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

PRESENT: BARBARA R. KAPNICK Justice PART 39

TLI INVESTMENTS, LLC

- v -

C-III ASSET MANAGEMENT

INDEX NO. 654371/12

MOTION DATE

MOTION SEQ. NO. 002

MOTION 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: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

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

Dated: 12/23/13

BARBARA R. KAPNICK J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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TLI INVESTMENTS, LLC and TORCHLIGHT LOAN SERVICES, LLC,

Plaintiffs,

-against-

C-III ASSET MANAGEMENT LLC, and (solely in their capacities as Trustees) U.S. BANK NATIONAL ASSOCIATION, as Trustee for ARCAP 2004-RR3 Resecuritization, Inc., Chase Manhattan Bank - First Union National Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 1999-1, and First Union National Bank - Bank of America, N.A. Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2001-C1, WELLS FARGO BANK, N.A., as Trustee for DLJ Commercial Mortgage Corp., Commercial Mortgage Pass-Through Certificates, Series 1999-CG1 and 2000-CKP1, and J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2004-C2, and THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., as Trustee for Prudential Securities Secured Financing Corporation Commercial Mortgage Pass-Through Certificates, Series 1999-C2 and 1999-NRF1,

Defendants.

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DECISION/ORDER
Index No. 654371/12
Motion Seq. No. 002

BARBARA R. KAPNICK, J.:

This is an action for breach of contract, conversion, unjust enrichment, declaratory judgment and a permanent injunction arising from investment vehicles known as Real Estate Mortgage Investment Conduits ("REMICs"), which are used to sell debt securities to

investors in connection with underlying commercial mortgage- backed securities ("CMBS"). Defendant C-III Asset Management LLC ("C-III") moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the Amended Complaint. Plaintiffs TLI Investments, LLC ("TLI") and Torchlight Loan Services, LLC ("Torchlight Services") cross-move, pursuant to CPLR 3212, for partial summary judgment, solely as to the Directing Securityholder Issue.

Parties

TLI is a Delaware limited liability company, engaged in the business of investment and investment services, including investments in commercial mortgage-backed securities such as those at issue here. (Amended Complaint ¶ 18.) Torchlight Services is also a Delaware limited liability company which provides special servicing for commercial mortgages and CMBS. (*Id.* ¶ 19.)

According to the Amended Complaint, dated January 23, 2013, C-III is a Delaware limited liability company which services commercial real estate loans. Defendants U.S. Bank National Association ("U.S. Bank") and Wells Fargo Bank, N.A. ("Wells Fargo") are national banking associations which are named here

solely in their capacities as trustees of certain REMICs at issue here.

Background

According to the Amended Complaint, in commercial mortgage securitization transactions, commercial mortgage loans are pooled and sold to a trust known as a REMIC, which issues and sells debt securities to investors, and then uses the stream of income on the underlying loans to make required payments on the securities. (*Id.* ¶ 1.)

Each REMIC is governed by a Pooling and Servicing Agreement ("PSA"). (Id. ¶ 4.) Each PSA defines a "Controlling Class" of underlying REMIC securities. The Controlling Class is granted certain "Control Rights," including, as relevant here, the right to select and supervise a "Special Servicer" for the loan. The Special Servicer services non-performing loans, and is responsible for minimizing losses by, among other things, foreclosing and selling the underlying properties which secure the loans, or by negotiating work-outs or modifications of the non-performing loans. (*Id.* ¶ 5.)

In some cases, REMIC securities are themselves securitized. In such a transaction, a group of REMIC securities are sold to a trust which is referred to as a "Re-REMIC." (*Id.* ¶ 2.) As with the original REMIC, the Re-REMIC issues and sells securities to investors, and uses the stream of income from the underlying REMIC securities to make payments on the Re-REMIC securities. (*Id.*)

At issue here is a Re-REMIC called ARCAP 2004-RR3 Resecuritization Inc. ("ARCAP"), which holds securities issued by several underlying REMICS. (*Id.* ¶ 3.) ARCAP issued and sold multiple tranches (or classes) of securities ("ARCAP Securities") to investors, including plaintiff TLI. The ARCAP Securities are backed by the underlying REMIC securities held by ARCAP, which are, as described above, backed by the loans held by the underlying REMICs. (*Id.*)

ARCAP is governed by a pooling agreement (the "ARCAP Agreement") dated September 30, 2004. As relevant here, the ARCAP Agreement defines a "Directing Securityholder," similar to the Controlling Class set forth in the PSAs for the underlying REMICs. (*Id.* ¶ 6.) The Directing Securityholder is defined in the ARCAP Agreement as follows:

> As of any date of determination, the most junior Class of Notes or Principal Balance

[* 6]

> Certificates then outstanding that has an outstanding Note Principal Balance or Certificate Balance, as applicable, at least equal to 25% of the initial Note Principal Balance or Certificate Balance thereof (or, if no such Class of Notes or Certificates outstanding has a Note Principal Balance or Certificate Balance at least equal to 25% of the initial Note Principal Balance or Certificate Balance thereof, the most junior Class of Notes or Certificates then outstanding).

(ARCAP Agreement Section 1.01 Definitions at 11.)

The ARCAP Agreement further provides that the Directing Securityholder has the right to exercise ARCAP's Control Rights pursuant to the underlying PSAs, including the right to select and supervise the Special Servicer for the loans held by the Underlying REMICs. (*Id.* ¶ 6.)

On November 6, 2012, TLI purchased two classes of securities in ARCAP: (i) 100% of the Class F securities and (ii) a portion of the Class E securities, for approximately $1 million. (Stasiulatis Aff. ¶ 5.) TLI alleges that it qualified as the Directing Securityholder of ARCAP from November 9, 2012 until at least November 20, 2012, and thus had the right to replace the Special Servicer of the underlying REMICs during that period because ARCAP was the Controlling Class at that time. (Amended Complaint ¶ 7.)

TLI also asserts that between November 9 and November 20, 2012 it sent Notices of Replacement to C-III, removing it as Special Servicer and designating a different Special Servicer for seven of the underlying REMICs. Specifically, the notices appointed plaintiff Torchlight Services as the new Special Servicer with respect to four of the REMICs and non-party KeyCorp Real Estate Capital Markets, Inc. ("KeyCorp") as the new Special Servicer with respect to three other REMICs. (*Id.*)

It is undisputed that the Notices of Replacement erroneously used the name "TLI Investors, LLC" rather than the correct name, "TLI Investments". (Stasiulatis Aff. ¶ 33.) TLI Investors is a Florida limited liability company which is not related to any of the parties in this action. (*Id.* ¶ 36.) Notably, the parent company of plaintiff TLI Investments is non-party Torchlight Investors, LLC. (*Id.* ¶ 1.)

After the Notices of Replacement were issued in November 2012, TLI and C-III communicated with each other over a period of months about the transfer of the special servicing, including numerous emails which continued to erroneously refer to TLI Investors, rather than TLI Investments.

Plaintiffs commenced this action in December of 2012, again erroneously using the name TLI Investors. On or about January 23, 2013, when the Amended Complaint was filed, the caption was changed to reflect TLI Investments as one of the plaintiffs.

C-III now moves for summary judgment dismissing the Amended Complaint. Plaintiffs cross-move for partial summary judgment on the Directing Securityholder issue only.

Standard

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Declaratory Judgment

Plaintiffs' first cause of action alleges that TLI validly exercised its right as Directing Securityholder under the ARCAP Agreement to terminate C-III as Special Servicer and designate Torchlight Services (and KeyCorp) as the new Special Servicer for

the underlying REMICs and that TLI has taken all steps necessary to replace C-III with Torchlight Services (and KeyCorp) as Special Servicer for the underlying REMICs. (Amended Complaint ¶¶ 56-57.) Plaintiffs thus seek a declaration that TLI's termination of C-III as Special Servicer and its designation of Torchlight Services (and KeyCorp) was valid, and that Torchlight Services (and KeyCorp) has the right to act as the Special Servicer for the underlying REMICs.

A. Notice

As a threshold issue, C-III argues that this cause of action should be dismissed because: 1) it is undisputed that the Notices of Replacement set forth the name TLI Investors rather than TLI Investments; and 2) the error cannot be corrected because TLI is no longer the Directing Securityholder. Plaintiffs argue that the defect is insufficient to render the Notices ineffective because C-III concedes that it knew that the Notices were signed, prepared and sent from TLI Investments, and C-III does not allege any prejudice from the typographical error.

The Court finds that C-III has not demonstrated that the conceded error in the name on the Notices rendered them ineffective. First, C-III has not set forth a single case in support of this argument. Moreover, it has been repeatedly held

that "[s]trict compliance with contract notice provisions is not required in commercial contracts when the contracting party receives actual notice and suffers no detriment or prejudice by the deviation." *J.C. Studios, LLC v Telenext Media, Inc.*, 32 Misc 3d 1211(A), *9 (Sup Ct, Kings Co 2011) (citing *Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 79 AD3d 1605 [4th Dept 2010]; *Fortune Limousine Service, Inc. v Nextel Communications*, 35 AD3d 350 [2d Dept 2006]; *Suarez v Ingalls*, 282 AD2d 599 [2d Dept 2001]; *Dellicarri v Hirschfeld*, 210 AD2d 584 [3d Dept 1994]); *see also Baker v Norman*, 226 AD2d 301 (1st Dept 1996), *lv dism*, 88 NY2d 1040 (1996).

Similarly, in the context of amending a caption to correct a party's name, it has been held that "[m]istakes relating to the name of a party involving a misnomer or misdescription of the legal status of a party surely fall within the category of those irregularities which are subject to correction by amendment, particularly when the other party is not prejudiced and should have been well aware from the outset that a misdescription was involved." *Cutting Edge v Santora*, 4 AD3d 867, 868 (4th Dept 2004) (internal quotations marks and citation omitted).

Here, it is undisputed that C-III received the Notices of Replacement. It is also undisputed that C-III knew that the notices were, in fact, from TLI Investments rather than TLI Investors. The parties communicated extensively about the replacement of C-III as Special Servicer and conducted negotiations on that issue over a period of weeks.

Further, C-III does not assert that it suffered any prejudice from the error in the name on the Notices. As such, the Court finds that the Notices were not defective, despite the typographical errors on both the Notices and the parties' emails.

B. Administrative Steps

In addition to sending Notices of Replacement, the PSAs governing the underlying REMICs set forth certain additional administrative steps that the Directing Securityholder had to satisfy in connection with replacing the Special Servicer. It is undisputed that TLI did not complete all of the steps. TLI asserts that it completed some of the steps, but failed to complete certain others due solely to C-III's intentional obstruction.

Each of the PSAs provides that in order for the replacement of the Special Servicer to be effective, the Directing Securityholder

was required to obtain one or more rating agency confirmations ("RAC") from a specified rating agency such as Standard and Poor's or Moody's. (Stasiulatis Aff. ¶ 47.) Essentially, the RAC had to set forth an assurance that the appointment of the new Special Servicer would not adversely affect the rating of any of the classes of securities which had been issued as part of the given REMIC. (*Id.* ¶¶ 49-50.) In certain cases, the RAC would not be issued unless the outgoing and incoming Special Servicers executed a fee-splitting agreement with respect to loans that were being actively serviced at the time of the transition. (*Id.* ¶ 51.)

The Directing Securityholder was also required to obtain opinion letters attesting to the completion of the various requirements set forth in the PSAs. Additionally, certain of the PSAs required the new Special Servicer to reimburse the trustee for expenses associated with the Special Servicer transfer. (*Id.* ¶ 50.)

TLI asserts that it obtained a RAC for one of the underlying REMICs, but was prevented from obtaining the other RACs because eC-III refused to execute a fee-splitting agreement. (*Id.* ¶¶ 56-60.) It also asserts that it obtained an opinion letter for the same REMIC for which it obtained the RAC, but that its transaction counsel could not issue opinion letters with respect to the

remaining REMICS because of C-III's refusal to cooperate with the Special Servicer transfer. (*Id.* ¶¶ 56-61.) TLI also asserts that it reimbursed the trustees for expenses associated with the transfer in connection with two of the REMICs.

The Court finds that neither side has demonstrated that it is entitled to summary judgment with respect to the first cause of action, as questions of fact exist in connection with the administrative requirements set forth in the PSAs which TLI, as Directing Securityholder, was required to complete after sending the notices to terminate C-III as the Special Servicer.

First, the parties sharply dispute how many of the conditions were, in fact, satisfied. C-III asserts that TLI has satisfied only one of the conditions while TLI states that it satisfied at least five of them. Moreover, questions of fact also exist as to whether C-III obstructed, or continues to obstruct, TLI's efforts to complete the administrative steps.

In light of the foregoing, both the motion and cross-motion for summary judgment with respect to the first cause of action are denied.

Injunction

Plaintiffs' second cause of action seeks a permanent injunction prohibiting C-III from continuing to act in derogation of plaintiffs' rights and requiring C-III to cooperate in facilitating the transfer of the servicing for the underlying REMICs from C-III to Torchlight Services. (Amended Complaint ¶ 65.) C-III argues that this portion of the Amended Complaint should be dismissed because, as it argues above, TLI never properly replaced C-III as Special Servicer. However, in light of this Court's finding that summary judgment was not warranted on that issue, the motion for summary judgment dismissing the second cause of action is denied.

Conversion

The third cause of action in the Amended Complaint is alleged on behalf of Torchlight Services against C-III for conversion. (*Id.* ¶¶ 66-72.) Specifically, plaintiff alleges that the right to act as Special Servicer is a property interest and that C-III wrongfully exercised dominion over the role of Special Servicer and thus converted Torchlight Service's right to act as Special Servicer.

"A conversion occurs when a party, 'intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.'" *Lynch v City of New York*, 108 AD3d 94, 101 (1st Dept 2013) (quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "'Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights.'" *Id.* (quoting *Colavito*, 8 NY3d at 50.) "Moreover, the mere right to payment cannot be the basis for a cause of action alleging conversion since the essence of a conversion cause of action is the unauthorized dominion over the thing in question." *Daub v Future Tech Enter.*,Inc., 65 AD3d 1004, 1006 (2d Dept 2009) (internal quotation marks and citations omitted).

