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

**PRESENT:** HON. BARRY R. OSTRAGER **PART** IAS MOTION 61EFM

*Justice*

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COLFIN GRAND TRIANGLE HOLDING, LLC, and COLONY CAPITAL AMC OPCO, LLC

Plaintiffs,

- v -

U.S. BANK NATIONAL ASSOCIATION, as successor-in-interest to BANK OF AMERICA, NATIONAL ASSOCIATION, as successor by merger to LASALLE BANK NATIONAL ASSOCIATION, as Trustee for the registered holders of LB-UBS COMMERCIAL MORTGAGE TRUST 2006-C1, COMMERCIAL MORTGAGE PASS-TROUGH CERTIFICATS, SERIES 2006-C1 and the registered holders of LB-UBS COMMERCIAL TRUST 2006-C7, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-C7 and LNR PARTNERS, LLC,

Defendants.

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**INDEX NO.** 655971/2018

**MOTION DATE** 03/13/2014, 11/22/2019

**MOTION SEQ. NO.** 002 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 82, 85, 95

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 93, 94, 96, 99

were read on this motion to/for AMEND CAPTION/PLEADINGS.

HON. BARRY R. OSTRAGER

This action concerns a loan in the principal amount of $200 million originally made on November 16, 2005 by UBS Real Estate Investments, Inc. in connection with the development of a regional shopping center serving the Raleigh, North Carolina metro area known as the Triangle Town Center (the "Loan").

As collateral for the Loan, the original borrowers pledged a portion of the property. The Loan was initially evidenced by one promissory note, which was split after closing into a Note A

(in the principal amount of about $127 million) and a subordinated Note B (in the principal amount of about $73 million). Note B was divided a year later into Note B-1 (for about $44 million) and Note B-2 (for about $29 million). Notes A and B-2 are currently controlled by defendant U.S. Bank National Association ("US Bank") as Trustee. Note B-1 is held by plaintiff Colfin Grand Triangle Holding, LLC ("Colfin").

Presently before the Court is defendants' motion to dismiss the First Amended Complaint (seq. no. 002), and plaintiffs' motion for leave to file a Second Amended Complaint (seq. no. 004).

As part of the securitization of Notes A and B-2, the lenders entered into a Pooling and Servicing Agreement dated January 11, 2006 (the "Servicing Agreement"). Defendant LNR Partners, LLC ("LNR") now acts as the Pooling and Special Servicer for the Loan. The Servicing Agreement and the related intercreditor agreements also establish a framework by which the lenders would determine which among them would be deemed the Directing Lender with the authority to (1) advise and direct the master servicer and/or special servicer with respect to the Loan, and (2) replace the special servicer.

The Agreement contemplated that the lowest priority note holder who remained "in the money" would be deemed the Directing Lender to ensure that the value of the property would be maximized for the benefit of all lenders, and not just the holder of the more senior note. Under the terms of a January 6, 2006 Co-Lender Agreement, the non-bifurcated Note B holder would be the Directing Lender. However, the Co-Lender Agreement did not contemplate the bifurcation of Note B into two separate subordinate Notes B-1 and B-2. Therefore, after the bifurcation, the parties entered into a Noteholders' Priority Agreement dated November 22, 2006 that set forth terms by which one or the other Note B holders would act as the "Controlling

Lender." The Controlling Lender has the right to exercise all of Note B's rights as the Directing Lender under the Co-Lender Agreement.

Pursuant to the Priority Agreement, the Note B-2 holder would be the Controlling Lender so long as both (1) the unpaid principal amount of the Note B-2 Mortgage Loan (net of any existing Appraisal Reduction Amount and any Realized Principal Loss with respect to the Note B Mortgage Loans) is less than 25% of the initial principal amount of the Note B-2 mortgage loan, and (2) the Note B-1 Mortgage Loan has not been paid in full. (Priority Agreement § 3.01(a)).

In December 2015, the Borrower failed to repay the loan in full by the maturity date and was in default. The default triggered LNR to obtain an appraisal which valued the property at $150 million, as of January 20, 2016. Based on this appraisal, LNR calculated that the B-2 Noteholder remained the Directing Lender under the Co-Lender Agreement and the Controlling Lender under the Priority Agreement. In February 2016, US Bank, the Borrower, and the Guarantor – but *not* Colfin, executed a Loan Modification Agreement extending the maturity date to December 5, 2018.

In November 2018, Colfin notified US Bank and LNR that, based on Colfin's calculations and $101 million appraisal of the property, Colfin had succeeded the Note B-2 holder as the Directing Lender in accordance with Section 3.02 of the Co-Lender Agreement. In November 2018, Colfin obtained an additional appraisal valuing the property at $77 million. Colfin then advised the parties that as Directing Lender it was exercising its right to terminate LNR as Special Servicer and appointing plaintiff Colony Capital AMC OPCO, LLC ("Colony AMC") as the replacement. US Bank and LNR refused to recognize Colfin as Directing Lender and Colony AMC as the new special servicer.

