P7 Owner LLC v Arbor Realty Trust, Inc
2016 NY Slip Op 30392(U)
March 3, 2016
Supreme Court, New York County
Docket Number: 651981/2012
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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P7 OWNER LLC,

Plaintiff,

-against-

ARBOR REALTY TRUST, INC and
ARBOR REALTY PARTICIPATION, LLC,

Defendant.

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Index No.: 651981/2012

Mtn Seq. No. 008

DECISION AND ORDER

JEFFREY K. OING, J.:

Plaintiff P7 Owner LLC, commonly known as Square Mile Capital ("Square Mile"), moves, pursuant to CPLR 3212, for an order granting it summary judgment on its complaint.

Defendants Arbor Realty Trust, Inc. ("Arbor Trust") and Arbor Realty Participation, LLC ("Arbor Participation") (collectively, "Arbor") cross-move for summary judgment dismissing the complaint.

Square Mile invested in the most subordinate of the participation interests of the $125 million financing of The James Hotel, located in Chicago, in 2007. The restructuring of the financing of this investment vehicle in 2012 eliminated its interest as a junior participant. Square Mile contends that Arbor, the servicer of the junior participation interests, breached the parties' sub-participation agreement by driving the workout negotiations and inappropriately allocating the entire $35 million write down of the hotel's loan to Square Mile's

participation interest. Plaintiff asserts that the undisputed facts demonstrate that Arbor breached its obligations by treating the losses at issue as realized losses despite the fact that the servicer for the entire loan, Wells Fargo, failed to meet its own obligations by issuing an inadequate and premature asset status report, by failing to take into account the loan's collectibility, and by failing to test the guaranty before entering into the loan work out.

Arbor counters that the undisputed facts show that Square Mile failed to perform its obligations to object to the asset status report, that Arbor performed in accordance with the parties' contract and that, in any event, Arbor did not commit a breach with gross negligence or willful misconduct, and Square Mile's claimed damages were not caused by Arbor, but rather by Wells Fargo or Square Mile itself.

Factual Background

A. Transactions

In June 2007, Wachovia Bank, N.A. ("Wachovia") made a $125 million loan to James Hotel Chicago, LLC, which was secured by a mortgage on the hotel, located at 55 East Ontario Street, Chicago, Illinois. Wachovia and MW1-2002, LLC ("MW1") entered into a "Participation Agreement" whereby Wachovia sold to MW1 an interest in the loan in the amount of $70 million, referred to as

a junior participation interest (plaintiff's rule 19-a statement of facts in support ["plaintiff's rule 19-a"], ¶¶ 1-4; see exhibit 20 to affirmation of Yong Hak Kim, dated January 23, 2015 ["Kim Affirm."]). Wachovia placed its senior participation interest into a pool of unrelated loans under a "Pooling and Servicing Agreement" (Kim Affirm., Ex. 19). Wells Fargo succeeded to Wachovia's interests, rights, and obligations under both the Participation and Pooling agreements (plaintiff's rule 19-a, ¶ 9). MW1 created two beneficial ownership interests in the junior participation interest, each in the amount of $35 million (the "B-1 Participation Interest" and the "B-2 Participation Interest", and collectively the "B Participation Interests") (Id., ¶ 11; Kim Affirm., Ex. 21).

By agreement dated December 28, 2007, MW1 entered into a sub-participation and servicing agreement (the Sub-Participation Agreement) with Square Mile in which it sold and transferred the B-2 Participation Interest to Square Mile for $31.5 million (plaintiff's rule 19-a, ¶¶ 12-13; Kim Affirm., Ex. 21). The junior participation interest was defined in the Sub-Participation Agreement as the junior participation interest in the James Hotel Loan with an original principal amount of $70 million (Kim Affirm., Ex. 21 at p. 1).

In January 2008, the original borrower sold the property, subject to the assumption of the loan documents, to a new borrower, 55 East Ontario Street, LLC, with a new guarantor, DHG Investments, LLC (plaintiff's rule 19-a, ¶¶ 15-16).

On January 25, 2008, MW1 assigned the B-1 Participation Interest to Arbor Realty Funding, LLC ("Arbor Funding") for $30.7 million, pursuant to an assignment and assumption agreement between them (Id., ¶ 21; Kim Affirm., Ex. 23). Arbor Funding then assigned its B-1 Participation Interest to defendant Arbor Participation (defendants' rule 19-a response, ¶ 22; exhibit G to affirmation of Kristen T. Roy, dated February 24, 2015 [Roy Affirm.]). Arbor Funding is owned by Arbor Realty SR, Inc. which, in turn, is wholly owned by Arbor Realty Limited Partnership, which is wholly owned by defendant Arbor Trust (defendants' rule 19-a response, ¶ 24). At all relevant times, the B-1 Participation Interest was held by Arbor or one of its affiliates (Roy Affirm., Ex. G). Arbor Participation had servicing obligations under the Sub-Participation Agreement.

In April 2009, in April 2010, and, again, in April 2011, the borrower extended the loan's maturity date as permitted under the loan agreements with Wells Fargo (plaintiff's rule 19-a, ¶¶ 36-37). Therefore, the loan's maturity date was extended to April 9, 2012, with a balloon payment due on that date.

On March 16, 2012, Wells Fargo declared the loan a "Specially Serviced Mortgage Loan," on the grounds of imminent default of the balloon payment (Id., ¶ 43; see Roy Affirm., Ex. M). The borrower wanted to avoid foreclosure, and hold onto the hotel, and was seeking a loan workout from Wells Fargo (Id., ¶¶ 45-46). On March 20, 2012, it executed a pre-negotiation agreement with Wells Fargo (Id., ¶ 50; defendants' rule 19-a response, ¶ 50). On March 21 and 30, 2012, Wells Fargo asked the borrower for a workout proposal (plaintiff's rule 19-a, ¶ 51).

On March 22, 2012, Hotel & Leisure Advisors commenced an appraisal of the property as requested by Wells Fargo (Id., ¶ 52; defendants' rule 19-a response, ¶ 52; Kim Affirm., Ex. 53, Addendum III).

On March 28, 2012, Wells Fargo prepared an asset status report (the "Asset Status Report"), which it sent to Square Mile on that same date (plaintiff's rule 19-a, ¶ 53; Roy Affirm., Ex. K). This report set forth a summary of the status of the negotiations with the borrower, the capital structure of the loan, the legal and environmental considerations, the collateral description, the escrow reserve accounts, the lodging operating statement analysis report, the recommendations to return the loan to performing status, the appraised value (indicating that an appraisal was expected by April 27, 2012), the status of

foreclosure (not recommended at this time), and the summary of proposed actions (Roy Affirm., Ex. K).

Arbor commissioned its own appraisal on the property, which indicated an "as is" value of $83 million, and a sales approach value in the range of $81.2 to $89.9 million (Kim Affirm., Ex. 36). Arbor and the borrower entered into a "Supplement Agreement" in which Arbor granted an extension of the B-1 Participation Interest for one month to May 9, and the guarantor agreed to make a debt service payment for the month of April 2012 (Kim Affirm., Ex. 26).

On May 2, 2012, Wells Fargo received an appraisal report valuing the property at $72 million (plaintiff's rule 19-a, ¶ 80; see Kim Affirm. Ex. 52).

On May 3, 2012, Wells Fargo sent a notice to Square Mile that a "Control Appraisal Period" existed under the Participation Agreement, and that Square Mile was no longer the "Controlling Holder" under that agreement (Kim Affirm., Ex 54).

On May 9, 2012, Arbor and the borrower executed a "Second Supplement Agreement," under which the guarantor paid the debt service for the month of May 9 through June 9, 2012 (plaintiff's rule 19-a, ¶ 83).

On May 31, 2012, Wells Fargo, Arbor, and the borrower agreed to the workout terms and Wells Fargo distributed a draft

"Forbearance Agreement" (plaintiff's rule 19-a, ¶ 89; Kim Affirm., Ex. 61). By letter dated May 30, 2012, Wells Fargo informed Square Mile that the parties intended to close the loan modification by entering into the Forbearance Agreement on June 8, 2012 (plaintiff's rule 19-a, ¶ 90; Roy Affirm., Ex V). On June 1, 2012, Wells Fargo received a broker's opinion of value from CBRE, appraising the property at $72-73 million (Roy Affirm., Ex. W). Wells Fargo never attempted to find a buyer for the loan (Ex. 6, EBT of Roger Briggs, dated Dec. 18, 2014 [Briggs EBT] at p. 32). On June 4, 2012, Square Mile sent a letter to Wells Fargo objecting to the upcoming closing (Kim Affirm., Ex. 64).

On June 5, 2012, Wells Fargo sent Arbor a draft of an "Asset Business Plan" (Kim Affirm., Exs. 65 and 66; Roy Affirm., Ex. Y). This document indicated that the appraisal by Hotels & Leisure Advisors concluded that, as of April 2, 2012, the "as is" value of the property was $72.7 million, the stabilized value was $78 million, and the sales comparison value equated to a $74 million value (Roy Affirm., Ex. Y at p. 6). It recommended that Wells Fargo enter into the Forbearance Agreement based on a number of terms, including that the borrower contribute $5 million in new equity, the B-2 Participation Interest be written down to $0.00, the Senior Participant Interest be written down by $8 million,

and the "Special Servicer", i.e., Wells Fargo, be paid a fee of $450,000 (Id.). Arbor approved this document as the Controlling Holder (Id.).

On June 8, 2012, the closing of the workout occurred modifying the loan terms (plaintiff's rule 19-a, ¶ 96). In connection with the closing, Arbor and Wells Fargo entered into the "First Amendment to the Participation and Servicing Agreement" to reflect the changes made in the loan and in the parties' interests by the loan modifications (plaintiff's rule 19-a, ¶ 100; Kim Affirm., Ex. 31). That agreement resulted in the elimination of the B-2 Participation Interest. On that same date, Arbor agreed to provide the borrower with a mezzanine loan to refinance the $35 million balance of the B-1 Participation Interest on the new loan's maturity date on April 9, 2014 (plaintiff's rule 19-a, ¶ 103; defendants' rule 19-a response, ¶ 103; Kim Affirm., Ex. 29).

B. The Sub-Participation Agreement

Under the Sub-Participation Agreement, Arbor, as the B-1 Participant, represented the senior participation interest in the Junior Participation Interest, and Square Mile, as the B-2 Participant, represented the subordinate participation interest in the Junior Participation Interest (Kim Affirm., Ex. 21, Sub-Participation Agreement at pp. 1-3). Under Section 3(a), Arbor,

as servicer of the B Participation Interests, was required to service the B Participation Interests "in a manner consistent with Accepted Servicing Practices, this Agreement, the Original Participation Agreement and applicable law" and promptly distribute funds in accordance with a priority order set forth in sections 2(b) and (c),

> provided however, ... the Servicer shall allocate any Realized Losses which are allocated pursuant to the Original Participation Agreement to reduce the Junior Participation Interest first, to reduce the B-2 Participation Principal balance (not below zero), and, thereafter, to reduce the B-1 Participation Principal Balance (not below zero).

(Id. § 3[a] at p. 8 [emphasis in original]). The Original Participation Agreement defines "Realized Losses" to include, inter alia, with respect to a defaulted loan, any portion of the loan principal or previously accrued interest payable thereunder that was canceled "in connection with ... a modification, waiver or amendment of the Loan granted or agreed to by Senior Participant ... [in] the amount of such principal and/or interest so canceled" (Kim Affirm., Ex. 20, Participation Agreement at pp. 9-10).

Similarly, section 4(e) of the Sub-Participation Agreement, regarding payment procedures, provided that in connection with a workout or proposed workout of the Junior Participation Interests, if the principal balance of the loan is decreased,

"the full economic effect of all waivers, reductions or deferrals of amounts due on the Junior Participation Interest" resulting from a loan workout "shall be borne by B-2 Participant" (Kim Affirm. Ex. 21, Sub-Participation Agreement § 4[e] at pp. 10-11). This section further provides that Square Mile had no right to participate in the negotiation or documentation of any workout or proposed workout and that "[n]o party shall have any fiduciary or similar duty to any other party herein in connection with the negotiation and documentation of a workout" (Id. at p. 11).