Here, the Amended Complaint does not assert that C-III exercised any control over personal property or goods, or any specific funds belonging to Torchlight Services. Plaintiff's claim, instead, "is based upon an alleged contractual right to payment where the plaintiff never had ownership, possession, or control of the disputed funds...," which is insufficient to support a claim for conversion. *Daub, supra* at 1006. Moreover, plaintiff

has put forth nothing to demonstrate that any questions of fact exist with respect to this cause of action. Accordingly, the motion for summary judgment dismissing this claim is granted.

Breach of Contract

The fourth cause of action in the Amended Complaint is by Torchlight Services for breach of contract. (Amended Complaint ¶¶ 73-80.) To the extent that plaintiff asserts a breach of the PSAs for the original REMICs, such a claim is not supported here because there is no privity between Torchlight Services and C-III. Torchlight Services is not a party to the PSAs and is not the assignee of ARCAP's rights under those agreements, which is Torchlight Investments.

Nor is there a valid claim for breach of the ARCAP Agreement because neither C-III nor Torchlight Services is party to that contract. Therefore, the motion for summary judgment dismissing this claim is also granted.

Third-party Beneficiary

Plaintiffs' fifth cause of action asserts that C-III wrongfully prevented Torchlight Services from acting as Special Servicer, in derogation of Torchlight Services' rights "as a

third-party beneficiary of the applicable contracts, including the PSAs...." *(Id.* ¶¶ 85-86.)

"A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost." *State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 (2000) (internal quotation marks and citation omitted).

Here, there is no language in the PSAs to indicate that Torchlight Services was an intended beneficiary of those agreements. The PSAs govern the rights of the Controlling Class to appoint a Special Servicer under the PSA. They do not specifically discuss or contemplate the rights of Directing Securityholders under Re-REMICs such as ARCAP, much less entities which are appointed to act as Special Servicers by such Directing Securityholders.

Plaintiffs have pointed to nothing here to suggest that the benefit which eventually flowed to Torchlight Services was sufficiently immediate to indicate that the parties to the PSAs intended to assume a duty to compensate Torchlight Services for any lost benefits. At best, Torchlight Services is an incidental beneficiary of the PSAs, which is insufficient to support its claim here. *See Miller & Wrubel, P.C. v Todtman, Nachamie, Spizz & Johns, P.C.*, 106 AD3d 446, 446 (1st Dept 2013), *lv den*, 21 NY3d 864 (2013).

Therefore, the motion for summary judgment dismissing this claim is granted.

Unjust Enrichment

Plaintiffs' sixth cause of action is by both plaintiffs against C-III for unjust enrichment. (Amended Complaint ¶¶ 88-94.) It alleges that by continuing to act as Special Servicer and preventing Torchlight Service from becoming Special Servicer, C-III earned income to which it was not entitled and was unjustly enriched at plaintiffs' expense. (*Id.* ¶ 83.)

"Unjust enrichment is a quasi-contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned.'" *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 (1st Dept 2011) *aff'd*, 19 NY3d 511 (2012) (quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). "To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." *Nakamura v Fujii*, 253 AD2d 387, 390 (1st Dept 1998); *see also Smith v Chase Manhattan Bank, USA*, 293 AD2d 598, 600 (2d Dept 2002).

Here, C-III has made a prima facie showing that it is entitled to summary judgment because the Amended Complaint does not allege that Torchlight Services conferred any benefit on C-III for which plaintiff should be compensated, as is required for a claim of unjust enrichment. Moreover, plaintiff has not demonstrated that any factual questions exist which would preclude summary judgment.

Plaintiff argues that equity requires that C-III not be permitted to retain the money it earned while acting as Special Servicer during the period at issue. However, absent a showing

that plaintiff conferred a benefit on C-III, the unjust enrichment claim lacks merit. *See ABN AMRO Bank, N.V. v MBIA Inc.*, 81 AD3d 237, 246 (1st Dept 2011), *aff'd as mod.* 17 NY3d 208 (2011).

Accordingly, it is

ORDERED that the motion for summary judgment by defendant C-III Asset Management LLC is granted to the extent that the third, fourth, fifth and sixth causes of action in the Amended Complaint are dismissed and the motion is otherwise denied; and it is further

ORDERED that the cross-motion for partial summary judgment by plaintiffs TLI Investments, LLC and Torchlight Loan Services, LLC is denied.

The first and second causes of action are severed and continued. Counsel are directed to appear for a status conference in IA Part 39, 60 Centre Street - Room 208 on January 22, 2014 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: December 23, 2013

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.