SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE **PART** 60M

Justice

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CLARK TOWER, LLC,

Plaintiff,

- v -

WELLS FARGO BANK, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF J.P. MORGAN CHASE COMMERCIAL MORTGAGE SECURITIES TRUST 2007-CIBC20, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-CIBC20, C-III ASSET MANAGEMENT LLC,MIDLAND LOAN SERVICES, INC.,AXONIC CAPITAL LLC

Defendant.

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INDEX NO. 651319/2019

MOTION DATE 01/06/2023, 01/06/2023, 01/06/2023

MOTION SEQ. NO. 007 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 398, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 468, 469

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 397, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 470, 471, 472, 473, 474, 475, 476, 477

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 399, 465, 466, 478

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Clark Tower LLC (Clark) is the former owner of an office tower (Clark Tower) in Memphis, Tennessee. Clark took out a loan secured by a mortgage on Clark Tower, in the amount of $60,750,000.00 (the Loan) from JP Morgan Chase Bank, N.A. (JP Morgan Chase), pursuant to a Deed of Trust and Security Agreement dated August 14, 2007 (Deed of Trust). On

September 28, 2007, JP Morgan Chase entered into a Pooling and Servicing Agreement (the PSA) that created a Trust Fund into which to place the Loan.

The Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Trust 2007 CIBC20 (the Lender or the Trust) was to own the Trust Fund. The other parties to the PSA are defendant Wells Fargo Bank, N.A. as the Lender's trustee (Trustee or Lender), Centerline Services Inc. (C-III) as the Special Servicer for the loans the Trust held, and defendant Midland Loan Services, a division of PNC Bank, N.A., formerly Midland Loan Services, Inc. (Midland), as the Master Servicer for the loans the Trust held (collectively, the Servicers).

Clark defaulted on the original mortgage in 2015 and Clark and the Trustee, as the representative of the Trust, and C-III acting as Special Servicer, then negotiated to restructure the loan pursuant to a Loan Modification Agreement (LMA) (Doc 339 [LMA]). The LMA allowed Clark to avoid foreclosure and to restructure its debt by bifurcating the mortgage into two notes: (1) a $43.5 million "A Note," that Clark was absolutely required to repay; and (2) a $17 million "B Note," that would be repaid if the property generated sufficient proceeds in a sale or refinancing. In exchange, Clark invested an additional $5.7 million in "New Equity" into Clark Tower (*see id.* Section 6 [a] [12]). The Notes had an original maturity date of September 1, 2017. Under the LMA, Clark could have exercised two options to extend the maturity date by one year each. Clark could exercise those options by giving the Trust sixty days' notice and paying a fee equal to 0.25% of the principal balance of the A Note.

After Clark exercised the first of its two options to extend the maturity date in 2017, it began to try to refinance the loan. Clark obtained an appraisal of Clark Tower, effective as of August 2017, that valued the property at $58,600,000 on an "as is" basis. The Trust obtained an appraisal, effective as of November 2017, that valued the property at $53,500,000 on an "as is"

basis and $59,300,000 on an "as stabilized" basis (i.e., assuming that Clark would invest several millions of dollars into the building and projecting the building's renovated value in November 2020). Midland calculated an "Appraisal Value" under the LMA of $50,107,000 by averaging the two appraisals. Clark and Midland agreed to that Appraisal Value on January 26, 2018.

Clark's affiliate, nonparty In-Rel Properties, Inc. (In-Rel), executed a term sheet with Deutsche Bank (DB) to refinance Clark Tower, for "up to" $75 million. The DB refinancing loan would have been secured by Clark Tower and an unrelated In-Rel property, Meidinger Tower. The maximum loan-to-value ratio would have been 75% of the value of both properties combined. The term sheet was signed on March 2, 2018.

On April 21, 2018, Clark informed Midland that the DB loan was being "finalized" and had a "May 10 deadline to close." On April 23, 2018, Clark requested that Midland assign to Clark's affiliate the B Note, rather than forgiving the B Note debt as the LMA contemplated. Plaintiff sought to avoid income tax liability for "cancellation of [the $17 million Note B] debt" by assigning Note B to its affiliate (Doc 329 [Cypel EBT] at 95-97; *see also* Doc 358 [Clark/In-Rel emails]; *but see* Docs 360, 362 [Clark/In-Rel emails and letters claiming to defendants that plaintiff's "go forward equity investors require an assignment of the B Note," but not mentioning plaintiff's expected tax relief]). Midland contacted C-III and Axonic to seek their consent, and Axonic and C-III requested additional information about the proposed refinance. On May 4, 2018, Clark provided the Trust and Midland with the DB term sheet that appraised Clark Tower's value "around" $62 million. Axonic then directed C-III and Midland (the Special Servicer and Master Servicer, respectively) not to consent to the refinance.

On May 14, 2018, DB completed an appraisal that valued Clark Tower in "as is" condition at $63,500,000. The parties attempted to negotiate towards the refinance, and on June

15, 2018, the Trust (through C-III and Axonic) offered to consent to the transaction with the B Note assignment if Clark agreed to use the $63.5 million DB appraisal value as the basis for the "Liquidity Proceeds" amount to be run through the LMA's waterfall provision. If the Liquidity Proceeds were calculated in that manner, Clark would have received $2.8 million in cash proceeds through the refinance, instead of $4.5 million, and the Trust would have received a $1.7 million payment towards the outstanding B Note principal through the LMA's refinancing waterfall.

Clark refused the request, and the Trust did not consent to the refinancing. Clark continued to own Clark Tower, then failed to exercise on time its second option to extend the maturity date under the LMA. The Loan then matured on September 1, 2018. Clark failed to pay the outstanding balance on the bifurcated notes upon the maturity date. Thereafter, C-III found that Clark had not been complying with the LMA's "lockbox" provision and demanded that Clark deposit the misdirected rents into the lockbox account in December 2018. Clark refused.

Finally, as relevant here, the Trust initiated a nonjudicial foreclosure of Clark Tower in February 2019. In May 2020, after litigating over the foreclosure in this court and the Appellate Division,[1] the Trust foreclosed on the property and purchased the property with a credit bid for around $43 million. In December 2020, the property was appraised at a fair market value of $38.9 million, and the Trust sold the property to a nonparty in August 2021 for $37.1 million.

Now, in Motion Seq. No. (MS) 07, defendant Axonic moves for summary judgment dismissing plaintiff's wrongful foreclosure cause of action against it, the only claim that is left

[1] Plaintiff initially obtained a preliminary injunction from this court (Friedman, J.) enjoining the foreclosure sale. The Appellate Division, First Department reversed that decision and order and the foreclosure proceedings then resumed in Tennessee.

against Axonic (Doc 191 [decision and order resolving defendants' motions to dismiss]). In MS 08, defendants C-III and Midland (together, the Servicer Defendants, and collectively with the Trustee/Lender, the Trust Defendants) move for summary judgment dismissing (a) plaintiff's breach of contract claim against the Trust and (b) plaintiff's wrongful foreclosure claim against all of the Trust Defendants. In MS 09, the Trustee moves for summary judgment dismissing the breach of contract and wrongful foreclosure claims against it.

DISCUSSION

Summary judgment is a drastic remedy that will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *DeCintio v Lawrence Hosp.*, 33 AD3d 329, 329 [1st Dept 2006]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidentiary proof in admissible form (*see Olan v Farrell Lines,* 64 NY2d 1092, 1093 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]).

If the movant makes that initial showing, the burden shifts to the party opposing the motion to establish that there are material issues of fact requiring a trial (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). The court must scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625, 626 [1985]), and the court must deny summary judgment where there is doubt as to the existence of a triable issue of fact (*see Ahmad v City of New York*, 129 AD3d 443, 444 [1st Dept 2015]). However, bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a

summary judgment motion (*Belle Lighting LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]).

Preliminarily, Tennessee law governs the LMA (LMA, ¶ 25 [Doc 339]). "[I]t is the well-settled 'policy of the courts of this State to enforce contractual provisions for choice of *law*' " (*Boss v American Express Fin. Advisors, Inc.*, 15 AD3d 306, 307 [1st Dept 2005], *affd* 6 NY3d 242 [2006], quoting *Koob v IDS Fin. Servs., Inc.*, 213 AD2d 26, 33 [1st Dept 1995]). However, the law of this forum governs matters of procedure (*see e.g. Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 285 [2d Dept 2010]).

I. Plaintiff's Breach of Contract Claim Against Lender (MS 08 and 09)

In Motion Seq. No. 08, the Servicers [C-III and Midland] and the Trustee move for summary judgment dismissing the complaint against them (Doc 325 [MS 08 Notice of Motion]). In Motion Seq. No. 09, the Trustee moves separately for summary judgment dismissing the complaint against it (Doc 386 [MS 09 Notice of Motion]). The Servicers and the Trustee [the Trust Defendants] make essentially identical arguments in both motions.

The Trust Defendants argue that the first cause of action [breach of the LMA against the Lender/Trustee] should be dismissed because plaintiff "cannot prove that withholding consent [to the DB refinancing] was unreasonable" (Doc 384 [Mem in Support, MS 08] at 13-17). They also argue that plaintiff's breach of contract claim must be dismissed because plaintiff will not be able to prove damages in that the lost equity in the property was the result of plaintiff's own failure to extend the loan's maturity date, not the Trust's refusal to consent to refinancing.

The LMA modified the Loan by bifurcating the Note. Note A had a principal balance of $43.5 million and Note B had a principal balance of $16,988,546.89. The maturity date for both

Notes 9/1/17, but plaintiff exercised its first (of two) options to extend the maturity date by one year to 9/1/18.

Regarding refinancing the property, the LMA states:

> "8. Sale or Refinance of the Property. During the period from and after the Maturity Date and through and including the Extended Maturity Date (the "Extension Period"), Obligors shall use commercially reasonable efforts to sell the Property or refinance the Loan (each, a "Liquidity Event"), in order to apply the net proceeds from the Liquidity Event (the "Liquidity Proceeds") against the outstanding Indebtedness due and owing to Holder in accordance with the terms of this Agreement (each, a "Liquidity Closing"). Unless the Liquidity Proceeds equal or exceed the full amount of outstanding indebtedness then due and owing to Holder under the Bifurcated Notes, **any such Liquidity Event is subject to the prior written consent of the Holder, which consent shall not be unreasonably withheld or delayed in connection with such Liquidity Event**"

(Doc 339 [LMA], § 8).

> "If the Liquidity Event is a refinance of the Indebtedness (a "Refinance"), the "Appraisal Value" shall be (except as set forth below) an amount equal to the average of (A) eighty-five percent (85%) of the amount of the appraised value of the Collateral, as determined by an MAI appraiser selected by Holder, and (B) eighty-five percent (85%) of the amount of the appraised value of the Collateral, as determined by an MAI appraiser selected by Borrower. If the amounts of the appraised value of the Collateral, as determined by the two initial appraisals described above, are less than five percent (5%) apart, then the appraised value of the Collateral shall equal the average of the two appraisals. . . . The Liquidity Proceeds in the event of a Refinance will be equal to the greater of (i) the Appraisal Value or (ii) the net proceeds of the Refinance, **subject to Holder's right to consent set forth above if the Liquidity Proceeds do not at least equal the full amount of the then outstanding indebtedness due under the Bifurcated Notes, unless otherwise agreed by Holder**. . . . Once the Liquidity Proceeds are determined in the event of a Refinance of the Indebtedness, Borrower shall pay to Holder all cash equal to the Liquidity Proceeds at the Liquidity Closing in accordance with Section 8(c) below. The Liquidity Closing under the Refinance may occur at any time at the election of the Borrower, but no later than one hundred and eighty (180) days from the date of the establishment and acceptance of the Appraisal Value"

(*id.* § 8 [b]).

Once the Liquidity Proceeds amount was calculated under Section 8 (b), those proceeds would be applied first through a waterfall payment structure whereby: (1) all Note A

indebtedness including all related Note A interest, fees, and charges; and (2) any "Excess Funds" in the "General Reserve Escrow Account" (Reserve Account) would be repaid to plaintiff as a credit towards the "New Equity" [i.e., the $5.7 million] that plaintiff had contributed to the Reserve Account upon execution of the LMA. Plaintiff would also be entitled to repayment of the remainder of the "New Equity" from the Liquidity Proceeds, plus 9% interest on the "New Equity" amount (*id.* § 8 [c] [1] – [4]). Next, all remaining Liquidity Proceeds (the "Excess Liquidity Proceeds") would be distributed through the waterfall as follows: (3) 50% to the Note B holder to be applied first to the outstanding Note B interest and second to the Note B principal balance, and 50% to plaintiff (*id.* § 8 [c] [5] [A] – [B]). "In the event that Holder's Share of the Excess Liquidity Proceeds[] . . . is not equal to the Excess Liquidity Amount Due Holder [i.e., the total amount owed under Note B], Holder shall forgive the remaining outstanding unpaid balance owed with respect to the Loan" (*id.* § 8 [d]). Thus, Note A was absolutely repayable in the event of a refinance, and Note B would be repaid to the Note B holders *pari passu* with equal payments to plaintiff, up to the full amount owed under Note B, but the Note B debt would be forgiven to the extent that the Excess Liquidity Proceeds were insufficient to pay the outstanding Note B amounts through the waterfall.

The parties agree that the property was appraised in 2017 by both Clark and Midland and that the "Appraisal Value" was set at $50,107,000 under the LMA (Doc 351 [Clark's August 2017 Appraisal]; Doc 352 [Trust's November 2017 Appraisal]). Afterwards, in March 2018, In-Rel, on plaintiff's behalf, signed a term sheet with Deutsche Bank [DB] to refinance both Clark Tower and Meidinger Tower, as a package, for "up to" $75 million, with a May 10, 2018 deadline to close on the refinancing. Plaintiff then asked Midland to assign Note B to plaintiff's affiliate, rather than simply forgiving the Note B debt, in connection with the proposed

refinancing. Midland informed In-Rel/plaintiff that assigning Note B required C-III and Axonic's consent, and Axonic and C-III wanted additional information about the refinancing terms. On May 4, 2018, plaintiff provided the defendants with the DB term sheet. The term sheet included DB's estimated valuation of the Clark Tower property as "around" $62 million and reflected plaintiff's cross-collateralization of the Clark Tower property with the Meidinger Tower property for the refinancing (*see* Doc 355 [DB Term Sheet]; Docs 361, 367 [5/4/18 and 5/7/18 emails indicating "around" $62 million DB appraisal]; *see also* Doc 368 [DB 5/14/18 Appraisal of Clark Tower in the amount of $63.5 million "as is"]).

After receiving the DB term sheet, Axonic directed C-III to withhold consent to the refinancing and the assignment of Note B (Doc 361 [May 2017 emails]). The parties negotiated over the proposed refinancing. In June 2018, the Servicers/Axonic offered to consent if plaintiff agreed to use the $63.5 million value from the DB Appraisal as the basis for the "Liquidity Proceeds" to be run through the LMA's waterfall, that would result in a $1.7 million paydown of Note B (Doc 370 [June 2018 emails]). Plaintiff refused and the DB refinance fell apart.

Later, on July 18, 2018, plaintiff attempted to exercise its second option to extend the maturity date under the LMA by sending a backdated letter to Midland (*see* Docs 373-377). Plaintiff backdated the letter to June 29, 2018 and indicated in the letter that it was transmitted "via Federal Express," though the letter does not seem to have been sent by Federal Express on that date (*id.*). Plaintiff seemingly backdated the letter in an attempt to fix its failure to notice the maturity date extension option on time (*see id.*; *see also* Doc 374 [Midland/Clark emails reminding plaintiff that the LMA requires 60-days' notice for an extension request]). Under the LMA, plaintiff's deadline to exercise that option was July 3, 2018 (i.e., 60 days before the maturity date). Plaintiff would have been required to pay a fee of .25% of the principal balance

within three days of a timely extension request pursuant to Section 6 (e) of the LMA. In its July 18, 2018 email attaching the backdated letter, plaintiff asked Midland to "confirm the amount due for the wire of the .25% fee which you will receive tomorrow" (Doc 376). It is unclear whether plaintiff would or could have paid that fee (*see* Doc 328 [Stein (plaintiff's principal) EBT] at 173 [testifying that he wasn't sure plaintiff "would even pay the extension fee based on what (he) thought just happened"]).

Plaintiff never paid the .25% fee and Midland rejected the backdated letter, telling plaintiff that the extension request "was not properly exercised since the letter (which was inappropriately backdated) was not received by Midland until 7/18/18," (Doc 376 [7/19/18 email]). However, the parties attempted to negotiate an extension anyway (*see id.* [telling plaintiff that the DCH would consider the extension if plaintiff provides "its current business plan as to how it expects to pay off the loan" and various financial documents to confirm that there are no outstanding defaults]). C-III instructed Midland to tell plaintiff that it was rejecting the backdated letter (Doc 377 [7/18/18 emails]).

Ultimately, defendants declined to extend the loan. Plaintiff then attempted, in August 2018, to initiate a second refinance process, that it asserts extended the loan's maturity date by operation of the LMA. The Trust Defendants did not process the second refinance request, submitted less than a month before the September 1, 2018 maturity date.

The loan matured on September 1, 2018. Plaintiff did not pay the Notes' balance upon maturity, and the Trust commenced a nonjudicial foreclosure in Tennessee. Plaintiff commenced this action in NY Supreme Court seeking to enjoin the foreclosure. This court (Friedman, J.) initially enjoined the foreclosure, but the Appellate Division, First Department reversed (*Clark Tower, LLC v Wells Fargo Bank, N.A.*, 178 AD3d 547 [1st Dept 2019] [Doc 150] [AD1 Decision

and Order]). The foreclosure proceeded and the Trust purchased the property through a $43 million credit bid in 2021. As of December 2020, the property was valued at around $39 million. In August 2021, the Trust sold the property in a REO transaction to a third party for around $37 million.

In its complaint, plaintiff frames the breach of contract claim as follows: "Lender breached the LMA, including the duty of good faith and fair dealing, by, among other things, withdrawing consent for the [DB] refinancing days before the scheduled closing [in May-June 2018] and refusing to move forward with the new refinancing demanded by notice, dated August 13, 2018" (Complaint [Doc 2]). More specifically, plaintiff alleges that "six days before the closing, defendants withdrew consent for the [DB] refinance" and "demanded Clark pay an additional $1.7 million to reinstate consent for the refinance"; (2) "defendants refused Clark's exercise of an option to extend the September 1, 2018 loan maturity" date; and (3) defendants "refused to advance the [second] refinance" and commenced a "sham nonjudicial foreclosure" (Complaint [Doc 2]). In the complaint, plaintiff's breach of contract cause of action is formally asserted against only the Lender (the Trustee).

The Servicer Defendants argue that: (1) plaintiff cannot prove that withholding consent was unreasonable and plaintiff's position is based on an incorrect interpretation of the LMA; (2) plaintiff cannot prove damages in support of the breach of contract claim; and (3) under Tennessee law plaintiff's first material breach of the LMA's lockbox provision excuses any potential breach of defendants. The Trustee adopts those arguments in MS 09 and also argues that (4) the Trustee "had no involvement in the events that underly Plaintiff's claims" and should be summarily dismissed.

1. The LMA's Appraisal and Consent Provisions

As an initial matter, the parties never moved to dismiss the breach of contract cause of action, so the court has not had occasion to consider whether the LMA is unambiguous on its face.

> "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms. The court should construe the agreements so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible, it will be so interpreted as to give effect to its general purpose"

(*AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC*, 2023 NY Slip Op 01157 [1st Dept Mar. 7, 2023] [internal quotation marks and citations omitted]).

"Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases. Nor should an agreement be read to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 208 AD3d 423, 425 [1st Dept 2022] [internal quotation marks and citations omitted]).

Tennessee courts apply essentially the same rules concerning contract interpretation:

> "A cardinal rule of contractual interpretation is to ascertain and give effect to the intent of the parties. We initially determine the parties' intent by examining the plain and ordinary meaning of the written words that are contained within the four corners of the contract. The literal meaning of the contract language controls if the language is clear and unambiguous. However, if the terms are ambiguous in that they are susceptible to more than one reasonable interpretation, we must apply other established rules of construction to aid in determining the contracting parties' intent. The meaning of the contract becomes a question of fact only if an ambiguity remains after we have applied the appropriate rules of construction."

(*Dick Broadcasting Co., Inc. of Tennessee v Oak Ridge FM, Inc.*, 395 SW3d 653, 659 [Tenn 2013] [internal quotation marks and citations omitted]).

Here, the court finds that the LMA's appraisal value and consent right provisions are not ambiguous or in conflict with the other terms in the agreement. As outlined above, Section 8 of the LMA provides that plaintiff "shall use commercially reasonable efforts to . . . refinance the loan [a "Liquidity Event"] . . . in order to apply the net proceeds from the Liquidity Event ["Liquidity Proceeds"] against the outstanding Indebtedness" (Doc 339). "Unless the Liquidity Proceeds equal or exceed the full amount of outstanding indebtedness then due and owing to Holder under the Bifurcated Notes, any such Liquidity Event is subject to the prior written consent of the Holder, which consent shall not be unreasonably held or delayed in connection with such Liquidity Event" (*id.*).

Under Section 8 (b) of the LMA, the Appraisal Value for a refinancing is 85% of the averaged appraisals plaintiff and the Trust obtained, because the appraisals were less than 5% apart. "The Liquidity Proceeds in the event of a Refinance will be equal to the greater of (i) the Appraisal Value [85% of the averaged appraisals of the property] or (ii) the net proceeds of the Refinance, subject to Holder's right to consent set forth above if the Liquidity Proceeds do not at least equal the full amount of the then outstanding indebtedness due under the Bifurcated Notes, unless otherwise agreed by Holder" (*id.*). "The Liquidity Closing under the Refinance may occur at any time at the election of the Borrower, but no later than one hundred and eighty (180) days from the date of the establishment and acceptance of the Appraisal Value" (*id.*).

The LMA plainly provides that the Trust has a contractual right to consent to any refinancing that would not pay off the Bifurcated Notes, but that its consent may not be unreasonably withheld or delayed. There is no ambiguity in these provisions. Moreover, the LMA is a fully integrated contract (*see id.* § 22 [LMA's integration clause]). Thus, the court need not consider parol evidence of the parties' intent under either Tennessee or New York law.

