SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 54EFM

----------X

TORCHLIGHT LOAN SERVICES, LLC, AS SPECIAL SERVICER TO U.S. BANK NATIONAL ASSOCIATION,

Plaintiff,

- v -

COLUMN FINANCIAL, INC., CREDIT SUISSE (USA), INC.,

Defendants.

INDEX NO. 654003/2012

MOTION SEQ. NO. 002, 003

DECISION & ORDER ON MOTIONS

----------X

HON. JENNIFER G. SCHECTER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 124-250, 446-475, 477-482, 488

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 124, 251-434, 438-445, 476, 483, 484-486, 488

were read on this motion for SUMMARY JUDGMENT.

Motion sequence numbers 002 and 003 are consolidated for disposition. Defendants Column Financial, Inc. (Column) and Credit Suisse (USA), Inc. (Credit Suisse) move, pursuant to CPLR 3212, for summary judgment of dismissal (seq. 002). Plaintiff Torchlight Loan Services, LLC (Torchlight) opposes, and it, too, moves for summary judgement (seq. 003). Defendants oppose. Plaintiff's motion is granted and defendants' motion is denied.

Introduction

The parties submitted a joint statement of undisputed facts (Dkt. 124 [JS]).[1] Unless otherwise indicated, the following facts are undisputed.

This is a commercial mortgage-backed securities (CMBS) put-back action. Plaintiff Torchlight is the special servicer in charge of servicing and administrating mortgage loans in the

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

Credit Suisse Commercial Mortgage Trust 2007-C2 (the Trust) that are in default (JS ¶ 1). Defendant Column is engaged in the commercial real estate loan origination business (JS ¶ 3). Defendant Credit Suisse guaranteed certain of Column's obligations, including the obligation to repurchase defective loans, pursuant to a guarantee dated May 1, 2007 (JS ¶ 7).

In 2007, Column sold a pool of mortgage loans that it had originated to an affiliate, Credit Suisse First Boston Mortgage Securities (CSFB), pursuant to an agreement titled Mortgage Loan Purchase Agreement dated as of May 1, 2007 (Dkt. 254 [MLPA]) (JS ¶¶ 5-6). CSFB deposited the pool of loans into the Trust created by a Pooling and Servicing Agreement, also dated as of May 1, 2007, assigning all rights, title and interest under the loans and the MLPA (Dkt. 256 [PSA] at 102 § 2.01[a]) (JS ¶ 8). Beneficial ownership of the loans was sold to investors in the form of Credit Suisse Series 2007-C2 Commercial Mortgage Pass-Through Certificates (JS ¶ 10).

Section 2.03(b) of the PSA authorizes plaintiff, as special servicer, to enforce Column's repurchase obligations under Section 7 of the MLPA (Dkt. 256 [PSA] at 113; *see* JS ¶ 12). Plaintiff commenced this breach of contract action against Column and Credit Suisse in November 2012. The complaint alleges material breaches of numerous representations and warranties, all of which defendants deny. The complaint claims damages of $19,690,218, plus interest and attorneys' fees.

Two of the mortgage loans in the Trust are the subject of plaintiff's put-back claims. The first (West Wing Loan) is secured by the west wing of an L-shaped residential apartment building located at 33 Village Parkway, Circle Pines, Minnesota (Circle Pines Property) (Dkt. 214 [West Wing Mortgage]). The second (Elgin Loan) is secured by commercial real estate located at 1200 St. Charles Road, Elgin, Illinois (Elgin Property) (Dkt. 143 [Elgin Mortgage]). Plaintiff and defendants each urge that they are now entitled to summary judgment as to both the Elgin Loan and the West Wing Loan.

Discussion

Plaintiff moves for summary judgment related to the West Wing Loan on breaches of four of the "Representations and Warranties Regarding the Mortgage Loans" set forth in Exhibit A to the MLPA (Reps & Warranties)—those contained in subsections v, xxvi, xxix and li—and for summary judgment related to the Elgin Loan on breaches of two of those four—those in subsections v and xxix. To prevail, plaintiff need only prove a single breach for each loan. Defendants move for summary judgment dismissing the complaint in its entirety, arguing that none of the Reps & Warranties addressed therein were actionably breached. Plaintiff established that there is no triable issue of fact—and that it is entitled to summary judgment—as to breaches of subsection xxix of the Reps & Warranties (Improvements Warranty) for both of the loans.

Section 6 of the MLPA states that "[Column] represents and warrants . . . as of the date hereof, … [that] [t]he representations and warranties contained in Exhibit A hereto … are true and correct in all material respects as of the date hereof with respect to the Mortgage Loans" (Dkt. 254 [MLPA] at 12, 15 [§ 6(xii)]). The Reps & Warranties are made "as of the date herein below specified or, if no such date is specified, as of the date of" the MLPA (*id.* at 48).

Section 7 of the MLPA, in turn, sets forth Column's obligation to repurchase mortgage loans that breach certain Reps & Warranties (*id.* [MLPA] at 15-19). It details Column's repurchase obligations in the event of a "Breach," defined as a "breach of any of the representations or warranties made by [Column] with respect to the Mortgage Loans … as of the date hereof in Section 6(xii)" (*id.* at 16). Section 7 states:

> If [Torchlight] determines that such Breach … materially and adversely affects the value of any Mortgage Loan … or the interests of the Holders of any Class of Certificates (in which case such Breach … shall be a "Material Breach" …), it shall give prompt written notice of such Breach … [to Column] … and shall request that [Column] not later than the earlier of 90 days from the receipt by [Column] of such notice or discovery by [Column] of such Breach ... (subject to the second succeeding paragraph, the "Initial

> Resolution Period"): (i) cure such Breach ... in all material respects; [or] (ii) repurchase the affected Mortgage Loan at the applicable Purchase Price …
>
> ***If Seller does not, as required by this Section 7, correct or cure a Material Breach*** … in all material respects within the applicable Initial Resolution Period (as extended pursuant to this Section 7), or if such Material Breach … is not capable of being so corrected or cured within such period, then ***Seller shall repurchase*** … ***the affected Mortgage Loan*** as provided in this Section 7 (*id.* at 16-18 [emphasis added]).[2]

Torchlight maintains that Column breached The Improvements Warranty as to each of the loans at issue. The Improvements Warranty provides:

> All improvements included in the related appraisal are ***within the boundaries*** of the related Mortgaged Property, ***except for encroachments onto adjoining parcels*** for which [Column] has obtained title insurance against losses arising therefrom or ***that do not materially and adversely affect the use or value of such Mortgaged Property*** (*id.* at 57-58 [emphasis added]).[3]

No one denies that the appraisals related to the two mortgaged properties contained mistakes about improvements or boundaries of the properties. The central question presented is whether improvements included in the appraisal but excluded from the collateral "materially and adversely affect the use or value" of the properties. They did.

