receiver; and (3) opposes any commission on \$48,100.84 held by the Receiver as rent-security deposits.

The plaintiff argues that most of the operations of the subject property are

performed by persons other than the Receiver, namely the Managing Agent and the legal counsel retained by the Receiver. Further, plaintiff asserts the management agreement entered into by the Receiver with Managing Agent, Sutton & Edwards Management, LLC, increased the commission of the Managing Agent from 3% to 5% to perform the very same functions it had done previously for the Defendant-Borrower. Plaintiff asserts the court should exercise its discretion to fix a commission less than the maximum of 5% requested by the Receiver.

The plaintiff also argues the Receiver is not entitled to a commission on the sum of \$499,802.38 received from the Borrower's Operating Account. Plaintiff asserts this sum did not constitute an amount both collected and disbursed by the Receiver as contemplated by CPLR § 8004(a). Plaintiff asserts the Operating Account consisted of rents collected prior to the appointment of the Receiver and no effort from the Receiver was needed to obtain these funds as these funds were ordered by the Court to be turned over to the Receiver. Plaintiff further asserts and the inclusion of this amount in calculating the commission of the Receiver would result in a double commission on the same funds as the property manager has already collected a commission on these previously collected funds.

In response, the Receiver asserts he rendered continuous, daily, constant, and extensive services to fulfill the of the Court's Order appointing him receiver of the property. These duties included collection of rents, review of leases, meeting with existing and prospective tenants, consultations with real estate brokers, payment of bills, keeping accurate books and records, bank deposits, maintaining appropriate property insurance, corresponding with parties of this action and managing the premises and consulting with the Management Agent.

The Receiver asserts he extended substantial efforts in obtaining the Operating Account funds from the defendant. He made both verbal and written demands to the Defendant 1129 Lanz LLC and its attorneys, held consultations with the Managing Agent

and had e-mail communications with Plaintiff's counsel over obtaining these funds. Further, the Receiver asserts the request for interim fees for the Managing Agent Sutton & Edwards Management, LLC does not include any fees based on the \$499,802.38 received from the Borrower's Operating Account, refuting the plaintiff's claim of a double commission being paid on these funds.

The receiver argues the Plaintiff expressly approved the management agreement he entered into with Sutton & Edwards Management, LLC providing a 5% fee for the Managing Agent of all amounts collected and the agreement was approved without any stipulation that paying a 5% fee to the Managing Agent would reduce or offset the Receiver's commission. Also, both parties now agree that the correct amount for the commission of the Managing Agent for the period in issue is \$35,031.38.

The Receiver also asserts that upon his appointment he discovered that the defendants had not maintained individual tenant security accounts as required by the respective leases and the security deposits were not segregated from other monies in the Operation Account. He stated he consulted with both the Managing Agent and the Plaintiff on this issue and his proposal regarding segregated security deposit accounts was incorporated in the Amendment to Order Appointing Rent Receiver in Mortgage Foreclosure Action dated September 22, 2009. The Receiver asserts that as the rent deposits accounts were not created until his appointment and these funds in the sum of \$44,979.90 "passed through" the receivership account and were not segregated funds until he created the accounts and should be considered in the calculation of his interim fee.

The authority for this court to determine the commission of a Receiver is found in CPLR § 8004(a). It reads as follows:

- Generally. A receiver, except where otherwise prescribed by statute, is entitled to such commissions, not exceeding five per cent upon the sums received and disbursed by him, as the court by which he is appointed allows, but if in any case the

commissions, so computed, do not amount to one hundred dollars, the court, may allow the receiver such a sum, not exceeding one hundred dollars, as shall be commensurate with the services he rendered

A Receiver is not entitled to the statutory maximum commission as of right, rather the court has the discretion to determine the percentage of commission (see, *Key Bank of New York v. Anton*, 241 A.D.2d 482, 2 Dept.,1997.)

Accordingly, upon consideration of the submissions of the parties the motions are determined as follows.

The Receiver, MICHAEL H. SAHN, is hereby awarded interim fees, in the amount of five (%) of the funds received in the Receivership account from May 8, 2009 to October 29, 2009, which interim fees amount to the sum of \$62,909.59, together with the reimbursement of disbursements of \$908.40 for various expenses incurred by the Receiver;

The managing agent Managing Agent, Sutton & Edwards Management, LLC, is awarded interim fees in the amount of \$35,031.00, for the months of May 2009 through September 2009 pursuant to the terms of the Management Contract previously approved by the Court.

The retention of Rosenberg Fortuna & Laitman, LLP, as counsel to the Receiver in connection with the preparation and execution of a License Agreement with Griffin Investments Corporation (“Griffin”), and permission to use and occupy Suite 303 in the subject building on a month to month basis commencing September 1, 2009 is granted. The award and payment of legal fees to Rosenberg Fortuna & Laitman, LLP, for services rendered in the sum of \$5,640.00 is granted.

Upon the payment of the awards made by the court above, the Receiver, after deducting one month’s current expenses relating to the management and care of the

mortgaged premises, shall immediately remit the balance of all sums on deposit in the Receiver's segregated bank, excluding the rent deposit accounts, to Plaintiff, which, remittance shall be applied by Plaintiff to the interest balance due under the leasehold mortgage herein.

So ordered

Dated: February 1, 2010

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

FEB 02 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**