

<b>CWCapital Asset Mgt. LLC v Great Neck Towers LLC</b>
2010 NY Slip Op 33143(U)
October 29, 2010
Supreme Court, Nassau County
Docket Number: 000169/2010
Judge: Ira B. Warshawsky
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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 8**

**CWCAPITAL ASSET MANAGEMENT LLC,  
solely in its capacity as Special Servicer for  
Bank of America, N.A. (Successor by merger  
to LaSalle Bank, N.A.), as Trustee for the  
Registered Holders of J.P. Morgan Chase  
Commercial Mortgage Securities Trust 2006-  
CIBC17, Commercial Mortgage Pass-Through  
Certificates, Series 2006-CIBC17,**

**Plaintiff,**

**-against-**

**INDEX NO.: 000169/2010  
MOTION DATE: 08/27/2010  
MOTION SEQUENCE: 004**

**GREAT NECK TOWERS LLC,  
NN GREAT NECK TOWERS, LLC,  
HH GREAT NECK TOWERS, LLC, and  
ELJAN GREAT NECK TOWERS, LLC,**

**Defendants.**

The following papers read on this motion:

Notice of Motion .....	1
Affirmation of Gregory W. Gilliam in Support & Exhibits Annexed .....	2
Memorandum of Law in Support of Motion .....	3
Affirmation of Russell L. Penzer in Opposition & Exhibits Annexed .....	4
Defendants' Memorandum of Law in Opposition .....	5
Supplemental Affirmation of Gregory W. Gilliam & Exhibits Annexed .....	6
Reply Memorandum of Law in Further Support of Motion .....	7

## PRELIMINARY STATEMENT

Plaintiff moves to dismiss the affirmative defenses and counterclaims in defendants' answer. Plaintiff contends that the affirmative defenses and counterclaims fail to state a claim upon which relief can be granted or which constitute a defense, and the claims are belied by documentary evidence, specifically the promissory note and mortgage terms.

Defendants respond that their counterclaims and affirmative defenses adequately state claims upon which relief may be granted or constitute a viable defense to the claims set forth in the complaint, and that the contents of the note and mortgage are insufficient to fully resolve the issues raised in the counterclaims and affirmative defenses.

## BACKGROUND

The action involves the foreclosure on a commercial mortgage. The Court has previously appointed a Receiver to operate the subject premises, a valuable parcel improved with a Class A office building.

On October 24, 2006 defendants, cumulatively the "borrowers", executed a promissory note in the amount of \$46,500,000 to CIBC, Inc. Borrowers contemporaneously executed an Amended, Restated and Consolidated Mortgage, Security Agreement, and an Assignment of Leases and Rents in favor of CIBC. The mortgage was recorded on November 3, 2006 in Mortgage Liber 31163, p. 749.

By assignment effective as of November 28, 2006, CIBC assigned all its right, title and interest in the mortgage to "LaSalle Bank National Association, As Trustee for the Registered Holders of JP Morgan Chase Commercial Mortgage Securities Trust 2006-CIBC17, Commercial Mortgage Pass-Through Certificates, Series 2006-CIBC17 . . .". This document was recorded on December 9, 2008 in Mortgage Liber 33376 p. 631. As of October 17, 2008 Comptroller of the Currency authorized Bank of America, National Association, to operate the main and branch offices of LaSalle Bank, National Association, and LaSalle Bank, Midwest, National Association as branches of Bank of

America, National Association.

On and as of November 28, 2006, JP Morgan Chase Commercial Mortgage Securities Corp., as Depositor, Wells Fargo Bank, N.A., as Master Servicer, LNR Partners, Inc., as Special Servicer, and LaSalle Bank National Association, as Trustee and Paying Agent, entered into a Pooling and Servicing Agreement. Such agreements enable the creation of commercial mortgage-backed securities, in which many single loans are pooled and transferred to a trust. The trust then issues a series of bonds, varying in yield, duration and payment priority, and are assigned credit ratings by rating agencies. The securitization structure for commercial real estate loans is a Real Estate Mortgage Investment Conduit (REMIC), a product of the tax law which avoids taxation at the trust level and the interest is passed through to the purchaser.

Plaintiff commenced this action on or about January 5, 2010. Defendants served an answer with affirmative defenses and counterclaims on June 21, 2010. Meanwhile, by Order dated February 8, 2010, this Court appointed Scott Mollen, Esq., of Herrick Feinstein, LLP as Receiver of the property. To date, Mr. Mollen has supervised the operation of the building in a manner befitting a professional office building.

Plaintiff moves to strike the Five Counterclaims and affiliated affirmative defenses. They are the Twelfth Affirmative Defense and First Counterclaim through the Sixteenth Affirmative Defense and Fifth Counterclaim, as contained in ¶¶ 48 — 84 of the Answer and Counterclaims.<sup>1</sup>

The substance of defendants' contentions against the plaintiff involve a claim that at the closing of title, and with only one day's advance notice, plaintiff's predecessor refused to distribute \$2,500,000 of the loan proceeds, retaining it in the form of a "Holdback Reserve". Despite the fact that mortgagor did not receive these funds, they were nevertheless required to pay interest on the amount as if they had received it. In addition, when it was determined that a portion of the garage forming a part of the

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<sup>1</sup> Exh. "1" to Supplemental Affirmation of Gregory W. Gilliam.

mortgaged premises was unsafe and required immediate remediation, mortgagee refused to release any portion of the reserved funds to accomplish the work. Mortgagee's response to a request for a portion of the reserve was the same after the early departure of a major tenant, when rents were insufficient to provide proper maintenance.