Legal Standard – Summary Judgment

Summary judgment may be granted only in the absence of any triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant bears the burden of making a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New*

---

[2] The MLPA defines "Material Breach" to "have the meaning given such term in Section 7 of this Agreement" (*id.* at 28).

[3] The MLPA does not define "Mortgaged Property." The PSA, to which the MLPA refers for the definition of capitalized terms not defined in the MLPA (*see* Dkt. 254 [MLPA] at 3, 27), defines "Mortgaged Property" as "each real property (together with all improvements and fixtures thereon) ***subject to the lien*** of a Mortgage and ***constituting collateral*** for a Mortgage Loan" (Dkt. 256 [PSA] at 65 [emphasis added]).

York, 49 NY2d 557, 562 [1980]). The motion must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions" (CPLR 3212[b]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

Once the movant has laid bare its proof, the opposing party is compelled to do the same (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 [1st Dept 2011]). A party opposing summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the claim rests or must demonstrate an acceptable excuse for failure to do so (*Zuckerman*, 49 NY2d at 562). Failure to contradict facts is an admission (*Costello Assocs., Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], appeal dismissed 62 NY2d 942 [1984]).

The evidence on the motion must be examined in the light most favorable to the opponent of summary judgment (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient and a summary judgment motion cannot be defeated simply by raising the "shadowy semblance of an issue" (*Zuckerman*, 49 NY2d at 562; *Jeffcoat v Andrade*, 205 AD2d 374, 375 [1st Dept 1994]).

The West Wing Loan

Background

In February 2006, the Circle Pines Property was entirely owned by Uppal Properties at Circle Pines, LLC ("Uppal I") (JS ¶ 15, 17). On February 14, 2006, Uppal I executed five easement

agreements (Easements) (JS ¶ 18).[4] The Easements bisected the Circle Pines Property, including the reverse L-shaped building located on it, into a west wing and a (north-) east wing, referred to elsewhere in the record and in this decision as the West Wing and the East Wing, respectively. Uppal I's owners formed Uppal Properties at Circle Pines II, LLC (Uppal II) to own the West Wing (JS ¶ 16).

The Easements are titled:

- "Declaration of Access and Stairwell Agreement" (Dkt. 188 [Stairwell Easement]);
- "Property Maintenance Agreement" (Dkt. 190 [Surface Parking Easement]);
- "Joint Easement and Maintenance Agreement" (Dkt. 187);
- "Utility Easement Agreement" (Dkt. 189); and
- "Declaration of Access Easement to Parking Agreement" (Dkt. 191).

Exhibit A to each of the Easements designates, by metes and bounds, the West Wing as Parcel 1, which was to be the "Rental Property," and the East Wing as Parcel 2, which was to be the "For Sale Property." The Stairwell Easement and the Surface Parking Easement expressly designate the West Wing as the servient (burdened) estate; that is, they purport to grant access to the ***West Wing's*** surface parking and stairwells.

The Stairwell Easement states as follows:

> Uppal reserves for itself and their respective successors and assigns, for the benefit of the Owner(s) of the Condominium Units, a ***permanent, non-exclusive easement for the use of pedestrian ingress and egress*** between the Condominium Units and underground parking garage located on the For Sale Property and surface parking lot ***via the stairwells, elevators, if any, and the second floor hallway located on the Rental Property*** (Dkt. 188 at 2 [emphasis added]).

It defines the "Condominium Units" as "two-one level condominiums [that] will be located on the second floor of the building located on the For Sale Property [the East Wing] and are legally

[4] The parties agree that Minnesota law applies to interpretation and reformation of all five Easements (*see* Dkt. 126 [Defs.' Opening Br.] at 8; Dkt. 446 [Plaintiff's Opp. Br.] at 35).

described as 'Units 217 and 218, CIC Number 231, Village Plaza Townhomes, Anoka County, Minnesota'" (*id.* at 1). Two paragraphs later, it describes that certain "Condominium Units are located on the ***east property line*** of the [East Wing] … directly adjacent to the ***west side of the property line*** of the [West Wing]" (*id.* [emphasis added]). Problem is that units 217 and 218 are actually part of the West Wing, and the only way to enter and exit them is through a hallway that leads to the East Wing (Dkt. 266 at 30 [Uppal Dep. 115:12-116:10]; Dkt. 279 at 9 [Freeman Dep. 31:21-32:7]). In fact, there is only one stairwell on the West Wing (Dkt. 266 at 27 [Uppal Dep. 103:12-25]).

The Surface Parking Easement states as follows:

> Uppal reserves for itself and their respective successors and assigns, for the benefit of the Owner(s) of the Condominium Units and their guests and invitees, a ***permanent, non-exclusive easement for*** vehicular ingress and egress and ***parking on the Surface Parking Lot located on the Rental Property*** [the West Wing] (the "Parking Easement") (Dkt. 190 at 2 [emphasis added]).

The Surface Parking Easement, which includes a merger clause (*id.* at 3 ¶ 7), does not define "Condominium Units." It defines Surface Parking Lot as follows: "a surface parking lot is ***located on the Rental Property*** [the West Wing] ('Surface Parking Lot') as pictorially shown" (*id.* at 2 [emphasis added]). The picture, however, shows that the Surface Parking Lot is on the East Wing (*id.* at 7). There is, in fact, no surface parking at all on the West Wing (*see* Dkt. 279 at 8, 16 [Freeman Dep. 29:8-18, 58:16-20]).

In 2006, Column prepared to originate two separate mortgage loans for the single property, one for each wing. If this sounds like a disaster waiting to happen in light of the easement problems, rest assured that it actually becomes one.

Column retained CB Richard Ellis (CBRE) to appraise the East Wing (JS ¶ 20), and in July 2006, Column originated a loan secured by a mortgage on the East Wing (the East Wing Loan) (JS ¶ 24; *see* Dkt. 304 [email with closing documents]). The East Wing Loan was subsequently

sold and securitized as part of a separate commercial mortgage-backed securities offering (*see* Dkt. 307 [Nov. 1, 2006 Column loan committee memorandum] at 10).

