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

PRESENT: MARCY S. FRIEDMAN PART 57/60
Justice

CWCAPITAL ASSET MANAGEMENT LLC, as Special Servicer for BANK OF AMERICA, N.A., as Trustee on behalf of the registered holders of GS Mortgage Securities Corporation II, Commercial Mortgage Pass-Through Certificates, Series 2007-GG 10,

INDEX NO. 117469/2009

-against-

MOTION DATE _____

CHARNEY-FPG 114 41ST STREET LLC, et al.

MOTION SEQ. NO. 011

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment and cross-motion for a stay pending discovery.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

It is ordered that this motion is decided in accordance with the accompanying decision/order dated October 7, 2013.

Dated: October 7, 2013

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☒ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

CWCAPITAL ASSET MANAGEMENT LLC, as Special Servicer for BANK OF AMERICA, N.A., as Trustee on behalf of the registered holders of GS Mortgage Securities Corporation II, Commercial Mortgage Pass-Through Certificates, Series 2007-GG10,

Plaintiff,

- against -

CHARNEY-FPG 114 41ST STREET LLC, et al.,

Defendants.

Index No.: 117469/2009
Motion Seq. 011

DECISION/ORDER

In this mortgage foreclosure action, plaintiff, CWCapital Asset Management LLC, in its capacity as special servicer for U.S. Bank National Association (CWCapital), moves for summary judgment on the Complaint. Defendant, Charney-FPG 114 41ST Street, LLC (Charney-FPG or defendant), mortgagor and owner of the commercial building which is the subject of this action, cross-moves for a stay of plaintiff's motion for summary judgment pending discovery.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered to defeat summary judgment "the opposing

party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b].)" (Zuckerman, 49 NY2d at 562.)

It is further settled that "[a] prima facie showing to warrant summary judgment foreclosure of a mortgage requires the movant to establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment." (Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept 2007].)

It is undisputed that Wachovia Bank (Wachovia) and Greenwich Capital Financial Products, Inc. (Greenwich) were the original lenders of a $160 million loan for the mortgaged premises, a building located at 119 West 40th Street, New York, New York.[1] Wachovia was subsequently appointed the master servicer and CWCapital was appointed the special servicer of the loan. It is further undisputed that Charney-FPG, as mortgagor, made the last monthly debt service payment on the mortgage in June 2009[2].

In opposition to plaintiff's motion, Charney-FPG asserts numerous affirmative defenses, of which the principal is that Wachovia and CWCapital (collectively, CWCapital) breached the loan agreement by refusing to fund construction work at the premises from reserves. More particularly, Charney-FPG claims that it submitted disbursement requests in April and May 2009 for construction work, and that CW Capital wrongfully refused to release funds from the reserves, thereby impairing the revenue stream from tenants of the building, materially breaching

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[1]The loan was subsequently transferred and securitized, and became the asset of a trust fund that issued ownership certificates to its investors. (Aff. In Opp. of Jonathan Landau [CEO of Fortis Property Group LLC, an indirect member of Charney-FPG], ¶ 8.)

[2]The parties have deferred disposition of this action pending settlement negotiations, which have now proved unsuccessful.

the loan agreement, and excusing Charney-FPG's subsequent performance thereunder. (Def.'s Memo. Of Law In Opp. at 12, 19.) CWCapital counters that the loan agreement provides for an enforceable waiver of defenses. In the alternative, CWCapital claims that Charney-FPG fails to raise a triable issue of fact on its defenses.

Wachovia and Greenwich, as lender, and Charney-FPG, as borrower, entered into a "Loan and Security Agreement," dated April 2, 2007 (Loan Agreement), which established reserves to fund construction and renovation work, to operate the building, and to service the loan. The Agreement provides for allocation of funds to the reserves according to a waterfall. (Id., § 5.02, 5.05 [a].) It also contains a provision under which the Borrower unconditionally waives all defenses and counterclaims. Section 18.27 provides in pertinent part:

> "[A]ll sums payable by Borrower hereunder shall be paid without notice or demand, counterclaim, set-off, deduction or defense and without abatement, suspension, deferment, diminution or reduction, and the obligations and liabilities of Borrower hereunder shall in no way be released, discharged, or otherwise affected . . . by reason of: . . . (e) any claim which borrower has or might have against Lender; (f) any default or failure on the part of Lender to perform or comply with any of the terms hereof or of any other agreement with Borrower; or (g) any other occurrence whatsoever, whether similar or dissimilar to the foregoing . . . ."

