SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

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STATEMENT OF DECISION

RINCON EV REALTY LLC et al VS. MAIDEN LANE COMMERCIAL MORTGAGE-BACKED SECURITIES et al

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SUPERIOR COURT OF CALIFORNIA

County Of San Francisco

RINCON EV REALTY LLC, a limited liability company, RINCON ET REALTY LLC, a limited liability company and RINCON RESIDENTIAL TOWERS LLC, a limited liability company,

Plaintiffs,

vs.

CP III RINCON TOWERS, INC.; CARMEL PARTNERS INVESTMENT FUND III, L.P.; U.S. BANK NATIONAL ASSOCIATION, not individually but solely in its capacity as Trustee for MAIDEN LANE COMMERCIAL MORTGAGE-BACKED SECURITIES TRUST 2008-1; MAIDEN LANE COMMERCIAL MORTGAGE-BACKED SECURITIES TRUST 2008-1; MAIDEN LANE, LLC; CARMEL PARTNERS, INC.; CARMEL PARTNERS, LLC; CARMEL MANAGEMENT, LLC; and DOES 6 through 50, inclusive,

Defendants.

Case No.: CGC-10-496887

STATEMENT OF DECISION AFTER COURT TRIAL

This case came on for trial before me. Plaintiffs RINCON EV REALTY LLC, a limited liability company, RINCON ET REALTY LLC, a limited liability company and RINCON RESIDENTIAL TOWERS LLC, a limited liability company ("Rincon") were represented by David Boies, David W. Shapiro, Jeremy M. Goldman, Kathleen M. Smalley, Christine Y. Wong, Maxwell V. Pritt, Devon Hanley Cook, and Nora K.C. Flum of Boies, Schiller & Flexner LLP. Defendants CP III RINCON TOWERS, INC.; CARMEL PARTNERS INVESTMENT FUND III, L.P.; U.S. BANK NATIONAL ASSOCIATION, not individually but solely in its capacity as Trustee for MAIDEN LANE COMMERCIAL MORTGAGE-BACKED SECURITIES TRUST 2008-1; MAIDEN LANE COMMERCIAL MORTGAGE-BACKED SECURITIES TRUST 2008-1; MAIDEN LANE, LLC; CARMEL PARTNERS, INC.; CARMEL PARTNERS, LLC; and CARMEL MANAGEMENT, LLC ("Defendants") were represented by Lenard G. Weiss, Barry W. Lee, Kimo S. Peluso, Ann M. Heimberger, Elizabeth K. Murray, Christian E. Baker, and Christopher A. Rheinheimer, of Manatt, Phelps & Phillips, LLP.

The trial took place over the course of court sessions in July and August 2012. The Court heard testimony of live witnesses, received and reviewed documentary evidence and deposition transcripts, heard oral argument from counsel, and received pre- and post-trial briefs on issues, all of which were considered in making this decision. Two rounds of post-trial briefs were filed by each side, with the last set of briefs filed on September 10, 2012.[1] By Order filed October 10, 2012, the Court granted Plaintiffs' motion (filed on September 17, 2012) to re-open their case for the limited purposes of admitting Exhibit 2306 in evidence. By Order filed October 18, 2012,

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[1] The post-trial briefs are referred to as follows: Plaintiffs' Post-Trial Brief ("POB"); Defendants' Post-Trial Brief ("DOB"); Plaintiffs' Response to Defendants' Post-Trial Brief ("PRB"); and Defendants' Reply to Plaintiffs' Post-Trial Brief ("DRB"). Trial exhibits are referred to as "TRX." The reporter's transcript of the trial is referred to as "Tr."

the Court permitted Defendants' case to be re-opened for the limited purpose of admitting Exhibit 3805 in evidence, as redacted, pursuant to stipulation. Defendants filed a supplemental letter brief on December 4, 2012 with new case authority; Plaintiffs filed a supplemental letter brief on December 5, 2012, with another case; and Defendants filed a supplemental letter brief on December 6, 2012. The Court grants Defendants' unopposed Request for Judicial Notice in Support of Defendants' Reply to Plaintiffs' Post-Trial Brief, filed September 10, 2012. The Court grants Plaintiffs' Request for Judicial Notice, filed September 17, 2012.[2]

The Court considered the written objections and responses to the Proposed Statement of Decision filed by the parties, and held oral argument on the objections on February 20, 2013. This Statement of Decision follows.

BACKGROUND

Plaintiffs bought a property in San Francisco known as Rincon Towers ("the Property") in June 2007 for $143 million. Plaintiffs, and their investor sponsor, Richard Cohen, are sophisticated investors with a large portfolio of commercial real estate investments throughout the United States. At the time of trial, Mr. Cohen and his business entities had a real estate portfolio of $1.5- $2 billion under management. Plaintiffs borrowed $110 million to finance the Property from Bear Stearns. The loan was due two years later, in June 2009, unless Plaintiffs exercised an option to extend the maturity date of the loan for another year to June 2010. The

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[2] Plaintiffs' request for judicial notice filed September 17, 2012 was made after all post-trial briefing was completed. It seeks judicial notice of a declaration filed April 11, 2010 by one of Defendants' attorneys, Christian Baker, in support of Defendants' opposition to Plaintiffs' motion for leave to file first amended complaint in this case. Plaintiffs contend the declaration is relevant to demonstrate that assertions in Defendants Post-Trial Reply Brief are incorrect, and to demonstrate that Mr. Baker's trial testimony is inconsistent. The statements in the declaration are hearsay; even if I were to consider them for the truth of the matters stated, the statements are consistent with Mr. Baker's very brief and straightforward testimony at trial, which I observed and found credible.

exercise of the option was subject to contractual prerequisites, including an appraisal showing that the principal amount of the loan did not exceed 72% of the fair market value of the property, to be determined by an appraisal consistent with the methodology used for the appraisal delivered in connection with the origination of the loan in 2007.

Nine months after entering into the loan, Plaintiffs and Mr. Cohen knew that the Rincon property was worth far less because of the global financial crisis. Mr. Cohen began his efforts to get out from under the $110 million debt in the spring of 2008, when he approached Bear Stearns and offered to purchase the loan at a 25-30% discount. Bear Stearns' counteroffer of 10% or less wasn't satisfactory for Cohen, in light of the drop in the property's value.

By November 2008, Bear Stearns collapsed. Mr. Cohen's loan was then held by Defendant Maiden Lane Commercial Mortgage-Backed Securities Trust 2008-1 ("the "Maiden Lane Trust" or the "Trust"). This entity was established by the Federal Reserve Bank of New York ("FRBNY") to facilitate JP Morgan's acquisition of Bear Stearns. The Trust acquired the Rincon loan, along with $30 billion of other Bear Stearns assets that JP Morgan was unwilling to acquire.

BlackRock Financial Management, Inc. ("BlackRock" or "BlackRock Financial"), the operating advisor to the Maiden Lane Trust, solicited bids to purchase the Rincon Loan.[3]

Mr. Cohen worked behind the scenes with Terra Capital Partners, another New York real estate company that Mr. Cohen had done deals with over the years, and without disclosing his identity, offered to purchase the Loan for $70 million, an approximately 36% discount off the face value. (TRX 3147; 3158) With Terra Capital as his representative, Mr. Cohen received a

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[3] FRBNY and BlackRock Financial are not parties to this case. Reginald Leese, a managing director at BlackRock Financial, was one of the principal people involved in managing the Rincon loan, one of many assets acquired by the Maiden Lane Trust. It is undisputed that the Loan Agreement expressly permitted the lender to sell the Rincon Loan.

copy of the Rincon Loan "book" that BlackRock was using to market the loan. Because the bid was made in the name of Terra Capital, neither the Trust nor BlackRock Financial had any idea that Mr. Cohen was behind it. Other bidders, including Carmel Partners, also submitted bids in the same range, but the Lender rejected them and ceased efforts to market the Loan.

Plaintiffs failed to repay the $110 million loan at maturity in June 2009, claiming that they were entitled to a one-year extension of the maturity date to June 2010. The lender disagreed, telling Plaintiffs that they were in default. Nonetheless, the lender continued to engage in workout negotiations with Mr. Cohen and did not accelerate the loan, reserving all rights. When negotiations stalled in late 2009, the Trust pursued a dual track by also marketing the Rincon Loan to third parties through Eastdil Secured ("Eastdil"), who is not a party. Mr. Cohen was invited to participate in the auction. At trial, witnesses from Eastdil and BlackRock testified credibly that, from their point of view, Mr. Cohen would be the best bidder for the Loan, because he had all of the information available on the operation and performance of the Loan. Mr. Cohen, for his part, saw the Eastdil auction process as an opportunity to purchase the Loan at a steeper discount than the Trust, at that time, was willing to consider in its negotiations with him.