As part of Column's preparations to originate the West Wing Loan, CBRE again prepared an appraisal, dated as of November 29, 2006 (JS ¶¶ 31-32, Dkt. 202 [West Wing Appraisal]). The West Wing Appraisal touted the property's "unique" characteristics—shared amenities with the East Wing including a community room, fitness center and leasing office (Dkt. 202 [West Wing Appraisal] at 2-3, 15). The West Wing Appraisal's valuation expressly includes the "common area components" (*id.* at 3, 54). The appraisal explains that "the property does not appear to be adversely affected by any easements" (*id.* at 50). The "Site Analysis" section notes that Encroachments, Deed Restrictions, Reciprocal Parking Rights and Common Ingress/Egress are all present and "Detrimental Easements" are "Unknown" (*id.* at 48).

In the "Improvements Analysis" section, the West Wing Appraisal states:

> The Village Plaza Apartments consists of one 4-story concrete-framed building with a total of 43 underground garage stalls (heated) and ***78-stall surface parking lot*** (***shared*** with Village Plaza Apartments North) also exist, equating to 121 total parking stalls throughout the development.
>
> The subject property is host to a moderate degree of amenities typically found in luxury apartment developments throughout the Twin Cities. These amenities include a community room, fitness center, leasing office and main floor retail space.
>
> Note, the subject property is part of a larger development containing for-sale Village Plaza Condominiums (as referred to above). The subject and the condominiums are located within the same building, share the same underground garage, and ***share the 78 surface parking stalls*** mentioned above. This valuation includes the apartment and common area components only and does NOT include the Village Plaza Apartments North Apartments or retail spaces (Dkt. 202 at 54 [emphasis added]).

"Interior stairwell**s**" are described as "located at opposite ends of the main lobby area to access the basement and upper stories" (Dkt. 202 at 55; *see also id.* at 53 [listing "two stairwells"]). The "Parking Improvements" are described as "Underground (43 stalls), Open Parking (78 stalls)" and

the "Parking Ratio (spaces/unit)" is described as 2.52 (*id.* at 53). The improvements analysis concludes that the "improvements are in good overall condition. Overall, there are no known factors that adversely impact the marketability of improvements" (*id.* at 59).

In December 2006, Column originated the West Wing Loan in the original principal sum of $7.1 million, which was secured by a mortgage on the West Wing (JS ¶¶ 37-38). In connection therewith, Uppal II issued a promissory note, which was dated as of December 28, 2006 (JS ¶ 37), and Sohan Uppal, a principal of both Uppal I and Uppal II, signed a guaranty (JS ¶¶ 15-16, 40).

It is undisputed that as of the origination date, the written Easements were all defective. Before the loan on the East Wing closed, underwriting counsel notified Column's counsel[5] of the defects (Dkt. 289 [June 30, 2006 letter] at 1; Dkt. 290 at 18-20 [Landmark Dep. 69:10-74:7]). Counsel for Uppal I and Uppal II (Uppal Counsel)[6] prepared amendments to the Easements dated July 14, 2006 (Dkt. 291 [July 10, 2006 email from Uppal Counsel to underwriter counsel]; Dkt. 290 at 22, 25-26 [Landmark Dep. 84:14-85:16, 97:15-98:11]; Dkt. 292-296 [Unsigned Amendments]). Both the Easements and the Unsigned Amendments were listed as exclusions to the title insurance policy (Dkt. 302 [July 27, 2006 letter from Column's counsel to Uppal Counsel] at 21-22). On December 18, 2007, only after the securitization of each of the separate mortgages, Uppal I and Uppal II finally executed amendments to three of the five Easements, but not the Stairwell or Surface Parking Easements (*see* Dkt. 297-299 [2008 Amendments]). On January 2, 2008, over a year after the sale and securitization of the East and West Wing Loans, Dolly Laubach,

[5] Column retained the same law firm in connection with both the East and West Wing Loans (JS ¶¶ 25, 27).

[6] Uppal I and Uppal II retained the same law firm in connection with both the East and West Wing Loans (JS ¶¶ 26, 28).

(continued on next page)

head of Column's closing department, executed purported consents to the 2008 Amendments on behalf of the mortgagees (Dkt. 297 at 4; Dkt. 298 at 4; Dkt. 299 at 4).

In June 2009, Uppal II defaulted on the West Wing Mortgage by failing to make loan payments (JS ¶ 42). Following notice of default, Torchlight, as special servicer, commenced a foreclosure action in Minnesota State Court in 2009.[7] The court appointed a receiver for the West Wing Property (JS ¶ 47). In 2010, Torchlight won the right to foreclose the Mortgage and sell the West Wing Property (JS ¶ 52).

After the receiver was appointed, Uppal I denied that West Wing residents and staff had legal access to the East Wing (*see* Dkt. 275 at 11, 21, 28 [French Dep. 39:21-40:10, 81:9-22, 108:8-14]; Dkt. 333 at 2 [Apr. 23, 2012 email by Sohan Uppal]; Dkt. 336 [May 23, 2012 letter by Uppal I's counsel] at 2; Dkt. 337 [June 1, 2012 letter by Uppal I's counsel] at 2-3). Uppal I's property manager for the East Wing posted notices forbidding West Wing tenants from accessing the East Wing (Dkt. 275 at 11, 28 [French Dep. 38:20-39:10, 106:18-107:11]). As defendants openly admit, Uppal I "tried to prevent" the West Wing receiver's access to the roof, "placing an additional lock on the door" located on the East Wing (Dkt. 445 [Defs.' Opp. Br.] at 29). The receiver's efforts to repair the West Wing's HVAC units and leaks into West Wing units were stymied as a result (*see* Dkt. 275 at 21-22, 28 [French Dep. 80:17-82:13, 107:12-22, 108:8-109:3]). Defendants point out that the access issues were ultimately all resolved and contend that Uppal was simply trying to minimize the value of the West Wing as part of "an ongoing effort to pressure Torchlight to reduce his loan amount" (Dkt. 445 [Defs.' Opp. Br.] at 29; *see also* Dkt. 482 [Defs.' Reply Br.] at 22).

[7] Section 2.03(e) of the PSA authorizes Torchlight to foreclose a mortgage loan while pursuing a repurchase claim.