Plaintiffs commenced this action on December 3, 2018 in anticipation of the maturity default and filed an Amended Complaint on February 6, 2019 (NYSCEF Doc. No. 22) seeking a judgment declaring that (1) Colfin is the Controlling Lender and the Directing Lender under the loan documents; (2) the replacement by Colfin of LNR as Special Servicer is valid and enforceable; (3) defendants are required to acknowledge and abide by the Replacement Appointment; and (4) LNR is required to (i) relinquish control as Special Servicer of the Loan to Colony AMC, (ii) cease and desist from taking any further actions as Special Servicer of the Loan, (iii) immediately turn over all books and records concerning the Loan to Colony AMC, and (iv) cooperate in the transition of all records necessary to enable Colony AMC to assume the role of Special Servicer in the place of LNR. Colfin also seeks money damages not less than $6.6 million for breach of contract against both defendants pursuant to its Second Cause of Action and additional money damages in the Third Cause of Action for the unpaid balance of the B-1 Note (about $43 million) against LNR.

The Borrower failed to pay the debt in full by the extended maturity date of December 5, 2018 and the loan returned to "Required Appraisal Loan" status. In January 2018, a month after this case was commenced, LNR obtained an appraisal valuing the property at $43M. Based on this appraisal, the A Noteholder became the Directing Lender.

Defendants have moved to dismiss the Amended Complaint asserting that, contrary to the terms of the controlling loan documents, Colfin unilaterally ordered an appraisal and, based on this allegedly unauthorized action, Colfin does not have the right to replace LNR as Special Servicer. More specifically, defendants claim that loan documents establish that Colfin (1) had no authority to either order the appraisal or replace LNR; (2) did not satisfy the procedural requirements to replace the Special Servicer, which go beyond the mere sending of a notice; and

(3) could not satisfy the requirements to be the Directing Lender even if its own appraisal were used.

Plaintiffs implicitly admit that at least through November 30, 2018, the B-2 Noteholder (US Bank) was the Directing Lender. Thus, Section 3.09(a) of the Servicing Agreement suggests that only US Bank, and not Colfin, had the right to obtain a second appraisal in November 2018. Thus, Colfin's November 2018 appraisal would appear to be unauthorized.

In anticipation of a default, LNR, as Special Servicer, obtained an appraisal of the property that valued it at only $43 million. This appraisal assumed that Sears, Saks, and Macy's would vacate the property by mid-2019. This $43 million appraisal would have the effect of putting both the B-1 and B-2 Notes out of the money and making the Note A holder (US Bank) the Directing Lender since it would necessarily be the only Note still in the money.

Defendants claim that plaintiffs seek a declaration that would rewrite the parties' agreements. They further claim that Colfin seeks to add new terms to the agreements because the current agreements are silent as to what should happen in the event the Special Servicer fails to obtain updates to the required appraisals. They assert that the agreements authorize specific parties to obtain appraisals and that Colfin is not one of those parties.

Another dispute concerns which waterfall payment provision should have applied following the 2015 default and the 2016 modification of the Loan. The Borrower allegedly defaulted for non-payment in 2015 and eventually entered into a modification agreement in 2016 extending the maturity date to December 2018. The modification also deferred certain interest payments. Ultimately, payments were then made pursuant to the "default waterfall," as opposed to the standard waterfall, which allegedly resulted in the Note A holder receiving more payments than it would otherwise be entitled to receive.

In its motion for leave to file a Second Amended Complaint, plaintiffs seek to amend their factual allegations to include: that LNR wrongly verified, *after the fact*, that the $150 million appraisal made the holder of the Note B-2 the Directing Lender at the time of the loan modification when, in fact, the Directing Lender should have been Colfin. Specifically, upon the occurrence of the December 5, 2015 maturity default, LNR was required to obtain a Required Appraisal by a contractually mandated deadline of February 4, 2016. It allegedly failed to do so. The Second Amended Complaint alleges that even though LNR entered into an agreement with the appraiser, CBRE, that required completion of an appraisal by January 25, 2016, the appraisal was not actually completed until March 30, 2016, two months late. By then, LNR had already concluded the Loan extension and modification with a new borrower based on the presumption that the holder of Note B-2 was the Directing Lender.

Rather than have the appraisal issued on the day it was completed, March 30, 2016, LNR allegedly had the Required Appraisal backdated to January 20, 2016, a date approximately two and a half weeks before the loan modification closed (the appraisal expressly says that it has an as-of date more than two months before it was issued). Since LNR used an "as of" January 20th date for the appraisal, it is alleged that LNR should have applied the loan balances and reserves existing as of that date as well to perform its Directing Lender calculation. Had LNR done so, Colfin asserts that it would have been the Directing Lender. There is an issue of fact as to whether LNR mixed and matched numbers from both before and after the Loan modification in an attempt to hide from Colfin that Colfin was really the Directing Lender.

The Second Amended Complaint states a claim, among others, that LNR manipulated the required appraisal process to prevent Colfin from becoming the Directing Lender. There has been no discovery in this case and, under the liberal pleading standards applicable pursuant to

CPLR 3211(a)(7), the motion to file a Second Amended Complaint is granted and the motion to dismiss the First Amended Complaint is denied on the grounds that defendants have failed to establish by irrefutable documentary evidence that defendants are entitled to judgment. As the Second Amended Complaint adds only factual allegations and no new causes of action, defendants shall e-file their Answer within twenty (20) days of entry of this Decision and Order. Counsel shall appear for a discovery conference on March 31, 2020 at 9:30 a.m. as previously scheduled.

2/20/2020
DATE

BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER
JSC

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