As a threshold matter, the court holds that this waiver provision is enforceable. Courts have repeatedly enforced express contractual waivers of defenses to foreclosure on a mortgage and note. (2010-1 SFG Venure LLC v 34-10 Dev., LLC, 106 AD3d 455 [1st Dept 2013]; JPMCC 2007-CIBC19 Bronx Apts., LLC v Fordham Fulton LLC, 84 AD3d 613 [1st Dept 2011].) However, it has long been held that a waiver provision will not be enforced as to defenses based on fraud, as such enforcement would violate public policy. (Sterling Natl. Bank

& Trust Co. of New York v Giannetti, 53 AD2d 533 [1st Dept 1976]; Mishal v Fiduciary Holdings, LLC, 2013 NY Slip Op 5884, 2013 NY App Div Lexis 5830 [2d Dept 2013].) There is also authority that a waiver provision will not be enforced as to a creditor of a secured party who violates the Uniform Commercial Code by failing to use reasonable care in the custody and preservation or liquidation of collateral. (See, e.g., Barclays Bank of NewYork v Heady Elec. Co., 174 AD2d 963, 965 [3rd Dept 1991], lv dismissed 78 NY2d 1072; Federal Dep. Ins. Corp. v Marino Corp., 74 AD2d 620 [2d Dept 1980].) In contrast, defenses or counterclaims "sounding in breach of duty to deal in good faith, breach of implied consent and breach of contract [cannot] overcome the waiver provision in the absence of fraud. . . ." (Greater N.Y. Sav. Bank v 2120 Realty, 202 AD2d 248, 248 [1st Dept 1994].)

Here, Charney-FPG makes no claim that CWCapital committed a fraud. Rather, it invokes the exception to enforcement of waiver provisions for a creditor's failure to use reasonable care with respect to collateral. Thus, Charney-FPG claims that CWCapital's conduct, in failing to release reserves to pay Charney-FPG's disbursement requests for construction work, caused damage to the building which serves as collateral for the loan and, hence, an "impairment of the collateral." (D.'s Memo. In Opp. at 17-18.) In support of this claim, Charney-FPG relies exclusively on Barclays Bank and Federal Dep. Ins. Corp., cited above, which were both decided under UCC § 9-207, governing the duty of care of a secured party in the possession of collateral. Barclays Bank involved a claim that the creditor did not exercise reasonable care in the custody, preservation, and disposal of siezed [sic] collateral that secured a note. (174 AD2d at 966.) Federal Dep. Ins. Corp., similarly, involved a claim that the creditor violated its duty of due care in refusing a demand to liquidate collateral which subsequently declined in value. (74 AD2d at

621.) These cases, addressing commonly arising issues regarding the reasonableness of a creditor's disposition of security, provide no authority for Charney-FPG's implicit contention that the duty of care imposed by § 9-207 extends to a mortgagee's performance under a mortgage requiring disbursements of reserves to a borrower that is operating the mortgaged premises. Nor could Charney-FPG cite any authority in support of such a claim. UCC § 9-109 (d) (11) expressly provides that Article 9, with exceptions not here relevant, does not apply to "the creation or transfer of an interest in or lien on real property." As the Official Comment further explains, Article 9, with few exceptions, "applies only to consensual security interests in personal property." (UCC § 9-109, Official Comment 10.)

Charney-FPG also claims that the UCC "applies to this transaction, because Charney-FPG's mortgage expressly provides that it 'is both a property mortgage and a 'security agreement' within the meaning of the UCC.'" (D.'s Memo. Of Law at 17.) While § 8.14 (a) of the parties' "Agreement Of Consolidation And Modification Of Mortgage, Security Agreement, Assignment Of Rents And Fixture Filing" does describe the Agreement as both a property mortgage and a security agreement, Charney-FPG's argument reads the word "both" out of the description of the transaction as "both a property mortgage and a 'security agreement.'" It also wholly ignores that under the mortgage documents, Wachovia, as mortgagee, continues to have the right under the Real Property Law to foreclose in the event of a default. Loan Agreement § 13.02 (a) categorically provides that "[u]pon the occurrence . . . of any Event of Default, Lender may, in addition to any other rights or remedies available to it hereunder or under any other Loan Document . . . (ii) bring an action to foreclose this Security Agreement or the Mortgage . . . ." (See also Bank of Tokyo Trust Co. v Urban Food Malls Ltd., 229 AD2d 14 [1st Dept 1996]

[decided under prior UCC § 9-102, now § 9-109].)

Finally, the court notes that Charney-FPG's answer, by its terms, pleads impairment or damage to the "collateral" for the loan – i.e., the building. (Eighth Aff. Defense, ¶ 113.) However, review of the answer, and of Charney-FPG's claims on this motion, confirms that the answer pleads a defense of breach of contract. In asserting that CWCapital wrongfully failed to fund construction work from the reserves, Charney-FPG claims that it was entitled to funds from both the Recurring Replacement Reserve Escrow Account (Recurring Replacement Reserve) and the Liquidity Reserve Escrow Account (Liquidity Reserve). These claims, in turn, are based on the contractual provisions governing disposition of these reserves.

Thus, in claiming entitlement to funds from the Recurring Replacement Reserve, Charney-FPG relies on Loan Agreement § 5.08, which requires the Lender to make payments out of the Recurring Replacement Reserve Escrow Account to the Borrower, provided that "(x) no Event of Default has occurred and is continuing, (y) there are sufficient funds available in the Recurring Replacement Reserve Escrow Account and (z) Borrower shall have theretofore furnished Lender with [specified documents, including lien waivers and bills]." In opposing CWCapital's motion for summary judgment, Charney-FPG argues that it was not in default at the time it submitted its April and May 2009 disbursement requests (a matter that is not in dispute), and that the funds in the Recurring Replacement Reserve were sufficient to pay its disbursement requests. In response, CWCapital claims that there were insufficient reserves at the time of the reimbursement request. Thus, resolution of Charney-FPG's claim would (were it not waived) require determination of whether there were sufficient reserves in the Recurring Replacement Reseve. In the event of a finding of sufficiency, CWCapital would be liable for breach of

contract for failure to dispense the reserves.

Similarly, in claiming entitlement to funds from the Liquidity Reserve, Charney-FPG relies on Loan Agreement § 5.10, as modified by Modification Agreement dated July 5, 2007, which requires the Lender, provided that no Event of Default has occurred or is continuing, to make payments out of the Liquidity Reserve, to be allocated to reserves (i) through (vi) of the waterfall established by § 5.05 (a). Reserve (iv), the Operation and Maintenance Expense Sub-Account (O&M Reserve), covers "Net Capital Expenditures," defined as "the amount by which Capital Expenditures during [any] period exceed reimbursements for such items during such period from any fund established pursuant to the Loan Documents." It is undisputed that the O&M Reserve, as well as the Recurring Replacement Reserve (item [v] in the waterfall), cover expenses of the type for which Charney-FPG sought reimbursement. However, CWCapital claims, and Charney-FPG disputes, that CWCapital was only required to fund these reserves from the Liquidity Reserve in the event the Debt Service Coverage met the ratios set forth in § 5.10, a condition that CWCapital claims was not met. (See P.'s Reply Memo. at 23-24; D.'s Supp. Memo. Of Law at 9-11.) Thus, resolution of Charney-FPG's claim of entitlement to funds from the Liquidity Reserve would (were it not waived) require interpretation of § 5.10. If the court were to credit Charney-FPG's interpretation and to hold that funds in the Liquidity Account were required to be distributed to the O&M Reserve and Recurring Replacement Reserve even if the debt service coverage did not meet the ratio specified in § 5.10, then a finding would follow that CWCapital breached the Loan Agreement by not making the distribution, assuming that there were sufficient reserves in the Liquidity Account to do so.

The court accordingly holds that Charney-FPG's defenses, however denominated, are for

breach of contract, and not for impairment of collateral under the UCC. These defenses are therefore barred by the waiver provision of the Loan Agreement.

In view of this disposition, the court does not reach the merits of the defenses. The court notes parenthetically, however, that Charney-FPG persuasively argues that § 5.10 of the modified Loan Agreement requires the specified debt service coverage ratio to be met prior to transfer of funds from the Liquidity Reserve to the mezzanine loan reserve ([viii] of § 5.05 [a]) and to the Reletting Reserve Escrow Account, and not prior to transfer of funds to the reserves set forth in § 5.05 (a) (i) - (vi). It also appears to be undisputed on this record that as of June 2009, the reserves were substantially depleted. (See June 10, 2009 letter to Wachovia from Jonathan Landau [DeAngelo Aff. In Support, Ex. M].) However, in June 2009, CWCapital made what it characterizes as a one-time accommodation payment of approximately $558,000 from the Liquidity Reserve, on account of the April and May 2009 disbursement requests which were for approximately $557,000 and $450,000, respectively. (DeAngelo Reply Aff., ¶ 102; see also Landau Aff. In Opp., ¶ 30.) This payment raises a triable issue of fact as to whether at least some funds were available in the reserves to pay the requests at the time they were made. Although the waiver provision of the Loan Agreement bars Charney-FPG's interposition of this defense in this mortgage foreclosure action, an issue remains as to whether the claim may be pursued in a separate action. (See Parasram v DeCambre, 247 AD2d 283, 284 [1st Dept 1998].)

It is hereby ORDERED that the motion of plaintiff CWCapital Asset Management LLC is granted to the extent of (i) awarding plaintiff summary judgment as to liability against all appearing defendants; and (ii) awarding plaintiff a default judgment as to liability against all non-appearing defendants; and (iii) dismissing defendants' counterclaims and cross-claims; and (iv)

amending the caption to strike the names of defendants Joel Kestenbaum, Margaret Kestenbaum, Leon Charney, Peter Duncan, and John Does #1-900; and (v) referring the matter to a Special Referee to ascertain and compute the amount due under the loan documents, and to examine and report whether the subject property can be sold in one parcel; it is further

ORDERED that Charney-FPG's cross-motion is denied.

Settle order providing for a reference to a Special Referee to hear and report (unless the parties stipulate to a reference to hear and determine) on the issues specified above. The order shall name the appearing and non-appearing defendants, and shall provide for amendment of the caption.

This constitutes the decision and order of the court.

Dated: New York, New York
October 7, 2013

MARCY FRIEDMAN, J.S.C.