On July 28, 2010, plaintiff obtained an appraisal valuing the West Wing (by itself) at a maximum of $2.7 million, applying a "confusion factor discount" of up to 50% (Dkt. 273 [appraisal] at 6).

By letters to defendants dated July 26, 2010 (Dkt. 363 [July 2010 Letter]), June 10, 2011 (Dkt. 364 [June 2011 Letter]) and April 11, 2012 (Dkt. 365 [April 2012 Letter]), plaintiff demanded that Column immediately repurchase the West Wing Loan. The July 2010 Letter asserted, among other things, that the lack of "shared amenities" with the East Wing, including both the fitness center and leasing office, was a material breach of the Improvements Warranty and demanded that Column "cure or repurchase" the West Wing Mortgage within 90 days (Dkt. 363 at 4). The June 2011 Letter asserted, among other things, that the West Wing lacked access to two of the units and that the West Wing violated the building code because it did not have two staircases (Dkt. 364 at 1). It also asserted that "residents of the West Wing have no legal right to use the parking lot and have NO surface parking" (*id.* at 6). The June 2011 Letter further asserted that the Easements failed to ensure that West Wing residents had access to parking or the second stairwell (among other deficiencies) and the 2008 Amendments were invalid for lack of consent of the mortgagee (*id.* at 6). The April 2012 Letter asserted breaches of the Improvements Warranty, among others, citing concerns about the conjoined nature of the building, the void and insufficient Easements and the failed 2008 Amendments (Dkt. 365 at 3-6). The letter complained that "only 43 underground parking spots for 48 units" were available and that two units within the Property altogether could not be accessed through common hallways and stairwells (*id.* at 5). It also asserted that the lack of two stairwells, among other things, violated the building code (*id.*).

In April 2014, more than a year after this action was commenced, plaintiff, Uppal I, Uppal II and Sohan Uppal agreed to reduce the balance of the West Wing Loan from $7.1 million to $3.75 million, and Uppal II agreed to make a cash payment of $250,000, entering an agreement

styled "Loan Modification Agreement" (LMA) dated April 11, 2014 (JS ¶¶ 57-58; Dkt. 240 [LMA]). Uppal I and Uppal II also agreed to execute agreements to cure various perceived deficiencies with the Easements (Dkt. 240 [LMA] at 5-6).

On September 17, 2014, Uppal I and Uppal II entered an agreement titled "Reciprocal Easement and Operation Agreement for Village Plaza" (Dkt. 280 [Reciprocal Agreement]), creating various easements (*id.* at 8-13). On the same date, Uppal I and Uppal II also amended the Stairwell and Surface Parking Easements to swap the descriptions of Parcel 1 and Parcel 2 (Dkt. 300 and 301). The mortgagees for both the East and West Wing Loans consented and agreed to subordinate their security interests in the East and West Wings to the Reciprocal Agreement and the amendments (Dkt. 280 at 27, 29; Dkt. 300 at 3, 5; Dkt. 301 at 3, 5).

Analysis

Plaintiff maintains that it is entitled to summary judgment based on the Improvements Warranty because many improvements included in the West Wing Appraisal were located outside the West Wing. Plaintiff argues, moreover, that the owners of the West Wing did not have rights to those improvements at the time of securitization. For example, the Surface Parking Easement (Dkt. 190) and the Stairwell Easement (Dkt. 188)—both of which identified the West Wing as the servient estate—failed to give West Wing users the necessary access to the East Wing's second stairwell and the Surface Parking Lot. According to plaintiff, the breach was not resolved in accordance with the rules and timeframes in § 7 of the MLPA.

Defendants maintain that despite the errors in the Easements, which resulted from "scrivener's error" swapping the legal descriptions of the East Wing with that of the West Wing, the Improvements Warranty was not breached because "a mutual mistake" can be reformed and Uppal's intention, as sole party to the Easements, must be understood as always having created the necessary easements for the benefit of users of the West Wing.

As drafted, the Easements unambiguously fail to bestow West Wing users with an express easement over the East Wing's second stairwell or its Surface Parking Lot. The court is not free to simply interpret them otherwise (*see Bergh & Mission Farms, Inc. v Great Lakes Transmission Co.*, 565 NW2d 23, 26 [Minn. 1997]; *Highway 7 Embers, Inc. v Northwestern Nat. Bank*, 256 NW2d 271, 275 [Minn 1977] ["When an easement is by express grant, its extent depends entirely upon the construction of the terms of the grant"]). Defendants cannot invoke reformation, an equitable remedy available when a legal instrument contains an error as a result of a mutual mistake (*see Berg v Carlstrom*, 347 NW2d 809, 811-12 [Minn 1984]; *accord Nash v Kornblum*, 12 NY2d 42, 47-48 [1962]), to rewrite history. Defendants' arguments—for example, that the defects were "inconsequential" and "technical"—are not grounded in reality. The West Wing Appraisal based its valuation on improvements that were not contained in the West Wing. It explicitly said so. The staircases, surface parking, fitness room and leasing office were all in the East Wing, and the West Wing did not have shared rights to those improvements at securitization. What was intended—as acknowledged years later—was neither expressed in the Easements nor actually conveyed with the West Wing Mortgage.

That the West Wing receiver may have had a meritorious legal claim to rights to access the improvements—at substantial cost—is unavailing. The reformation ship sailed years ago. Column had an opportunity to cure within the resolution period. However, it was not until 2014, ***years*** after plaintiff notified defendants of the defects in the Easements (*see* Dkt. 364 [June 2011 Letter]), and well after this action was commenced, that plaintiff obtained consent from Uppal I, Uppal II, and the mortgagor of the East Wing Loan to correct the Easements. Nor is the court "entirely invalidating" Easements that were already defective when the warranties were made. Defendants are not entitled to retroactive equitable relief in contravention of the MLPA after the damage has already been done. The appraisal contained improvements that were not on the mortgaged property

and the material and adverse consequences of all of the problems—even apart from the appraisal itself stating that the improvements were part of the valuation—were not just hypothetical, they caused actual damage in terms of both value and use.

While defendants argue that the depressed value of the West Wing was solely because of market forces and not the defective Easements, they never dispute that a lack of access to the second stairwell and the Surface Parking Lot would "materially and adversely" affect the value of the West Wing and the West Wing Loan. They simply rely on the written Easements to provide access, while failing to demonstrate that any of the Easements did, in fact, provide the necessary access. Defendants ignore their prior breach of the MLPA in failing to seek timely reformation of the instruments or to take other steps to ensure that the West Wing's rights to access the East Wing were fully realized.