Defendant also attributes the action of the plaintiff, in delaying the required approval of the renewal of another major tenant's lease, to creating an uncertainty among prospective tenants with respect to the future viability of the facility, thereby impeding the marketability of other vacancies. By October 2009, the income was inadequate to maintain the premises and service the debt. Defendants transferred control of the income to plaintiff, Wells Fargo, and the Trust's controlling certificate holders, referred to by defendants as "Plaintiff Parties". Despite promises to the contrary, Plaintiff Parties accepted the income but failed to use it to pay the operating expenses, as plaintiff alleges they promised to do

#### DISCUSSION

Plaintiff moves pursuant to Civil Practice Law and Rules §§ 3211 (a)(1) and (7). CPLR § 3211 (a)(1) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, "... the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim". (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine*, 2010 WL 3583424 (N.Y.A.D. 2d Dept.)).

When determining a motion to dismiss for failure to state cause of action under § 3211 (a)(7), the pleadings must be afforded a liberal construction, facts as alleged in the complaint are

accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass', Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments. (*Brinkley v. Casablancas*, 80 A.D.2d 815 [1<sup>st</sup> Dept. 1981]).

Plaintiff's claim that the loan and other documents constitute documentary evidence which fully resolve the claims asserted in the counterclaims is without merit. For example, the Twelfth Affirmative Defense and First Counterclaim asserts that plaintiff's predecessor in interest breached the contract obligation to lend to defendants the sum of \$46,500,000, apparently despite a commitment to do so, by withholding the sum of \$2,500,000, and that plaintiff has to this day refused to transfer the funds to defendants, despite the fact that they have been required to pay interest on the total amount referred to in the mortgage.

The Thirteenth Affirmative Defense and Second Counterclaim also revolves about the withholding of the \$2,500,000 at a time when emergency repairs were required. Defendants contend that they were forced to enter into an otherwise unfavorable contract for the termination of a major lease, offering a release to the tenant in return for a lump sum settlement, which funds were then applied to the repair of the garage, while still paying interest on the withheld \$2,500,000.

The Fourteenth Affirmative Defense and Third Counterclaim assert that Wells Fargo, in its capacity as servicer of the mortgage, claimed that it required the approval of plaintiff and the Plaintiff Parties of a new long-term lease with an existing tenant whose lease was expiring. Plaintiff and Plaintiff Parties' refusal to respond in a reasonable time caused the tenant to threaten to vacate in advance of its lease expiration. This situation created an uncertainty as to the future viability of the facility, thereby impeding the ability to lease other vacant space. Defendants allege that the conduct by the plaintiff was a violation of their contractual obligations to them.

The Fifteenth Affirmative Defense and Fourth Counterclaim are based upon an alleged breach of a subsequent agreement between plaintiff and defendants whereby defendants were induced to continue the management of the building after assigning the right to collect rental to plaintiff, by virtue of an agreement that plaintiff would apply the income to essential services and maintenance. Defendants allege that the representation by plaintiff was false and that defendants relied upon it to their detriment. As a consequence, the conditions at the premises continued to deteriorate, impairing the marketability and reputation of the facility, leading to the withholding of rent and the inability to attract new tenants, and, ultimately, a diminution of the value of the property.

In the Sixteenth Affirmative Defense and Fifth Counterclaim Defendants contend that the plaintiffs tortiously interfered with the lease agreements that defendants had with the tenants, by accepting rent but refusing to provide the landlord services required by the leases. The elements of tortious interference with contractual relations are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff resulting therefrom.

The Court's role in deciding this motion is simply to determine whether or not the foregoing allegations can reasonably be interpreted to constitute a claim under any valid legal theory. At the very least, defendants have asserted a breach of the obligation of good faith and fair dealing which is inherent in every contract. The last minute withholding or \$2,500,000, allegedly not provided for in any commitment or other agreement, the refusal to make such funds available for the performance of emergency repairs, or essential maintenance, the obtaining of further services of defendants upon a false promise to utilize rental income for maintenance, and the poisoning of the relationship between landlord and tenants, resulting in breaches of the obligation of tenants to make rental payments constitute allegations of actionable conduct on the part of plaintiffs. Nothing in the papers submitted in support of the motion in any way vitiate or fully resolve any of these claims.

Plaintiff's motion to strike the Twelfth through Sixteenth Affirmative Defenses and the First through Fifth Counterclaims is denied.

This constitutes the Decision and Order of the Court.

Dated: October 29, 2010

*Irwin B. Warkow*  
J.S.C.

**ENTERED**  
NOV 05 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE