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OF THE
STATE OF DELAWARE

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RE: Community Bank Delaware v. Far East Capital, Inc. et al.
C.A. No. 6868-MA

Dear Counsel:

Pending before me are Defendant Far East Capital, Inc.'s ("Far East") Exceptions to the Draft Report in which I recommended that summary judgment be granted in favor of Plaintiff Community Bank Delaware ("Bank"). After reviewing the parties' briefs, I find that Far East's Exceptions are without merit and adopt my Draft Report as my Final Report as modified herein.

In its first exception, Far East again argues that Bank failed to plead and prove a condition precedent, i.e., Far East's default of the Forbearance Agreement. According to Far East, the Forbearance Agreement modified the note and mortgage, and a default of the Forbearance Agreement by Far East is a condition precedent of Bank's right to

foreclose. [1] Since Bank did not refer to the Forbearance Agreement or its default in the Complaint, the argument goes, Bank is not entitled to equitable foreclosure.

While Far East is correct that Section 8 of the Forbearance Agreement provides that Bank will forbear collection efforts under the note and mortgage as long as Far East performs certain obligations,[2] the record shows that Far East defaulted under the terms of the Forbearance Agreement.[3] Far East has not disputed the fact that it is in default of the Forbearance Agreement,[4] just as it is in default of the Loan Documents, yet Far East continues to invoke the Forbearance Agreement in an attempt to avoid foreclosure. Section 6 of the Forbearance Agreement expressly states that the agreement is not to be construed as a waiver by Bank, and that Bank's remedies under the loan documents remain in force and available.[5] The Forbearance Agreement explicitly states that "the Loan Documents remain in full force and effect and constitute the legally binding and enforceable obligation of the Borrower [Defendant]."[6] Thus, Bank's right to pursue collection is through the enforceable obligation of the Loan Documents. To argue that the Forbearance Agreement has modified the note and mortgage, as Far East does, ignores Section 17 J of the Forbearance Agreement, which provides that the agreement does "not result in or effect a Modification or Amendment of any of the Loan

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[1] Def. Br. at 8.
[2] Forbearance Agreement ¶ 8. These obligcations include such acts as delivery of payments and timely compliance with the obligations, terms and conditions of the Loan Documents.
[3] Affidavit of Wm. Jack Riddle at ¶¶ 22, 23.
[4] Def. Reply Br. at 2.
[5] Forbearance Agreement ¶ 6.
[6] *Id.* ¶ 3.

Documents."[7] According to the Forbearance Agreement, Far East's only defense to a collection action is the defense of payment.[8] In sum, the right to foreclose was created through the Loan Documents, the Forbearance Agreement does not change that, and the condition precedent is the default under the mortgage. This exception, therefore, is without merit and must be dismissed.

Far East also takes exception to the Draft Report's finding that the legal description of the Ocean View property was sufficient. As discussed in my Draft Report, there are a few minor typographical errors in the metes and bounds legal description of the Ocean View property, but those errors would not prevent the Court or any third party from identifying or locating the Ocean View property with certainty.[9] It is well settled that "in the mortgage it is a sufficient description of the property if it can be identified."[10] Thus, the two mortgages in which the Ocean View property was used as collateral are enforceable as a matter of law. This exception, therefore, is without merit and must be dismissed.

In addition, Far East now raises the argument that there exists a genuine issue of material fact whether the mortgage dated June 25, 2008 (hereinafter "2008 Mortgage") was intended to attach to one or two properties as collateral for the $175,000 commercial demand line of credit business loan. According to Far East, the 2008 Mortgage is ambiguous in this respect because it: (1) omits the address of the Lewes property; (2)

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[7] *Id.* ¶ 17 J.
[8] *Id.* ¶ 3.
[9] *See In re Vezinot*, 20 B.R. 950 (Bankr. W.D.La. 1982), cited in *In re 1025 Associates, Inc.*, 106 B.R. 805, 809 (Bankr. D. Del. 1989).
[10] *Thompson v. King*, 43 A. 168, 168 (Del. Super. 1897).

attaches two exhibits labeled "Exhibit A"; and (3) refers to "property" in the singular tense rather than the plural tense despite the identification of two separate tax parcels. Although Far East is relying upon these apparent errors in the document to argue that an ambiguity exists, it is not the form of the document that is essential to a mortgage, but rather "the intention of the parties to secure a debt with a pledge of real property."[11] In equity, any instrument transferring an estate that is intended as security for money is considered a mortgage, and the parties' intention may appear in "the same instrument or from any other . . .."[12]

It is clear from the record that the parties intended to secure the line of credit business loan with a pledge of two properties, i.e., the Lewes and Ocean View properties. The 2008 Mortgage reflects that intent in the following manner: (1) identification of two different tax parcel ID numbers in the top right corner of the first page of the Mortgage; (2) insertion of the same two tax parcel ID numbers within the Grant of Mortgage clause; and (3) two exhibits labeled as "Exhibit A" that describe two different parcels of land identified by the same two tax parcel ID numbers as those on the first page and within the Grant of Mortgage clause of the 2008 Mortgage. Common sense dictates that the two exhibits simply were mislabeled and the word "property" should have been "properties." Furthermore, any possible ambiguity in the 2008 Mortgage due to these errors is completely eliminated by the Forbearance Agreement. In Section 4 C of the Forbearance Agreement, Far East confirmed that the line of credit business loan was secured by the

[11] *Handler Construction, Inc. v. Corestates Bank, N.A.*, 633 A.2d 356, 363 (1993).
[12] *Id.* at 361.

Lewes and Ocean View properties.[13] Thus, there is no issue of material fact regarding the parties' intentions as to the 2008 Mortgage. This exception, therefore, is without merit and must be dismissed.

For the foregoing reasons, I find Far East's Exceptions to be without merit, and adopt my Draft Report as my Final Report, as modified herein. The Motion for Summary Judgment should be granted in favor of Bank.

Very Truly Yours,

/s/ Kim E. Ayvazian

Kim E. Ayvazian
Master in Chancery

[13] Forbearance Agreement ¶ 4.C.