Plaintiff is entitled to summary judgment that defendants breached their obligation to repurchase the West Wing Loan, and defendants' motion for summary judgment is therefore denied as to that loan.[8]

The Elgin Loan

Background

On March 5, 2007, Column issued a $9,550,000 loan (Elgin Loan) to Elgin O'Hare Commerce Center, LLC (Elgin Borrower), secured by, among other things, a mortgage on the Elgin Property executed by the Elgin Borrower (JS ¶¶ 59-60). Along with the security interests,

[8] Torchlight's statement in the LMA that, to the actual knowledge of its associate, there were no "Events of Default" other than the borrower's nonpayment is unavailing. The statement does not speak to whether Column breached the MLPA. Indeed, the LMA sets forth that the Easements were insufficient to uniformly operate the properties and outlines all of the problems (Dkt. 240 [LMA] at 5-6). Neither defendant, moreover, was a party to the LMA. Also, the PSA let plaintiff modify the Mortgage Loan while pursuing the repurchase claim, and defendants agreed that modifications "shall not be a defense to the repurchase claim" (Dkt. 256 [PSA] at 114-115 [emphasis added]).

Elgin Borrower also assigned to Column its rights under the leases with the tenants of Elgin O'Hare Commerce Center (Elgin Building), the multi-tenant building situated on the property (JS ¶ 61; Dkt. 370 [Lease Assignment]).

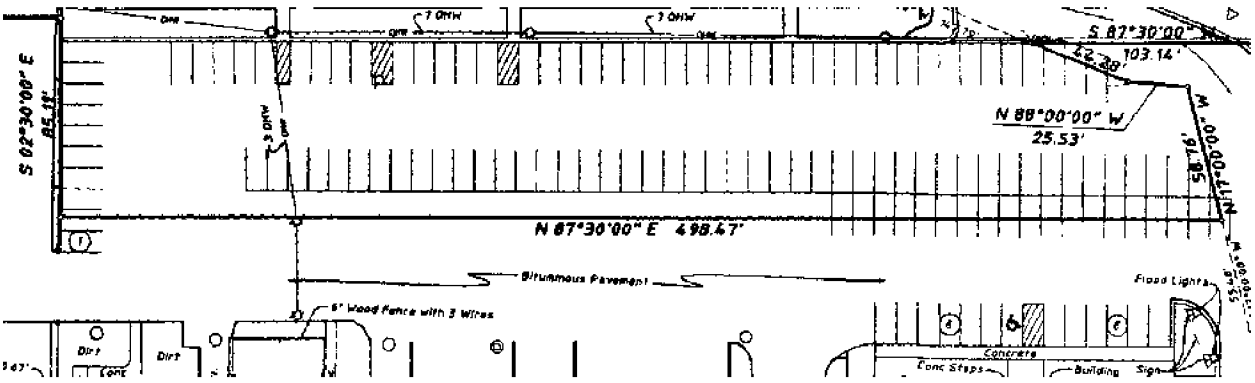
Pre-closing, Column retained Property Valuation Advisors (PVA) to perform an appraisal, and PVA issued its report dated January 9, 2007 (JS ¶¶ 62-63; Elgin Appraisal [Dkt. 137]). In its "Description of Improvements" section, the Elgin Appraisal states that the property contained "65 exterior dock high doors with levelers, 14 drive in doors" and "over 200 surface car parking spaces" (Dkt. 137 at 58-59; *see also id.* at 15).

The Elgin Appraisal states that "the value of the property as improved is greater than the value of the land as if vacant" and all "factors considered the use of the subject property as a warehouse/distribution property is consistent with the principles of highest and best use" (*id.* at 69). Primary reliance was placed on the Income Capitalization Approach to valuation, which analyzes a property's ability to produce income (*id.* at 69-70). The Elgin Appraisal listed the property's tenants, Dovenmuehle Mortgage, Inc. (Dovenmuehle) being its largest (*id.* at 82-84). The appraiser certified that the "statements of fact" in the report were "true and correct," that the "reported analyses, opinions and conclusions are limited only by the reported assumptions," and that he had "made a personal inspection of the property that is the subject of this report" (*id.* at 98).

The Elgin Appraisal states that the "subject consists of a single land parcel containing 14.5 acres or 631,620 square feet of land area" (*id.* at 55). The section titled "Real Estate Tax and Assessment Data," however, states that the "subject property is designated for tax purposes one Property Identification Number (PIN): 06-25-200-033, 034, 036, 06-25-100-002, and 06-25-400-001" (*id.* at 20) and lists the taxes for all five land parcels (*id.* at 21). In truth, only the land parcel bearing PIN 06-25-200-036 (the Elgin Parcel) was included in the collateral for the Loan (Dkt. 143 [Elgin Mortgage] at 1). Under the heading "Survey Legal Description," the Elgin Appraisal

states that "[w]e requested but were not provided with a survey and legal description therefore relying on information obtained from the Kane County assessor" (Dkt. 137 at 104). A photograph, one of 14 pictures in a section titled "Photographs of Subject Property," is captioned "View of northern parking lot" and appears to depict a row of stationary cars in a paved area (*id.* at 10).

Column separately procured a survey of the Elgin Parcel dated January 30, 2007 (Dkt. 372 [Elgin Survey]). As is depicted in the Elgin Survey, the parcel bearing PIN 06-25-200-034 (North Parcel) is immediately adjacent to and situated north of the Elgin Parcel, divided by a north-south boundary line (Northern Boundary). The Northern Boundary horizontally bisects the below image, which was excerpted from the Elgin Survey and depicts the parking lot north of the Elgin Building:



Thirteen parking spaces located along the north side of the Elgin Building are in the lower right-hand corner of the above diagram. As shown, the Northern Boundary cuts across 20 additional striped parking spaces. It is also situated less than 89 feet from five semitrailer truck loading docks along the north side of the Elgin Building (*see* Dkt. 378 [Abrams expert report] at 4). There is no evidence that PVA was given the Elgin Survey before the loan closed.

Column also retained the Planning & Zoning Resource Corporation (PZR) to prepare a zoning report dated March 1, 2007 (Dkt. 468 [Elgin PZR Report]). It described the "Existing Land Use" as "Industrial" (*id.* at 2) and used a "Parking Space Formula" based upon "Manufacturing/Industrial Use," calculating that the Elgin Property needed 192 parking spaces total (*id.* at 3). Noting that only 152 striped parking spaces existed on the Elgin Property according

to the Elgin Survey, the report concluded that the existing parking would be in conformance with legal requirements, "provided 40 additional spaces are striped" (*id.* at 3). The report also noted that according to the survey, "there is unstriped paved parking area to accommodate 40 spaces." (*id.* at 3-4). Sometime later, Elgin Borrower striped an additional forty spaces ***southwest*** of the Elgin Building to meet the requirement, bringing the total to 192 (*see* Dkt. 130 at 8-10 [Aufrecht Dep. 28:24-30:8, 35:17-36:15]; Dkt. 150 (satellite image)].

On March 5, 2007, the date of closing, Column requested that PVA revise the Elgin Appraisal to exclude the additional "real estate tax parcels," attaching tax bills for the Elgin Parcel (*see* Dkt. 405 [3/5/2007 email] at 1). Emails discussing the need for and timing of a revised report continued for several days thereafter (*see* Dkt. 407 [3/12/2007 email from PVA to Column]). There is no evidence that the Elgin Appraisal was ever revised.

In June 2009, two years after the Elgin Loan was securitized, the Elgin Borrower defaulted by failing to make the required payments (JS ¶ 64). Following notice of default, an action was commenced in the Circuit Court for Kane County, Illinois, Civil Division, to foreclose on the Elgin Property (JS ¶ 66). The foreclosure court appointed a receiver (JS ¶ 67).

An appraisal plaintiff obtained dated October 2009 valued the Elgin Property at nearly $8 million (Dkt. 158 [2009 Elgin Appraisal] at 3). The 2009 Elgin Appraisal noted that the Elgin Property had "152 asphalt-paved parking spaces" (*id.* at 33, 36). It made no reference to issues with parking or the loading docks, but noted it was "not surprising" that the loan amount exceeded the value of the property "considering current weak market conditions and the recessionary economy which has softened the demand for industrial and office space" (*id.* at 13). Plaintiff formally notified a representative for the certificate holders that it estimated the fair value of the loan at $7,980,000 (Dkt. 156 [Jan. 24, 2010 letter] at 2).

By letter dated February 1, 2010, the receiver informed plaintiff:

> [The Property's survey] reveals that the north parking area of the Property is actually a separate parcel (PIN 06-25-200-034). This area includes parking for approximately 100 cars and is integral to the functionality and value of the Property. We respectfully suggest that you ensure that this parcel is conveyed to the foreclosing entity. If this falls through the cracks and the Borrower continues to hold title to the parcel, this will greatly affect the value of the Property in a negative manner (Dkt. 423 [letter] at 1).

By letter to defendants dated November 5, 2010 (Dkt. 430 [November 2010 Letter]), plaintiff asserted that the Elgin Loan violated the Improvements Warranty, among others, because "not all of the improvements related to the Property were included in the real property covered by the Mortgage and securing the Note" and that Column had failed "to transfer the Property intended to act as security for the Loan" (Dkt. 430 at 2-3). By letter dated March 28, 2011 (Dkt. 431 [March 2011 Letter]), plaintiff asserted that the Elgin Loan violated additional warranties. Both letters demanded that Column repurchase the Elgin Loan within 90 days. By letters dated December 20, 2010 (Dkt. 249) and June 27, 2011 (Dkt. 250), Column responded that plaintiff had failed to place it on notice of a breach of the MLPA.

Following a foreclosure auction, on September 15, 2014, the court awarded possession of the Elgin Property to plaintiff, as trustee on behalf of the certificate holders, pursuant to a $2 million credit bid (Dkt. 427 [order] at 2). The receiver's final report to the foreclosure court, dated November 11, 2014, explained that continued non-ownership of the North Parcel "negatively affect[ed] the Property":

> Adjacent to the north side of the Property is +/- 100 car parking parcel that is owned by a land trust that is affiliated with the Defendant (PIN: 06-25-200-034). There are no physical barriers between this parcel and the Property. Prior to Receivership and continuing to present, it is commonly understood that tenants could utilize this parking area, especially Dovenmuehle Mortgage, who occupies over 25% of the building and has over two hundred employees. We also believe that originators of the prior mortgage thought that this parking area was part of the collateral. As Receiver, I have continually emphasized that this potential parking problem

> had to be solved. It remains an unresolved issue (Dkt. 377 [Receiver's Final Report] at 3).

Analysis

Plaintiff contends it is entitled to summary judgment on its put-back claim for the Elgin Loan because the North Parcel's parking and other critical property features associated with income-generating leases—for example, space to maneuver trucks so that they could load and unload deliveries—were improvements included in the Elgin Appraisal that were not within the boundaries of the Elgin Property and that affected both the property's use and value.

In opposition, defendants maintain that (1) the Elgin Appraisal did not include the North Parcel in the valuation;[9] (2) the North Parcel was never intended to be part of the collateral; and (3) none of the tenants' leases allowed them to use the North Parcel. Defendants do not dispute that all improvements located on the North Parcel, including all but 14 parking spaces directly north of the Elgin Building, are outside the boundaries of the Elgin Property. Plaintiff carried its burden of showing that the parking lot on the North Parcel was an improvement included in the Elgin Appraisal that was not part of the mortgaged property and that lack of the improvement "materially and adversely" affects the use or value of the Elgin Property.

The North Parcel was not only listed in the Elgin Appraisal, it was also used to calculate the value of the Elgin Property using the income capitalization approach, on which PVA "placed primary reliance" (Dkt. 137 [Elgin Appraisal] at 70).[10] While the appraisal elsewhere describes the

---

[9] The author of the Elgin Appraisal testified that he thought at the time of appraisal that the Elgin Property was made of up a single land parcel (Dkt. 138 at 8 [Flanagan Dep. 26:25-27:16). Flanagan did not recall, however, whether there was any access to the loading docks on the property being appraised, how he calculated 200 parking spaces or where the spaces were located (*id.* 28:5-14).

[10] The author of the Elgin Appraisal testified that as a result of including the additional four parcels, the appraisal overstated taxes by $12,000, decreasing the appraised value of the Elgin Property by $150,000 (Dkt. 138 at 21 [Flanagan Dep. 80:6-81:8]). Had he excluded the additional parcels, the valuation would have been higher (*id.*).

