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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MASS OP, LLC, et al., :

Plaintiffs, :

- against - : Index No. 15952/2011

U.S. BANK NATIONAL ASSOCIATION, et al., :

Defendants. :

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LAWRENCE K. MARKS, J.

Plaintiffs Mass OP, LLC and Mass One, LLC moved for a temporary restraining order and a preliminary injunction against defendants U.S. Bank National Association ("U.S. Bank"), Principal Global Investors, LLC ("Principal Global Investors ") and C-III Asset Management, LLC ("C-III Asset Management").[1]

BACKGROUND

This action involves a loan modification agreement entered into between plaintiffs and Bank of America on or about April 27, 2010 (the "Agreement"). Tuerk Aff, ¶ 2. The Agreement modified a loan through which plaintiffs borrowed the principal sum of $65,000,000 from the Principal Life Insurance Company on November 8, 2006 (the "Loan"). *Id.* The Loan

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[1] As per both the full caption and the affidavit of counsel in support of this motion, U.S. Bank National Association is a defendant as successor trustee to Bank of America, National Association (which is successor by merger to LaSalle Bank National Association), as trustee for the holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2006 PWR14. Defendant C-III Asset Management, LLC was formally known as Centerline Servicing LLC. Tuerk Aff, ¶ 1.

itself was to refinance plaintiffs' existing mortgage on a shopping center in Massapequa, New York, known as 5500 Sunrise Highway. *Id.*

The Loan contained a Lockbox and Security Agreement, central to the current action. *Id.*, Exh C (the "Lockbox Agreement"). The Lockbox Agreement provides that the property needed to maintain a certain debt service coverage ratio ("DSCR"). The DSCR is calculated by determining the net operating income of the property, and dividing it by the property's annual debt service. Under the Agreement, if the DSCR falls below the agreed upon ratio,[2] plaintiffs are required to, *inter alia*, make payments to fund tax and insurance escrow accounts. Agreement, § 3.4.

On January 11, 2011, Principal Global Investors notified plaintiffs that the DSCR had fallen below the agreed upon ratio and a "Trigger Event" had therefore occurred. Tuerk Aff, Exh D. Shortly thereafter, by email dated January 28, 2011, Principal Global Investors acknowledged that this was a mistake, and that the "triggers have not been triggered at this time" for the loan at issue. *Id.*, Exh E. On September 14, 2011, Principal Global Investors again notified plaintiffs that the DSCR had fallen below the agreed upon ratio and, as such, a trigger event had occurred. *Id.*, Exh F.

Plaintiffs contend that, based on their calculations, the DSCR had not changed from the time of the Agreement, and certainly had not changed between January 28, 2011 - - when Principal Global Investors acknowledged that no triggering event had occurred - - and September 14, 2011. Mot Br at 2. Plaintiffs assert that the only thing that changed in this time period between January 28 and September 14, 2011, is that defendant C-III Asset Management had a

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[2] The agreed upon ratio is 1.05:1.00. Agreement, § 3.4; Lockbox Agreement, at 4.

dispute with an officer of plaintiffs, in a negotiation regarding an unrelated property. *Id.* at 2-3. Plaintiffs aver that defendants manufactured the purported trigger event as "retribution" for that separate dispute. Mot Br at 3.

On November 1, 2011, Principal Global Investors sent a letter to plaintiffs, notifying plaintiffs that unless they made payments for tax and insurance impound reserves within five days, an event of default would occur under the Agreement. Tuerk Aff, Exh G, at 2. Should an event of default occur, C-III Asset Management, as special servicer, would take over from Principal Global Investors. Plaintiffs contend that this would enable C-III Asset Management to "punish" plaintiffs, in its efforts to gain leverage in the "unrelated transaction solely motivated by retribution." Mot Br at 3.