Mr. Cohen could not get the discount he wanted. He then tried to disrupt the sale and to deter others from closing a purchase of the loan. During the auction, Mr. Cohen directed his lawyers to send threatening letters to the lender, which would be disclosed to potential loan purchasers. After Carmel Partners[4] was selected as the high bidder in the auction process, Mr. Cohen instructed his lawyers to file this lawsuit and to record a *lis pendens*, thus encumbering

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[4] "Carmel Partners" is the trade name under which several of the Defendants do business – CP III Rincon Towers, Inc. ("CP III"); Carmel Partners, Inc.; Carmel Partners, LLC; Carmel Management, LLC; and CP Investment Fund III, L.P. CP III is the entity that purchased the Loan and foreclosed on the collateral.

the collateral for the loan and making it a far less attractive purchase for the average bidder. Mr. Cohen used operating revenues generated at the Property (in which the lender held a security interest) to pay the lawyers that were suing the lender.

After investigating Plaintiffs' claims, Defendant CP III closed on the purchase and acquired the Loan from the Maiden Lane Trust on April 16, 2010. CP III waited until after June 14, 2010, the maturity date if Plaintiffs had been entitled to the one year extension, before commencing non-judicial foreclosure proceedings. CP III acquired the property at the foreclosure sale on Oct. 12, 2010 with a $73 million credit bid.

Defendants obtained summary adjudication on Plaintiffs' original causes of action. Plaintiffs' attempts to enjoin the foreclosure were not successful. This case proceeded to trial on Plaintiffs' Fifth Amended Complaint alleging breach of contract, fraud, unfair competition, slander of title, trade secret misappropriation, and seeking to set aside the foreclosure and an accounting.

As set forth below, Plaintiffs' claims are without merit. First, all of Plaintiffs' claims fail because Plaintiffs were in default on June 12, 2009; Plaintiffs did not qualify for the one-year extension of the loan maturity date and, indisputably, failed to pay back the $110 million they borrowed. Even if Plaintiffs were not in default as of June 2009, Plaintiffs' claims still fail. The Lender reserved its rights and did not accelerate the loan or record a Notice of Default as a result of the June 12, 2009 default. Plaintiffs received the benefit of the one-year extension, and when the loan matured, at the latest, on June 14, 2010, Plaintiffs never made any offer to pay back the principal, let alone the additional amounts due.

Defendants are entitled to judgment on all claims.

1. Choice of Law.

There are three contracts at issue: the Loan Agreement (TRX 9), the Cash Management Agreement (TRX 16) and the Pre-Negotiation Agreement ("PNA") (TRX 101). Each has a New York choice of law provision.

The parties agree that New York law applies to the contract claims. Defendants contend New York law also applies to the causes of action for fraud, unfair competition, slander of title, and violations of trade secrets. Plaintiffs disagree, and contend that California law (the law of the forum) applies to the non-contract claims. Defendants principally rely on the Court's Order Granting Defendants' Motion to Strike Plaintiffs' Jury Demand, filed March 13, 2012, and contend that the Court has already decided the issue. For the reasons set forth below, I find that New York law governs only the contract causes of action. The March 13, 2012 order did not address this issue.

The Loan Agreement and Cash Management Agreement contain a detailed New York choice of law provision, that states in pertinent part that "[I]n all respects, including without limiting the generality of the foregoing, matters of construction, validity and performance, this Agreement, the Note and the other loan documents hereunder and thereunder shall be governed by, and construed in accordance with, the laws of the State of New York applicable to contracts. . . " (TRX 9 at 97-98, §10.3(a); CMA, TRX 16 at 24-25 § 8.11.) The contracts also specify that claims relating to the security interests are governed by California law. (TRX 9 at 98.)

Whether New York law applies to the non-contract causes of action (and the causes of action which do not relate to the security interests) is determined by New York law. *Nedlloyd Lines v. Superior Court*, 3 Cal. 4th 459, 469 n. 7 (1992). New York courts have consistently held that contractual choice of law provisions only apply to claims in contract, not tort. *Finance One Public Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 355 (2d Cir. 2005) ("Presumably a contractual choice-of-law clause could be drafted broadly enough to reach such

tort claims....However, no reported New York cases present such a broad clause."); *Burns v. Delaware Charter Guarantee & Trust Co.*, 805 F. Supp. 2d 12, 22 (S.D.N.Y. 2011) ("Under New York choice of law rules, tort claims are outside the scope of contractual choice of law provisions.").

In support of its claims that New York law should apply to all claims, Defendants cite to two cases that are distinguishable. In *Continental Airlines, Inc. v. Mundo Travel Corp.*, 412 F. Supp. 2d 1059, 1064 and n.2 (E.D. Cal. 2006), the District Court looked to California law to interpret the scope of the choice of law provision, rather than the law of the chosen state (Virginia) as required by *Nedlloyd*, because the parties there did not discuss Virginia choice of law rules or argue that they differed from California's. Thus *Continental Airlines, Inc.'s* conclusion about whether the unfair competition claim (Bus. & Prof. Code 17200) in that case is governed by Virginia or California law is inapplicable here. Defendants also rely on *Cardonet, Inc. v. IBM Corporation,* 2007 WL 518909 (N.D. Cal.). Although *Cardonet* looked to New York law to determine the scope of the choice of law provision, its decision as to scope was based on a case involving forum selection clauses. (*Id.* at *3.) Under New York law, however, a forum selection clause is not dispositive of the scope of choice of law provisions. *See, e.g., Finance One, supra*, 414 F. 3d at 335 ("Under New York law, then, tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract, even when the contract also includes a broader forum-selection clause.")

First and Second Causes of Action - Breach of the Loan Agreement and Cash Management Agreement

The first and second causes of action are alleged against CP III; Fund III; Carmel Partners, Inc.; Carmel Partners, LLC; Carmel Management, LLC; U.S. Bank as Trustee; Maiden Lane Trust; and Maiden Lane LLC.

Plaintiffs must prove: (1) formation of a contract between plaintiffs and defendants, (2) plaintiffs' performance or excuse for nonperformance, (3) defendants' failure to perform, and (4) resulting damage. (New York Pattern Jury Instructions ("NYPJI") No. 4:1, Contracts – Elements, citing *Furia v. Furia* (1986) 498 N.Y.S.2d 12.)

Plaintiffs established only the first element of a contractual relationship, and only as to some of the Defendants.[5] Plaintiffs cannot prevail on this cause of action because they did not prove their own performance or excuse for nonperformance, that defendants' had failed to perform, or any resulting damage.

Plaintiffs' performance or excuse for nonperformance is an essential element of a breach of contract claim. "In the absence of some factor excusing compliance with the terms of a contract, '[a] plaintiff seeking to maintain an action for . . . damages for nonperformance of a contract must demonstrate that a tender of his or her own performance was made' . . . ." (*First Frontier Pro Rodeo Circuit Finals LLC v. PRCA First Frontier Circuit*, 737 N.Y.S.2d 694, 695 (2002) [citation omitted].) Plaintiffs have the burden of alleging and proving that they performed or have an excuse for failing to perform. (*Losch v. Marcin* (N.Y. 1929) 167 N.E. 514, 517.) Even where a party partially performs a contract, if it has materially defaulted in completing the contract, it will not be entitled to recover for part performance without a legal excuse for not completing the work. (*Waters v. Glasheen*, 478 N.Y.S.2d 437, 438 (1984).)

Here, Plaintiffs did not establish their own performance or excuse for nonperformance. Plaintiffs breached the Loan Agreement by allowing multiple events of default before any alleged Lender conduct occurred.

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[5] Plaintiffs did not establish any contractual relationship with Defendants Fund III, Carmel Partners, Inc., Carmel Partners, LLC, Carmel Management, LLC or Maiden Lane, LLC. These entities are not parties to the Loan Agreement or the Cash Management Agreement.

Plaintiffs breached the Loan Agreement in multiple respects, including by failing to pay the entire principal balance on the June 12, 2009 maturity date; failing to complete required Property improvements by December 2008; permitting liens to be recorded against the Property without the lender's consent; and failing to provide required documentation.

Plaintiffs Did Not Qualify for a Loan Extension

Plaintiffs failed to satisfy the conditions precedent for an extension of the Loan. As a result, Lender's rejection of Plaintiffs' extension attempt and declaration of a default in June 2009 were not breaches of the Loan Agreement. Every alleged "breach" of the Loan Agreement by Defendants occurred after June 2009 and, therefore, after Plaintiffs were already in default for failing to pay the full principal amount of the Loan.

A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." (*Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.* (1995) 636 N.Y.S.2d 734, 737 [internal quotation marks and citations omitted]; *MHR Capital Partners LP v. Presstek, Inc.* (2009) 884 N.Y.S.2d 211, 215.) Plaintiffs failed to satisfy sections 2.7(f) and 2.7(g) of the Loan Agreement and were, therefore, not entitled to the one-year extension of the maturity date.