Elgin Property as a "single land parcel," defendants point to no other means for identifying the physical boundaries of the appraised property apart from the tax section. At least three indications in the appraisal, taken together, are adequate to carry plaintiff's burden of demonstrating that not just the land, but the improvements on the North Parcel, too, were included in the Elgin Appraisal.

First, the Elgin Appraisal boasted "over 200" parking spaces. On the date of the appraisal, however, the Elgin Property had only 152 parking spaces. Defendants' contention that the Elgin Appraisal simply overestimated the number of spaces on the Elgin Parcel by 30% is insufficient to raise an issue of material fact over whether at least 48 additional spaces were included in the appraisal. Defendants point to non-probative testimony by a colleague of the appraiser—who was not a licensed appraiser, did not prepare appraisals and had never visited the Elgin Property (Dkt. 409 at 3-4 [Bowers Dep. 6:23-7:5, 11:16-18])—who offered a theory that obscured striping "probably" resulted in an overestimate (*see* Dkt. 445 [Defs.' Opp. Br.] at 14, citing Dkt. 409 at 7 [Bowers Dep. 23:15-24:13] ["And that's ***probably*** where it says 'over 200' because on older lots and that, ***a lot of time***, the striping is obscured. So he ***probably*** counted as many as he could and estimated wherever. That's where the number came from" (emphasis added)]). The same colleague testified, however, that the appraiser's primary method was to "physically count" striped parking spaces (*id.*). On the date of the appraisal, the only source of striped parking spaces beyond 152 was the North Parcel.

Second, the Elgin Appraisal included a photograph captioned as "View of northern parking lot" that depicts cars parked in a paved area (Dkt. 137 [Elgin Appraisal] at 10). The undisputed evidence (*see* Dkt. 372 [Elgin Survey]) shows that a single paved parking lot lies north of the Elgin Building, rather than, as defendants effectively argue, two parking lots divided by the (virtual, not physical) Northern Boundary. The caption, therefore, refers to the entire parking lot. Defendants

offer no rebutting evidence, apart from testimony that is, at best, conclusory, that the parking spaces on the North Parcel were excluded from this section of the Elgin Appraisal.[11]

Finally, the Elgin Appraisal also included five loading docks lacking adequate clearance to the northern boundary of the Elgin Parcel without use of the North Parcel. Plaintiff proffered expert testimony from Todd Abrams, a civil engineer, who conducted computer-aided truck circulation simulations to examine the path of vehicular travel along the north side of the Elgin Building (Dkt. 378 [Abrams expert report] at 3, 6-8, 25-39). According to Abrams, the paved area necessary to actually ***use*** those loading docks for their intended purpose—an unrefuted industry standard of 120 feet, when less than 89 feet remained on the Elgin Parcel (*see* Dkt. 378 [Abrams expert report] at 4)—encroaches on the North Parcel by over 30 feet. Consequently, not all of the improvements included in the Elgin Appraisal were within the boundaries of the Elgin Property.

Plaintiff also presents unrebutted proof that these encroachments materially and adversely affected both the use and value of the Elgin Property. Abrams testified that two of three standard-sized types of trucks cannot access five of the loading docks on the north side of the Elgin Building without trespassing on the North Parcel (Dkt. 378 [Abrams expert report] at 8).[12] In response,

---

[11] *See* Dkt. 445 (Defs.' Opp. Br.) at 11, citing Dkt. 409 at 7 (Bowers Dep. 22:3-18). Plaintiff's proffered expert testimony on the photo is also conclusory and therefore nonprobative (Dkt. 417 [Maglocci Report] at 9; Dkt. 429 [Maglocci Dep. 348:25-349:9]). While the record includes a clearer copy of the Elgin Appraisal and the photograph in question (Dkt. 397 at 9), because neither side presents probative, non-conclusory testimony regarding the photo itself, the court resists the urge to analyze its contents, instead relying on the accompanying caption in light of the undisputed fact that the photo depicts cars parked in a parking lot.

[12] Defendants complain that Abrams incorrectly assumed that all parking spots were occupied by cars and that all loading docks were occupied by large trucks (Dkt. 482 [Defs.' Reply Br.] at 14-15, citing Dkt. 175 [Abrams Dep. Tr.]). In light of his testimony that circulation analyses typically use such assumptions (Abrams Dep. 26:19-27:25, 51:6-52:15, 57:6-59:1, 60:4-8), the assumptions are not a basis for excluding or discounting Abrams's testimony. Defendants also argue that Abrams incorrectly assumed that trucks were forbidden to encroach on the North Parcel (Dkt. 482 at 15). But the North Parcel was excluded from the Elgin Loan collateral, and defendants identify no easement or any other legal doctrine as a basis for their challenge to the expert's assumption.

(continued on next page)

defendants again offer non-probative, conclusory testimony (Dkt. 445 [Defs.' Opp. Br.] at 16).[13] Defendants' argument that "no tenants at any time ever claimed not to have access to the loading docks" does not refute unrebutted evidence that tenants had that access through the North Parcel, which was outside the boundaries of the mortgaged property. In fact, the court-appointed receiver testified that, during the receivership, Elgin Building tenants used the North Parcel to maneuver trucks to access the loading docks (Dkt. 379 at 18-19 [Cibula Dep. 69:9-70:7]).

The parties also agree that only fourteen striped parking spaces north of the Elgin Building are on the Elgin Parcel. Plaintiff's proffered expert, Michael Maglocci, considered how a lack of access to the Elgin Parcel would affect Dovenmuehle, the largest tenant when the Elgin Loan closed (Dkt. 425 [2012 Elgin Appraisal] at 95-96; *see* Dkt. 126 [Defs.' Opening Br.] at 9-10, citing Dkt. 136 at 4 [rent rolls]). Dovenmuehle's lease, which was subject to the Lease Assignment, originated in February 1997 and was the subject of various extensions, amendments and addenda dated between January 2001 and March 2006 (Dkt. 387 [Lease and Addenda]). Paragraph 5 of the fourth addendum to the lease, entered on August 30, 2005, states as follows, in relevant part:

---

[13] Defendants cite the deposition of Michael Aufrecht, a corporate representative for an affiliate of Elgin Borrower, who testified as follows with respect to the loading docks:

> Q. Is it not a fact, sir, that in order to access those loading docks the tractor trailers by necessity have to use some portion of parcel 34 to back into and to have access to the loading docks?
>
> A. No, that's not correct.
>
> Q. You say you have been there four, five, six times over the years?
>
> A. Yeah.
>
> Q. Have you ever seen what kind of vehicles are using the loading docks?
>
> A. I can't tell you that I remember what kind of vehicles were using docks.