With regard to liability under the Sub-Participation Agreement, section 3(c) provides, in relevant part, that the

> [c]ontrolling Holder will not have any liability to the ... Senior Participant, Junior Participant, any B Participant or any other Person for any action taken, or for refraining from the taking of any action ... absent any loss, liability or expense incurred by reason of its willful misfeasance, bad faith or gross negligence.

(Kim Affirm., Ex. 21, Sub-Participation Agreement § 3[c] at p. 9). Under section 9(a), Arbor, as the B-1 Participant, "shall have no liability to B-2 Participant with respect to the B-2 Participation Interest, except with respect to losses actually suffered due to the gross negligence or willful misconduct on the part of B-1 Participant," and liability was further limited to damages not to exceed the principal, interest and other amounts relating to the B-2 Participation Interest (Id., Sub-

Participation Agreement § 9[a] at p. 13). Section 9(b) similarly provides that Arbor, as the servicer, shall have no liability except for losses due to its gross negligence or willful misconduct, and that it does not owe either B Participant a fiduciary duty, but that it was not relieved of its obligation to disburse funds as set forth therein or for losses due to its gross negligence or willful misconduct (Id., Sub-Participation Agreement § 9[b] at p. 13).

C. The Pleadings

In the third amended complaint, Square Mile alleges two causes of action: for breach of the Sub-Participation Agreement and the other for a declaratory judgment (Kim Affirm., Ex. 1, third amended complaint). By order, entered November 5, 2014, the second cause of action for a declaratory judgment was dismissed (Roy Affirm. Ex. AL). Thus, the only remaining cause of action alleges that Arbor breached the Sub-Participation Agreement as servicer of the B Participation Interest by not servicing both the B-1 and the B-2 Participation Interests as required therein in a manner consistent with Accepted Servicing Practices, the Original Participation Agreement, and the Sub-Participation Agreement.

Discussion

Square Mile's motion for summary judgment is denied, and Arbor's cross motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed.

In order for Square Mile to prevail on its claim for breach of the Sub-Participation Agreement, it must demonstrate: (1) the existence of a contract between it and Arbor; (2) Square Mile's performance; (3) Arbor's failure to perform its obligations; and (4) damages resulting from the breach (El-Nahal v FA Mgt., Inc., 126 AD3d 667, 668 [2d Dept 2015]; PFM Packaging Mach. Corp. v ZMY Food Packing, Inc., 131 AD3d 1029, 1030 [2d Dept 2015]; Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]). "[W]here the language [of a contract] is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language," and the "writing should as a rule be enforced according to its terms" R/S Assoc. v New York Job Dev. Auth., 98 NY2d 29, 32 [2002] [internal quotation marks and citations omitted]). "Interpretation of the contract is a legal matter for the court" 805 Third Ave. Co. v M.W. Realty Assoc., 58 NY2d 447, 451 [1983] [citations omitted]).

Section 3(a) of the Sub-Participation Agreement required Arbor, as the Servicer of the B Participation Interests, to service and administer their interests "in a manner consistent

with Accepted Servicing Practices, this Agreement, the Original Participation Agreement and applicable law" (Kim Affirm., Ex. 21, Sub-Participation Agreement § 3[a] at p. 8). Arbor was to distribute funds to the B-1 and B-2 Participants "to the extent that funds [were] received in respect of the Junior Participation Interest," promptly in accordance with the priority order set forth is section 2(b) and (c), "provided, however, [Arbor] shall allocate any Realized Losses ... to reduce the Junior Participation Interest first, to reduce the B-2 Participation Principal Balance (not below zero), and, thereafter, to reduce the B-1 Participation Principal Balance (not below zero)" (Id. [emphasis in original]). Square Mile alleges that the $35 million reduction in loan principal was not a Realized Loss allocable entirely to the B-2 Participation Interest, and that such allocation violated section 3(h) of the Participation Agreement. Realized Losses are defined in the Participation Agreement, to which the Sub-Participation Agreement was subject, to include, with regard to a defaulted loan, if any portion of principal on the original loan was canceled in connection with a modification, waiver or amendment of the loan granted by the senior participant, the amount of such principal so canceled (Kim Affirm., Ex. 20, Participation Agreement, Definitions at pp. 9-10). Thus, under the clear contractual language in section 3(a)

of the Sub-Participation Agreement, Realized Losses, including principal canceled on a defaulted loan, were allocated to eliminate the B-2 Participation Interest entirely before any losses were allocated to the B-1 Participation Interest. Square Mile was the only B-2 Participant.

Section 4(e) of the Sub-Participation Agreement similarly requires that if there is a workout or proposed workout of the Junior Participation Interest, modifying the terms such that there is a decrease in the principal amount of the loan, as occurred in the workout here, "the full economic effect of all waivers, reductions or deferrals of amounts due on the Junior Participation Interest and the Promissory Note attributable to such workout shall be borne by B-2 Participant" (Id., Sub-Participation Agreement § 4[e] at p. 11; see also Kim Affirm., Ex. 20, Participation Agreement § 4[e] at p. 29 [corresponding provision]). Together, these provisions unequivocally demonstrate that the parties agreed that if there were a workout of the loan and part of the principal amount of the loan representing the Junior Participation Interest was decreased, the B-2 Participant, that is, Square Mile, would bear the full economic effect of that decrease up to the amount of its investment before Arbor, as the B-1 Participant, would suffer any loss. While Square Mile contends that section 4(e) of the Sub-

Participation Agreement does not apply and did not require the B-2 Participant to absorb the entire $35 million loss under any circumstance, the loan workout which occurred plainly decreased the principal balance of the original note underlying the loan, and, therefore, section 4(e) applied to this workout.

Upon the closing of the loan workout, Arbor, as the party entitled to exercise all of the rights of the Junior Participant, and the Senior Participant entered into the First Amendment to Participation and Servicing Agreement which resulted in the decrease of the Junior Participation Interest from the principal amount of $70 million to $35 million, and the elimination of the B-2 Participation Interest (Kim Affirm.. Ex. 31). Under the clear provisions of the Sub-Participation Agreement, with the elimination of the B-2 Participation Interest, Arbor no longer was obligated to disburse funds to Square Mile.

Square Mile challenges the process by which its interest was eliminated through the loan workout, urging that Arbor, as servicer, breached the Sub-Participation Agreement during this process. Square Mile, however, fails to present any evidentiary proof that Arbor acted in a manner that amounted to gross negligence or willful misconduct. Under section 9(b) of the Sub-Participation Agreement, Arbor "shall have no liability to ... B-2 Participant with respect to the B Participation Interests,

except with respect to losses actually suffered due to the gross negligence or willful misconduct on the part of Servicer" (Kim Affirm., Ex. 21, Sub-Participation Agreement § 9[b] at p. 13). This unambiguous limitation of liability provision applies to the instant matter, and will be enforced (Retty Fin. v Morgan Stanley Dean Witter & Co., 293 AD2d 341, 341 [1st Dept 2002]). Square Mile's argument that this provision does not apply to the servicer's obligations to make disbursements to the B-2 Participation Interest is unavailing. The language which Square Mile quotes in support of its position, a parenthetical clause at the end of section 9(b) that "the foregoing shall not relieve Servicer from the obligation to make any disbursements of funds," applies to the prior part of that same sentence which addresses that the Servicer does not owe a fiduciary duty to the B Participants. It does not modify the provision in the preceding sentence that the Servicer has no liability except for conduct amounting to gross negligence or willful misconduct. Thus, the limitation of liability provision clearly applies to Arbor's actions as servicer.