Plaintiffs moved by Order to Show Cause for a preliminary injunction and a temporary restraining order. Pending the return date of plaintiffs' motion, plaintiffs obtained a temporary restraining order, that enjoined the defendants from declaring a default under the Agreement pursuant to the November 1, 2011 letter (the "TRO"). At the argument on the preliminary injunction motion, plaintiffs requested that the TRO remain in place until the resolution of this motion. Defendants consented to this request, and the TRO was extended.

Plaintiffs now seek a preliminary injunction to: (1) enjoin and restrain defendants from taking any action to interfere with plaintiffs' rights under the Agreement; (2) enjoin and restrain defendants from declaring a default under the Agreement; (3) staying and/or reinstating the cure period, to prevent the alleged event of default; (4) declaring that there has been no violation of the DSCR; and (5) declaring the relative rights and obligations of the parties under the Agreement. Order to Show Cause, at 2.

DISCUSSION

A movant seeking a preliminary injunction must demonstrate: (i) a likelihood of success on the merits; (ii) irreparable harm if the injunction is not granted; and (iii) that the balance of the equities is in its favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990); *S.J.J.K. Tennis, Inc. v. Confer Bethpage, LLC*, 81 A.D.3d 629, 629-30 (2d Dep't 2011).

Thus, as a first step, plaintiffs must establish that they are likely to succeed, on the merits, on their underlying claims. This, they have wholly failed to do.

In the underlying Complaint, plaintiffs seek: a determination by this Court that they are not in violation of the DSCR provisions of the Agreement, Loan and Lockbox Agreement (the first cause of action); a judgment of specific performance from defendants, requiring defendants to acknowledge that there has not been a "trigger event," as a result of defendants' breaches of the implied covenants of good faith and fair dealing in the Agreement, Loan and Lockbox Agreement (the second cause of action); a declaration from the Court preliminarily staying and/or reinstating the cure period, while the merits of the parties' underlying dispute are determined by the Court (the third cause of action); and what appears to be a contention that defendants' "fabrication" of a trigger event constitutes a tort (the fourth cause of action). Compl, ¶¶ 24, 33, 39, 42-44.

Most fatal to their motion, plaintiffs have not identified any errors in Principal Global Investors' DSCR calculation,[3] nor have they provided defendants - - or the Court - - with

[3] Principal Global Investors calculated the DSCR to be 101.65, also expressed as 1.0165, which was below the 1.05:1.00 ratio required by the Agreement and Lockbox Agreement. LeSher Aff, ¶ 39; LeSher Aff, Exh L.

plaintiffs' own calculation. The accuracy of Principal Global Investors' DSCR calculation is central to at least the first three of plaintiffs' four causes of action.[4] Indeed, although plaintiffs assert that the DSCR has not changed from the time of the Agreement, they have offered no supporting evidence of this position.

As the Second Department has stated:

> The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court. Where the movant does not demonstrate a likelihood of success on the merits, irreparable damage, and a balance of the equities in his or her favor, the motion should not be granted. 'While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits . . . to such a degree that it cannot be said that the plaintiff established a clear right to relief.' Here, the plaintiffs failed to demonstrate their entitlement to the drastic remedy of a preliminary injunction.

Cooper v. Board of White Sands Condominium, 89 A.D.3d 669, 669 (2d Dep't 2011) (internal citations omitted). Since the plaintiffs in the instant matter have not demonstrated that the DSCR calculation was incorrect, or even offered any proof that would support such a contention, they have not established a "likelihood of success on the merits [and] 'it cannot be said that the plaintiff[s] established a clear right' to preliminary injunctive relief." *Id.* (internal citations omitted).[5] As such, plaintiffs have failed to establish a likelihood of success on the merits.

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[4] Plaintiffs aver that, as their fourth cause of action does not provide an independent basis for the relief sought in this motion, its merits are not addressed. Mot Br, n2. Without addressing the sufficiency of plaintiffs' position on this, the Court notes that plaintiffs are contending in their fourth cause of action that the trigger event was fabricated; the accuracy of the DSCR calculation would therefore appear relevant to this claim, even if the plaintiffs are opting to not address this claim in the instant motion.