Section 2.7(f) of the Loan Agreement, a condition precedent to an extension of the Loan, stated, in pertinent part, that the borrower had one option to extend the initial maturity date of the loan to June 12, 2010, "upon satisfaction of the following terms and conditions," including:

"(f) the maximum principal amount of the Loan does not exceed seventy-two percent (72%) of the fair market value of the Property as determined by an appraisal prepared in a manner consistent with the methodology used for the appraisal delivered in connection with the origination of the Loan and submitted to Lender at least ten (10) Business Days prior to the first day of the Extension Option..." (TRX 9, § 2.7(f).)

Based on the $110 million Loan principal, the value of the Property had to be at least $152.78 million in June 2009 to satisfy the 72% loan to value test.

The original appraisal, referred to in section 2.7(f), was conducted by CBRE in May 2007 by Joel Ehrlich ("2007 CBRE appraisal"). (TRX 1029.)

Plaintiffs contend they met the requirements of section 2.7(f) by delivering an appraisal prepared by Eric Haims, a licensed appraiser. Mr. Haims was retained by Plaintiffs through their then counsel for the purpose of meeting the requirements of section 2.7(f) to exercise the option.[6] Mr. Haims understood from his conversations with counsel that an objective of the appraisal was to meet the 72% loan to value ratio. (TRX 317.) Mr. Haims sent an email to Plaintiffs' counsel with his "initial values" for the property as of March 2009. These values were $75.5 million, based on the property's "as is" market value; or $95 million, based on a "hypothetical scenario" that 120 units were converted to short-term luxury furnished rentals. (TRX 3222.)

Plaintiffs' counsel at the time conceded that these values did not meet the requirements of section 2.7(f) for extension of the loan. (TRX 4009, Montgomery Depo. at 89.) So Mr. Haims was asked by Plaintiffs' counsel to try a different approach: to proceed with the "extraordinary assumption" that the market conditions existing as of the appraisal in May 2009 were at that moment the *same* as they had been in 2007. (TRX 1400.)[7] (This, of course, wasn't the case.)

Mr. Haims' initial engagement letter had said nothing about using any "extraordinary assumptions." He testified that his discomfort at this request caused him to consult with someone at the Appraisal Institute, a professional association for appraisers. Mr. Haims did not go into the details of the proposed appraisal project with the person he spoke to at the Appraisal Institute. He was told by the person at the Appraisal Institute that it was possible to appraise a

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[6] Plaintiffs' counsel in connection with the appraisal were not trial counsel in this case.

[7] I give no weight to the testimony of Plaintiffs' former attorney that the extraordinary assumption was used in order to follow the 2007 CBRE methodology. The former attorney could not even recall how the extraordinary assumption evolved or how it came about, and his

property based on an extraordinary assumption that the property, in a *prospective* time period, could have returned to the levels of a prior time period, so long as it was disclosed in the appraisal.

Mr. Haims appraised the property again, this time based on his hypothetical assumption about converting units into furnished short term rentals, and his extraordinary assumption that by a *future* date -- May 2010 -- the San Francisco real estate market would return to May 2007 levels. Only by making these assumptions did Mr. Haims arrive at an appraised value of $165 million, which was in excess of the $143 million that Plaintiffs had paid for the property in 2007 ("the May 2009 Haims appraisal") (TRX 132.). Mr. Haims was told by Plaintiffs' then counsel not to put his earlier appraised values ($75 million and $95 million) in his written report. His initial $75 million appraised value was not disclosed to Defendants until discovery in this case.

Mr. Haims conceded that in 20 years as an appraiser, he had never done an appraisal like the May 2009 appraisal for Plaintiffs. To confirm the reasonableness of his assumption that the market would return to 2007 values by May 1, 2010, he simply just "thought about it." It seemed "reasonable" to him. (TRX 4006. Haims Depo. at 247.) He believed that markets are "cyclical." A section in Mr. Haims' appraisal entitled "Economy" is scant; it begins with the California Gold Rush and does not include the recession of 2008. (TRX 132-025.) Further, Haims conceded that he does not have much experience appraising real estate in San Francisco. I find that Mr. Haims' reliance on the extraordinary assumption is essentially unsupported.[8]

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testimony was inconsistent as to whether the idea came from the lawyers or from Haims. (TRX 4009, Montgomery Depo.)