Square Mile then urges that its claim rests on three bases of misconduct by Arbor: (1) the Asset Status Report was issued prematurely by Wells Fargo; (2) Wells Fargo failed to take the loan accountability into account; and (3) Wells Fargo failed to

take the guaranty into account. All of this alleged misconduct, however, focuses on Wells Fargo's, not on Arbor's, conduct. Section 3(a), which defines Arbor's duties as servicer, does not require that Arbor ensure that Wells Fargo issue a proper asset report pursuant to 3(f) of the Participation Agreement, or take into account loan accountability or tests the guaranty before a loan workout. Square Mile already has sought to hold Wells Fargo directly liable to it for this purported misconduct, on theories of negligence and breach of covenants, but those claims were dismissed by this Court (Joaquin Ezcurra Reply Affirmation in further support of defendants' cross motion [Ezcurra Reply Affirm.], Exhibit A, 6/5/13 Transcript at pp. 60-62).

Moreover, contrary to Square Mile's assertions, as this Court has already found, the undisputed documentary proof shows that Wells Fargo did not breach any obligations with regard to submitting the asset report, and the loan documents do not specifically spell out one course of conduct that Wells Fargo was required to take regarding the loan and the loan servicing agreement. In fact, the loan documents provide various scenarios or approaches that Wells Fargo, as the lender, and U.S. Bank, as servicer, could take in evaluating loan workout proposals, and in seeking to maximize their returns (Id., 6/5/13 Transcript at p. 61). Again, the Asset Status Report met the requirements set

forth in section 3(f) the Participation Agreement, and section 3.25 of the Pooling Agreement. With regard to timeliness, section 3(f) merely states that the asset status report shall be prepared "not later than 30 days after the Loan becomes a Specially Serviced Mortgage Loan" (Kim Affirm., Ex. 20, Participation Agreement § 3[f] at p. 20). Thus, section 3(f) does not require Wells Fargo to wait the entire 30 days before issuing it. Further, the Asset Status Report was timely because the loan became a Specially Serviced Loan on March 16, 2012, and the report was issued on March 28, 2012 (Roy Affirm., Ex. M). The Asset Status Report, which was to contain, to the extent reasonably determinable, a summary of the loan status and negotiations with borrower; legal considerations regarding enforcement of the guaranty; current rent roll, income and operating statement; recommendations for returning loan to performing status; the appraised value of property; summary and analysis of any proposed actions; and any other relevant information, clearly contained all of this information to the extent it was available (Roy Affirm., Ex. K). With regard to the appraised value, the report indicated that an appraisal was ordered and expected by April 27, 2012. If, as Square Mile seems to contend, Wells Fargo waited until it had an appraisal before issuing the report, the report would have been untimely. In

addition, contrary to Square Mile's contention, the report contained a section for "Summary of Proposed Actions," in which Wells Fargo noted that conversations were ongoing between the special servicer, the borrower and the Junior Participants, and that if an agreement was not reached, it would recommend initiation of foreclosure (Id., at p. 4). This Court finds that there are no triable issues of fact as to whether the Asset Status Report issued by Wells Fargo conformed to the requirements in the Participation Agreement.

Further, at the time the Asset Status Report was issued, Square Mile was the Controlling Holder, not Arbor. Under the Sub-Participation Agreement, the initial Controlling Holder was defined as "the B-2 Participation Interest, unless a Control Appraisal Period then exists with respect to the B-2 Participation Interest," and Square Mile was the B-2 Participant. This designation only shifted after the declaration of a Control Appraisal Period, which did not occur until May 3, 2012 (Kim Affirm., Ex. 54). As the Controlling Holder, under section 3(b) of the agreement, Square Mile could exercise any rights of the Junior Participant, and under section 3(f) of the Participation Agreement, it "may object to any Asset Status Report within 10 Business Days after receipt," and the "Controlling Holder is required to act as promptly as possible in order to finalize" the

report (Kim Affirm., Ex. 20, Participation Agreement § 3[f] at p. 21). These provisions obligated Square Mile, not Arbor, to object to the report if it was insufficient, and it cannot shift its own contract responsibilities onto Arbor (TLM Realty Corp. v Glick, No. 603870/08, 2015 WL 274629, * 6, 2015 NY Misc LEXIS 147, *15 [Sup Ct, NY County Jan 16, 2015]).