[5] *See also Twin Holdings of Del. LLC v. CW Capital, LLC*, 906 N.Y.S.2d 784, 2010 N.Y. Misc. LEXIS 112, at *24-25 (N.Y. Sup., Nassau Cty. Jan 19, 2010) (where the court found, *inter alia*, that the plaintiffs, having failed to provide documentary support for their allegations

At the oral argument, plaintiffs raised the issue of whether defendants had waived their right to enforce the DSCR provisions. The Court gave counsel the opportunity to submit supplemental papers, if they wished, on that issue.[6] The parties in this action do not dispute that the Lockbox Agreement contains a no-waiver provision. This clause provides that any waivers must be in writing, waivers of a breach will not be deemed to waive other or later breaches, and a failure to enforce a right will not constitute a waiver of that right.[7]

Plaintiffs argue that, even if defendants are correct and the DSCR is not in compliance, defendants waived the requirement when defendants acknowledged that no trigger event existed, in January 2011, and plaintiffs continued to operate for almost ten months thereafter. Pl Supp Br at 3. Plaintiffs aver that, during this time, they operated in reasonable reliance on defendants' January 2011 representation. *Id.* at 3-4. Plaintiffs also argue that a no-waiver provision in a contract does not preclude a finding of waiver. *Id.* at 2-3.

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regarding the relevant financial ratio at issue in their case, had failed to show a likelihood of success as to their claims and their motion for a preliminary injunction was denied).

[6] The Court notes that defendant Principal Global Investors submitted a supplemental affirmation, but that it did not address the waiver issue. Supp LeSher Aff. As such, the Court declines to include that affirmation in its considerations.

[7] Specifically, the provision holds that:

> Waivers of any term or condition of this Agreement must be in writing and signed by the party against whom such waiver is sought to be enforced. No waiver of any breach hereunder shall be deemed to be a waiver of any other or subsequent breach. Except as otherwise provided in this Agreement, failure by any of the parties hereto to insist upon or enforce any rights herein shall not constitute a waiver thereof.

Lockbox Agreement, ¶ 23.

Defendants U.S. Bank and C-III Asset Management counter that they did not waive any of their contractual rights. They are correct in asserting that the law regards waiver as "the voluntary and intentional abandonment of a known right." *Town of Hempstead v. Incorporated Village of Freeport*, 15 A.D.3d 567, 569 (2d Dep't 2005). Waiver requires more than merely not having enforced that right. *Id.*; *DeCapua v. Dine-A-Mate, Inc.*, 292 A.D.2d 489, 491-92 (2d Dep't 2002). Where a no-waiver clause requires a written stipulation to change the agreement, conduct does not result in waiver. *Kendall v. Kendall*, 44 A.D.3d 827, 829 (2d Dep't 2007). Indeed, the Court of Appeals stated that waiver requires "an intentional relinquishment of a known right and should not be lightly presumed." *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 968 (1988). Defendants argue that, far from waiving their rights, their conduct evidences that they exercised their rights at the first opportunity, which they claim they were not able to do until the very notices at issue in this litigation. US Bank/C-III Asset Management Suppl Br at 2.

There is insufficient support for plaintiffs' contention that the defendants waived any of their rights with regard to the DSCR. Waiver is, therefore, not a basis for determining that the DSCR calculation is anything less than critical to the issues in the underlying claims. Thus, it remains that, when plaintiffs failed to demonstrate an error in the DSCR calculation or proffer a DSCR calculation of their own, plaintiffs failed to establish a likelihood of success on the merits of their underlying claims. Plaintiffs are, as such, not entitled to a preliminary injunction.

The Court has considered the parties' other arguments, and finds them unavailing.

Accordingly, it is

ORDERED that the motion of plaintiffs Mass OP, LLC and Mass One, LLC, motion sequence #1, for a preliminary injunction is hereby denied in full; and it is further

ORDERED that the temporary restraining order, issued on November 10, 2011, is hereby vacated; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: April 2, 2012

ENTER:

J.S.C.