[8] I credit the testimony of Defendants' expert appraiser, Timothy Lowe, who takes the view that the extraordinary assumption is unsupported in Haims' report and testimony. I give no weight to the brief testimony in rebuttal of Plaintiffs' expert Randi Rosen about research she had done near the end of the trial into publications about the real estate market in 2009. There is no evidence that Mr. Haims saw or relied on these articles, which are not in evidence. Even Ms. Rosen admitted she had not seen any other appraisal use the assumption that San Francisco

With this as background, Plaintiffs' contention that the Haims appraisal is the same "methodology" as the 2007 CBRE appraisal for purposes of complying with section 2.7(f) cannot withstand scrutiny. "Methodology" is not a defined term in the Loan Agreement. At trial, various appraiser witnesses testified that there are three basic methods to appraise property: cost, sales comparison, and direct capitalization. The May 2007 CBRE appraisal used a direct capitalization approach, as well as a sales comparison approach for corroboration. Mr. Haims did not do a sales comparison approach. Plaintiffs contend that because Mr. Haims used the direct capitalization approach, the methodology is therefore the same and the Haims May 2009 appraisal thus meets the requirements of section 2.7(f). In effect, Plaintiffs contend that any appraisal that uses the direct capitalization approach, no matter what other assumptions, techniques or premises are used, satisfies section 2.7(f).

This contention is without merit. Mr. Haims' extraordinary assumption appraisal is not consistent with any reasonable interpretation of the 2007 CBRE appraisal's methodology. The purpose of section 2.7(f) was to determine whether the option could be exercised upon meeting a certain loan to value ratio as of a certain date. The May 2009 Haims appraisal does not meet the requirements of section 2.7(f) because, among other reasons, it states that the "*prospective* date of valuation is May 1, 2010." (TRX 132-007)(emphasis added). The Haims appraisal did not give a value at the time of the extension in mid-2009, as section 2.7(f) required.

Mr. Haims himself recognized the fluidity of his particular extraordinary assumption, testifying that he was "writing the [appraisal] report in May 2009 and I didn't have a crystal ball. So what the extraordinary assumption says that this would be my value as of the date if this

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would return to market conditions of 2007 by May 2010. Nor would she offer the opinion at trial that as of 2009 it was a true statement that the Loan did not exceed 72% of the fair market value of the Property.

happens. If it doesn't happen then my value obviously is no longer valid and that may be what you're getting at because if it's not –if it doesn't return…then that's not the number anymore. It's something different. And I don't know what that is." (TRX 4006, Haims Depo. at 246-247.) This admission leads to the conclusion that the Haims May 2009 appraisal did not comport with the methodology used in the 2007 CBRE appraisal. (See TRX 3067.)

Further, the Haims appraisal was missing two key and standard certifications that are required by the Uniform Standards of Professional Appraisal Practice, or "USPAP." (TRX 2275, pp. 38 – USPAP Standards.) The many appraiser witnesses at trial agreed that USPAP is the standard by which real estate appraisers do their work. The CBRE 2007 appraisal includes standard USPAP certifications stating that "our engagement in this assignment was not contingent upon developing or reporting predetermined results," and "our compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal." (TRX 1029 at page 5.) The absence of these standard certifications, when coupled with the evidence as to how Mr. Haims came to make the "extraordinary assumption" in his appraisal, further undermines Plaintiffs' position that they complied with provisions of section 2.7(f).

Plaintiffs contend that the 2007 CBRE appraisal, performed by Joel Ehrlich, was not a "true as-is valuation," but a future valuation which is really no different than Mr. Haims projecting into the future that the San Francisco real estate market will rebound. This argument is not persuasive. When Ehrlich valued the Property, it was unstabilized: not all rents were at market rate, and the building was 70% rented. It had potential to be stabilized at then existing market rates and fully leased (which virtually all witnesses agreed meant about 95% occupancy).

As Mr. Ehrlich explained, the valuation of an unstabilized property is often a two-step process: as an initial step, the appraiser may consider future, as-stabilized performance, but the important second step is to deduct the costs of becoming stabilized. That is how Ehrlich performed his as-is valuation, reaching a final figure that represented a current value of the property. He did so using then-market rate rents, and assumed full occupancy. He deducted the cost to achieve stabilized occupancy (about $8.8 million) from his value. (TRX 1029 at 122.) His date of value was May 16, 2007, which was contemporaneous with the time he was writing his report. This was the value he believed a willing buyer would find in the Property.

Plaintiffs further contend that Section 2.7(f) was satisfied because Mr. Cohen believed he had negotiated a contract term that allowed the Borrower under the Loan Agreement (Plaintiffs) – rather than the Lender – to obtain the required appraisal. Plaintiffs point to the phrase that the appraisal is "delivered to the Lender." Plaintiffs contend that they bargained for the right to provide the appraisal, which means that regardless of the appraisal they deliver, the underlying merits of the appraisal shouldn't be the subject of litigation, ipse dixit. The plain language of the contract does not support this position. Section 2.7(f) cannot fairly be read to give the Lender no right to consider the substance of the appraisal once it is "delivered to the Lender." Further Plaintiffs have not come forward with any other persuasive evidence to support their position that the delivery by the borrower of *any* appraisal to the Lender that *purports* to meet the 72% LTV requirement satisfies section 2.7(f). Where, as here, the Haims May 2009 appraisal clearly does not meet the terms of section 2.7(f), the mere fact that a borrower has delivered it is not enough.

Plaintiffs also failed to satisfy a second condition precedent to obtaining an extension of the Loan's Maturity Date. Section 2.7(g) provides that "Borrower shall have complied in all material respects with the covenants contained in Section 5.1.28 hereof and completed the

institution of its business plan as described in such Section 5.1.28." (TRX 9.) Section 5.1.28 provides in relevant part:

> (a) In compliance with Borrower's business plan Borrower shall diligently and expeditiously (i) renovate all market rate units and common areas, (ii) operate one hundred twenty (120) market rate units as self-managed furnished apartment units, and (iii) construct a health club facility at the Property. . . .
>
> (c) In furtherance of the foregoing Subsections (a) and (b) Borrower shall spend all funds in the Required Repair Account for performance of the Required Repairs within, with respect to (a)(i) and (a)(iii) above, the time frames set forth on Schedule II attached hereto.

(*Id.* at § 5.1.28.) Schedule II, in turn, provides a December 8, 2008 deadline for completion of renovations for 120 "Furnished Unit Upgrades"; 124 "Market Rate Unit Upgrades"; "Common Areas (Lobby, corridors, landscaping/lighting, canopy, new entry doors)"; and "Health Club." (*Id.* at p. 124 [Schedule II].) Mr. Cohen admitted that he did not complete these items. His admissions prove that Plaintiffs were not in compliance with the Business Plan and, therefore, failed to satisfy the condition precedent set forth in Section 2.7(g).

Plaintiffs contend that they reached an accommodation with Bear Stearns whereby they were no longer required to complete the Business Plan. Pursuant to the terms of the Loan Agreement, however, any such alteration was required to be in writing. (TRX 9, § 10.4 ["No modification, amendment, extension, discharge, termination or waiver of any provision of this Agreement, or of the Note, or of any other Loan Document, nor consent to any departure therefrom, shall in any event be effective unless the same shall be in a writing signed by the party against whom enforcement is sought . . . ."].) It was not.[9]

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[9] Further circumstantial evidence that the business plan had not been amended was Plaintiffs' unsuccessful attempt to include language in the Pre-Negotiation Agreement that there had been a prior amendment. (TRX 100; TRX 4001, 12/16/11 Carp Depo. at 153-156.)

Plaintiffs did not establish that their failure to comply with the Business Plan was excused because of "delays that are beyond Borrower's control." (TRX9-064, § 5.1.28(d).)

Plaintiffs failed to satisfy both Section 2.7(g) and 2.7(f) of the Loan Agreement and, therefore, failed to qualify for an extension of the Maturity Date. Plaintiffs' failure to pay the Loan in full ($110 million plus interest) when it came due in June 2009 constituted an Event of Default under the Loan Agreement. (TRX 9, § 8.1(i).) All of Plaintiffs' claimed breaches by Defendants occurred after that maturity default. Accordingly, Plaintiffs' cause of action for breach of the Loan Agreement necessarily fails.

Plaintiffs Permitted Liens to be Recorded Against the Property

Plaintiffs were required to pay certain fees and charges when they became due, and liens or other encumbrances on the Property were not permitted without prior written consent of the Lender. (TRX 9, §§ 5.1.2, 5.1.24, 5.2.2.) By December 2008, Plaintiffs had violated these covenants by failing to pay the Master Association fees that were due, failing to pay other vendors when due, and allowing those non-payments to mature into liens encumbering the Property without Lender's prior written consent. (TRX 93, 96, 180; 7/12/12 Tr. 768:7-16 [Albert]; 7/24/12 Tr. 2307:23-2308:17 [Leese]; 7/25/12 Tr. 2619:9-2621:2 [Leese].) I do not find that the Lender (through Reginald Leese of BlackRock) told Plaintiffs that the liens were acceptable or that the lender had approved the liens.