Square Mile's argument that Wells Fargo failed to consider the loan collectibility and the guaranty before entering into the loan workout is inapposite. There is no provision in the Sub-Participation Agreement that requires Arbor to ensure that Wells Fargo consider those specific approaches in evaluating the loan, and this Court has already found that the loan documents do not specify one particular course of conduct, and allow for a variety of scenarios (Ezcurra Reply Affirm., Ex. A, 6/5/13 Transcript at p. 61). Moreover, Arbor has submitted the undisputed testimony of Roger Briggs of Wells Fargo, which establishes that it did take into account loan collectibility, and the parties had extensive negotiations before the loan workout was effected. For example, Briggs stated that from the time the loan went into Special Servicing on March 12, 2012 to when the borrower's first workout proposal was submitted on April 12, 2012, there were discussions of workout alternatives (Roy Affirm., Ex. AN, Roger Briggs EBT, dated Dec 18, 2014 [Briggs EBT] at p. 59). Briggs

testified that Wells Fargo took into account the net present value of the loan, under three different scenarios: a foreclosure, a discounted payoff or loan sale, and restructure or forbearance (Id. at pp. 89-90). He further testified, contrary to Square Mile's unsupported contention that Wells Fargo never tested the market or attempted to sell the loan, that "[i]f we went to market the note, my assumption is the borrower would take that as us not negotiating in good faith," in which case Wells Fargo could "lose the workout alternative we had been negotiating, which, in our view, was superior to what we would get from the sale of the note" (Id., at pp. 41-42). With respect to the guaranty, Briggs attested that Wells Fargo reviewed the guarantor's financial statements as part of the loan workout process, but did not test it because that would have required foreclosure on the loan, a possible bankruptcy filing by the borrower, a judgment against the borrower, and then collection on the judgment (Id., at pp. 22-27).

Further, the undisputed facts show that Arbor did not act with gross negligence or willful misconduct by ceasing to disburse funds to Square Mile because its interest was eliminated in the loan workout in accordance with sections 3(a) and 4(e) of the Sub-Participation Agreement, as discussed supra. Square Mile's assertions of a trust relationship, with Arbor holding the

funds for the B-2 Participation Interest in trust for Square Mile, has already been rejected by this Court and dismissed with the dismissal of the conversion claim (Ezcurra Reply Affirm., Ex. A, 6/5/13 Transcript at pp. 34-35), and may not be revived here.

Finally, Square Mile has failed to show any basis to pierce the corporate veil because Arbor Participation was created in 2006 (Roy Affirm., Ex. H) and it handled the B-1 Participation Interest in the loan in 2008 (Roy Affirm., Ex. G; see also Roy Affirm., Ex. AM, defendants' response to interrogatory #6 at p. 6), approximately four years before the loan was declared in danger of imminent default in 2012. Square Mile fails to meet its heavy burden of showing that any purported domination by Arbor Realty of Arbor Participation was used to perpetrate a fraud or that it committed a wrong that was the proximate cause of Square Mile's loss (TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339 [1998]). The documentary evidence shows that Arbor Participation paid Arbor Funding $30.7 million for Arbor Funding's assignment of the B-1 Participation Interest to it in 2008 (Roy Affirm., Ex. AP at p. 62; see also Kim Affirm., Ex. 5, defendants' second amended supplemental response, interrogatory #6 at p. 2), and that when Arbor Participation sub-participated the B-1 Participation Interest to other Arbor affiliates, those affiliates paid cash consideration to Arbor Participation (Kim

Affirm., Ex. 5 at p. 2). Square Mile's unsupported contention that Arbor Participation is judgment-proof, and was made judgment-proof through Arbor Funding's actions, fails to provide a basis to either grant it summary judgment, or to deny Arbor's cross motion for summary judgment (Fantazia Intl. Corp. v CPL Furs N.Y., Inc., 67 AD3d 511, 513 [1st Dept 2009]). It simply has failed to offer any evidence that Arbor Funding's alleged domination and control over Arbor Participation was used to commit a wrong that was the proximate cause of Square Mile's loss (Id.).

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the defendants' cross motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/3/16

HON. JEFFREY K. OING, J.S.C.