(Dkt. 130 at 13 [Aufrecht Dep. 47:11-24] [objections omitted]).

(continued on next page)

> Tenant shall be entitled to park a total of ***14 automobiles*** (to be adjusted to reflect a ratio of 4 spaces per 1,000 square feet as Tenant expands or surrenders square footage as per paragraph 7 & 8 of this Lease Extension) in the east (front) parking lot during normal business hours [and] ***all remaining vehicles must be parked in the northern most parking field*** (Dkt. 391 at 39 [emphasis added]).

The "northern most parking field" refers, on its face, to the single paved parking lot north of the Elgin Building, the bulk of which sits on the North Parcel. Defendants present no evidence that Dovenmuehle's parking rights were limited to the 14 spaces on the Elgin Parcel or otherwise excluded the North Parcel.[14] Maglocci predicted that removing access to North Parcel parking would likely have prompted Dovenmuehle to vacate, based on a dearth of available parking spaces on the date of Maglocci's site visit and based on reports that substantial numbers of Dovenmuehle employees parked north of the Elgin Building, which was conveniently located to the entrance to its space (*see* Dkt. 425 [2012 Elgin Appraisal] at 95). Defendants present no evidence sufficient to rebut Maglocci's opinion that removing all but a handful of the parking spaces most convenient to Dovenmuehle's entrance to the Elgin Building—a large commercial building—would harm its

---

[14] Defendants fail to demonstrate that a tenant estoppel entered in connection with the Elgin Loan waived Dovenmuehle's right to park on the North Parcel. That document stated:

> No uncured default, event of default, or breach by Landlord exists under the Lease [including the Fourth Addendum], no facts or circumstances exist that, with the passage of time, will or could constitute a default, event of default, or breach under the Lease. Tenant has made no claim against Landlord alleging Landlord's default under the Lease (Dkt. 172 [Estoppel dated Feb. 1, 2007] at 1; *see also* Dkt. 173 [similar agreement from 2011]).

Plaintiff presents unrebutted evidence that Elgin Building tenants parked, undisturbed, on the North Parcel during the receivership, and there is no indication that the tenants were ever previously denied such access.

Defendants also argue that the receiver's renewal of other leases without amendment (Dkt. 444 [Dec. 8, 2010 Helken Equipment Corporation lease renewal]) acknowledges that those leases did ***not*** convey rights to the North Parcel, because the North Parcel is not a part of the Elgin Loan collateral. The court reads no such admission in the renewal agreement

(continued on next page)

use. Parking elsewhere on the property would not alleviate that absence.[15] Moreover, the court-appointed receiver testified that Elgin Building tenants parked on the North Parcel during the receivership (Dkt. 379 at 18 [Cibula Dep. 68:12-18]).

Plaintiff also demonstrated a material and adverse effect on the Elgin Loan's value related to the off-lot improvements that were included in the Elgin Appraisal. Maglocci anticipated a negative impact to the cash flow for the Elgin Property unless the rights to use the North Parcel could be obtained at market value (Dkt. 425 [2012 Appraisal] at 95-99; Dkt. 426 at 18 [Maglocci Dep. 69:1-21]). His resultant near-zero or negative valuation was based on his assessment of a "strong possibility" that some tenants could claim that the landlord was in "substantial default" of their leases if denied access to the North Parcel (Dkt. 425 at 95).[16] Maglocci opined this would result in a 50% vacancy or, more conservatively, Dovenmuehle's departure (*id.* at 95-96). Moreover, the Elgin Appraisal included income from Dovenmuehle's lease. It is irrelevant that the parties to the loan intended to exclude the North Parcel from the collateral, or that the PZR Report included only 152 striped parking spaces. The "related appraisal"—the Elgin Appraisal—included the North Parcel parking lot, giving rise to a Material Breach under the MLPA.

Conclusion

The breaches of the Improvements Warranty require defendants to repurchase both the West Wing Loan and the Elgin Loan.[17] Plaintiff is entitled to summary judgment, and defendants, therefore, are not entitled to dismissal of the complaint. Accordingly, it is

---

[15] An appraisal dated December 5, 2011 noted that there was "adequate site area to add 166± lined parking spaces" at unspecified locations (Dkt. 440 [Dec. 5, 2011 appraisal] at 82).

[16] In addition to the parking issues, Maglocci noted that a lack of access to the North Parcel could compromise truck access and maneuverability (Dkt. 425 at 95-96).

[17] For similar reasons, plaintiff is also entitled to summary judgment under another provision of the MLPA. Subsection v of the Reps & Warranties (Authorization Warranty) states that to Column's knowledge, based on, among other things, "due diligence as a reasonably prudent

(continued on next page)

ORDERED that defendants' motion for summary judgment of dismissal is denied; and it is further

ORDERED that plaintiff's motion for summary judgment on its first and second causes of action is granted as to liability, and a trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that within 30 days, the parties shall jointly contact chambers (by emailing mrand@nycourts.gov) regarding the scheduling of a pre-trial conference.

20200806130312JSCHECTE6BB4888E7C44FAF88E232CCFC8FABFF

8/6/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER

commercial mortgage lender would deem appropriate," that "the borrower … was in possession of all … authorizations then required for use of the Mortgaged Property which were valid and in full force and effect as of the origination date and to [Column's] actual knowledge, such … authorizations are still valid and in full force and effect" (Dkt. 254 [MLPA] at 50). Under the MLPA, "[a]ll information contained in documents which are part of ... a Mortgage File shall be deemed to be within [Column's] knowledge" (*id.* at 48).

Plaintiff carried its burden to show its entitlement to summary judgment as to both the Elgin Loan and the West Wing Loan for breach of the Authorization Warranty. As to the West Wing Loan, plaintiff carried its burden to show that Column knew that the Easements were invalid and were required for use of the West Wing, as evidenced by the fumbled attempts to amend them both before and after the West Wing Loan was originated. As to the Elgin Loan, Column intentionally excluded from the Elgin Mortgage any right to access the North Parcel, but the Elgin Appraisal—part of Column's own purported "due diligence"—was knowingly flawed and never corrected.