Further, any modification to the Loan Agreement was required to be in writing. (TRX 9-099, §10.4.) The fact that the Lender did not assert the liens as an event of default until April 2010 is not dispositive, since the Loan Agreement stated that '[n]either any failure nor any delay on the part of Lender in insisting upon strict performance of any term …shall operate as or constitute a waiver thereof….") (*Id.*, §10.5.) Plaintiffs' reliance on equitable estoppel is not persuasive, because they agreed that all modifications of the contract would have to be in

writing. (*Id.*) Under New York law, where a contract contains such a clause, oral modification is precluded and courts reject parties' equitable estoppel arguments. (*Tember Associates v. Bloomberg LP*, 859 N.Y.S. 2d 61, 62 (2008); *Aris Indus. v. 1411 Trizechahn-Swig*, 744 N.Y.S. 2d 362, 363 (2002).)

Plaintiffs Did Not Comply With Reporting Requirements

Plaintiffs failed to deliver to Lender certain items required under Section 5.1.11(c) for the months of January, February, and March of 2010. The missing items included the monthly and year-to-date operating statements (including capital expenditures); information necessary to identify the financial position and results of the operation of the Property, including monthly rent rolls, a comparison of budgeted income and expenses and actual income and expenses from the Property, a calculation reflecting the annual debt service coverage ratio for the immediately preceding 12 month period, and a net cash flow schedule. (TRX 9, § 5.1.11; TRX 323 [April 15, 2010 default letter].) Plaintiffs' failure to provide this information to Lender was an event of default.

As a result of these defaults, Plaintiffs needed to prove that they were excused from performing in order to satisfy this element of their breach of contract claim. Plaintiffs failed to do so.

Plaintiffs Did Not Establish Any Excuse

Plaintiff did not establish that they were excused from performance under New York law. (*Kel Kim Corp. v. Central Markets*, 524 N.Y.S.2d 384, 385 (1987) ("the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances").

In order to justify excuse, the Lender conduct at issue must be so egregious as to have "either prevented plaintiff's performance by 'greatly disrupting and frustrating [plaintiff's]

performance' . . . or amounted to a breach of the implied covenant of good faith and fair dealing so as to excuse plaintiff's further performance under the agreement." (*Seven Strong Development Corp. v. Wash. Medical Associates* (2003) 759 N.Y.S.2d 186, 190; see also *Young v. Whitney* (1985) 490 N.Y.S.2d 330, 332.) Lender's purported breaches were not egregious, were not a breach of the covenant of good faith and fair dealing, and were not the proximate cause of any of Plaintiffs' claimed damages. Finally, in order to establish an excuse, Plaintiffs were required to demonstrate that they were "ready, willing and able to perform" under the contract. (*3M Holding Corp. v. Wagner* (1990) 560 N.Y.S.2d 865, 867.) "While the defendants' improper cancellation of the contract excused the plaintiff from its duty to tender its won [sic] performance, it was still the plaintiff's burden upon trial to show that it was ready, willing and able to perform its obligations under the contract in order to obtain the relief of specific performance . . . ." (*Ibid.* [citations omitted].)

Plaintiffs did not establish that they were "ready, willing and able" to pay the principal amount of the Loan in either June 2009 or June 2010 (based on the purported loan extension).

Defendants' Alleged Breaches

Because Plaintiffs did not qualify for the one-year extension of the Loan, Plaintiffs breached the Loan Agreement by failing to pay the outstanding balance in full in June 2009 at the maturity of the Loan. Plaintiffs were in default as of that date. Lender's declaration of that default was not a breach of contract.

Once the Loan was in default (as of June 2009 when the Loan was not paid in full), Lender was under no obligation to provide any funding to the Borrower. (TRX 9, §§ 2.6, 7.1-7.6, 8.1, 8.2; TRX 16, §§ 5.1, 5.2.) After June 2009, the Loan was in default and the Lender was under no obligation to fund the Property in accordance with the 2010 Annual Budget or make disbursements from the Replacement Reserve Account. (TRX 9, §§ 2.6, 7.1-7.6, 8.1, 8.2; TRX