The LMA's appraisal value and consent provisions are clear and unambiguous, so "[t]he literal meaning of the contract language controls" (*Dick Broadcasting Co., Inc. of Tennessee*, 395 SW3d at 659).

The court agrees with defendants that the Trust did not have to give consent when the parties agreed to the Appraisal Value, because the Appraisal Value amount is the floor the LMA sets for refinancing Liquidity Proceeds. The LMA then reiterates that the Trust's reasonable consent right necessarily persists after the Appraisal Value has been established because the Liquidity Proceeds must be the greater of either 85% (a) of the Appraisal Value or (b) the "net proceeds of the Refinance." The "net proceeds" of the "Refinance" (i.e., the net proceeds of "a refinance of the Indebtedness," that is "the total outstanding amount due and owing under the Loan Documents") can only be determined once the new lender has given plaintiff the amount that it will loan it for the refinancing. If the reasonable consent right did not survive beyond the pegging of the Appraisal Value, the remainder of Section 8 (b) of the LMA, that involves determinations of the amount of Liquidity Proceeds, would be rendered superfluous (*see e.g. Perceptics Corp. v Societe Electronique et Systemes Trindel*, 907 F Supp 1139, 1143 [ED Tenn 1992] ["It is a well accepted and basic principle that an interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless."] [internal quotation marks and citation omitted]).

It is undisputed that Midland and Plaintiff agreed to an Appraisal Value of $50,107,000 using the LMA's property valuation provisions and the parties' independent appraisals of Clark Tower. Midland and Clark agreed on that calculation in January 2018 (*see* Doc 353 [Clark/Midland emails]). Midland informed plaintiff that the accepted Appraisal Value did not equate to the Trust's consent to the proposed refinancing under the LMA (Doc 353 at 7 [Midland

informed Clark that consent to the refinance would be needed after the new lender submitted an amount for the new loan]; *see also* Doc 354 at 2-3 [Midland/Clark emails]).

The court disagrees with plaintiff's position that the Trust gave its consent to the refinance at the time the Appraisal Value was established and then breached the LMA by unreasonably "revoking" its consent after it learned about the DB loan and appraisal amounts. As discussed, the LMA unambiguously provides that the Trust may exercise its reasonable consent right after the Appraisal Value has been set and through the time that the "net proceeds of the Refinance" can be calculated. Further, defendants' evidence establishes that the Trust did not give plaintiff its consent prior to the exchange of the DB term sheet, or "rescind" or "revoke" consent after production of that term sheet (*see* Doc 353 at 6 [Midland/Clark emails], Doc 354 [Midland/Clark emails declining to give plaintiff "conditional consent"]).

2. Whether the Trust Reasonably Withheld Consent to the DB Refinance

Nevertheless, whether defendants unreasonably withheld or delayed consent to the DB refinance is a question of fact that the court cannot decide on these motions. Defendants' evidence in support of MS 08 and 09 establish that Midland referred the refinancing to C-III and Axonic when plaintiff: (a) sought assignment of Note B to plaintiff's affiliate (*see* Doc 357 [4/23/18 email from plaintiff to Midland requesting Note B assignment, instead of payoff/forgiveness]; Doc 360 [formal letter requesting assignment of Note B]; Doc 363-364 [5/2/18 emails discussing assignment request and noting that it would require C-III/Axonic (SS/DCH) consent]) and (b) when the terms of the proposed DB refinance were disclosed. These terms show DB's substantially higher appraisal rate for the Clark Tower property and that the refinancing bundled Clark Tower together with the Meidinger Tower property (*see* Doc 361 [5/4/18 Midland/Clark emails providing plaintiff with Axonic's comments as DCH]).

Axonic then told Midland it would not consent to Note B's assignment because it "need[s] to more fully vet out the appraisal used for the proceeds calculation give the borrowers [sic] incentive to try and force through zero recovery to the b-note despite the excess value" (Doc 366 [5/2/18 Axonic/C-III emails]; Doc 367 [additional May 2018 emails]). The LMA does not provide for Note B's assignment. Instead, it provides that "Holder [the Trustee] shall forgive the remaining outstanding unpaid balance" of Note B after Liquidity Proceeds and Excess Liquidity Proceeds go through the waterfall. The Holder's [i.e., the Trustee or C-III acting as special servicer] consent was needed to assign Note B to plaintiff's affiliate, as requested, instead of simply cancelling the debt (LMA [Doc 339] at at Recital M [authorizing C-III to act on behalf of the Trustee to "enforce all rights and remedies of the Holder (the Trustee) under the Loan Documents]).

After some negotiation, Axonic and C-III made the following offer, tendered through Midland, to plaintiff:

> "Ok after visiting with the SS and the DCH, these parties have agreed to revisit the [B-Note] assignment issue and will agree to the assignment of the B-Note as requested, subject the following conditions, (i) a payoff amount of no less than $53,975,000 which is 85% of the [DB] Market Value As Is Appraisal value of $63,500,000, . . . and (iii) the assignment is without representation or warranty and there is no agreement by the noteholder as to the tax consequences of the payoff of the note and the Noteholder shall report the payoff in accordance with its standard procedures"

(Doc 370 [June 2018 Midland/Clark emails]).

Thus, Axonic and C-III offered to assign Note B as plaintiff requested and consent to the DB refinance as a whole if plaintiff agreed to use the DB appraisal value of $63.5 million as the "Appraisal Value" for the purpose of calculating the Liquidity Proceeds to run through the waterfall. That, in turn, would have resulted in repayment of $1.7 million of the outstanding indebtedness for Note B, instead of a complete cancellation/forgiveness of Note B, and would

have reduced plaintiff's excess cash earnings from the refinance from $4.5 million to $2.8 million after passing through the waterfall.[2] Plaintiff refused.

The court finds that there are issues of fact as to whether the Holder's and Servicers' decisions to withhold consent were reasonable. Under New York law, the use of a reasonableness standard in a contract provision generally "suggests that the parties intended a standard of objective reasonableness to apply (*Christie's Inc. v SWCA, Inc.*, 22 Misc 3d 380, 384 [Sup Ct, NY County 2008], citing *Misano di Navigazione, SpA v United States*, 968 F2d 273, 277 [2d Cir 1992], Restatement [Second] of Contracts § 228 [an objective standard is preferred, unless the parties clearly express otherwise in their agreement]; *see also MBIA Ins. Corp. v Patriarch Partners VIII, LLC*, 842 F Supp 2d 682, 704 [SDNY 2012]). Similarly, under Tennessee law, the implied covenant of good faith and fair dealing is imposed on every contract, even where, for instance, there is a "silent" consent clause (unlike here, where the consent provision in the LMA requires that the consent not be "unreasonably withheld") (*see Dick Broadcasting Co., Inc. of Tennessee v Oak Ridge FM, Inc.*, 395 SW3d 653, 660-669 [Tenn 2013]).

Tennessee courts have explained in cases considering whether a landlord reasonably withheld consent: "In determining whether a landlord's withholding of consent is reasonable, we apply a reasonable commercial standard. That standard is generally understood to include the elements of good faith and fair dealing" (*1963 Jackson, Inc. v De Vos*, 436 SW3d 278, 292-293 [Tenn Ct App 2013] [internal quotation marks and citations omitted]; *see also First Am. Bank of*

[2] Because 85% of the Appraisal Value that the parties had agreed to in January 2018 was $50,107,000. Using 85% of the DB appraisal as the basis of a new Appraisal Value for determining Liquidity Proceeds would have meant applying $53,975,000 to pay off the Bifurcated Notes under Section 8 of the LMA. That increased amount would result in some "Excess Liquidity Proceeds" being used to pay down Note B by $1.7 million before the remainder of the debt on Note B was assigned.

Nashville, N.A. v Woods, 781 SW2d 588, 590-591 [Tenn Ct App 1989]). These subtenant consent provision cases are instructive to the extent that they underscore that a commercial reasonableness standard applies, and that consent provisions include the implied covenant of good faith and fair dealing, generally.

Defendants acknowledge that "reasonableness is often a question of fact" but suggest that, here, "summary judgment is appropriate [because] plaintiff's claim is predicated on an erroneous interpretation of the contract" (Mem Supp, MS 08 [Doc 384] at 13-14, citing *Turnberry Residential Ltd. Partner, L.P. v Wilmington Tr. FSB*, 950 NYS2d 362, 367 [1st Dept 2012]). They assert that "Plaintiff cannot meet its burden as a matter of law because the undisputed evidence shows that the Trust's request for $1.7 million to pay down the B Note was not unreasonable, and Plaintiff's arguments to the contrary are legally insufficient" (Mem Supp, MS 08 at 13-14). The court disagrees.

Defendants have not established *prima facie* that Servicers' refusal to consent to the DB refinance was reasonable as a matter of law. Defendants' submissions demonstrate the Servicer Defendants and Axonic withheld consent largely because DB valued the Clark Tower property at a greater amount than the parties' earlier appraisals underlying the Appraisal Value. Because of this higher DB appraisal, Axonic as DCH and C-III as Special Servicer tried to mitigate the loss to the Note B holders by attempting to negotiate a $1.7 million return for Note B in exchange for their consent. Those negotiations failed.

The LMA contains clear provisions for establishing the property's Appraisal Value and, for the purposes of a refinancing transaction, states that the Liquidity Proceeds must be the greater of either 85% (a) of the Appraisal Value or (b) the net proceeds of the Refinance. Here, the net proceeds of the DB refinance would not have been greater than the agreed Appraisal

Value, yet defendants opted to withhold consent where the DB appraisal of the property was several million dollars higher than the appraisals that the parties used to set the Appraisal Value. Defendants also withheld consent and attempted to negotiate a compromise whereby the parties would replace the Appraisal Value with the amount of 85% of that greater DB appraisal in order to push more funds through the waterfall to pay down part of Note B. It is quite possible, or even likely, that Axonic's and the Servicers' decision to withhold consent was perfectly reasonable given that the DCH had an obligation to protect the Note B holders. However, it is also possible that this withholding consent was an attempt at a money grab. While it is far from apparent that these decisions were *unreasonable*, defendants have not met their burden of establishing that it was reasonable as a matter of law to withhold consent under these circumstances. Thus, the court finds that there are issues of fact as to the reasonableness of withholding consent to the DB refinance in May-June 2018.

Defendants have also failed to establish that there was no breach of the LMA in August 2018. Even though defendants establish that, as of August 2018, plaintiff had not exercised its option to extend the maturity date for another year, and that plaintiff's request to restart the refinancing process under the LMA in August 2018 was sent only a few weeks from of the loan's September 2018 maturity date, defendants do not establish that they are entitled to summary judgment dismissing the breach of contract claim with respect to the August 2018 refinancing request. The LMA states that "The Liquidity Closing under the Refinance may occur at any time at the election of the Borrower, but no later than one hundred and eighty (180) days from the date of the establishment and acceptance of the Appraisal Value." While the August 2018 refinancing request did not extend the loan's maturity date, defendant's

unsupported contention that a new refinancing could not have been completed in approximately three weeks is not sufficient to warrant summary judgment.

3. Damages for Breach of Contract

The parties agree that damages are measured at the time of the alleged breach (*see* Doc 384 [Servicers' Mem, MS 08] at 17-18; Doc 466 [Plaintiff's Mem Opp, MS 09] at 2-3). However, defendants assert that plaintiff has no damages because plaintiff was not harmed by the Trust's decision to withhold consent (Doc 478 [Reply Mem, MS 09] at 5-6 [asserting that "after the alleged breach in May 2018, Clark still owned the property, and therefore could not have suffered any lost equity at that time. At most, Clark lost the difference between the value of the DB financing and the value of replacement financing—a measure of damages Clark has not attempted to prove"]).

Plaintiff, on the other hand, argues that:

> "In May 2018 (or August 2018), had defendants not breached, Clark would have paid $43.2 million to satisfy the A Note, would have received $1 million of cash rent reserves held by Lender, and would have clear title of the property that was valued by defendants in the amount of $63.5 million at the time of breach (and $59 million by the parties' independent appraisers). Clark would have been entitled to approximately $25 million of [Note B] debt forgiveness and would have received additional loan proceeds that could have been used to further stabilize the building"

(Doc 466 at 2).

"Tennessee law allows the courts to 'award all damages which are the normal and foreseeable result of a breach of contract'" (*Flatiron Acquisition Veh., LLC v CSE Mtge. LLC*, 2019 WL 1244294, at *9 [SDNY Mar. 18, 2019], quoting *Morrow v Jones*, 165 SW3d 254, 259 [Tenn Ct App 2004]). "Such damages include reasonably foreseeable incidental and consequential damages" (*Morrow*, 165 SW3d at 259). "The purpose of assessing damages in a breach of contract suit is to place the plaintiff, as nearly as possible, in the same position he

would have had if the contract had been performed," however, "[t]he injured party is not entitled to profit from the defendant's breach" (*BancorpSouth Bank, Inc. v Hatchel*, 223 SW3d 223, 228 [Tenn Ct App 2006] [citations omitted]). "Determinations concerning the amount of damages are . . . essentially [] fact question[s]. However, the choice of the proper measure of damages is a question of law to be decided by the court" (*id.* at 228, quoting *Beaty v McGraw*, 15 SW3d 819, 827 [Tenn Ct App 1998], *abrogated on other grounds by Bowen ex rel. Doe v Arnold*, 502 SW3d 102 [Tenn 2016]).

Here, plaintiff did not lose any equity in the property as a result of the alleged breach of contract, whether measured in May-June 2018 or in August 2018. The court is also not persuaded that the Note B debt forgiveness is an adequate measure of damages under the circumstances of this case. However, plaintiff would have been entitled to certain cash payments due to the refinance through the LMA's waterfall provision and, in any event, Tennessee law provides for nominal damages for breach of contract (*see e.g. Buffington v Legacy & Exit Planning LLC*, 2017 WL 1240155, at *10 n 6 [Tenn Ct App Mar. 31, 2017] ["Tennessee law recognizes the existence of nominal damages for a breach of contract . . . . The mere non-existence of discernible damages, therefore, is not fatal to (a breach of contract) claim."]).

Thus, the court rejects defendants' arguments that the breach of contract claim must be summarily dismissed for lack of damages.

4. The LMA's Lockbox Provision

Defendants argue that plaintiff's breach of the LMA's lockbox provision excuses any subsequent breach of the LMA under Tennessee's "first-to-breach" rule.

Section 7 of the LMA provides that "Borrower and Holder agree that all Rents and Profits generated from the Property (the 'Operating Proceeds'), shall be deposited into a lockbox

(the 'Lockbox') maintained by Wells Fargo Bank (the 'Cash Management Agent')" (Doc 339).

The Operating Proceeds deposited into the Lockbox would be applied on a monthly basis to a "Cash Flow Waterfall" as follows:

> "(a) First, to the Cash Management Agent and the deposit bank for any reasonable fees associated with the establishment, management, and maintenance of the restricted lockbox account . . . ;
>
> (b) Second, to Holder for payment of necessary amounts required to be made to the Escrow Account that shall consist of and be limited to one-twelfth (1/12) of the amount of annual real estate taxes, assessments and insurance premiums;
>
> (c) Third, to Holder for monthly payment of the Bifurcated Note A interest only payment;
>
> (d) Fourth, to Borrower for payment of (i) all Projected Operating Expenses for the current month plus (ii) a reconciliation payment for applicable Actual Operating Expenses from the prior month . . . ;
>
> (e) Fifth, to the General Reserve Account in the amounts specified for projected Capital Expenditures and TI/LC Expenses for that month . . . ; and
>
> (f) Sixth, all excess remaining revenue for the month . . . (the "Excess Cash Flow"), if any, . . . shall be applied to reduce the principal balance of Bifurcated Note A without prepayment penalty or premium . . ."

(*id.*).

Under the Deed of Trust, the LMA is an "Other Loan Document" (Doc 337 [Deed of Trust], Section 3.1). The Deed of Trust provides, in Article 9 [Defaults], that an Event of Default occurs:

> "if Borrower or any Guarantor, as the case may be, shall continue to be in default under any other term, covenant or condition of this Security Instrument or any Other Loan Documents for thirty (30) days after notice from Lender; provided that if such default cannot reasonably be cured within such thirty (30) calendar day period and Borrower (or such Guarantor as the case may be) shall have commenced to cure such default within such thirty (30) calendar day period and thereafter diligently and expeditiously proceeds to cure the same, such thirty (30) calendar day period shall be extended for so long as it shall require Borrower (or such Guarantor as the case may be) in the exercise of due diligence to cure such default,

> it being agreed that no such extension shall be for a period in excess of ninety (90) calendar days after the notice from Lender referred to above"

(*id.*, Section 9.1 [t]).

Under Section 3 of the parties' Cash Management Agreement (CMA), the lockbox account was under the sole dominion of the Trust. Under Section 7 of the CMA, plaintiff was required to deposit any rents received from tenants into the lockbox account within three days of receipt if any tenants failed to pay the rents into the lockbox account in the first place (Doc 345 [CMA]).

Plaintiff concedes that several tenants paid monthly rent to its affiliate, In-Rel, rather than paying the rent directly into the lockbox account, and that plaintiff did not deposit those rents into the lockbox as the CMA required. C-III began servicing the property in August 2018 and then noticed "that eight tenants of Clark Tower, with combined rents of approximately $140,000 per month, had been paying rents directly to InRel [sic], and . . . In-Rel had not been depositing those rents into the lockbox as required by the CMA" (Doc 326 [Ascher Aff]). C-III determined that "over a period of 29 months, In-Rel collected rents in excess of $4 million directly from tenants of Clark Tower" (Doc 326 [Ascher Aff], paragraphs 104-105, citing Doc 58 [Buckhair Aff], Doc 378 [12/6/18 emails], Doc 379 [12/12/18 emails and chart]). On December 20, 2018, the Trust demanded that plaintiff deposit those rent payments into the lockbox (Doc 380 [12/20/18 letter]).

Tennessee courts apply a "first-to-breach" rule that prevents "[a] party who has materially breached a contract" from obtaining "damages stemming from the other party's later material breach of the same contract" (*Kryder v Estate of Rogers*, 296 F Supp 3d 892, 907 [MD Tenn 2017] [internal quotation marks omitted], quoting *Advanced Concrete Tools, Inc. v Beach*, 2014 WL 1385868, at *19 [MD Tenn Apr. 9, 2014], *affd* 2015 WL 13928182 [6th Cir June 1,

2015]). "However, a party owed performance may waive its right to assert the first uncured material breach as a bar to recovery because of its own subsequent breach. In particular, a party may waive its right to assert first material breach as a bar to recovery if it accepts the benefits of the contract with knowledge of a breach" (*Advanced Concrete Tools, Inc.*, 2014 WL 1385868, at *19 [citations omitted]).

Defendants establish their *prima facie* entitlement to summary judgment based on the first-to-breach rule and plaintiff's violation of the lockbox provisions. Defendants' submissions establish, and plaintiff concedes, that plaintiff breached the LMA's lockbox provision prior to the Trust's alleged breach in May 2018, and that plaintiff was aware of its lockbox violations (Doc 328 [Stein EBT] at 181-188 ["Q: So, Mr. Stein, I guess I have the same question about In-Rel, which is: Did In-Rel actually know that rents were not getting paid into the lock box every month? A: Yes, I think we did know."]). Defendants demonstrate *prima facie* that eight of plaintiff's tenants paid rents to In-Rel, rather than into the lockbox account, from July 2016 to November 2018 (*see* Buckhair Aff [Doc 59] at 3). Defendants noticed the lockbox violation on December 4, 2018, plaintiff confirmed that rents from those eight tenants were not paid into the lockbox account by letter dated December 6, 2018, and the Trust demanded that Clark cure the default by depositing those misdirected rent payments into the lockbox by letter dated December 20, 2018. As of March 27, 2019, more than 30 days from the date of the Trust's default notice, plaintiff had not cured the lockbox violations, constituting an Event of Default that entitled the Trust to institute foreclosure proceedings under Sections 9.1 (t) and 10.1 (d) of the Deed of Trust.

Defendants also establish that the breach of the lockbox provision is material in that it constitutes an event of default under the Deed of Trust, the LMA, and the CMA (*see e.g. Roswell*

Capital Partners LLC v Alternative Const. Tech., 08 CIV 10647(DLC), 2009 WL 222348, at *9 [SDNY Jan. 30, 2009]; *cf. Wilmington Tr. v MC-Five Mile Commercial Mtge. Fin. LLC*, 171 AD3d 591, 592 [1st Dept 2019] [finding that failure to execute a lockbox agreement was a material breach of a mortgage loan purchase agreement that had a "material and adverse effect by increasing the risk of loss"]). Like a failure to obtain insurance coverage, plaintiff's failure to deposit rents into the lockbox account created a risk of loss to defendants in violation of the LMA and the CMA.

Thus, even though the Trust did not notice the breach until December 2018 when C-III became aware of the lockbox violations (*see* Doc 378 [12/6/18 emails], Doc 379 [12/12/18 emails and chart], Doc 380 [12/20/18 letter]), defendants' evidence establishes that plaintiff breached the lockbox provisions beginning in July 2016, almost two years before the alleged refinancing breach, and plaintiff failed to cure the breach after it was given notice in December 2018. To the extent that plaintiff also asserts in the complaint that defendants breached the LMA by failing to extend the maturity date, that claim is also barred by the first-to-breach rule, in addition to the fact that plaintiff's failure to exercise its second option to extend the maturity date was plaintiff's own mistake (*see* Doc 328 [Stein EBT] at 173; *see also* Discussion, *infra*, Section II, pgs. 32-33).

Plaintiff's submissions fail to raise a triable issue of fact. Plaintiff first argues that defendants waived any breach of the lockbox provision because an employee at Midland was aware of the lockbox violations and did not object. Specifically, Paul Catalano, Vice President of Finance at In-Rel, suggested that one Midland employee was aware of the lockbox violations (*see* Doc 438 [Catalano EBT] at 145). Catalano stated:

> "Q: And do you recall when you first learned that there was a lockbox requirement for Clark Tower?

> A: When you say a lockbox requirement, what do you mean by it?
>
> Q: A requirement that rents could not go into your [In-Rel] general operating account.
>
> A: Yeah. The requirement, I wasn't really aware that there was a formal requirement until we dug into the loan modification subsequent to the refinance start. It was -- when I came on board in the beginning of 2016, things were operating what seemed to be very loose on Midland's side. They failed to set up the lockbox for multiple months, and finally when it got going, I believe there was a representative named Garfield who was one of the people who worked at Midland to help service the loan"

(*id.*).

Charles Stein, one of plaintiff's principals, reiterates plaintiff's position that Midland was aware, or should have been aware of the lockbox violations, in paragraph 41 of his affidavit:

> "By the time that it became clear that the eight or so tenants would not pay into the lockbox, Clark and Midland had almost a year of experience with the LMA program. Clark reported to Midland the rent roll, with every tenant and rent amount, and income statements with every penny of rent paid along with expenses for the building. Midland, obviously, controlled the lockbox and discovery confirms the obvious fact that Midland received detailed reporting from the lockbox account of every rent payment, including tenant name, date and amount. . . . Clark's financial reporting during the term of the LMA was sufficient for the servicers to clearly understand the rents in and outside of the lockbox"

(Doc 440 [Stein Aff]).

Plaintiff's waiver argument is unpersuasive. "In general, the doctrine of waiver is an excuse for nonperformance of contractual duties or conditions" (*Ringold v Bank of Am. Home Loans*, 2013 WL 1450929, at *4 [WD Tenn Apr. 9, 2013] [internal quotation marks and citation omitted]). "Waiver is an affirmative defense" that can serve as a defense to Tennessee's first-to-breach rule (*id.* [quotation marks and citation omitted]; *see e.g. Advanced Concrete Tools, Inc. v Beach*, 2014 WL 1385868, at *19 [MD Tenn Apr. 9, 2014], *affd* 2015 WL 13928182 [6th Cir June 1, 2015]). However, the agreements at issue here contain express no waiver provisions that impact plaintiff's lock box obligations.

Specifically, Section 17 of the LMA provides "[e]xcept as expressly provided herein, no waivers, amendments or modifications of any of the Loan Documents shall be valid unless in writing and signed by Borrower or Guarantors, as applicable, and an officer of Holder" (Doc 339 [LMA]). Likewise, the CMA provides in Section 14 that "[t]his Agreement may not be modified or amended, or any provision thereof waived, except in a writing signed by all the parties to this Agreement," and states in Section 8 (d) that "[n]o failure on the part of Holder to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver thereof" (Doc 345 [CMA]). Thus, because of clear contractual language, any implicit agreement with Midland to ignore the lockbox violations cannot amount to waiver and is insufficient to raise a triable issue of fact (*see Wilmington Tr.*, 171 AD3d at 592-593).

Further, given the no-waiver provisions in these agreements, it is irrelevant whether C-III's entity deponent, Christopher Bradshaw, "had no knowledge of Midland's administration of the lockbox and did not speak to [Garfield] Dyke" (Plaintiff's Mem Opp [Doc 449] at 13). Plaintiff did not notice Dyke's deposition, anyway, and his testimony would also be irrelevant given the no-waiver provisions.

Plaintiff's argument that it did not breach the LMA first because the notice to cure was not sent until December 2018, after the purported refinancing breach in May-June 2018, is unpersuasive. It is undisputed that plaintiff violated the lockbox provision as far back as 2016, long before the refinancing issues arose. It is also undisputed that plaintiff never cured the lockbox violations by depositing the misdirected funds into the lockbox account after it received notice. Plaintiff does not assert that it cured, or even attempted to cure, its default of the lockbox provisions. Instead, plaintiff unpersuasively argues that it was not given notice of the default. To the contrary, defendants noticed the default in their December 20, 2018 letter (Doc 380). The

court rejects plaintiff's argument that it did not commit the first uncured breach. Plaintiff committed the lockbox violations, going back to 2016, well before defendants sent the notice in December 2018.

Accordingly, the defendants' motions for summary judgment (MS 08 and 09) are granted and plaintiff's breach of contract cause of action against the Lender is dismissed pursuant to Tennessee's first-to-breach rule (MS 08 and 09).

II. Plaintiff's Wrongful Foreclosure Claim (MS 07, 08, and 09)

In MS 07, Axonic argues that plaintiff's wrongful foreclosure claim against it must be summarily dismissed because: (a) Axonic cannot be liable, as a matter of law, for the foreclosure and (b) there is no evidence that Axonic committed any wrongful act. In MS 08, the Servicer Defendants join in Axonic's motion and adopt its arguments with respect to the wrongful foreclosure claim. The Servicers also argue that plaintiff cannot prove damages, therefore they are entitled to summary judgment dismissing this claim. In MS 09, the Trustee argues that it is entitled to summary judgment dismissing the wrongful foreclosure claim because C-III was responsible for the foreclosure as the Special Servicer under the PSA and the Trustee had no involvement.

Under Tennessee law, a plaintiff may assert a claim for wrongful foreclosure. New York does not have a corresponding cause of action. "While there are no specific elements for wrongful foreclosure, Tennessee courts generally examine whether contractual or statutory requirements were met in the foreclosure of the property in question" (*Ringold v Bank of Am. Home Loans*, 2013 WL 1450929, at *6 [WD Tenn Apr. 9, 2013], citing *Hutchens v Bank of Am. N.A.*, 2012 WL 1618316, at *9–10 [ED Tenn May 9, 2012]; *Lee v EquiFirst Corp.*, 2010 WL 4320714, at *10 [MD Tenn Oct. 26, 2010]). "If a foreclosure sale is legally held, conducted and

consummated, there must be some evidence of irregularity, misconduct, fraud, or unfairness on the part of the trustee or the mortgagee that caused or contributed to an inadequate price, for a court of equity to set aside the sale" (*Holt v Citizens Cent. Bank*, 688 SW2d 414, 416 [Tenn 1984]).

While "wrongful foreclosure may be raised as a theory of a breach of contract claim, . . . a plaintiff may bring a wrongful foreclosure claim independent and distinct from a breach of contract claim" (*Terry Case v Wilmington Tr., N.A. as Tr. for Tr. MFRA 2014-2*, E202100378COAR3CV, 2022 WL 2313548, at *9 [Tenn Ct App June 28, 2022]). Tennessee courts do not require a plaintiff to allege damages or prejudice in support of a stand-alone wrongful foreclosure claim (*see id.* at *8 ["Within a wrongful foreclosure cause of action, there is no requirement that a borrower establish damages as with a breach of contract claim; instead, a trustee's mere failure to comply with the terms of a deed of trust will render the foreclosure sale invalid."]). "Unlike a breach of contract claim, we find no legal authority in Tennessee that requires a plaintiff raising a wrongful foreclosure claim to establish any other element than the creditor's failure to strictly comply with the terms of the deed of trust" (*id.*). "A party asserting wrongful foreclosure may seek one of two mutually exclusive remedies—either damages at law or having the foreclosure sale set aside in equity" (*Ogle v U.S. Bank N.A. for Residential Asset Sec., Corp., Home Equity Mtge. Asset-backed Pass-Through Certificates, Series 2007-KS3*, 2018 WL 1324137, at *3 [ED Tenn Mar. 14, 2018], citing 123 Am. Jr. Proof of Facts 3d *Real Property* § 417 [2011]).

To the extent that plaintiff's wrongful foreclosure claim relies entirely on the defendants' purported breaches of the LMA, and is wholly disconnected from any statutory or technical irregularity, the wrongful foreclosure claim falls within the ambit of contract law (*see Pearson v*

Specialized Loan Servicing, LLC, 2017 WL 3158791, at *4 [ED Tenn July 24, 2017]; *see also Bank of New York Mellon v Chamberlain*, 2022 WL 3026908, at *12-13 [Tenn Ct App Aug. 1, 2022], *appeal denied* [Jan. 11, 2023] [noting that a wrongful foreclosure claim can be raised as a theory of breach of contract or as an independent claim]). In *Pearson*, the Tennessee Court of Appeals held that the plaintiff's

> "allegations concerning Tenn. Code. Ann. section 35-5-101 appear to strike at the very intersection between this statute and contract law; indeed, she pleads that the Bank of New York Mellon violated Tenn. Code. Ann. section 35-5-101 '[b]y failing to comply with the terms of the securitized trust.' The allegation that this document known as a 'securitized trust' existed between the parties—and more precisely, not only existed but also through the Bank of New York Mellon's alleged failure to comply with its provisions, *gave rise* to her home's wrongful foreclosure—uncouples her claim from Tenn. Code. Ann. section 35-5-101 and shifts it into the ambits of contract law. To plead a sufficient claim for breach of contract claim under Tennessee law, Ms. Pearson must allege facts showing: (1) the existence of an enforceable contract, (2) non-performance amounting to a breach, and (3) damages stemming from that breach"

(*id.* [citations omitted]).

Here, the nonjudicial foreclosure had not occurred when plaintiff originally filed its complaint. Plaintiff did not seek to amend the complaint to add additional allegations concerning the foreclosure after the nonjudicial foreclosure was completed. As it stands, plaintiff's only grounds for the wrongful foreclosure are "Lender's breaches [of the LMA and other loan documents], caused by the Servicer Defendants' bad faith and fraudulent conduct" (Doc 2 [complaint], ¶¶ 69-70 [asserting "(b)ut for defendants' misconduct, Clark would have satisfied the Loan by refinancing" and "Defendants' breaches constitute breaches of the material terms of the LMA and other loan documents and constitute wrongful foreclosure"]). Plaintiff does not assert that there was any irregularity or misconduct relating to the foreclosure sale itself, such as the statutory notice requirements for a nonjudicial foreclosure under Tennessee law, or that the foreclosure violated any specific provisions in the deed of trust (*see* Docs 44-46 [deed of

trust and deed of trust amendment]). Plaintiff also does not assert that any "irregularity, misconduct, fraud, or unfairness on the part of the trustee or the mortgagee . . . caused or contributed to an inadequate [foreclosure sale] price" (*Holt*, 688 SW2d at 416).

So postured, plaintiff must establish the elements of a breach of contract claim to pursue its wrongful foreclosure claim, as in *Pearson*. This is an issue, as defendants point out, because plaintiff cannot prove that it sustained damages from the foreclosure (Mem Supp, MS 08, at 19 ["Wrongful foreclosure damages are measured as 'the difference between the value of the property in question at the date of foreclosure and the remaining balance due on the mortgage debt.' "], quoting 123 Am. Jr. Proof of Facts 3d, Real Property 417, § 31 (2011)]).

After commencing this action, plaintiff obtained a preliminary injunction that enjoined the nonjudicial foreclosure in Tennessee (4/26/19 decision and order [Friedman, J.]). In its December 17, 2019 decision, the Appellate Division, First Department reversed this court's order enjoining the foreclosure (*see* Doc 150 [AD1 Decision]). In February 2020, the nonjudicial foreclosure proceedings resumed in Tennessee, and in May 2020, the Trust purchased the property for around $43 million in a credit bid (*see* Doc 333 [Wilkicki EBT]). As of December 2020, the property was valued at around $38,900,000 (as-is) and $51.3 million ("prospective value upon stabilization" projected for January 2024) (Doc 383 [Dec. 2020 appraisal]). Thus, the property was underwater at the time of the foreclosure as the result of market fluctuations during the pandemic.

Further, although "monetary damages for procedurally improper foreclosure sales" may be awarded as a post-sale remedy for foreclosure sales that violated Tennessee statutory requirements (*see Dauenhauer v Bank of N.Y. Mellon*, 2013 U.S. Dist. LEXIS 7352, at *7 [MD Tenn Jan. 16, 2013]), plaintiff does not allege any statutory defects or irregularities with the

foreclosure sale. Additionally, the court cannot overturn the sale of the Tennessee real property (AD1 decision and order [Doc 150] ["(T)he courts of one State may not decide issues directly affecting title to real property located in another State."]), and the Trust has already sold the property to a third-party purchaser for value (*see* Doc 326, ¶ 122; *see also PVB, Inc. v Rossotti*, 1999 WL 220123, at *3 [6th Cir Apr. 6, 1999]).

Even if plaintiff's wrongful foreclosure claim stands alone, distinct from any contract allegations and contract damages, plaintiff still cannot recover. Aside from the breach of the lockbox provision, defendants also establish *prima facie* that the Trust and Servicer Defendants were entitled to commence the foreclosure proceedings as a result of plaintiff's failure to extend the loan's maturity date on time per the LMA (*see* Doc 328 [Stein EBT] at 173 [admitting that plaintiff failed to timely extend the maturation date, stating that Clark's employee, Kirk Cypel, "just blew it. I think he missed (the deadline). He was so wrapped up in all the other things going on, he just missed it"]; *see* LMA §§ 6 [c] [1], 6 [e]), as well as plaintiff's failure to pay the outstanding amounts due on the Bifurcated Notes upon maturation (*see* Doc 59 [Buckhair Aff]). Failure to pay the outstanding balance on the loans on the maturity date was an Event of Default under the Deed of Trust (Deed of Trust § 9.1 [a]).

Specifically, on July 18, 2018, plaintiff attempted to exercise its second option to extend the maturity date under the LMA by sending a backdated letter to Midland (*see* Docs 373-377). Under the LMA, plaintiff's deadline to exercise that option was July 3, 2018 (i.e., 60 days before the maturity date). Plaintiff was also required to pay a fee totaling .25% of the principal balance within three days of a timely extension request pursuant to Section 6 (e) of the LMA. Plaintiff did not timely exercise its second option to extend the maturity date. Instead, plaintiff sent an email on July 17, 2018 with an attached letter, backdated to June 29, 2018, requesting an

extension. In an email on July 18, 2018, In-Rel asked Midland to confirm the amount of the fee so that plaintiff could pay it the following day (Doc 376 [7/18-1/19/18 emails]; *but see* Doc 328 [Stein EBT] at 173 [Stein, plaintiff's principal, testified that he wasn't sure plaintiff "would even (have paid) the extension fee"]). By email on July 19, 2018, Midland told plaintiff that the Servicers rejected Plaintiff's untimely extension request and backdated letter (Doc 374 [emails]). Ultimately, the parties were unable to reach an agreement to extend the maturity date. The loan matured on September 1, 2018, and plaintiff failed to pay the outstanding balance of the Bifurcated Notes. Thus, defendants' submissions establish that the foreclosure was properly commenced under the loan documents because there was an uncured event of default under the Deed of Trust, the LMA, and other loan documents.

Plaintiff's submissions fail to raise a triable issue of fact in opposition to these motions. Plaintiff's allegations that, but for the defendants' wrongful withholding of consent the foreclosure would not have occurred, are speculative and attenuated. When the refinancing did not go through in May-June 2018, plaintiff still had possession of the property and could have, but did not, exercise its second option to extend the maturity date on time. Nor did plaintiff pay the extension fee. When the maturity date occurred in September 2018, plaintiff failed to pay the outstanding balance of the Bifurcated Notes and defendants properly declared an event of default on a dilapidated property with significant debt attached to it. Plaintiff's attempt to color its wrongful foreclosure claim as a conspiracy to steal the building has no support in the record.

III. Conclusion

The court has considered the parties' remaining contentions and finds them unavailing. Accordingly, it is

ORDERED that Motion Seq. Nos. 07, 08, and 09 are granted, and the complaint is dismissed against all defendants with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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4/14/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE